



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

CITE THIS VOLUME 20 A.L.R.

HERCULES POWDER CO.
LEGAL DEPT. — LIBRARY
**AMERICAN
LAW REPORTS**
ANNOTATED

Editors in Chief

BURDETT A. RICH AND M. BLAIR WAILES

Consulting Editor

WILLIAM M. MCKINNEY

Managing Editors

H. NOYES GREENE

HENRY P. FARNHAM

GEORGE H. PARMELE

ASSISTED BY THE EXCEPTIONALLY EXPERIENCED EDITORIAL
ORGANIZATIONS OF THE PUBLISHERS

VOL. XX.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY

EDWARD THOMPSON COMPANY

BANCROFT-WHITNEY COMPANY

- - - - -

1922

ROCHESTER, N. Y.

NORTHPORT, L. I., N. Y.

SAN FRANCISCO, CALIF.

Copyright 1922

BY

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
EDWARD THOMPSON COMPANY
BANCROFT-WHITNEY COMPANY

E. R. ANDREWS PRINTING CO., ROCHESTER, N. Y.

CASES REPORTED

Drobner v. Peters	(N. Y.)	1503	Hughes v. State	(Tenn.)	639
Duteil v. Mullins	(Ky.)	361	Hultin v. Klein	(Ill.)	230

E.

Edgeley Co-Operative Grain Co. v. Spitzer ..	(N. D.)	1417
Eldridge v. Endicott, J. & Co.	(N. Y.)	1
Emery (E. H.) & Co. v. Amer- ican Refrigerator Transit Co.	(Iowa)	86
Employers' Indemnity Corp. v. Grant	(C. C. A.)	1118
Endicott, J. & Co., Eldridge v.	(N. Y.)	1
Ettinger v. Loux	(N. J.)	1265
Ex parte Hancock (John) Mut. L. Ins. Co.	(C. C. A.)	253

F.

Ferry v. Spokane, P. & S. R. Co.	(U. S.)	1326
First Nat. Bank, Hill v.	(Fla.)	270
Fitzgerald, United Shoe Ma- chinery Corp. v. (Mass.)		1508
Floesch Constr. Co., Robison v.	(Mo.)	1239
French v. Pirnie	(Mass.)	1098

G.

Gadsden v. Craft & Co.	(N. C.)	662
Geary v. Geary	(Neb.)	809
Gibson Land Auction Co. v. Brittian	(N. C.)	211
Grambo, Cleveland, C. C. & St. L. R. Co. v.	(Ohio)	1214
Grant, Employers' Indemnity Corp. v.	(C. C. A.)	1118
Greenberg, Re	(C. C. A.)	253

H.

Hancock (John) Mut. L. Ins. Co., Ex parte (C. C. A.)		253
Hanson v. Lemars Mut. Ins. Asso.	(Iowa)	964
Harper v. Battle	(N. C.)	357
v. Hochstim	(C. C. A.)	1232
Hebard Exp. & Van Co., Chi- cago v.	(Ill.)	206
Helena Improvement Dist., City Oil Works v.	(Ark.)	296
Hemphill, Martin v.	(Tex.)	984
Henderson, Jones v.	(Ky.)	1471
Hess, Wall v.	(N. Y.)	1497
Hill v. First Nat. Bank	(Fla.)	270
Hochstim, Harper v.	(C. C. A.)	1232
Hoffman v. Roehl	(Mont.)	189
Hollis & Ray v. Isbell	(Mass.)	244

I.

Idell v. Day	(Pa.)	1429
Illinois C. R. Co. v. Ash ..	(Miss.)	1061
Industrial Acci. Commission, Yosemite Lumber Co. v.	(Cal.)	994
Industrial Commission, Twin Peaks Canning Co. v.	(Utah)	872
Ingalls v. Allin	(Ill.)	956
Insurance Asso., Lemars Mut., Hanson v.	(Iowa)	964
Insurance Co., Columbian, v. Modern Laundry	(C. C. A.)	1159
Hancock (John) Mut. L., Ex parte ..	(C. C. A.)	253
Isbell, Hollis & Ray v.	(Miss.)	244

J.

Jones, Campbell v.	(Wash.)	671
v. Henderson	(Ky.)	1471

K.

Kaler v. Puget Sound Bridge & Dredging Co. (Wash.)		674
Kanawha County, State ex rel. Smith v.	(W. Va.)	1030
Kent Storage Co., Sichterman v.	(Mich.)	309
Kirkpatrick Lumber Co., Swain v.	(La.)	665
Klein, Hultin v.	(Ill.)	230

L.

Lavoy, O'Shea v.	(Wis.)	1008
Lee, Claimant	(Mass.)	870
Leet v. Block	(Ind.)	654
Lemars Mut. Ins. Asso., Han- son v.	(Iowa)	964
Littleton, Bissett v.	(W. Va.)	1478
Logan County v. Adler	(Colo.)	512
Loux, Ettinger v.	(N. J.)	1265

M.

McDonald, Mundy v.	(Mich.)	398
Manriquez, People v.	(Cal.)	1441
Marcum v. Smith	(Ala.)	1303
Martin v. Hemphill	(Tex.)	984
Mercer Garage & Auto Sales Co., Scott v.	(W. Va.)	246
Merchants' Nat. Bank, Down- ing v.	(Iowa)	1138
Menter Co. v. Brock	(Minn.)	857
Mittendorf, Wagner v.	(N. Y.)	520

Modern Laundry, Columbian	
Ins. Co. v. . . (C. C. A.)	1159
Modern Woodmen v. Allin . . (Ill.)	956
Monitor Stove Co., Stansberry	
v. (Minn.)	316
Moriyama, Veysey v. (Cal.)	1363
Mullins, Duteil v. (Ky.)	361
Muncie, Sinke v. (Kan.)	383
Mundy v. McDonald (Mich.)	398
Myers v. Shipley (Md.)	1460

N.

Nossaman, State v. (Kan.)	921
-----------------------------------	-----

O.

Odell, Watson v. (Utah)	280
Olinger, Toy v. (Wis.)	1366
Ornsteen v. Allen (Mass.)	1203
Orth v. Board of Public Edu-	
cation (Pa.)	1352
O'Shea v. Lavoy (Wis.)	1008

P.

Panoras, Semonian v. (R. I.)	83
Peabody v. Russel (Ill.)	972
Pearson, City Street Improve-	
ment Co. v. (Cal.)	1317
Peltola v. Western Workman's	
Pub. Soc. (Wash.)	374
People v. Manriquez (Cal.)	1441
Peters, Drobner v. (N. Y.)	1503
Petersburg, Petersburg Gas Co.	
v. (Va.)	542
Petersburg Gas Co. v. Peters-	
burg (Va.)	542
Pirnie, French v. (Mass.)	1098
Pollard v. Ward (Mo.)	936
Providence Gas Co., Cranston	
v. (R. I.)	222
Rivelli v. (R. I.)	222
Public Utilities Commission,	
Ashtabula Gas Co.	
v. (Ohio)	217
Puget Sound Bridge & Dredg-	
ing Co., Kaler v.	
(Wash.)	674

R.

Railroad Co., Illinois C., v. Ash	
(Miss.)	1061
Railway Co., Chicago, R. I. &	
P., v. Bennett . . (Okla.)	678
Cleveland, C. C. & St. L.,	
v. Grambo (Ohio)	1214
Southern, v. Barbee	
(John T.) & Co. . . (Ky.)	257
Spokane, P. & S., Ferry	
v. (U. S.)	1326

Railway Co., Vicksburg, S. &	
P., Scott v. (La.)	908
Rath, Shubert Theatrical Co. v.	
(C. C. A.)	846
Re Donohoe (Pa.)	392
Greenberg (C. C. A.)	253
Rhodes, Security Sav. Bank v.	
(Neb.)	412
Richardson v. State	
(Tex. Crim. App.)	1249
Rivelli v. Providence Gas Co.	
(R. I.)	222
Robison v. Floesch Constr. Co. (Mo.)	1239
Roehl, Hoffman v. (Mont.)	189
Rollins, Cooper v. (Ga.)	1105
Rome, Wilkerson v. (Ga.)	1334
Rosen v. Allen (Mass.)	1203
Russel, Peabody v. (Ill.)	972
Russell, Vincent v. (Or.)	417

S.

Saye, State ex rel., Ables v. (Okla.)	589
Scott v. Mercer Garage & Auto	
Sales Co. (W. Va.)	246
v. Vicksburg, S. & P. R.	
Co. (La.)	908
Security Sav. Bank v. Rhodes	
(Neb.)	412
Semonian v. Panoras (R. I.)	83
Shipley, Myers v. (Md.)	1460
Shubert Theatrical Co. v. Rath	
(C. C. A.)	846
Sichterman v. Kent Storage Co.	
(Mich.)	309
Sinchuk, State v. (Conn.)	1515
Sinke v. Muncie (Kan.)	383
Smith, State ex rel., v. Kana-	
wha County . . (W. Va.)	1030
Marcum v. (Ala.)	1303
Snow v. State . . (Tex. Crim. App.)	1180
Southern R. Co. v. Barbee	
(John T.) & Co. . . (Ky.)	257
Spitzer, Edgeley Co-Operative	
Grain Co. v. (N. D.)	1417
Spokane, P. & S. R. Co.,	
Ferry v. (U. S.)	1326
Stafford v. Stafford (Ill.)	827
Stansberry v. Monitor Stove	
Co. (Minn.)	316
State ex rel. Saye, Ables v.	
(Okla.)	589
Coons v. (Ind.)	900
Cooper v. (Tex. Crim. App.)	410
v. Corbett (S. C.)	328
v. Dailey (Ind.)	1004
v. Diamond (N. M.)	1527
Hughes v. (Tenn.)	639
ex rel. Smith v. Kana-	
wha County . . (W. Va.)	1030
v. Nossaman (Kan.)	921

State, Richardson v.

	(Tex. Crim. App.)	1249
v. Sinchuk	(Conn.)	1515
Snow v. .. (Tex. Crim. App.)		1180
ex rel. Brunson, Tallas-		
see v.	(Ala.)	1127
v. Toliver	(Kan.)	502
Steele v. Allen	(Mass.)	1203
Stewart v. Todd	(Iowa)	1272
Storm v. Thompson	(Iowa)	658
Sunnyside Land & Invest. Co.		
v. Bernier	(Wash.)	1261
Swain v. Kirkpatrick Lumber		
Co.	(La.)	665

T.

Tallassee v. State ex rel. Brun-		
son	(Ala.)	1127
The Celia v. The Volturno		
(Eng. H. L.)		884
Thompson, Storm v.	(Iowa)	658
Todd, Stewart v.	(Iowa)	1272
Toliver, State v.	(Kan.)	502
Toy v. Olinger	(Wis.)	1366
Twin Peaks Canning Co. v. In-		
dustrial Commission		
(Utah)		872

U.

United Shoe Machinery Corp.		
v. Fitzgerald ..	(Mass.)	1508

V.

Veysey v. Moriyama	(Cal.)	1363
Vicksburg, S. & P. R. Co.,		
Scott v.	(La.)	908
Vincent v. Russell	(Or.)	417
Volturno, The, Celia, The, v.		
(Eng. H. L.)		884

W.

Wagner v. Mittendorf	(N. Y.)	520
Wall v. Hess	(N. Y.)	1497
Ward, Pollard v.	(Mo.)	936
Watson v. Odell	(Utah)	280
Western Pattern & Mfg. Co. v.		
American Metal		
Shoe Co.	(Wis.)	264
Western Workman's Pub. Soc.,		
Peltola v.	(Wash.)	374
Wilkerson v. Rome	(Ga.)	1334

Y.

Yosemite Lumber Co. v. Indus-		
trial Acci. Commis-		
sion	(Cal.)	994

AMERICAN LAW REPORTS ANNOTATED

VOL. 20

MRS. G. I. ELDRIDGE, Respt.,
v.
ENDICOTT, JOHNSON, & COMPANY et al., Appts.
STATE INDUSTRIAL COMMISSION, Respt.

New York Court of Appeals — January 20, 1920.

(228 N. Y. 21, 126 N. E. 254.)

Workmen's compensation — necessity of evidence — statutory presumption.

1. A provision of the Workmen's Compensation Act that it shall be presumed that a claim comes within the provision of the statute does not authorize an award, in the absence of at least some evidence, that an employee who dies of anthrax, after working about hides with a cut upon his neck, might, with his cut, have taken anthrax while at work about the hides.

[See note on this question beginning on page 4.]

— admission of counsel — effect.

2. A statement of counsel in a proceeding before the compensation commission, in response to a suggestion by opposing counsel that he should concede a certain fact, that he does not know much about the case and is not going to concede anything that should not be conceded, cannot be accepted as an admission of a fact which should have been proven to sustain an award.

Evidence — judicial notice — presence of anthrax germ.

3. The compensation commission cannot take judicial notice, or presume, that hides with which an employee was working when he contracted anthrax were of a kind that usually or frequently contain anthrax germs, and that a person working about them with an open wound would receive the germ and die of anthrax.

[See 15 R. C. L. 1131.]

(Cardozo and Pound, JJ., dissent.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award by the State Industrial Commission.
20 A.L.R.—1.

dustrial Commission to claimant, of compensation for the death of her husband, in a proceeding under the Workmen's Compensation Act. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Walter L. Glenney, with Mr. Bertrand L. Pettigrew, for appellants:

The death of the deceased was not caused by an accident arising out of and in the course of his employment within the intention of the legislature as expressed in the Workmen's Compensation Law.

Hiers v. Hull, 178 App. Div. 350, 164 N. Y. Supp. 767; *Sherwood v. Johnson* [1913] W. C. & Ins. Rep. 57; *Steel v. Cammell, L. & Co.* [1905] 2 K. B. 237, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; *Eke v. Hart-Dyke* [1910] 2 K. B. 681, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; *Higgins v. Campbell & Harrison* [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 86 L. T. N. S. 660, 20 Times L. R. 129, 6 W. C. C. 1; *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1; *Collins v. Brooklyn Union Gas Co.* 171 App. Div. 381, 156 N. Y. Supp. 957.

Mr. E. C. Aiken, with Mr. Charles D. Newton, Attorney General, for respondent State Industrial Commission:

It is conceded that the deceased employee died of anthrax, and it is a reasonable inference that the anthrax germ entered the cut in the neck while in the course of his employment.

Hart v. Wilson & Co. 227 N. Y. 554, 124 N. E. 898; *Higgins v. Campbell & Harrison* [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 86 L. T. N. S. 660, 20 Times L. R. 129, 6 W. C. C. 1.

The contraction of anthrax is an accident for which the State Industrial Commission may make compensation.

Brinton v. Turvey [1905; H. L.] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, 7 W. C. C. 1; *Hiers v. Hull*, 178 App. Div. 352, 164 N. Y. Supp. 767; *Lewis v. Ocean Acci. & Guarantee Corp.* 224 N. Y. 18, 7 A.L.R. 1129, 120 N. E. 56; *Plass v. Central New England R. Co.* 221 N. Y. 472, 117 N. E. 952; *H. B. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E.

329; *Ætna L. Ins. Co. v. Portland Gas & Coke Co.* L.R.A.1916D, 1027, 144 C. C. A. 12, 229 Fed. 552; *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

Mr. John Marcey, Jr., with Mr. Laverne M. Twining, for respondent:

The death of the deceased was caused by an accident arising out of and in the course of his employment, within the intent and meaning of the Workmen's Compensation Law.

Horrigan v. Post-Standard Co. 224 N. Y. 620, 121 N. E. 872; *Hart v. Wilson & Co.* 227 N. Y. 554, 124 N. E. 898; *Plass v. Central New England R. Co.* 169 App. Div. 826, 155 N. Y. Supp. 854.

Crane, J., delivered the opinion of the court:

On November 20, 1915, William Eldridge died, leaving a wife and four children. He lived in the village of Endicott, Broome county, New York, and worked for Endicott, Johnson, & Company, as subforeman of a freight gang at one of their tanneries. The cause of Eldridge's death was anthrax, and the claim is that he contracted it in the course of his employment, while working about the hides at the tannery. The evidence to sustain this claim presented to the commission showed that Eldridge, in November of 1915, had been cut in the neck while being shaved by the barber of the village, and that a pimple appeared after the cut had healed over. The wife pricked this with a needle, and applied a poultice of sugar and Octagon soap, and covered it with a cloth which went around his neck. At that time the neck was not swollen. This was on the 17th of the month. He went to work, and when he returned at night his neck was swollen, and three days thereafter he died of anthrax as stated.

Eldridge's work was counting

hides as they were unloaded at the freight cars. The hides were called dry Ceará hides from Southern Mexico and South American countries. Some of the employees noticed that Eldridge's neck was swollen while he was at work. Solely upon this evidence, the commission found as follows: "On or about November 17, 1915, the day when the symptoms of anthrax first appeared, William Eldridge was working for his employer at the tannery above mentioned. On November 16, 1915, while being shaved at a public barber shop in Endicott, New York, William Eldridge's neck was slightly cut with a razor. The reasonable inference is that he contracted anthrax in the course of his employment. He died as a result of said anthrax November 20, 1915."

No evidence was given as to the nature of anthrax, whether hides such as those in question have anthrax bacteria, and whether and in what manner it may be transmitted to men. The commission has presumed that, because Eldridge had a cut or pimple, worked in a tannery about hides, and died of anthrax, he must have received the injury in the course of his employment. On this appeal it is said by the respondent that the employer conceded that the deceased got the anthrax germ at his work. We do not so read the record. Mr. Phillips asked the appellants' lawyer if he conceded that Eldridge received anthrax in his work. The lawyer replied, "He got a cut outside of his work, and it is supposed he got the anthrax germ at his work," to which the claimant's lawyer said, "You ought to concede that he got the anthrax germ at his work," and to this the other attorney answered, "I do not know much about this case; I am not going to concede anything that should not be conceded."

Workmen's compensation—
admission of
counsel—effect.

This cannot be accepted as an admission of a fact which should have been proved to sustain the award.

We do not think this is a case where the commission were justified in taking judicial notice, or in presuming, that hides such as those in question usually or frequently contain anthrax germs, and that a person working about them with an open wound is likely to receive the germ and die of anthrax.

Evidence—
judicial notice
—presence of
anthrax germ.

It has been held that glanders is not a disease so frequently taken by man as to permit the court to take judicial notice of its character. State use of Hartlove v. M. Fox & Son, 79 Md. 514, 24 L.R.A. 679, 47 Am. St. Rep. 424, 29 Atl. 601. And yet instances have arisen where death resulted from glanders acquired from a horse. Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651. In Webster's Dictionary anthrax is defined to be "an infectious, and usually fatal, bacterial disease of animals, especially cattle and sheep, and occasionally of man, to whom it may be transmitted by inoculation."

In the absence of all proof upon the subject the commission was not justified in presuming that the hides in question had anthrax, and that the germ could pass to a person working about them; in other words, the commission could not take judicial notice of the nature of these skins, or their susceptibility to anthrax, or the method or likelihood of inoculation by an employee. Some evidence should have been given upon these matters to justify the assumption and finding made.

Section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67) is not a substitute for facts, and does not help the claimant in this particular. The commission is not authorized to make an

Workmen's compensation—
necessity of
evidence—
statutory
presumption.

award under this section, in the absence of at least some evidence that the employee might, with his cut, have taken anthrax while at work about the hides. Collins v. Brooklyn Union

Gas Co. 171 App. Div. 381, 156 N. Y. Supp. 957.

If this employee had been inoculated through the cut in his neck with anthrax germs from the hides, and the cut had been received a few days before at the barber shop while being shaved, a question might arise as to whether the inoculation were an accidental personal injury arising out of the course of his employment.

We do not reach this question, and shall not attempt to decide it,

as the facts of the case are not substantiated by any evidence, and the matter must be sent back to the commission for a rehearing.

The order of the Appellate Division and the determination of the Industrial Commission should be reversed, and the claim remitted to the Commission for rehearing, with costs to abide event.

Hiscock, Ch. J., and Chase, Collin, and Andrews, JJ., concur.

Cardozo and Pound, JJ., dissent.

ANNOTATION.

Necessity and sufficiency of evidence that disease contracted by applicant for workmen's compensation is attributable to employment.

I. In general, 4.

II. Illustrations:

- a. Actinomycosis, 6.
- b. Aneurism, 6.
- c. Ankylosis, 7.
- d. Anthrax, 7.
- e. Apoplexy, 9.
- f. Arsenical poisoning, 11.
- g. Arteriosclerosis, 11.
- h. Arthritis, 12.
- i. Beat hand, 13.
- j. Blood poisoning, 13.
- k. Cattle ringworm, 23.
- l. Cancer, 23.
- m. Deafness, 25.
- n. Delirium tremens, 26.
- o. Dermatitis, 27.
- p. Diabetes, 27.
- q. Diphtheria, 27.
- r. Erysipelas, 27.
- s. Eye inflammation or infection, 28.
- t. Felon, 34.
- u. Gas inhalation, 35.
- v. Gastralgia, 35.
- w. Heart disease, 36.
- x. Heat stroke, 42.
- y. Hemorrhage, 44.
- z. Hernia, 48.

I. In general.

Concisely stated, this annotation purports to deal with the cases passing on the weight and sufficiency of the evidence to sustain a finding that the diseased condition of an applicant under the workmen's compensation law is the result of, or attributable to, his employment. A liberal interpretation has been given to the word "dis-

II.—continued.

- aa. Hodgkin's disease, 57.
- bb. Hydrophobia, 57.
- cc. Influenza, 57.
- dd. Insanity, 59.
- ee. Kidney disease, 60.
- ff. Lead poisoning, 61.
- gg. Locomotor ataxia, 61.
- hh. Mastoiditis, 61.
- ii. Nephritis, 62.
- jj. Neurasthenia, 62.
- kk. Osteomyelitis, 62.
- ll. Paralysis, 63.
- mm. Paresis, 65.
- nn. Peritonitis, 65.
- oo. Phlebitis, 66.
- pp. Pneumonia, 66.
- qq. Rheumatism, 72.
- rr. Scarlet fever, 73.
- ss. Sciatica, 73.
- tt. Sleeping sickness, 74.
- uu. Spondylitis deformans, 74.
- vv. Tetanus, 75.
- ww. Tuberculosis, 75.
- xx. Tumor, 80.
- yy. Typhoid fever, 80.
- zz. Uremia, 80.
- aaa. Miscellaneous, 81.

ease," and many cases are included, involving an injury which is not, strictly speaking, a disease, but belongs to a class frequently so termed by the courts and text-writers. As illustrative of this class of physical ailments may be mentioned "hernia" and "insanity." The particular point under discussion is whether or not the evidence in a given case is sufficient

to show that a disease from which an applicant is suffering is the result of his employment. This excludes the closely related question, whether the evidence is sufficient to show that the disease arose out of and in the course of the employment, and also the disputed question whether a disease is an accident within the meaning of the act. In other words, this annotation is not concerned with the question whether a disease admittedly originating in the course of the employment is such an accident as is contemplated by the workmen's compensation acts, but, conceding that it is such an accident, discusses whether it did in fact result from, and was attributable to, the employment, and not to some cause wholly disconnected from the employment. However, it is sometimes difficult to determine whether a case is concerning itself primarily with the sufficiency of the evidence to show that an ascertained cause of disease arose out of and in the course of the employment, or with the sufficiency of the evidence to show that the diseased condition was attributable to the employment. Doubtful or border-line cases have been included.

No attempt has been made to classify the cases according to the general rules governing the weight and sufficiency of the evidence, though it may be said generally that those principles apply to proceedings under the workmen's compensation acts. Thus, as a general rule, the burden of furnishing evidence from which the inference can be legitimately drawn that a disease was the result of an injury which arose out of and in the course of the employment is said to rest on the claimant, and an award which is based on mere surmise or conjecture will be set aside. The facts may be shown with sufficient certainty, however, by circumstantial evidence, and it has been frequently said that if there is any evidence in its support the finding will not be disturbed. 28 R. C. L. 812.

However, an arrangement of the cases according to these general rules would be of little value, as the courts frequently reach contrary conclusions on practically the same state of facts,

though applying the same rule of law. In the final analysis, the point under discussion resolves itself into a determination whether a given state of facts was, or was not, sufficient to support a particular finding. Accordingly no attempt has been made to arrange the cases with respect to the rules governing the weight and sufficiency of evidence, but the facts in each case, and the holding of the court thereon, have been set out in detail, and the cases arranged with respect to the particular disease involved. It may be said, however, that while the general rules pertaining to the weight and sufficiency of evidence are applicable to cases arising under the workmen's compensation acts, both the courts and administrative authorities, having the beneficent purpose of the acts in view, have been most liberal in construing them, holding that claims thereunder need not be made out with the same exactness of proof required in actions in other cases.

The purpose of these laws is further evidenced, in some instances, by specific provisions of the statutes creating presumptions in favor of the applicant. Thus, in some instances, it is provided generally in the acts that it shall be presumed that claims come within the act, in the absence of substantial evidence to the contrary. This is true of the New York statute, but this presumption does not relieve the claimant from the necessity of establishing his claim by some legal evidence. See the reported case (*ELDRIDGE v. ENDICOTT, J. & Co. ante*, 1). Other statutes provide that particular diseases contracted in specific employments shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary. The English statute contains such a provision, and it has been held that an award in favor of a claimant will be sustained although there is no direct evidence that the claimant came in contact with materials likely to contain the germs of the disease contracted, the evidence of employment in the particular work, together with the contraction of

the particular disease coupled by statute with work of that nature, being sufficient. *Meadows v. Ellerman Lines* [1920; C. A.] 3 K. B. (Eng.) 544, 89 L. J. K. B. N. S. 1234, 13 B. W. C. C. 227, [1920] W. N. 305, 36 Times L. R. 847, 64 Sol. Jo. 698, 150 L. T. Jo. 71, 124 L. T. N. S. 65, [1920] W. C. & Ins. Rep. 207. The effect of the application of these and similar provisions in the workmen's compensation acts to a particular state of facts is treated in detail under the specific diseases set out infra.

II. Illustrations.

a. *Actinomycosis.*

A workman employed by a milling company was engaged in the work of grinding and sacking wheat and barley for feed. While actively engaged in filling sacks with the pulverized grain from the spout of the grinding mill, he became afflicted with an affection of the nose and mouth which was diagnosed as actinomycosis. The medical testimony was in conflict as to the nature and causes of the disease, and as to whether it could be conveyed by grain to the human organism, but some of the physicians who treated the applicant and diagnosed his case testified in effect that his employment in and about the grain caused him to contract the disease. The applicant testified that he had not theretofore suffered from any such disorder, but that it had become acutely developed while he was engaged in the work of sacking and handling the grain for his employer. It was held that there was sufficient evidence to support a finding that the disease was attributable to his employment. *Hartford Acci. & Indemnity Co. v. Industrial Acci. Commission* (1917) 32 Cal. App. 481, 163 Pac. 225.

b. *Aneurism.*

A workman and another man were engaged in unloading steel sheets from a car. Each sheet weighed from 465 to 485 pounds, and was moved by means of a crane. The sheets stood on edge in the car, and sometimes became jammed together so that their separation required a great deal of

physical effort. The morning of his injury, the workman came to his work feeling well. Later he was seen to put his hand to his throat, to stagger, and to complain of feeling sick. He was found to be suffering from an aneurism of which the medical evidence was to the effect that the strain was the exciting or aggravating cause. It was held that the evidence was sufficient to sustain the finding that he suffered personal injuries by accident "arising out of and in the course of the employment." *Haskell & B. Car Co. v. Brown* (1917) 67 Ind. App. 178, 117 N. E. 555.

There were two accidents, one in October, when a workman fell into an excavation and sustained bruises of the chest and ribs; the second in November, when he fell dead while doing some heavy lifting. After the first accident he was examined by the employer's physician, who found heart irregularity and aneurism of the aorta. The trial court inclined to the view that the accident in October produced a condition that brought on the decedent's death under the strain of November, although he held that it could reasonably be found that the strain of November, in his diseased condition, was the cause of death, and therefore found that the workman came to his death by an accident arising out of and in the course of his employment. The latter theory was held to be sufficiently sustained, and the finding was affirmed. *Winter v. Atkinson-Frizelle Co.* (1915) 88 N. J. L. 401, 96 Atl. 360.

A workman, suffering from an aneurism in so advanced a state that it might have burst at any time, was tightening a nut with a spanner, when the strain, which was an ordinary one in the work, ruptured the aneurism. The county court judge found that the death was due to strain arising from the ordinary work, acting on the diseased condition of the man. It was held that there was evidence to support the finding, and that the accident arose out of the employment. Where a man in a diseased condition dies at his work, the case is within the act, if the employment is one of the con-

tributing causes to the accident; i. e., the question for the arbitrator in each case is whether the accident came from the disease alone, or whether the employment contributed to it in a material degree; whether, looking at it broadly, free from overnice conjectures, the man died from the disease alone, or from the disease and employment taken together. *Clover, C. & Co. v. Hughes* [1910; H. L.] A. C. (Eng.) 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885, affirming [1909] 2 K. B. 798, 78 L. J. K. B. N. S. 1057, 101 L. T. N. S. 475, 25 Times L. R. 760, 53 Sol. Jo. 763, 2 B. W. C. C. 1.

A workman was suffering from an aneurism of the aorta, an aneurism in such a condition that there might be a rupture at any moment, from exertion. While moving a box he fell down dead. It was held that this was an accident arising out of his employment. *McArdle v. Swansea Harbour Trust* (1915) 113 L. T. N. S. (Eng.) 677, 8 B. W. C. C. 489, 11 N. C. C. A. 175, following *Clover, C. & Co. v. Hughes* (Eng.) *supra*.

c. Ankylosis.

The claimant was working for a stonemason. In May, 1917, a piece of stone fell on his right toe, severely injuring it. He was unable to work because of the injury; several hearings were had before the industrial commission, and he was allowed \$13.08 for a period of forty-two weeks. On May 10, 1918, the case was closed. The toe continued to trouble the claimant and render him unable to work. After that the claimant went to a hospital; his toe was operated on to relieve his pain and correct defective walking, caused, as claimed by him, by the injury. The operation was successful for the purpose for which it was had, but ankylosed the joint of the toe. The toe was practically a total loss. The employer contended that at the time the case was closed, in March or May, 1918, it had healed. That seemed to be the fact appearing in the evidence. The case was reopened, and on the rehear-

ing claimant said that at the time of the injury, and since infancy, he had had on the great toe of each foot a bursa or bunion, and that the injury to the right great toe was to or on this bunion, greatly enlarging it, and rendering the foot practically useless in its then-present condition; that the operation was necessary to enable him to work at all; and that the whole condition was the result of the injury. It was held that the evidence was sufficient to sustain a finding that the injury was the cause, or contributing cause, which made the operation proper, practicable, and necessary. *Vaselenito v. Kasenetz* (1920) 190 App. Div. 879, 180 N. Y. Supp. 651.

A workman's arm was broken while he was engaged in the duties of his employment. The fracture properly united, but during the course of the treatment, due to the abrasion or infection of the skin from the rubbing or pressure of an unguarded or unpadded splint, there developed an abscess of the fleshy part of the thumb, which resulted in ankylosis, making the thumb and the first and second fingers permanently useless. It was held that the evidence was sufficient to justify a finding that the diseased condition resulted from the accident, which was attributed to the employment. *Newcomb v. Albertson* (1914) 85 N. J. L. 435, 89 Atl. 928.

d. Anthrax.

The foreman of the halter department in a tannery picked a pimple on his neck, causing it to bleed slightly. Two days later he had to leave his work and go to a hospital, from which he returned with his neck bandaged. His neck was swollen, and the next morning a physician was summoned who treated him for diabetes. Two days later he died. An examination of the tissue cut from his neck showed the presence of anthrax bacilli. It was shown in evidence that anthrax was an infectious and usually fatal disease of animals, especially sheep and cattle, and occasionally man, and the men who became its victims were usually those engaged in handling wool, hides, or animals that were infected. That

the disease might be acquired either by inhaling the bacteria or by inoculation through an abrasion of the skin, and that the latter was the most usual way. It was held that the evidence was sufficient to support a finding that the death was due to the employment. *Chicago Rawhide Mfg. Co. v. Industrial Commission* (1920) 291 Ill. 616, 126 N. E. 616.

A workman was employed as a wool sorter. When he went to his work one day he was perfectly well and had no abrasion or mark on his neck, but when he left there was a little scratch or abrasion on his neck, which caused a swelling, and which developed into external anthrax, from which he died. The medical testimony was to the effect that if the workman was a wool sorter, and had no abrasion on his neck when he went to his work, and sustained an abrasion on his neck, and the neck immediately began to swell and external anthrax developed, this condition was probably brought about by the anthrax germ entering through the abrasion; that anthrax germs were frequently found on the hair and skins of animals. It was held that the evidence was sufficient to sustain a finding that the scratch occurred during the course of his employment, and that at that time the anthrax germs entered the body of the workman, subsequently causing his death. *McCauley v. Imperial Woolen Co.* (1918) 261 Pa. 312, 104 Atl. 617, 17 N. C. C. A. 864.

It is provided by the English Workmen's Compensation Act 1906 that "if the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the third schedule of this act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." Construing this provision, it has been held that the words "employed in any process men-

tioned in the second column of the third schedule" related to the general nature of the workman's services. Where, therefore, a workman employed as a foreman of a gang of laborers who were engaged in unloading hides and skins from a ship, died from anthrax, one of the diseases mentioned in the schedule, it was held that the onus of proving that his death was due to the nature of his employment was not shifted to the dependents of the deceased workman, notwithstanding that there was no direct evidence to show that he had himself in fact handled any of the hides or skins; and that, as the employers had failed to prove that the disablement was not due to the nature of his employment, his dependents were entitled to an award. *Meadows v. Ellerman Lines* [1920; C. A.] 3 K. B. (Eng.) 544, 89 L. J. K. B. N. S. 1234, 13 B. W. C. C. 227, [1920] W. N. 305, 86 Times L. R. 847, 64 Sol. Jo. 698, 150 L. T. Jo. 71, 124 L. T. N. S. 65, [1920] W. C. & Ins. Rep. 207.

In the reported case (*ELDRIDGE v. ENDICOTT, J. & Co.* ante, 1) it appeared that an employee at a tannery died of anthrax. He had a small cut on his neck, and it was claimed that he contracted the disease from handling hides which were infected with anthrax germs, but no evidence was given as to the nature of the disease, nor as to whether the hides in question were infected with anthrax germs. It is held that in the absence of some evidence on these points, and that he might with his cut have taken anthrax, the commission was not justified in finding in favor of the claimants, as it could not take judicial notice, or presume, that hides frequently contained anthrax germs and that a person working about them with an open wound was likely to contract the disease. The court says that § 21 of the New York Workmen's Compensation Law (64 McKinney, Consol. Law), providing that it shall be presumed, in the absence of evidence to the contrary, that a claim comes within the provisions of the law, was not a substitute for facts and could not sustain an award in the absence of any evidence.

To the same effect, see *White v.*

American Soc. (1920) 191 App. Div. 6, 180 N. Y. Supp. 867, wherein it appeared that the claimant was an ambulance driver for the Society for the Prevention of Cruelty to Animals, and died of anthrax taken through a boil on his nose. It was held that, in the absence of some evidence that the disease was contracted in the course of his employment other than the bare proof of the nature of his employment, an award in his favor could not be sustained. The court said: "As to the second theory, that an anthrax germ attacked the deceased through an incision in the boil, there is no evidence that he contracted the disease in the course of his employment. It does not appear that any of the animals with which he came in contact had anthrax. It does not even appear that about the time when he contracted the disease he came in contact with any diseased animal, except a lame horse, or with any other kind of animal, either sick or well, except horses. It does not appear that the disease is peculiar to horses. No evidence was given as to the nature of anthrax, or as to the circumstances or conditions under which it attacks mankind. Because the deceased died of anthrax, and because his employment was in connection with animals, the commission has concluded that a causal relation between his employment and death existed. Such a conclusion is not justified in the absence of evidence establishing a causal relation. The case, in this particular, is very similar to the reported case (*ELDRIDGE v. ENDICOTT, J. & Co.* ante, 1), and is controlled by the decision in that case."

But see *Hiers v. John A. Hull & Co.* (1917) 178 App. Div. 350, 164 N. Y. Supp. 767, wherein it appeared that the occupation of the claimant was weighing hides on the piers in Brooklyn, which hides constituted cargoes, or parts of cargoes, unloaded from vessels. He was doing this work in the performance of the duties which, as an employee, he owed to his employer. Previous to February 10, 1916, while in the same work, wet salt from the hides had permeated his gloves and caused a swelling on the back of one

of his hands, and a fissure or abrasion of the skin resulted. On the day mentioned he was handling dirty and diseased hides, and anthrax germs contained therein were communicated to him through the fissure in the back of his hand, causing infection and disease for which the award in question had been made. The court sustained the award in favor of the claimant without discussing the sufficiency of the evidence further than to say: "There seems to be no question in this case but that the claimant contracted the disease in the manner and under the conditions above indicated."

A gamekeeper handled dead animals on July 31 and on August 2, 3, and 5. The animals he handled on July 31 and August 5 were handled in the course of his employment, but not those on August 2 and 3. The animal he handled on August 5, a dog, was proved to have died from anthrax. There was no evidence as to the cause of the death of the other animals. On August 11 he fell ill, and died on August 18. The county court judge found that the deceased did not die from an accident, and that if he did the accident was not proved to have arisen out of the employment. It was held that the burden of proof was on the applicant, and that it had not been discharged. *Sherwood v. Johnson* (1912) 5 B. W. C. C. (Eng.) 686.

e. Apoplexy.

A workman engaged in operating a machine for the sawing and shaping of boards suffered an accident on August 7, 1918, by having three of his fingers cut off. He died on October 13 following the accident, the immediate cause of death being the third of a series of apoplectic strokes, occurring at intervals following the injury to his hand. The workman was sixty-one years of age at the time of the accident. Immediately following the accident he was taken to the hospital, where he was given an anesthetic, followed by proper surgical treatment. He remained at the hospital six days, and while there, and some two days after the injury, suffered a slight apoplectic stroke, his left side being affected, with paralysis of the face

and loss of power of speech. He recovered from the shock, and when he left the hospital was apparently in his normal condition, barring the injury to the hand. He suffered another and more severe stroke on the 18th of August, from which he made only a partial recovery, and a third stroke on October 10, 1918, resulted in his death three days later. The medical testimony tended to show that the injury was a severe nervous shock to the workman's system, reducing the power of resistance of the tissues of the body, bringing on or causing an embolismic condition, which in turn caused the apoplectic strokes, the third of which resulted in his death. It was held that the evidence was sufficient to sustain a finding that the apoplexy was attributable to the employment. *State ex rel. George D. Taylor & Sons v. District Ct.* (1920) 147 Minn. 10, 179 N. W. 217.

A miner, while assisting in pushing and dumping a buggy or dump wagon, received a blow on the head when the buggy went back. He sat down for awhile, and then got up and again attempted to help push the buggy, but was unable to do so and became unconscious. He was taken to his home, and from there to a hospital, where he died without ever regaining consciousness. The medical testimony showed that he died from a hemorrhage of the brain, producing apoplexy and unconsciousness. He suffered from arteriosclerosis, but he had been working prior to the time of the accident without any evidence of any discomfort or illness, and the doctors testified that the condition of the arteries was not such as that the apoplexy would have resulted without some exciting or inducing cause, and that a blow such as he was said to have received might be the inducing cause which would produce the apoplexy. A recent scar was found on his head over the place where the hemorrhage occurred, which the doctors testified had been healed too long to have been the result of the blow alleged to have been the cause of his death, and there was no evidence as to the manner in which this scar had

been received. It was held that the evidence was sufficient to sustain a finding that the death of the workman was due to an injury received in the course of his employment. *Yadis v. Philadelphia & R. Coal & I. Co.* (1921) 269 Pa. 586, 113 Atl. 73.

A gatekeeper, whose duty it was, besides attending to the gate, to take charge of the ambulance appliances for use in case of accidents occurring in the works, to telephone for the doctor, and to attend personally to minor accidents, was informed while on duty of an accident in the works. He ran to the scene of the accident and then back to the gate to telephone for the doctor. The exertion of running, and the excitement, brought on an apoplectic shock, from which he died in a few hours. It was held that the evidence was sufficient to sustain a finding that his condition was attributable to his work. *Aitken v. Finlayson, B. & Co.* [1914; Ct. Sess.] S. C. 770, 51 Scot. L. R. 653, [1914] W. C. & Ins. Rep. 398.

A fireman, after having been for some time at work shoveling coal and raking fires in the stokehold of a steamship, had an apoplectic stroke. The medical evidence went to prove that the man was in a diseased condition, and that such a stroke would be likely to be brought on by such exertion. It was held that the evidence was sufficient to justify the inference that the apoplexy was caused by the employment. *Broforst v. The Bloomfield* (1913; C. A.) 6 B. W. C. C. (Eng.) 613.

A finding that apoplexy was caused by an injury in the course of employment cannot be sustained, where there is no evidence of any strain, and the evidence adduced is equally as consistent with the fact of no accident, as with the fact of an accident. *Barnabas v. Bersham Colliery Co.* (1910) 103 L. T. N. S. (Eng.) 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119.

So, where, on medical evidence, the arbitrator finds that heat apoplexy from which a ship stoker was suffering might have been caused by the heat of the sun or by the heat of the stokeholds, the arbitrator is justified

in holding that the evidence will not permit him to draw the inference that the injury was caused by an accident arising out of and in the course of the employment. *Olsen v. The Dorset* (1913) 6 B. W. C. C. (Eng.) 658.

As to apoplexy producing paralysis, see *infra*, II. 11.

f. Arsenical poisoning.

An employer had operated his plant for nearly fifty years, and no case of lead, zinc, or arsenical poisoning had ever appeared there. The applicant during all his years of service had been in good health, with the exception of two accidents. He had never been affected with any appearance of disease or disability by lead, zinc, or arsenical poisoning, and in the year before his fatal illness he never missed a day except when there was no work. Two other men who worked with the applicant, doing precisely the same work, for more than ten years, had never been injuriously affected in any way by their work. October 6, 1914, came on Tuesday, and the claimant was in his usual health up to the morning of that day. The plant was operated only five days in the week, and he worked on the previous Saturday until 10 o'clock at night, but did not work on Sunday or Monday. On Tuesday morning he began work at 6 o'clock, and on leaving home for the plant said that he did not feel like going to work. He worked until 2 o'clock in the afternoon, when he went home sick and had dysentery. His daughter had been slightly affected in the same way during the day, and she at first attributed his sickness to coffee which he had drunk, which was discolored when milk was poured in it; but the attending physician found that there was nothing the matter with the coffee, and other members of the family who had drunk the coffee were not affected. About 8 o'clock in the evening he was seized with cramps through his arms and legs, chest, stomach, and bowels, and from that time he grew steadily worse. His discharges were black and loose. His teeth became black and loose, there was a dark line around his gums, his toe nails and

finger nails became black, his eyes had a glassy, staring look, his wrists dropped, and his mind wandered. He was treated at home until October 12, when he was taken to a hospital, where he died on October 14. The medical testimony was to the effect that the death was due to acute rather than chronic arsenical poisoning. It was held that the evidence was sufficient to sustain a finding that the workman came to his death from acute arsenical poisoning contracted on October 6, 1914, and attributable to his work. *Matthiessen & H. Zinc Co. v. Industrial Bd.* (1918) 284 Ill. 378, 120 N. E. 249.

g. Arteriosclerosis.

A laborer, while attempting to start a gas engine, caught his foot in the crank case, lacerating it, and in attempting to release himself he fell backward into a box of trash and pieces of old iron; he lay there in a faint from half to three quarters of an hour, and when he got up he could not stand on his left foot; shortly after his injury he felt a severe pain in his neck and back; he had fits of shaking and trembling, and lost the use of his limbs so that he walked with crutches. At the trial, which occurred about two years after his injuries, it was conceded that he was suffering with multiple sclerosis. Previous to the injury he was an able-bodied man, working as a common laborer for about two years at construction work. The medical testimony was conflicting. The claimant's physician testified that in his opinion the injury was contributory, but would not say that it was absolutely the cause of the disease. Another testified that it was possible that the injury brought on the nervousness and jerking sooner than it would otherwise have developed, and still another testified that the claimant's condition was due to an injury or shock, which undoubtedly aggravated and may have been the absolute cause of the disease. On the other hand there was testimony that the claimant's injury was absolutely independent of, and had nothing to do with, the disease. It was held that

there was sufficient evidence to sustain an award in favor of the claimant. *Blackburn v. Coffeyville Vitriified Brick & Tile Co.* (1920) 107 Kan. 722, 193 Pac. 351.

A plumber who had worked for the defendant employer for five months became ill from lead poisoning. There was evidence that during this time he was handling lead pipe, and his handkerchiefs and napkins would be colored red from the red lead. His family physician testified that for the past few years he had treated him for what he supposed was lead poisoning. An expert, after reviewing the history and symptoms, gave as his opinion that the cause of death was sclerosis of the coronary arteries, and that it was undoubtedly caused by lead poisoning. It was held that the evidence was sufficient to sustain an award in favor of the claimant; that on the testimony of the expert it could be found that the lead poisoning, which was a contributing cause of the employee's death, was progressive, and probably due to the constant assimilation of the lead during the period he had been exposed to it. *O'Donnell's Case* (1921) 237 Mass. 164, 129 N. E. 353.

A workman was employed as yardman by a firm of paving contractors. In a building on their premises was a desk phone. Shortly before noon this telephone rang, and he, in answering it, picked up the phone with his right hand and lifted the receiver with his left. He received a shock of sufficient severity to make it difficult for him to release himself from the instrument. It was raining that morning and his clothing and shoes were damp. He felt the shock all over his body, but mostly on his right side. The numbness continued to grow worse until afternoon, when he first realized that his face was partially paralyzed. He then discovered that he could not use his lips to draw his pipe. He went home about 4 o'clock, and there found that his left eye and the left side of his mouth were drawn down. The next morning he could not close his eyes, and he had pains in his back and head. He did no work after the day of the accident. Physicians who exam-

ined him testified that he was suffering from arteriosclerosis, and that, while the shock may have aggravated this condition, the real cause of his disability was the disease. The court was of the opinion that a clear preponderance of evidence showed that the condition of the applicant was due largely, if not entirely, to an organic disease, but held that there was sufficient evidence on which the commission could base its finding that the disability was due to an injury arising out of the course of the employment. *McGarry v. Industrial Commission* (1919) 290 Ill. 577, 125 N. E. 318.

A workman was ruptured while engaged in the performance of his duties. He was operated on, and made a fair recovery from the operation, and was able to go about for a time, although in a weakened condition. Six weeks after the operation his condition became such that he had to take to his bed, and he died about a month later. The medical testimony was to the effect that he died from chronic arteriosclerosis. There was no evidence that the operation or anesthesia was the cause of the death, and two physicians testified that they did not think the operation or the anesthesia accentuated or accelerated the disease, or hastened the death of the decedent. It was held that the evidence was not sufficient to sustain a finding that the death was caused by an injury received in the course of the employment. *Tucillo v. Ward Baking Co.* (1917) 180 App. Div. 302, 167 N. Y. Supp. 666.

h. Arthritis.

In *Selvage v. Charles Burrell & Sons* [1921; C. A.] 1 K. B. (Eng.) 355, (1920) W. N. 373, 90 L. J. K. B. N. S. 209, 124 L. T. N. S. 428, 13 B. W. C. C. 277, [1921] W. C. & Ins. Rep. 12, 37 Times L. R. 95, 65 Sol. Jo. 133, affirmed in (1921; H. L.) 65 Sol. Jo. 734, 14 B. W. C. C. 161, 90 L. J. K. B. N. S. 1340, the applicant was employed in the copper-plating department as a finisher of shell adapters. In the course of her employment, extending over a period of about six months, she from time to time sustained scratches

to her hands, which were commonly followed by gatherings, and the pus thereby formed caused blood poisoning. Her condition gradually became worse until ultimately she was found to be suffering from arthritis of the joints, caused by the poison of the pus, with the result that she was totally incapacitated. It was held that the evidence was sufficient to warrant a finding that the disease was occasioned by an accident arising out of and in the course of her employment, and that it was not material that it was caused by a number of accidents which all contributed to that condition, or that they extended over a period of time, as under the circumstances she was not required to show the exact time of the accident further than she had shown.

A deal carrier met with an accident arising out of and in the course of his employment, causing injury to one of his knees. At the time of the hearing he was found to be suffering from arthritis in the knee. Arthritis was the natural result of such an injury as he had suffered. It was held that the evidence was sufficient to justify an award in favor of the workman, and that the burden of proving that it was caused by intervening improper medical treatment was on the employer. *Bower v. Meggitt* (1917) 86 L. J. K. B. N. S. (Eng.) 463, [1917] W. C. & Ins. Rep. 40, 116 L. T. N. S. 178, 10 B. W. C. C. 146.

A workman bruised his leg through an accident happening in the course of his employment. There was no abrasion, but a discolored spot, and later the leg became inflamed and swollen. A physician opened the place and made a microscopic examination of the substance which came from the leg, and found that it contained gonococci, and was of the opinion that he had gonorrheal arthritis. Other physicians agreed with this diagnosis. It became necessary to remove a part of the bone which was infected. The doctors testified that the disease, if dormant, could have been lighted up and aggravated by a blow such as the claimant was said to have received, or it might have been caused by other things. It was held that, though the physicians

indicated that there might have been other causes, there was no evidence suggesting any other than the injury, and there was evidence sufficient to sustain a finding that the disease was lighted up or accelerated by the injury. *Hanson v. Dickinson* (1920) 188 Iowa, 728, 176 N. W. 823.

4. *Beat hand.*

The applicant was employed as a "riveter's holder-up" by a shipbuilding company. His work consisted of knocking rivets into holes, and then holding them up against the hammering of the riveter with a 3½-pound hammer. When he had been at work for about two years his hand became sore, and the certifying surgeon certified that he was suffering from "beat hand" as a result of his employment. It was held that the evidence was sufficient to sustain an award in his favor. *Wilson v. Blyth Shipbuilding & Dry Docks Co.* [1919; C. A.] 1 K. B. (Eng.) 324, 88 L. J. K. B. N. S. 27, [1918] W. C. & Ins. Rep. 385, 11 B. W. C. C. 173, 120 L. T. N. S. 1, 63 Sol. Jo. 67.

5. *Blood poisoning.*

A workman sustained a contused wound on the great toe of his right foot while engaged in the service of his employer. Three days later he had the toe dressed at the hospital. On the fourth day the toe was so painful that after starting to work he returned home, and undertook to treat the toe himself. On the next day he complained of a swelling on his face, and on the day following the symptoms of the face became so alarming that he was removed to a hospital, where it was discovered that there was a streptococcal infection of the injured toe. The skin surrounding the toe was in an erysipelatous condition, and there was a development of erysipelas on the face. The facial infection resulted in septicemia, from which the man died in about a week. The medical testimony was to the effect that the germs which caused the facial infection were carried by external means from the toe to the face; that such a method was exceedingly common. It was held that the evidence was sufficient to sustain a

finding that the claimant's death was attributable to the injury received in his work. *Bethlehem Shipbuilding Corp. v. Industrial Acci. Commission* (1919) 181 Cal. 500, 7 A.L.R. 1180, 185 Pac. 179.

An employee was engaged with the assistance of another in cleaning a gear. In order to clean the gear it was necessary to remove a sheet-iron cover. The fellow workman testified that the edges of the cover were thin and sharp, and that he himself had cut his hand on it at another time; that after they had finished cleaning the gear he noticed blood on the workman's hand, and spoke to him about it. The cut on the hand became infected, finally causing death by blood poisoning. It was held that the evidence was sufficient to warrant a finding that the hand was cut or scratched in the course of the employment, resulting in death by blood poisoning. *McRae v. Morgan & Wright* (1919) 205 Mich. 493, 171 N. W. 394.

In the discharge of his duties a fireman was required to take out clinkers from the combustion chamber, clean the boilers and fixtures, polish the same, clean the engine, and oil it. One day he was attended by a physician who discovered two little cuts through the skin and the thumb, about an eighth of an inch apart and half an inch long, around which there was some redness, and from the condition of which he judged that he was suffering from streptococcic infection. Two days later the hand was more swollen, the next day he had chills and his temperature had gone up. He was removed to a hospital, grew worse, and died four days later of septicemia. It was held that there was evidence to sustain the finding of the commission that the death was due to an injury received in the course of his employment. *William Rahr Sons Co. v. Industrial Commission* (1917) 166 Wis. 28, 163 N. W. 169.

An award for the death of a printer from streptococcic infection originating from a small cut in the index finger of the right hand was affirmed in *McCartney v. Wood-Temple Co.* (1922) — Mich. —, 187 N. W. 251,—against

the objection that there was no testimony that the accident was received while deceased was working in the printing office,—upon the strength of reports made by the employer shortly after the accident which, under the authorities, were *prima facie* evidence that the accident arose out of and in the course of employment, although, as the court said, the other evidence, without the reports, would probably have been insufficient.

A workman was employed to assemble brake and clutch pedals, in which employment abrasions were a common form of injury. Shortly before quitting time, he went to the foreman and exhibited his thumb, which was dirty, torn up, and clotted over the nail with blood, and was sent by the latter to a doctor. The abrasion was treated, but was infected, septicemia followed, and the workman died therefrom. It was held that the facts supported the inference that the injury arose out of and in the course of the employment. *Kinney v. Cadillac Motor Car Co.* (1917) 199 Mich. 435, 165 N. W. 651.

An employee was engaged in loading and unloading bags into and from box cars. When he arrived home one evening he had a scratch on one hand. It was about 1½ inches long and had been bleeding "quite badly." He had wrapped it in a piece of handkerchief which was bloody. The blood was hard, and witnesses testified it looked as if the scratch was about two hours old. The time required to go from his work to his home was about twenty minutes. Deceased had no scratch on his hand when he left home for work that morning. It was shown that the men engaged in his line of work often received scratches on their hands, sometimes from nails inside the cars. Blood poisoning shortly set in, causing his death. A letter of the insurance company stated that it had examined all the workmen at the plant, and found only one man who knew anything about the workman being injured. It was held that the evidence was sufficient to show that the blood poisoning and death were due to the scratch, and that, while there was no

direct evidence, the circumstances were sufficient to sustain a finding that the scratch was received in the course of the employment. The court said: "The fact that deceased had no scratch when he left home in the morning and had one when he came home from work at night; that he must have come home immediately, for he was home within half an hour of the time he quit work; that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work; that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well have received while at work—these facts, taken in connection with the letter, . . . which is of some force as an admission, were such that the court might infer that the scratch was received while deceased was in the course of his usual work, and that it arose out of it." *State ex rel. Albert Dickinson Co. v. Dist. Ct.* (1917) 139 Minn. 30, 165 N. W. 478.

A man working as a repairer on night shift in a colliery left home with a sound finger and arrived at work with a sound finger. He came home in the evening with his finger injured, and a rag round it, and died later from blood poisoning. It was held that there was evidence from which it could be inferred that the injury arose in the course of the employment. *Mitchell v. Glamorgan Coal Co.* (1907) 23 Times L. R. (Eng.) 588, 9 W. C. C. 16.

A bricklayer returned from work on December 27, 1911, with a sore on the back of the thumb of his left hand. The wound appeared to heal, but ultimately blood poisoning ensued in the armpit, and the workman died on January 30, 1912. Evidence was given that injuries such as this were common in case of bricklayers. The workman was engaged in cutting grooves in a wall, and had to use a hammer and chisel. In doing such work the face of the hammer might slip off the chisel and hit the workman's hand. The medical evidence was that the inflammation started under the man's armpit

in the form of an abscess, due to an inflamed gland, and that an injury to the back of the thumb might give rise to this. The doctor was of opinion that the bacillus entered through this injury, but he said in cross-examination, that he could not say that a dirty condition of the armpit might not have caused the abscess. It was held that there was evidence from which the court might infer that the injury to the workman happened to him while he was at work. *Feet v. Johnson* [1913] W. C. & Ins. Rep. (Eng.) 149, 57 Sol. Jo. 226, 29 Times L. R. 207, 6 B. W. C. C. 60.

A miner, who was employed at a colliery in moving tubs from the working place to the shunt, arrived at the colliery apparently in his normal health, but in the course of his work he was seen by two of his fellow workmen to be rubbing his knee and to limp, and on his return home he had a slight abrasion on his knee. The next day he absented himself from his work owing to the injury to his knee, and after resuming work again for two days he called in a doctor. Two days afterwards the man died from blood poisoning caused by the injury to his knee. It was held that there was evidence to support a finding that the death resulted from an injury by accident arising out of and in the course of the employment. *Hayward v. Westleigh Colliery Co.* [1915; H. L.] A. C. (Eng.) 540, 84 L. J. K. B. N. S. 661, [1915] W. C. & Ins. Rep. 233, 8 B. W. C. C. 278, 112 L. T. N. S. 1001, 31 Times L. R. 215, 59 Sol. Jo. 269, [1915] W. N. 67, Ann. Cas. 1917D, 877, reversing [1914; C. A.] W. C. & Ins. Rep. 21, 7 B. W. C. C. 53.

On March 6, 1915, a workman came home with his hands scratched, and complained that they had been knocked about at his work of shell making. Next day his doctor saw him, and immediately diagnosed blood poisoning from a small wound on a finger, from the effects of which he died on March 14, 1915. The nature of the workman's duty was likely to cause abrasions on the hands. There was no evidence as to the exact date of the injury. It was held that the evidence

was sufficient to support a finding that the disease was the result of an injury received in the course of the employment, and that, as it was not possible to state an exact date for such an injury, an approximate date was sufficient. *Burvill v. Vickers* [1916] 1 K. B. (Eng.) 180, 85 L. J. K. B. N. S. 256, 114 L. T. N. S. 29, 9 B. W. C. C. 50.

A workman employed in "spreading sod, cultivating, and doing work in the line of improving the grounds," received a scratch on the back of his hand which became infected, and he died of blood poisoning. It was held that the evidence sustained a finding that the injury arose out of and in the course of his employment. *Re Bean's Case* (1917) 227 Mass. 558, 116 N. E. 826.

A workman in a machine shop appeared at his work with his hand bandaged. The foreman inquired the cause, and was informed that he had scratched his hand at a manifold sometime previously. A doctor and nurse both testified that there was a wound upon his hand when they treated him for blood poisoning. The workman died. It was held that there was sufficient evidence to sustain a finding that the injury arose out of and in the course of his employment. *Fitzgerald v. Lozier Motor Co.* (1915) 187 Mich. 660, 154 N. W. 67.

The claimant was employed in making metal brushes. The performance of this work necessitated a constant pressure with the hand on the prongs of pliers with which the wire used in making the brushes was manipulated. He developed a blister on his hand. He continued to work until the blister broke and blood came, and a crack in the flesh under the skin was seen by his fellow workman. Almost immediately it commenced to smart, pain, and swell, the swelling extending to and involving the back of the hand. Some way in connection with the work, dye was present, and by that, or something from some other source then and there present, infection entered the hand through this cut or broken skin. Claimant painted his hand with iodine; it continued to swell and grow worse,

and the following day, or the second day thereafter, he went to a doctor who pronounced it a "palmar abscess," and who testified on the hearing: "There must be some point of infection; there must be some cut, scratch, or break in the skin to cause infection." In his report the physician stated that the symptoms from which the claimant was suffering were due entirely to the injury to his hand, and he later testified that the condition of the hand was due to infection. It was held that the evidence was sufficient to sustain a finding that the condition of the claimant's hand was due to an injury arising out of and in the course of his employment. *Scoville v. Tolhurst Mach. Works* (1920) 193 App. Div. 606, 184 N. Y. Supp. 608, affirmed without opinion in (1921) 231 N. Y. 510, 132 N. E. 867.

In *Blaess v. Dolph* (1917) 195 Mich. 137, 161 N. W. 885, a finding allowing recovery for an accident arising out of and in the course of the employment was sustained where there was evidence that the employee, who was an undertaker's assistant, had a cut on his finger, which became infected with malignant poison germs while he was assisting in embalming one who had died from the same germs, or while he was sterilizing the instruments.

A workman was employed by a manufacturer of peroxide and toilet articles. His duties consisted, in part, in washing and filling bottles. On the day of the alleged accident he came to a fellow workman and told him that he had hurt his hand. He also told the forelady in charge of his department the same thing, and showed her his bleeding hand. He worked at the plant after this time, and witnesses saw that his hand was bandaged. No witness saw the actual accident. Three days after the accident he died. A post-mortem examination showed a dark, prominent, and large swelling, involving the upper half of the right forearm and extending up into the region of the neck. The doctors agreed that he died of septic poisoning. It was held that the evidence was sufficient to sustain a finding that the

death was due to an accident arising out of and in the course of the employment. The court said: "This court has said more than once that the burden rests upon the claimant to show by competent testimony not only the fact of the injury, but that it occurred in connection with the employment of the deceased; to furnish evidence from which the inference can be logically drawn that the injury arose out of and in the course of his employment; that the proof must be based on something more than mere guess or conjecture; that the proof of such facts may be established by circumstantial as well as by direct evidence, and the greater or less probability, leading on the whole to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* (1917) 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Mechanics Furniture Co. v. Industrial Bd.* (1917) 281 Ill. 530, 117 N. E. 986; *Smith-Lohr Coal Min. Co. v. Industrial Commission* (1918) 286 Ill. 34, 121 N. E. 231. It is not necessary, under these authorities, that there should be eyewitnesses to the accident. We think there is evidence in the record that justified the industrial board in finding that the accident arose out of and in the course of the employment of the deceased." *Hydrox Chemical Co. v. Industrial Commission* (1920) 291 Ill. 579, 126 N. E. 564.

A workman stated to his employer, his wife, and his physician that he had hurt his thumb while at work, by running a sliver from a screw into it. His hand and forearm subsequently became infected, and about ten days after the alleged accident he died. The medical testimony was to the effect that he died as a result of the injury to his thumb. It was held that the evidence was sufficient to sustain a finding that his death was due to an injury received in the course of his employment, and the fact that the evidence of witnesses to whom the workman had stated the origin of his injury was hearsay was cured by the failure to raise timely objection there-
20 A.L.R.—2.

to. *Hege & Co. v. Tompkins* (1919) 69 Ind. App. 273, 121 N. E. 677.

A workman employed as a furnace laborer in the course of his work was required to shovel up and screen calcined ore. He had chilblains on his hands, and while so working a frost crack opened up and bled so freely that he got a fellow workman to bind up his hand with his handkerchief. On the following day septic poisoning set in and for a time he was unable to work. The arbitrator found that the microbes entered the frost crack while the man was working, and that the evidence showed that calcined ore dust was liable to render a sore septic, but held that he could not decide from the evidence whether the microbes came from the calcined dust, or from the man's handkerchief, or from some other source which had not even been suggested, and he therefore made his award for the employers. It was held, on appeal, that the evidence was sufficient to justify a finding that the injury arose out of and in the course of the employment, although the source of the infection could not be determined, such source being immaterial. *Saddington v. Inlup Iron Co.* (1917) 87 L. J. K. B. N. S. (Eng.) 184, 62 Sol. Jo. 120, 52 L. Jo. 438, 144 L. T. Jo. 75, 118 L. T. N. S. 138, 10 B. W. C. C. 624.

The applicant was employed in the kitchen of a golf club. She stated that she cut her finger on a piece of glass that was in some crockery she had washed. The finger was bound up. The next morning she found her finger very painful and discolored, and she told the stewardess of the club what had happened, and how, and when. The stewardess applied remedies, but the finger gradually grew worse until applicant finally got leave from the stewardess to go home, as she was unable to do her ordinary work, and she was incapacitated from work for about a month. The employers suggested that the state of the applicant's finger was not caused by any accident that took place on their premises, or on the date alleged by the applicant, but that for some time before she had been suffering from a whitlow. It was held that the evidence was sufficient to

sustain a finding that the accident occurred in the course of the employment. *Venters v. Sundridge Park Golf Club* [1918] W. C. & Ins. Rep. (Eng.) 224, 118 L. T. N. S. 799, 11 B. W. C. C. 55.

A small burr from a screw head entered the little finger of a workman. He picked it out, this causing no wound and no bleeding, and he went on with his work. Three days afterwards blood poisoning set in, and the man was seriously ill and in bed for ten weeks. A doctor testified that the condition of the man was consistent with its being caused by the accident, and there was no other explanation of the blood poisoning. It was held that the inference drawn by the county court that the blood poisoning was due to the accident was justified, as it was not a case in which there were two alternatives, but only this one circumstance which could have caused the blood poisoning. *White v. Ford Motor Co.* [1918] W. C. & Ins. Rep. (Eng.) 25.

A workman met with injury by accident in the course of his employment, having a middle finger crushed. Healing progressed favorably for three weeks, when symptoms of blood poisoning appeared, and a fortnight later the finger had to be amputated. Shortly afterwards a medical examination disclosed the fact that the workman was suffering from syphilis, which must have been contracted before the date of the operation and after the original injury. It was held that the evidence was sufficient to support a finding that the workman's incapacity at the date of the arbitration was not due entirely to the syphilis, but to the original injury, aggravated by the infection, and that there was no *novus actus interveniens*, and that the complainant was, therefore, entitled to compensation. *Laverick v. William Gray & Co.* (1919; C. A.) 12 B. W. C. C. (Eng.) 177, [1919] W. C. & Ins. Rep. 173, 121 L. T. N. S. 289.

A workman who had an old wound on his foot, which was unhealed, was obliged to wade through foul and dirty water which had overflowed the yards of his employer's plant. On the morn-

ing after wading in the water his foot was badly swollen, and the swelling increased for several days, finally necessitating amputation. The medical testimony was to the effect that the infection could be, and probably was, caused by wading in the dirty water. It was held that the evidence was sufficient to sustain a finding that the injury arose out of and in the course of his employment. *Monson v. Battelle* (1918) 102 Kan. 208, 170 Pac. 801.

In *Dove v. Alpena Hide & Leather Co.* (1917) 198 Mich. 132, 164 N. W. 253, an award based on septic poisoning alleged to have been caused by handling South American hides was held to have been warranted by the evidence, which the court summarized as follows: "The testimony has been carefully examined, and we think it tends to establish the following facts: (a) That the cause of death was 'septic infection.' (b) That dust arose from the handling of the hides, and that the ventilation in the hide house was very poor. (c) That septic infection could be taken into the body by means of inhalation. (d) That the throat of deceased was badly inflamed. (e) That the infection which caused death was contracted from without. (f) That if the dust contained infection, the deceased could have contracted it by working on the hides in a poorly ventilated room. (g) That the dust arising from the hides contained infection."

A finding that infection, causing blood poisoning of a workman engaged in handling fertilizer consisting mostly of bone dust, in which bacilli likely to cause such infection were present in large numbers, arose out of and in the course of his employment, is warranted where there is medical evidence to the effect that it was in the highest degree probable that the workman received the infection from the germs contained in the bone dust, and highly improbable that he contracted it elsewhere, although it also appeared that such bacilli were found in the air and in other substances, though in a much lesser degree, and it was impossible to say with certainty when the infection occurred. *Innes v. Kynoch*

[1919; H. L.] A. C. (Eng.) 765, 9 B. R. C. 478, 88 L. J. P. C. N. S. 85, 121 L. T. N. S. 39, [1919] W. N. 118, 35 Times L. R. 392, 63 Sol. Jo. 444, 12 B. W. C. C. 78, 56 Scot. L. R. 345, reversing [1918] W. C. & Ins. Rep. 117 [1918] S. C. 185, 55 Scot. L. R. 220. It was also held in this case that it was not necessary to establish positively the time at which bacilli causing blood poisoning entered the body of a workman, in order to prove that the resulting injury arose out of and in the course of his employment, but all that could be required was the preponderating probability that the workman was infected while he was engaged in doing the work he was employed to do, from a source of infection with which he was brought into contact by that work.

A workman who had undergone an operation returned to work before the operation wound had completely healed, having been instructed not to strain himself. He worked at the lever of a machine. A fellow workman, noticing that the machine was stopped, looked for the man, and saw that he was talking to the foreman some yards away. It was then seen that the operation wound had burst open, and that the blood was flowing freely. Septic poisoning followed, and the man died. The county court judge inferred that the wound had been burst open by the strain of working the lever, and found that the accident arose out of the employment. It was held that there was evidence to support the inference. *Groves v. Borrowghes & Watts* (1911) 4 B. W. C. C. (Eng.) 185.

A woodworker, while engaged in the duties of his employment, suffered an injury which resulted in the crushing of the end of the index finger, and the making of a blood blister on the side and near the distal joint of the middle finger of his right hand. By reason of his work the knuckles of his fingers had become calloused, and these callouses would become hard and sore, something like a corn. The blood blister was near the edge of the callous on the middle finger of his right hand. He went to a physician,

who dressed his fingers. November 26 he was discharged as cured. About December 5 the callous on the finger where the blood blister had been became sore, and he scraped the calloused place with a pocket knife. There was no evidence, however, that in doing so he caused an incision or break in the skin. On December 8 he reported his condition to his foreman when he quit work for the day, and on the 9th he went to a physician, who discovered a serious infection in or under the callous. The infection became so serious that it was necessary to remove the finger. As a further result of the infection the other fingers of the hand were stiffened, and the commission found a loss of two thirds of the use of the right hand. It appeared from the testimony of the physicians that it would be necessary to have an incision or wound before an infection could follow, and that it was entirely possible for the infection to be the result of the accident of November 2. An award in favor of the applicant was held to be consonant with justice, when all the circumstances of the case were considered, as it could not be said that there was no evidence on which it could be based. *Challenge Co. v. Industrial Commission* (1920) 292 Ill. 596, 127 N. E. 83.

An employee claimed that while engaged in his work he slipped on the snow and ice, and fell, and struck his arm against a stump; he continued his work the rest of the day, and said nothing about the matter to other workers. The next day he felt sick, and his arm pained him. He did not work, and on the day following was discharged and left the neighborhood. That his arm got worse, and thereafter he found and pulled out of his arm two long slivers, which had penetrated deeply into it. The arm continued to grow worse, and shortly thereafter he received medical and hospital attention. Amputation became necessary. The commission held three hearings at intervals of several months, at each of which applicant testified. There was testimony of the hospital matron and another that when the applicant

came to the hospital there were two marks on his arm, near the seat of infection, where the skin was broken, and which looked as though something might have been pulled out there. There was testimony on behalf of the employer, by fellow employees of the company and the keepers of a boarding house at which applicant lived at times, that his left hand was swollen and discolored before the alleged accident, and that no one had heard of or knew of the alleged accident. Applicant testified that his hand had been calloused, but was otherwise in good condition, and this was corroborated by the testimony of persons at the hospital. It was held that there was sufficient evidence to sustain a finding that the condition of the applicant's arm was due to an injury received in the course of his employment. *Hackley-Phelps-Bonnell Co. v. Cooley* (1920) 173 Wis. 128, 179 N. W. 590.

An employee died as the result of an infection received through an opening in his right foot, which was caused by a traumatic injury. It was claimed that he received the injury by the falling of a billet of steel on his foot while engaged in his work for his employer. In support of the claim a statement made in the employer's report of the injury was received in evidence. In this report it was stated that the workman was unloading billets, and one of the billets scratched his foot. The attending physician found blood poisoning, and had the man sent to a hospital. It was held that the admission contained in the report, together with the statements of the workman as to the cause of the injury, which were not set out, constituted sufficient evidence to sustain a finding that death was attributable to an injury received in the course of employment. *Athus v. Rail Joint Co.* (1920) 193 App. Div. 571, 185 N. Y. Supp. 314, affirmed without opinion in (1921) 231 N. Y. 557, 132 N. E. 887.

A woman alleged that her thumb was poisoned by accident while cleaning dirty red oxide drums for her employer. She continued working for five days after the alleged accident. Three days later her thumb was oper-

ated on for septic poisoning. The only evidence of any accident was her own statement that her thumb "became painful and sore," and that of a fellow worker that she saw her with a rag on the thumb. No cut or abrasion was alleged. The uncontradicted medical evidence was that her thumb would have been very painful within forty-eight hours of its being poisoned. It was held that the evidence was not sufficient to support a finding that the thumb was poisoned by an accident arising out of and in the course of her employment. *Miller v. Jensen & Nicholson* [1918] W. C. & Ins. Rep. (Eng.) 51.

A collier returned home from work with a red patch on his wrist. This patch was a symptom of blood poisoning, which was due to an abrasion on his thumb. There was no evidence as to how the abrasion was caused; but there had been a fall of stone in the colliery during his shift, some four hours before he got home. He died from the blood poisoning, and his dependent claimed compensation on the ground that the fall must have caused the abrasion. The medical evidence showed that at least twelve hours must have elapsed between the abrasion and the appearance of the red patch. The county court judge inferred that the abrasion occurred at work, and that the accident, therefore, arose in the course of the employment. It was held that there was no evidence to support the inference. *Jenkins v. Standard Colliery Co.* (1912) 105 L. T. N. S. (Eng.) 730, 28 Times L. R. 7, 5 B. W. C. C. 71.

A collier, on return from his work, was seen to have a small scratch on his knee and a large lump on his groin. The lump was a bubo due to blood poisoning. He died in a few days of blood poisoning, caused by the scratch. The dependent claimed compensation, alleging that the scratch was caused at work on the day when it was first seen. There was no direct evidence as to the cause of the scratch, but there was medical evidence that, if the lump was due to the scratch, the scratch must have been received at least three days before the

lump appeared. The county judge inferred that the scratch was caused at work, and that the accident accordingly arose in the course of the employment. It was held that there was no evidence to support the inference. *Wood v. D. Davis & Sons* (1911) 5 B. W. C. C. (Eng.) 113.

A railway fireman cut his finger at home. He bandaged it and went to work. Coal dust and oil worked into the cut at his work. Blood poisoning (caused by the entry of streptococci into the wound) supervened, and caused incapacity. The county court judge inferred that the streptococci entered with the coal dust and oil, and that this arose out of the employment. It was held that there was no evidence to support the inference. *Chandler v. Great Western R. Co.* (1912) 106 L. T. N. S. (Eng.) 479, 5 B. W. C. C. 254, [1912] W. C. Rep. 169.

A collier died from acute blood poisoning, caused, according to the medical evidence, by septic infection getting into a superficial abrasion of the skin just below his kneecap. That was stated to be a frequent cause of blood poisoning in colliers, abrasions being occasioned by kneeling on the coal dust while working in a very narrow seam. It was held that the burden had not been sustained by the applicant. *Howe v. Fernhill Collieries* (1912) 107 L. T. N. S. (Eng.) 508, [1912] W. C. Rep. 408, 5 B. W. C. C. 629.

The conclusion of the commission that abscesses on both knees, caused by streptococcic infection which developed about three weeks after a fall from a pile of lumber, the employee having been engaged in his usual employment in the meantime, were not proximately caused by the fall, was justified where the only expert witness who testified stated that the accidents alleged were slight, and in his opinion were not contributing causes of the abscesses. *Nelson v. Industrial Acci. Commission* (1921) — Cal. App. —, 204 Pac. 23.

A woman claimed for injuries from blood poisoning in her hand, alleging that the injury was caused by pricking her thumb on a nail while working on

her employers' premises. The employers alleged that the injury was received at her home. At the hearing she was cross-examined as to alleged statements made by her to certain persons that she had done it at home, and their evidence as to these statements was heard. It was held that the evidence was insufficient to prove that the injury arose out of and in the course of the employment. *Jones v. South-Eastern & C. R. Co.* (1918) 87 L. J. K. B. N. S. (Eng.) 775, [1918] W. C. & Ins. Rep. 190, 118 L. T. N. S. 802, 11 B. W. C. C. 38.

A workman, on returning home from work one evening, showed his wife a scratch or mark behind one ear. He continued to work, but continually complained of pain, and after a fortnight died of acute blood poisoning. Evidence was given on behalf of the employer that the deceased had a pimple behind his ear, and that if he scratched it, and dirt got in, blood poisoning would be caused. It was held that the facts in evidence supported the decision of the county court judge that he was not satisfied that there was "personal injury caused by accident arising out of and in the course of the man's employment." *Fitzgerald v. Murphy*, 45 Ir. L. T. 200.

A woman who was employed in operating a multigraphing and typewriting machine claimed that she cut her finger while operating the machine. On the following day the finger showed signs of infection, and was ultimately amputated, and her hand was otherwise affected. No one witnessed the alleged accident. The claimant testified that she cut her finger while operating the machine, but that the cut was so slight that she did not pay any attention to it, that she could not point out what part of the machine caused the cut, and that she really did not know where she hurt it. It was held that the evidence was insufficient to sustain an award in her favor. The court said: "Although the claimant cut her finger while operating the multigraphing machine in the course of her employment, she is unable to say how she hurt it, or even that she hurt it on the machine. A cut so slight

as not to arrest the attention of its victim, and the origin of which she is unable to indicate, cannot be said to have been caused by a machine on which she was at the time working. Furthermore, the evidence is that the multigraphing machine had no sharp edges, nor any place where an operator could cut himself. This evidence is uncontradicted, although, if incorrect, it was susceptible of contradiction by the claimant herself. She had several interviews with her employer, after the accident, concerning the condition of her hand, but admits that she never claimed to him that she injured it on the machine. From her testimony it does not appear that she ever made such claim to any person. She did not even so state in her claim for compensation filed with the commission. It has been so frequently held that the burden of proof is on the claimant in these proceedings as to render superfluous the citation of authorities to that effect. The nature of some injuries is such as to indicate their origin, but that is not true of a slight cut or scratch on the finger, which may have occurred in various ways. In my opinion it cannot be held, on the evidence produced, that this accident arose out of the employment." *Gale v. Munro* (1920) 193 App. Div. 561, 184 N. Y. Supp. 413.

A woman employed to work a particular machine scratched her hand on another machine of a different sort. Blood poisoning ensued, and she died. There was no evidence as to how or why she was at another machine, but she had to pass it on her way in and out of the room where she worked. It was held there was no evidence to support an inference that the accident arose out of her employment. *Cronin v. Silver* (1911) 4 B. W. C. C. (Eng.) 221.

An employee finished his work on Saturday at noon. The following Monday forenoon a scratch upon his hand was observed, and there was testimony of swelling and of red streaks upon the hand. Later a doctor was consulted, who found a developed case of septic poisoning. The scratch and the resulting infection

caused death. Based upon the condition and appearance of the hand on Monday forenoon, as related by witnesses, there was medical testimony that the scratch had been suffered not less than forty-eight hours, and not more than six days, prior thereto. This brought the time of injury within the last week of the employment. There was testimony that a part of the employment was spreading cotter pins, which was likely to produce scratches upon the hands; that deceased and another employee had been so scratched several times in such work. There was no testimony that he had suffered a scratch in such employment during the last week thereof, or at any other definite time. There was testimony that he did many and various chores about his home, including gardening and housework, and that he kept and cared for a cow. It was held that a finding that the blood poisoning was due to a scratch which arose out of and in the course of the employment was not sustained by the evidence, but was based on the conjecture that the scratch was received while working. *Hubbard v. Republic Motor Truck Co.* (1921) — Mich. —, 185 N. W. 715.

So, in *Wilio v. Quincy Min. Co.* (1922) — Mich. —, 187 N. W. 249, an award for death due to blood poisoning caused by a cut or scratched thumb was set aside because, aside from hearsay or conjecture, there was no proof that the deceased scratched or cut his thumb while engaged in his work, or that it was an accidental injury.

In his particulars of claim a dependent alleged that the workman was moving scenery "when a splinter was driven into the middle finger of his right hand," and that he had died of blood poisoning following on this injury. The doctor who attended the workman stated that he saw a place where a small wound had been in the middle finger of the deceased's right hand, and that the inflammation was in his right arm. But a fellow workman, who saw the deceased with a splinter in his finger and who removed it with a knife, said that the splinter

was in the tip of the middle finger of the left hand. It was held that there was no evidence from which the arbitrator could find that there was an accident arising "out of and in the course of" the employment. *Ford v. Gaiety Theatre* [1914] W. C. & Ins. Rep. (Eng.) 53, 7 B. W. C. C. 197.

A miner was required to work for some weeks in foul air and dioxide gas, which came from an old inclosed entry which was broken into. He became sick and was taken to a hospital, where he later died of septicemia. The medical testimony was to the effect that working in the bad air depleted the system of the deceased, and rendered him more susceptible, or less resistant, to disease. There was no other evidence connecting the conditions of work with the disease, and it was shown that the disease which caused death was caused by a definite infection by a germ. There was no evidence of the time, place, or manner of the infection. It was held that the evidence was not sufficient to sustain a finding that the disease causing death was attributable to the employment. *Prouse v. Industrial Commission* (1920) 69 Colo. 382, 194 Pac. 625.

A workman, while cutting kindling in the course of his duties, got a splinter in his finger. He died a week later of septicemia, claimed to have been a result of the injury. There was no evidence as to how or where he injured his finger, except the statements of his family, friends, and the physicians as to what the injured man had told them. No splinter was found in his finger by the physicians. It was held that there was no evidence on which a finding that the injury arose out of or in the course of his employment could be based. *Valentine v. Weaver* (1921) 191 Ky. 37, 228 S. W. 1036.

k. Cattle ringworm.

A girl who was employed to look after calves noticed at the beginning of February, 1915, that some of the calves had scabs on their necks and heads. The calves were kept in a pen, and when the girl went to feed them

they used to push forward and try to get out. She had then to push them back, and sometimes she used a stick for this purpose, and sometimes her hand. On February 13, she noticed that her arm was breaking out in scabs, and on seeing a doctor she was found to be suffering from cattle ringworm. It was admitted by the employer that the cattle had the disease, which, according to the medical testimony, was contagious. It was held that the evidence was sufficient to show that the girl's illness was due to an injury arising out of and in the course of her employment. *Scott v. Pearson* [1916] 2 K. B. (Eng.) 61, 85 L. J. K. B. N. S. 825, [1916] W. C. & Ins. Rep. 128, 114 L. T. N. S. 833, 60 Sol. Jo. 428, 32 Times L. R. 412, 9 B. W. C. C. 229.

l. Cancer.

A workman suffered a fall while engaged in his work at the plant of his employer. He made claim for compensation for a sarcoma or cancer on his left clavicle, which he contended resulted from his fall. The testimony of the physicians who were called as witnesses before the commission was in accord on the point that the lump or swelling indicating the presence of a sarcoma, if it was caused by a fall or a blow, would not make itself manifest on a bone on the day of the injury, or on the next day, but only after a "few days," at the earliest; and the evidence appeared to show that a sarcoma, once appearing, would remain apparent to palpation. The claimant, his wife, and a friend of his family all testified to the presence, three or four hours after the accident, of a lump at the place on the clavicle at which, according to the testimony of nearly all of the experts, there was, at the time of the hearing before the commission, a sarcoma. The physician who attended the claimant immediately after the accident, and on the same day it occurred, said that he then discovered no injury to him except a scalp wound. He saw the patient the next morning, however, and at the request of his wife made a special examination of his left shoulder, stripping it up and down, and going

over it carefully. He said: "It was sensitive, also tender. I don't recall that it was swollen." The accident occurred on September 5, 1916, and on the 8th the physician took an X-ray picture of the region he had thus examined. He said: "It showed a normal condition of the clavicle." There was other testimony to the same effect from the same physician. It was held that the evidence was sufficient to sustain an award in the claimant's favor. *Santa Ana Sugar Co. v. Industrial Acci. Commission* (1917) 35 Cal. App. 652, 170 Pac. 630.

A workman was blown a distance of 30 feet by the explosion of a still in the employer's plant. The only physical injury suffered as a result of the explosion was a bruise on the left side of his face, which disappeared in a few days. There remained, however, a pain in his jaw, first noticed the evening of the accident. The intensity of the pain continued to increase during the week, and the trouble was diagnosed by two physicians as malignant cancer, termed carcinoma. An operation was performed which gave temporary relief, but a recurrence of the disease a few months later resulted in his death, more than six months after the accident. At the time of the accident the workman was suffering from a slight cancerous affection of the cheek at or near the place of injury. There was medical testimony to the effect that the injury might have been the cause of the rapid development of the cancer. There was no evidence to indicate any other cause for the sudden change in the development of the disease from normal to abnormal. It was held that the evidence was sufficient to warrant a finding that the workman came to his death through the aggravation of the disease by the accident, and was, therefore, entitled to an award. *Whittle v. National Aniline & Chemical Co.* (1920) 266 Pa. 356, 109 Atl. 847.

An employee who rode a bicycle in the course of his work arrived at his employer's shop one day, lame, covered with mud, and wheeling the machine. He complained of injury caused by a side-slip, and went home, where he

rested for two days. He then returned to work, though still suffering slightly from the effects of the fall. In about a month the pain became worse, and he consulted a doctor. A week later an operation was performed and cancer diagnosed. Two other operations were performed, but the workman died of sarcoma about five months later. The medical evidence was to the effect that the disease was brought about by the accident. It was held that the evidence was sufficient to support a finding in favor of the applicant. *Haward v. Rowsell* [1914; C. A.] W. C. Ins. Rep. (Eng.) 314, 7 B. W. C. C. 552, 111 L. T. N. S. 771.

The superintendent of a machinery company died of sarcoma of the ribs and pleura. Compensation was claimed by his widow on the ground that the disease was caused by an injury received during his employment. The only evidence of any injury was the statements made by the injured man to his wife that while engaged in his work he was struck by a casting, which fell when a chain broke, and that his side was hurt, and to a physician, who attended him five days later, that his injury was due to being thrown against an automobile lamp while cranking an automobile. This physician testified that he made a thorough examination, and did not then discover a fractured rib or any other serious injury to the side. The injured man did not consult another physician until sometime during the following August, when an examination disclosed a fractured rib. In the meantime it appears he had been in at least two automobile accidents, and, when complaining about his side, declared to at least one witness that it was due to one of such accidents, and to sustain this statement the foreman of the employer's plant testified that no casting fell while the superintendent was present. Another employee testified he was at work in the plant at the time when the accident was alleged to have occurred, and he never heard of it; and the one whose duty it was to make a report of all accidents also testified that she never heard of it. It was held that the evidence was

insufficient to sustain an award in favor of the claimant, the court saying: "If an accident had occurred, as here claimed, to the superintendent and general manager, it is fairly to be inferred that someone other than himself would have heard of it, and yet not a single witness was produced to testify thereto. Under such circumstances, to permit a claim against the employer to be sustained is to base an award upon sympathy, and not evidence. This court has held that great liberality should be allowed in establishing claims under this statute, but in the final analysis, notwithstanding such liberality, there must be evidence setting forth facts of a probative character, outside of hearsay statements, to prove the award and show it is fair and just." *Belcher v. Carthage Mach. Co.* (1918) 224 N. Y. 326, 120 N. E. 735.

An employee of a construction company, while walking in a dark passageway, fell and broke his leg. He was taken to a hospital, and it was found that he had cancer of the bone at the point of the fracture. The attending physician testified that the disease was malignant and necessitated the amputation of the leg; that the amputation was rendered necessary by the disease alone; that if the accident had occurred as described, and there had been no disease at that point, no operation would have been necessary. The disease existed before the fracture. It was held that the evidence was not sufficient to sustain an award in favor of the claimant. *Brady v. Holbrook C. & R. Corp.* (1919) 189 App. Div. 405, 178 N. Y. Supp. 504. And upon a subsequent appeal in (1921) 195 App. Div. 74, 185 N. Y. Supp. 541, it was held that an award for the loss of the whole leg was not a proper one, but that the compensable injury should be limited to the fracture, exclusive of the bone cancer or any results flowing therefrom.

The claimant was employed in a department store. While pulling out a large drawer, in the work of cleaning up her department, she said she felt something snap in her chest, and fell fainting. In falling the drawer

fell on her chest. She remained out of the store for three days, in the meantime submitting to an X-ray examination, which showed a negative result. She remained at work for seven months, when she visited a physician because of a rash on her breast, and was sent to a hospital where an operation for cancer of the breast was performed. The physician testified that it could not be said positively that a blow would cause cancer; that neither he nor anyone else knew; but that he connected the cancerous condition with the injury, because there was a certain amount of evidence that cancer might follow an injury. It was held that the evidence was insufficient to sustain a finding that the cancer was attributable to the injury. *Schapiro v. Wanamaker* (1921) 197 App. Div. 810, 189 N. Y. Supp. 843.

A workman crushed his finger in a drill at which he was working in the regular course of his employment. Blood poisoning set in, and for a time he complained of general soreness in different parts of his body. Settlement was made for the injury, and he returned to work for his employer, and remained in his employment for two years, doing substantially the same work as he had done before his injury. He then filed a petition for a rehearing, and asked for additional compensation because of disabilities that had recently developed. The physicians testified that he was suffering from a cancer which had recently developed in his private parts. Two testified that the injury to his hand received two years previously did not have anything to do with the cancer, while the third testified that the claimant's reduced vitality and run-down physical condition, imputable to his accident, might have contributed to the development of the cancer. It was held that the evidence was insufficient to show that the cancer was attributable to any injury received in the course of the employment. *Ortner v. Zenith Carburetor Co.* (1919) 207 Mich. 610, 175 N. W. 122.

m. Deafness.

An employee of a bridge company

filed a claim for compensation, in which he alleged that while working in air pressure, sinking a pier, his left ear was injured, impairing his hearing. He did not testify himself, or introduce any evidence other than the report of the medical examination. This report showed an injury to the drum of the left ear, with a small amount of mucopurulent discharge, with total deafness in that ear. The report concluded with the statement that it was impossible to state whether the deafness was due to disease or injury. The attending physician's report stated that the appearance indicated a chronic ear disease, but the patient declared there had been no trouble previously. It was held that there was no evidence to support a finding that the deafness was due to an injury received during the course of the employment. *Associated Employers' Reciprocal v. State Industrial Commission* (1921) — Okla. —, 200 Pac. 862.

In *Ferst v. Dictograph Products Corp.* (1920) 193 App. Div. 564, 184 N. Y. Supp. 422, the work of the claimant was to assemble and test motor dictographs, which were manufactured by his employer. He had been engaged in this work about three weeks when his right ear began to trouble him with pains and temporary deafness. He thereafter received the sound of the dictograph with his left ear, instead of his right ear. After thus continuing his work about one week he suddenly felt sharp pains in the left ear, and found it bleeding freely. He said that he held the receiver about 1 foot from his ear, and never held it close to his ear. He further testified that it was his belief that the continual wear of the ear vibrations on the ear caused the irritation and final swelling and the bleeding. He tested about thirty or forty dictographs each day, and had never had any previous difficulty with his ears. Claimant was the only witness before the commission. He received medical treatment, but no medical evidence was offered. The medical adviser of the commission reported, after examination, that the left ear,

from which blood and other substance was discharged, showed no evidence of injury to the drum; that the right ear showed evidence of a slight retraction and some fibrous band over the left upper half of the drum; that there was good hearing in both ears, with slight diminished hearing in the right ear as compared with the left; and that the claimant was able to continue his usual vocation. It was held that the evidence was insufficient to support an award in favor of the claimant, the court saying: "No causal relation has been established between the work performed by the claimant and his injury. It may have resulted from natural causes entirely independent of his work. The hiatus between cause and effect has not been bridged. In the absence of all proof on the subject, the commission was not justified in finding that the disease of the ears was the result of vibrations caused by the dictographs. No effort was made to prove that the vibrations could have caused such a result. It would seem that the physicians who examined claimant and prescribed for him could supply the necessary evidence, if his theory of the accident is correct."

n. Delirium tremens.

A workman was employed by an ice company as a driver on one of its wagons. On his return home from work one day he told his wife that a 300-pound cake of ice had fallen on his stomach. He made the same statement to a physician who was called in to treat him, to a neighbor, and to the physicians at the hospital where he was taken. He was suffering from an epigastric hemorrhage and rigidity of the stomach, and later developed delirium tremens, from which he died. A helper on the ice wagon and two cooks at the saloon where the ice was delivered testified that they were present at the time and place when it was alleged that the driver was injured, and that they did not see any accident whatsoever, or see any cake of ice fall. The physicians who subsequently examined the decedent testified that there were no bruises, discolorations,

or abrasions on the surface of the body. It was held that the evidence was not sufficient to sustain an award in favor of the claimant, the court saying that, while hearsay evidence was admissible in workmen's compensation cases under the provisions of the statute, it was of no probative value as against the substantial evidence of eyewitnesses, which directly contradicted the hearsay evidence. *Carroll v. Knickerbocker Ice Co.* (1916) 218 N. Y. 435, 113 N. E. 507, reversing (1915) 169 App. Div. 450, 155 N. Y. Supp. 1.

o. Dermatitis.

An assistant to a hairdresser, while in the employ of the latter from October 21, 1913, to March 30, 1914, had to use a dry shampoo furnished by his employer. He left his employment on March 30, suffering from dermatitis on his hands. He alleged that this was caused by the use of the dry shampoo on January 17, 1914, and claimed compensation for injury by accident on that day. It was held that there was no evidence that the injury occurred during his employment, and compensation was properly denied. *Petschelt v. Preis* [1915; C. A.] W. C. & Ins. Rep. (Eng.) 11, 8 B. W. C. C. 44, 31 Times L. R. 156.

p. Diabetes.

An employee, during the course of his employment, was caught between the door and casing of an elevator and severely injured. He was taken home in a nervous and dazed condition, and put to bed. There were black and blue marks over the seat of his liver, and he was suffering from shock. He grew steadily weaker, and seventeen days later he died. The medical testimony as to the cause of his death was in conflict. There was some evidence that he was suffering from diabetes and influenza at the time of the accident, and that his death was due to one or other of these diseases, while other doctors testified that up to the time of his death he was quite well, and there was evidence that he had never lost any time from illness, and for many years had not required

the services of a physician. It was held that the evidence was sufficient to sustain a finding that his death was attributable to his employment, whether the disease was caused wholly by the accident, or, being existent in a latent form, was developed and hastened by the accident. *Geizel v. Regina Co.* (1921) — N. J. L. —, 114 Atl. 328, affirmed on opinion below in (1922) — N. J. L. —, 116 Atl. 924.

An award of compensation was sustained in *Balzer v. Saginaw Beef Co.* (1917) 199 Mich. 374, 165 N. W. 785, in favor of an employee who suffered an accidental injury arising out of and in the course of his employment, and was thereafter found to be suffering from diabetes. The expert testimony was that the disease might have been caused by the injury, and he had previously been a strong healthy man, and had been pronounced a healthy man after an examination for life insurance about three months prior to the injury.

q. Diphtheria.

A carpenter was obliged, in the course of his employment, to enter a pit 20 inches below the floor level, and to lie down to perform his work. The pit was damp, and he was obliged to go out in the rain to get his materials, and got his clothes wet. When he went home at night he was not feeling well, and awoke in the morning with a cold, and later developed diphtheria. There was no evidence of anything in the nature of an accident occurring in the pit. The claimant's physician refused to testify that there was any necessary relation between the diphtheria and the work which the claimant was doing. It was held that the evidence was insufficient to sustain a finding that the diphtheria was attributable to the employment. *Bixby v. Cotswold Comfortable Co.* (1921) 195 App. Div. 659, 186 N. Y. Supp. 762.

r. Erysipelas.

An employee of an insurance company was required to visit various places at definite times, regardless of the weather conditions. One day, during the month of February,

while in the regular course of his work, he traveled some 15 or 20 miles. The day was very cold, and he suffered a frostbite of the nose, which produced a lesion of the skin and surface tissues adjacent thereto. Subsequently he contracted erysipelas, from which he later died. The doctor testified that he diagnosed the injury on the day after the injury as frostbite, and on a later day, probably the next, he for the first time diagnosed the case as erysipelas. It was held that the evidence was sufficient to support a finding that he contracted the disease from which he died as a result of the injury received in the course of his employment. *Larke v. John Hancock Mut. L. Ins. Co.* (1916) 90 Conn. 303, 97 Atl. 320.

s. Eye inflammation or infection.

A workman in falling from a ladder while engaged in the duties of his employment struck his head on the roof of a shed. The second day thereafter he experienced intense pain above the left eye and on the left side of the head, and ten or fifteen days thereafter lost the sight of his left eye. He had had no trouble with his eye before the injury. The medical testimony was to the effect that such an accident could cause the loss of the sight of the eye. It was held that there was sufficient evidence to sustain a finding in favor of the claimant. *Struple v. Bishop* (1916) 202 Ill. App. 349.

The finding of the board that detachment of the retina of the eye was attributable to a strain or exertion in lifting a heavy barrel, which fell and struck the employee on the knee, was held in *Sullivan's Case* (1922) — Mass. —, 134 N. E. 393, to be justified by evidence that on the night after the accident the employee observed some trouble with his eye and that the detachment was discovered twelve days thereafter, and the testimony of physicians to the effect that the accident caused the condition.

A workman while working in his employer's coal mine received an injury to his left eye. Following this injury he was not able to work for two or three weeks. He had the eye

treated by eye specialists. His sight began to fail shortly after the injury, and in six or seven months thereafter he had completely lost the sight of both eyes. The attending physician testified that the condition of the man's eyes, the atrophy of the optic nerves, might have resulted from the injury which he had suffered. This statement, when taken in connection with the other evidence, was held to be sufficient to sustain a finding that the disability was attributable to the employment. *Indiana Power & Water Co. v. Miller* (1920) — Ind. App. —, 127 N. E. 837.

A carpenter suffered an injury while engaged in the course of his employment, and made claim for compensation on the ground that the injury resulted in the loss of the sight of one eye. He testified that up to the time of the accident he used either eye as convenience dictated, and that there had been no trouble with or diminution of his vision. A neighbor testified that about a year before the accident he was with the claimant when he was shooting hogs, and that he could shoot from one shoulder as well as the other, and that he never complained about his eyesight. The medical testimony was in direct conflict, it being the opinion of some of the physicians that the loss of sight could not have been caused by the injury, while others testified that it might have been so caused. There was no evidence that the claimant was ever afflicted with any germ-carrying disease which might have caused the trouble, and he testified that he was not and had never been so afflicted. It was held that the evidence was sufficient to sustain an award in favor of the claimant. *Nelson v. Industrial Ins. Dept.* (1918) 104 Wash. 204, 176 Pac. 15, 17 N. C. C. A. 1057.

The claimant got a foreign substance in his eye while working at the plant of his employer. He testified that the substance was from an emery wheel. He visited in turn four doctors, one of whom testified that he removed the foreign substance from the claimant's eye. His eye continued to grow worse until it had to be removed. One physician testified that he found

the claimant suffering from a corneal ulcer of the eye; that the cause was infection, which might result from getting emery dust in the eye, and from the inflammation attendant upon it; that a corneal ulcer depends on the abrasion of the corneal surface, and that it is usually secondary to an injury, and that you could not get an ulcer without an abrasion to the cornea. It was held that the evidence was sufficient to sustain a finding that the infection of the eye was due to an injury received during employment. *Riley v. Mason Motor Co.* (1917) 199 Mich. 233, 165 N. W. 745.

A woman employed as a kitchen servant in a restaurant was permitted, with other employees, to use the laundry in the basement of the hotel operated by her employer, for doing personal laundry. The evidence showed that, while engaged in the course of her employment, she was directed by the management of the restaurant to wash the dish towels; that accordingly she went to the laundry in the basement of the hotel and started to wash the towels, and at the same time included some of the clothes of herself and husband; that when she had finished washing she undertook to replenish the fire in the laundry stove; and that while in the act of breaking a stick of wood for the fire, a splinter flew into her right eye, inflicting the injury complained of. She also testified that she was required to and did wash dishes, scrub floors, prepare vegetables, wash dish towels, and do other kinds of work about the restaurant. An eye specialist testified that when he examined her about a week later he found a small wound in the eye with marked inflammation; that when he performed an operation on the eye he found a little splinter; that her eye was, as a result, practically useless. It was held that the evidence was sufficient to sustain a finding that the condition of the eye was due to an injury received in the course of the employment. *Butch v. Shaver* (1921) — Minn. —, 184 N. W. 572.

A workman employed in a lumber yard, whose duties required him to

handle cement, testified that while putting loose cement in a sack on a windy day some of it got in his eye; that it caused pain and made the eye red; that the eye continually grew worse and more painful thereafter, although he applied various home remedies and remedies which he obtained at a drug store; that, these affording no relief, he consulted a doctor and applied the medicine prescribed by him; and that, his eye continuing to grow worse, he finally consulted an eye specialist. He first consulted the specialist about three months after the cement got in his eye. The specialist testified, as to the condition of the eye when he first examined it, that he had seen the action of cement on the exposed portion of the eye in many cases; that such action is caustic and corrosive, and destructive of the tissues; and that the condition in which he found claimant's eye might have resulted from getting cement in it. It was held that a finding that the loss of the eye resulted from getting cement in it, as alleged, was sustained by the evidence. *Kraker v. Nett* (1921) 148 Minn. 139, 180 N. W. 1014.

Where a workman stated in his application for compensation that dirt, or sawdust, or some other foreign substance entered his left eye while he was sawing timber, and in his testimony he said that he was sawing some timber, and the wind was strong, and the dust flew into his left eye, it was held that it could fairly be inferred that the dust caused by his sawing flew into his eye, and that the injury arose out of the employment. *Dickinson v. Industrial Bd.* (1917) 280 Ill. 342, 117 N. E. 438.

An employee, while working in a foundry in the dust, received an injury to his eye by a particle of some hard substance entering it. He continued to work; the eye pained him some in the afternoon and became inflamed, and was observed and commented on by persons whom he met on that evening and the following day. On the day after the injury he consulted an eye specialist, who testified that he removed a particle of some

hard substance from the eye. That the eye was inflamed at the time and subsequently became infected, and he lost nine tenths of his normal vision. It was held that the evidence was sufficient to sustain a finding that the condition of the eye was due to an injury received in the course of the employment. *Newcastle Foundry Co. v. Sopher* (1918) 68 Ind. App. 509, 120 N. E. 713.

A workman suffered burns to his head, face, and limbs during the course of his employment. He was sent to a hospital, where his burns were treated. The claimant testified that when he left his bed, after a confinement of five or six weeks, he discovered that he could not see out of his left eye, and but little out of his right eye. The oculists testified that this condition had existed for a long time, and was due to causes of which they knew nothing, long preceding the injury from the burn. One oculist testified that he had the claimant come to him on two different occasions, in the hope that he would acknowledge more vision, or that he could prove that he was an exaggerator or malingerer, but that he was unable to do so, and his opinion that the claimant was exaggerating was based on no definite proof, but that his reason for disbelieving him was because he had never seen a case like it before. A contractor testified that the claimant had worked for him for eighteen years, on buildings, stages, beams, etc., and that there was nothing defective in his eyesight that showed in his work in those dangerous places. Coworkers said his eyesight was bad, but none could tell of any instance where he manifested it by acts or words. It was held that the evidence was sufficient to warrant a finding that the condition of his eyes was due to the injury received in his work. *Raina v. Standard Gaslight Co.* (1920) 193 App. Div. 54, 183 N. Y. Supp. 264.

The claimant, in the course of his employment, sustained an injury to his right eye which made its removal by operation necessary. Simultaneously with the operation the sight of the left eye became affected—became

almost wholly lost. No injury appeared to have been done to the eyeball, the optic nerve, or any physical thing constituting a part of the organ of sight, yet distinguished physicians agreed that the claimant was not simulating blindness, and in fact did not see. A physician who was paid for his services as a witness by the employer stated: "He cannot see at all." He diagnosed the trouble as "traumatic neurosis," or "hysterical blindness," and said: "This psychic shock, the surgical operation which produced the shock, was the primary means of producing that hysterical blindness." It was held that an award in favor of the claimant was warranted, the court saying: "It is not important that the claimant has an uninjured physical equipment with which he should, but cannot, see. After all, a man sees with his brain, not with his eyeball or his optic nerve, and if an operation performed upon an eye so affects the mind, the nerves, or even the imagination, that a man genuinely loses vision with his other eye, then the faculty of sight has been more directly attacked than when assailed through the mechanical contrivances by which it functions." *Weber v. George Haiss Mfg. Co.* (1920) 191 App. Div. 12, 181 N. Y. Supp. 140, affirmed without opinion in (1920) 229 N. Y. 525, 129 N. E. 900.

A worker, while engaged in the work of welding rails, operated an electric welder which used about 550 volts of electricity. In the operation of welding a dazzling light was generated, and it was necessary for the welder to protect his eyes with colored glasses. While in the performance of his duties one set of the glasses broke and dropped, and he received the flash of light on his naked eye. For some minutes his sight was blurred so that he could not see, but after a few minutes' rest he replaced the broken glass and returned to work. His sight thereafter continued to fail until he was no longer able to work. The claimant was thirty-three years of age, and up to the time of the accident had never had any trouble with his eyes. About two years before this ac-

cident a doctor removed a little piece of solder from the right eye of the claimant. The injury was not a serious one, and had little, if any, permanent effect on his eye. The doctor tested the claimant's eyes at that time, and found the vision of his right eye to be two-fifths normal, and the vision of his left eye better than normal. Immediately after the accident his eyes began to pain him. They bothered him while he was at his work, and he was unable to sleep at night on account of the pain. On the 23d of May he resigned because his eyes were in such condition that he could no longer attend to the work. There was no evidence that the claimant was suffering from a pre-existing disease which might eventually have affected his eyesight. It was held that the evidence was sufficient to sustain a finding that the blindness was the result of the accident, and even if caused by the acceleration of a pre-existing disease, the claimant could nevertheless recover. *Rockford City Traction Co. v. Industrial Commission* (1920) 295 Ill. 358, 129 N. E. 135.

In *Stansby v. Ayrton & Co.* (1919; C. A.) 122 L. T. N. S. (Eng.) 149, [1919] W. C. & Ins. Rep. 266, 12 B. W. C. C. 301, the applicant was employed as an apprentice turner. On September 11, 1918, he was engaged in turning a steel piston when a piece of steel flew off and entered his eye. He went to an eye hospital, and it was found that a piece of steel had lodged under his eyelid, and it was removed. He was prescribed for at the hospital and received from the dispensary some drops and a lotion. The applicant attended as an out-patient at the hospital for a considerable time, using the drops and the lotion. On October 19, 1918, when the applicant's eye was very much inflamed, he was seen by a doctor, and again on November 1, the first time the doctor saw him being considerably more than a month after the accident happened to him. Ultimately the eye had to be removed, which took place on November 5. The doctor testified that, as he could find no mark of any actual injury to the applicant's eye, he was driven to

the conclusion that the inflammation must be attributable, not to a foreign body which had undoubtedly been in the eye, but to tuberculosis. He gave evidence, however, on cross-examination, to the effect that inflammation would follow the presence in the eye of such a foreign body as a piece of steel, and that, as he could not find any abrasion on the eye, he thought that there was some other cause, such as tuberculosis, for the inflammation. It was held that the evidence was sufficient to sustain a finding that the injury to the eye had resulted in its removal, and that it arose out of and in the course of the applicant's employment, the doctor's evidence as to the cause of the inflammation being merely conjectural.

A workman got a cinder from a passing locomotive in his eye, which a fellow workman removed from the eye with a piece of cotton. Later a gonorrheal infection developed in the eye, blinding him. It was held that the evidence sustained the finding that the accident occurred by reason of and in the course of his employment. *Canadian P. R. Co. v. Flore* (1915) Rap. Jud. Quebec 24 B. R. 55, 24 D. L. R. 710.

A workman employed by a manufacturing company was working on a rear axle with another employee, when a piece of steel flew and struck him in the right eye. At once, after the accident, a fellow workman examined the eye, using for that purpose a match wrapped in a piece of cloth. A gonorrheal infection set in, and he lost the sight of the eye. It was held that the evidence warranted the finding that the loss of sight was attributable to an accident arising out of and in the course of his employment. *Cline v. Studebaker Corp.* (1915) 189 Mich. 514, L.R.A.1916C, 1139, 155 N. W. 519.

In *State ex rel. Adriatic Min. Co. v. District Ct.* (1917) 137 Minn. 435, L.R.A.1917F, 1094, 163 N. W. 755, it was held that the evidence was sufficient to sustain a finding that the accident occurred in the course of his employment, where it appeared that a workman received an injury to his eye,

caused by a flying particle of iron ore, which was removed by a fellow workman by means of a match and a handkerchief which had been in use for several days; that the eye was then washed with water from a trough used in common by the miners; and that gonorrheal infection soon set in, causing the loss of the eye, it also appearing that the workman was not previously afflicted with the disease.

While a miner was breaking up a large chunk of iron ore with a hammer, a particle of ore flew into his left eye, cutting through the cornea and embedding itself in the eyeball. A fellow workman removed the particle from the eye at the time, using in his efforts a match and handkerchief. The eye was immediately thereafter washed in water from a trough which was used daily by other miners for the purpose of washing their hands and faces. Thereafter a gonorrheal infection set in, and the workman lost his sight. It was held that the finding that the accidental injury arose out of and in the course of the employment was sustained by the evidence. *Ibid.*

An employee working as a fitter suffered an injury to his eye from hot sparks flying into it. A doctor who saw him a month afterwards said that his eye was then practically well. Later, his eye became worse, and he was seen from time to time by the doctor, who testified that the condition of his eye on those later occasions pointed to some constitutional disease. Another doctor, who examined him five months after the accident, testified that the condition of the eye at that time was consistent with the accident. The medical assessor who advised the county court judge was of the opinion that the injury from which the applicant was suffering was not the result of the accident. It was held that a finding that the incapacity from which the applicant was suffering was not caused by the accident was supported by the evidence. *Tucker v. Manganese Bronze & Brass Co.* (1921; C. A.) 14 B. W. C. C. (Eng.) 38, [1921] W. C. & Ins. Rep. 175.

A workman got some dust in his eye while at work, and inflammation

subsequently set in, with the result that he was incapacitated. The medical evidence was that the germ which caused the inflammation could only have entered the eye through an abrasion, and that it could not have entered with the dust, or have been rubbed into it by the man in clearing his eye. There was no evidence to show how and when the germ got into the eye. It was held that, even assuming that the abrasion was caused by the workman in trying to clear his eye, the evidence was not sufficient to show that the condition of his eye was due to an injury arising out of his employment. *Bellamy v. James Humphries & Sons* [1913; C. A.] W. C. & Ins. Rep. (Eng.) 169, 6 B. W. C. C. 53.

A miner, while breaking coal with a sledge, received an injury on September 26, 1918, by a small particle of rock striking his left eye and lodging therein. He went to a doctor, who found the particle of rock in the outer coating of the eye. There was some inflammation of the eyelids, but none of the iris, and the particle of rock had not gone through the outer coating of the eye. He returned to his work on September 30, and worked continuously up to March, 1919. In February he consulted a specialist, who, upon examination, found that his sight was defective, that there was a defect in the vision of both eyes, and the pupils did not react alike. The vitreous or jelly-like substance in the posterior of the eyes, behind the lenses and pupils, was filled with floating foreign bodies which the doctor called "exudates." He had suffered an injury to his right eye, for which he received compensation. The doctor testified that the lens and iris of each eye were normal, and the defect was due to the floating exudates or foreign bodies, which were not caused by, and had no relation to, the accident for which compensation was claimed, that the accident was not such as to increase or aggravate the existing condition, and that the condition was due to syphilis, a pre-existing disease of many years' standing. The applicant testified that he did not

know there was anything wrong with the vision of his left eye before the accident, but after the accident he could not see as well as he did before, and had to look closely at objects to see what they were. It was held that the evidence was not sufficient to sustain a finding that the affection of the eyes was due to the injury received in the employment, but, on the contrary, was conclusive that it was not caused by the injury. *Perry County Coal Corp. v. Industrial Commission* (1920) 294 Ill. 117, 128 N. E. 333.

In *Keller v. Industrial Commission* (1922) 302 Ill. 610, 135 N. E. 98, the court was of the opinion that even if the employee was hit upon the head by a heavy piece of coal, as he claimed, the finding of the commission that the complete loss of the sight of one eye and partial loss of the sight of the other were attributable to that injury was against the weight of evidence, and should be reversed, in view of the expert evidence that the condition of the eyes was due to locomotor ataxia, and the fact that the employee returned to work nine days after the injury, the defect in the sight not appearing for several weeks after the injury.

In *Pinto v. Chelsea Fibre Mills* (1921) 196 App. Div. 221, 186 N. Y. Supp. 748, the claimant who was employed by a fibre mills company, and was engaged frequently in handling hemp, complained to the nurse employed by his employers that he had a sore eye. The nurse testified that he stated that he did not know what was the matter with it. She put some drops in. He testified originally that the injury was caused by getting some dust from the hemp with which he was working in his eye, but later admitted that the first thought of dust in his eye as the cause of the trouble came to him after it was suggested by his doctor, weeks after the alleged accident. There was no evidence that the dust alleged to have lodged in the claimant's eye contained any germs, or was apt to cause any serious trouble to the eye. It was shown that he was suffering from an ulcer of the cornea, and had sus-

tained 90 per cent loss of vision in that eye. It was held that the evidence was insufficient to sustain an award in the claimant's favor, there being a total lack of evidence that the dust either got in his eye, or that it carried disease germs which could cause an ulcer if it did get in the eye. In such cases the court said that the presumption in favor of claimants provided by the statute was unavailable, citing the reported case (*ELDRIDGE v. ENDICOTT, J. & Co.* ante, 1).

A workman, while assisting a fellow employee in chipping a casting in the regular course of his employment, was struck in the eye by a piece of the casting. Two doctors testified that there was inflammation perceptible after the accident; that he had a cataract on his left eye which reduced his vision in that eye approximately 70 per cent; that the cataract was in the same stage of development immediately after the accident, and some nine months later, and that in their opinion the accident had nothing to do with the trouble with the eye. The claimant testified that before the accident he could see all right, but did not state whether he referred to his left eye or to his vision generally. His right eye was not impaired in any way. One doctor, assuming that he was struck in the eye, that the eye became inflamed, and that because of the condition of the eye his vision was greatly impaired, testified that in his opinion the trouble was due to the accident. He gave no facts to justify his assumptions. It was held that the evidence was insufficient to sustain a finding that the diseased condition of the eye was attributable to the injury received in the course of employment, the court saying that the only possible foundation for the award was the testimony of the claimant and a doctor's conclusion from unjustified assumptions. *Landau v. E. W. Bliss Co.* (1921) 199 App. Div. 145, 191 N. Y. Supp. 454.

A teamster fell from his wagon and broke his ankle. Previous to the accident he was suffering from syphilis, which manifested itself a week later by a dimness of vision, which finally

became almost total. The medical testimony was to the effect that, though the accident might have accelerated the disease, it was so far advanced that it was only a matter of a comparatively short time when he must have reached the condition he was in, though no accident had happened. It was held that the evidence was not sufficient to support a finding that the disease was the result of an accident received during the course of the employment. *Borgsted v. Shults Bread Co.* (1917) 180 App. Div. 229, 167 N. Y. Supp. 647.

While a workman was engaged on a machine a small splinter of steel became lodged in his eye. In rubbing the eye it was infected with gonorrhea, from which he was suffering. It was held that the evidence did not permit an inference that the infection was a proximate consequence of the accident. *McCoy v. Michigan Screw Co.* (1914) 180 Mich. 454, L.R.A.1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455.

So, it has been held that an award of compensation must be set aside, as having been made on insufficient evidence, where the commission found that while the employee, a plumber, was lying on his back to fix the hot-water cock of a wash basin, something fell into his eye, which caused acute pain, and impelled the rubbing of the eye, and that gonorrheal infection developed, resulting in the loss of the eye, and further found that the substance which fell into the eye might have been infected, or, "with the eye inflamed, it might have become infected by rubbing it with an infected cloth, or washing it with infected water, or in other ways," although it was found that the claimant had no gonorrheal infection except that which developed in his eye. *Voelz v. Industrial Commission* (1915) 161 Wis. 240, 152 N. W. 830.

A hot-water fitter met with an accident, while making a hole in a brick wall for fitting a hot-water cylinder, through a piece of brick flying into his left eye. The man did no more work, and the eye was examined, first, by a man at the works, who found nothing in it, then at home, by his

mother and brother, and in the evening by a chemist. Two days later he was admitted into a hospital suffering from gonorrheal infection of the eye, as a result of which he lost the sight of it. The doctor who examined him at the hospital found no injury to the eye apart from the discharge due to the infection. The evidence was that the infection could take place without any wound in the eye, either from an infected finger or from an infected rag or cloth touching it. It was held that the evidence showed that the loss of the eye was not due to the original trifling injury by accident, aggravated by infection, but was due to the infection as an independent cause, and was therefore sufficient to support a finding that the accident was not attributable to the employment. *Doolan v. Henry Hope & Sons* (1918) 87 L. J. K. B. N. S. (Eng.) 671, (1918) W. C. & Ins. Rep. 121, 119 L. T. N. S. 14, 11 B. W. C. C. 93.

A finding by the commission that there were times when claimant could not wear glasses while engaged in the regular course of his employment, due to the nature of his employment (the commission having also found that the defective vision could be corrected to normal with glasses), was held in *McNamara v. McHarg-Barton Co.* (1922) 200 App. Div. 188, 192 N. Y. Supp. 743, to be unsupported by claimant's statement that it was very inconvenient for him to wear glasses, and—in reply to the question why he did not wear goggles when doing such work as occasioned his injury—that it was very dark in the boiler room, and he required all the light possible, and if he covered his eyes with goggles he could not see.

t. Felon.

In *Perkins v. Jackson Cushion Spring Co.* (1919) 206 Mich. 98, 172 N. W. 374, the claimant's work consisted in putting strips in metal frames by the use of a pair of pliers. In this work a bone felon developed. The testimony showed that the strips were shorter than usual, and required the exertion of more strength to put them in place. There was no evidence

of abrasion of the skin resulting in infection, but the infection developed between the bone and the covering of the bone. There was evidence that this might have resulted from a blow or from continued pressure. There was no evidence of a blow. It was held that the evidence was not sufficient to justify a finding that the felon was due to an accident received in the course of the employment.

A carpenter, while engaged in his employment, was required to make frequent use of a screw driver, which he alleged resulted in a frog felon in the palm of his hand. He testified that he did not know definitely just what caused the pain or injury, but he believed it was caused by the constant use of the screw driver; that the pain was several days coming on; that at no time did he get a splinter in his hand, or any particle of grit, or anything that was ground into his hand from the screw driver, but he thought it was just from its continual use; that it bruised the flesh; that at times he fastened a pin in the jamb, and then would set his screw driver there and hit it with his hand; that his hand felt tender at the time, but that he had never had anything like this. It was held that the evidence was insufficient to establish that the felon was the result of bruising his hand by the continued use of the screw driver. *Woodruff v. R. H. Howes Constr. Co.* (1920) 228 N. Y. 276, 127 N. E. 270, reversing (1919) 189 App. Div. 395, 178 N. Y. Supp. 418.

u. Gas Inhalation.

An employee was engaged in wheeling lime from a kiln in a lime room of his employer. Lime dust was present and gases were generated, so that it was necessary to keep a pump in constant operation to draw off the gases from the room. While so engaged he became violently ill, suffering with pains in his chest and arms. He was taken home, and died about four hours later. An autopsy was performed, and two physicians testified that he died of carbon monoxide poisoning. Other physicians testified that the cause of death was bronchial

pneumonia, in no way connected with gas poisoning. It was shown that at least two other employees had been previously affected by gas while working in the lime room. It was held that there was sufficient evidence to sustain a finding that the death was due to carbon monoxide poisoning suffered in the course of employment. *Amalgamated Sugar Co. v. Industrial Commission* (1920) 56 Utah, 80, 189 Pac. 69.

v. Gastralgia.

A workman alleged that he had strained himself while carrying a bar of iron. He continued to work for three weeks, after which he was examined by a doctor. The doctor was of opinion that the gastralgia, or pain in the stomach, from which the workman was suffering, was consistent with a strain such as he said he had suffered. The case was referred to specialists whose reports were not submitted to the court. The only evidence in support of the alleged accident was that of the applicant and his mate. The county judge was not satisfied with the way they gave their evidence. One Dunkley, who was present at the time of the alleged accident, and was stated to have heard the workman's complaint, was subpoenaed as one of the applicant's witnesses, but was not called by him, whereupon the solicitor for the employers asked the judge to call Dunkley, as he was a material witness. The judge assented without formal opposition from the workman's counsel. The judge did not question Dunkley, but the employer's solicitor did, and elicited from him that he had not heard any complaint at the time the alleged strain occurred. The judge found that the onus of proving the accident had not been discharged. The workman appealed on the ground that the judge had wrongly admitted the evidence of Dunkley, and had been influenced thereby, and that the judge was wrong in finding that there was no evidence of the accident. It was held that, apart from Dunkley's evidence, the workman had not discharged the onus of proving an accident. *Trigg v. Vauxhall Motors* (1914)

7 B. W. C. C. (Eng.) 462, [1914] W. C. & Ins. Rep. 251.

v. Heart disease.

A workman employed as a painter, while in the course of his work, fell from a ladder, sustaining a fracture of the pelvic bone. He died in two weeks from the rupture of the right ventricle of the heart. He was thirty-eight years old, and had been in good health prior to the accident. After falling from the ladder, he was taken to a hospital, and the injured hip was incased in a plaster cast. He remained in the hospital, confined to his bed, and was apparently making satisfactory progress toward recovery, until the 14th day of November, 1915, when he suddenly died. The ensuing autopsy disclosed, as the immediate cause of death, a small rupture of the right ventricle of the heart. The surgeon who performed the autopsy stated that the wall of the ventricle was unusually thin, but that in other respects the heart was in normal condition. He did not discover an embolus. He, as well as the attending physician, inclined to think that the facts did not indicate any causal connection between the injury and the subsequent heart rupture. On the other hand, a pathologist, who had made a microscopic examination of the heart, testified in effect that, while the wall of the ventricle was thin, it was not more so than in many cases of men in normal health; that, in the absence of any sudden or great exertion on the part of the deceased (of which there was no evidence), he would attribute the rupture to a sudden pressure of blood upon the wall of the ventricle, and that such pressure might well have been caused by the lodging of an embolus in an artery leading from the heart to the lungs. Such an embolus could have resulted from the pelvic fracture, and been carried from the point of its origin to the heart. He testified, further, that an embolus was easily lost or overlooked in the course of an autopsy, and that the failure to discover one did not necessarily indicate that it had not existed. It was held

that there was evidence on which a finding that the heart trouble was caused by the accident could be based, as under the law absolute proof or mathematical demonstration was not required. *Santa v. Industrial Acci. Commission* (1917) 175 Cal. 235, 165 Pac. 689.

A workman employed as a sweeper sustained an injury on October 29, 1919, by an automobile seat slipping off a truck and striking him on the right leg between the knee and ankle. A severe bruise resulted. He was taken to a hospital, where his wound was dressed, and afterwards to his home. On November 7 the wound became infected, and he was removed to a hospital, where he remained until November 18. He was then able to walk with the aid of others. His wife and daughters testified that on the second or third day after his return he again began to complain of pain and soreness, and this continued. The wound "looked worse, . . . more inflamed, . . . awful dark red," and began to discharge matter of a "whitish" color, streaked with blood. His condition grew worse until the morning of November 24, when he died. A short time before his death, he complained much of the pain in his leg, and said that it was "crawling up to his chest." A post-mortem was held. The doctor testified that he found a thrombus, or blood clot, at the mouth of the left coronary artery of the heart, which in his opinion was the cause of death, and that the injury in no way contributed to it. Another doctor, who was present, was of the same opinion. A third doctor was called as an expert by the applicants. In answer to a hypothetical question, fairly embodying the facts as testified to by the witnesses for applicants, he stated that in his opinion the "accident contributed to or resulted in the man's death." He testified that bacteria from the infection might have gotten into the artery and produced the condition revealed by the post-mortem. It was held that there was evidence sufficient to sustain a finding that death was attributable to an injury received in the

course of the employment. The court said that, while the testimony of the surgeons might seem conclusive to them, "we may only set aside the award when the record contains no testimony to facts or theory amounting to legal evidence that death is attributable to the accident." *Krueger v. Hayes Mfg. Co.* (1921) 213 Mich. 218, 181 N. W. 1010.

A workman, who was employed on a "band press," a machine used to press copper bands around shells, slipped on a T-rail extending about an inch above the level of the floor, as he took a shell and started towards the press. He fell and hit his breast against the lever that operated the press, an iron rod with a steel handle, and was injured. After the injury there was found a mark over his heart about 5 inches long, and his attending physician testified that the fall brought on a condition of the heart known as "pericarditis," which caused the death. It was held that the evidence was sufficient to show an injury by accident arising out of and in the course of the decedent's employment, which proximately caused the death. *Bucyrus Co. v. Townsend* (1917) 65 Ind. App. 687, 117 N. E. 656.

The finding of the commission awarding compensation was held to be warranted where the evidence, apparently in harmony with the medical testimony, was to the effect that the accident was a sufficient producing cause of the acute pericarditis, and that the bruising of the chest from the accident was sufficient to cause a traumatic injury to the membrane surrounding the heart, causing the ultimate death. *LaFleur v. Wood* (1917) 178 App. Div. 397, 164 N. Y. Supp. 910.

An employee of an automobile company was directed to go up on a gondola car to put keys in the trucks he had been helping to load. He went to obey the order, and a few minutes later was found on the ground in a half-reclining position, resting one arm near the foot of the ladder running up on the side of the car. When he was assisted to his feet he said that he was hurt. He walked to his

home, and was soon visited by a doctor, who testified he found him suffering much pain and in a condition of shock, and gave it as his opinion that the shock proceeded from an injury. Two physicians gave it as their opinion that he died from acute dilatation of the heart, and that this could be, and was usually, produced by a fall, or by overexertion, or by jumping. The workman was a man fifty-one years of age, in good health, with no known tendency to heart trouble. He had been working in the usual way on the day of the accident. It was held that the evidence justified an award in favor of the claimant, the court saying: "We are not of the opinion that we should say, as a matter of law, that there is no testimony to support the award. If it be known that a person is on an elevated object, and soon after he is found lying on the ground at the foot of the ladder which leads to the elevation, in a half-reclining position, complaining of being hurt, it would not be an unnatural inference that in his attempt to return he had fallen to the ground." *Shaw v. Packard Motor Car Co.* (1921) 214 Mich. 660, 183 N. W. 767.

A workman engaged in lifting a heavy weight in the course of his employment strained himself. He complained of a pain, and asked that someone else be substituted in his place to do the rest of the lifting. On the following day he went to a physician, who diagnosed his trouble as heart difficulty, and prescribed for him accordingly until he died about ten days later. His wife testified that prior to the accident he had never before complained of illness. It was held that the evidence favored the presumption that the claim was within the law created by § 21 of the New York Workmen's Compensation Statute, and that there was no substantial evidence to overcome this presumption, and therefore an award in favor of the claimant was sustained. *Gibbons v. Marx & Rawolle* (1917) 181 App. Div. 142, 168 N. Y. Supp. 412.

A structural iron worker, while engaged in the duties of his position, was injured by being struck on the

forehead with an air hammer which he was using. At the time of the accident he was a vigorous, well-nourished man, and had never complained of being sick, or of any trouble with his heart. Immediately after receiving the blow he threw his hands over his face, and walked around for a few minutes, and then returned to his work. The blow was of sufficient force to produce a discolored spot about an inch in diameter, and three or four other smaller places around the nose and beneath the eyebrows, where the skin was broken. He left his work at noon, and complained that he was getting "awfully sick," and that his head was "hurting fit to kill." A little later he went home and died in about half an hour. An autopsy was performed, which showed no apparent injury to the skull or brain. The heart was removed, and it was found that the tissue on the posterior side of the right auricle had degenerated to such an extent that it was but slightly thicker than paper, and was ruptured. The direct and immediate cause of death was the rupture of the heart. Four or five physicians testified. Two of them, in answer to the hypothetical questions, testified that in their opinion the rupture of the heart which caused death was a probable result of the shock produced by the blow on the head. Others testified that the blow did not cause the rupture, and that the blow had nothing to do with the rupture. It was held that the evidence was sufficient to sustain a finding that the death was attributable to an injury received in the course of the employment. *Mansfield Engineering Co. v. Winkle* (1921) — Ind. App. —, 133 N. E. 390.

A workman was employed as a coal miner. During the course of his work he was at times required, with the help of others, to push a car from one room in the mine to another. After having assisted on one occasion in pushing a car which required unusual physical effort, he complained of a pain in his side and was compelled to lie down. He was removed to the office of the company, and died about three hours later. An autopsy showed

that the aorta had ruptured at a point where it was unnaturally thin, indicating a diseased condition, and the medical testimony was to the effect that, when such a condition existed, a rupture of the aorta might occur from any exertion, such as laughing or coughing, and that from the appearance of the aorta it looked as though it might have been caused by a strain or exertion of some kind. It was held that the evidence was sufficient to sustain a finding that the death of the workman was attributable to his work. *Indian Creek Coal & Min. Co. v. Calvert* (1918) 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709.

A workman employed as a repair man in and about a colliery, while engaged with other workmen in taking a buggy or small car up a breast in his employer's mine, received a sprained back. This was followed by cardiac collapse, from which he died in about three weeks. The medical testimony was to the effect that a cardiac collapse could be the result of a strain, and the attending physician said that he knew of no other cause in this case. It was held that the evidence was sufficient to sustain a finding that the death of the employee was attributable to his employment. *Tracey v. Philadelphia & R. Coal & I. Co.* (1921) 270 Pa. 65, 112 Atl. 740.

A workman was employed by a mining company in looking after its line of pipe, used for the purpose of conveying silt from the surface into its mine. His duties were to keep the line in repair, and in order to enable him to examine it underground he carried an open lamp. One morning his lifeless body was found inside the mine, a short distance from this pipe line, and his lighted lamp about 2 feet away from him. His clothing was burning and he had severe burns on his body. He was in a kneeling position, on his hands, and apparently had been vomiting. The medical testimony was to the effect that his death was due to a rupture of the aorta, a large blood vessel leading from the heart. The workman was afflicted with a syphilitic condition in which

he might have lived four or five years, or his death might have occurred at any time, but which rendered him more susceptible to a rupture of the aorta than he otherwise would have been. It was held that there was evidence to sustain a finding that the workman came to his death through an extra effort in vomiting, while engaged in discharging his duties as an employee. *Clark v. Lehigh Valley Coal Co.* (1919) 264 Pa. 529, 107 Atl. 858.

A miner working in a pit was called on to render assistance to an injured fellow workman, and, having fetched a stretcher, helped to place the injured man on it and to carry him a distance of over half a mile through the pit workings. After the party had been brought up to the top of the shaft the workman started, as one of the stretcher bearers, to go to the ambulance, but as he was seen to be looking very white and ill, he was relieved of the duty, and shortly afterwards he collapsed and died. The medical evidence showed that he was suffering from heart disease in an advanced stage, in which sudden death might be caused by any unusual exertion. It was held that there was sufficient evidence to support a finding that the workman's death was hastened by the extra and unusual exertion of carrying a heavy man an unusual distance, and therefore that it was due to accident arising out of and in the course of his employment. *Treasure v. Cardiff Colliers* [1920; C. A.] W. C. & Ins. Rep. (Eng.) 18, 13 B. W. C. C. 28.

A workman was descending the side of a ship by a rope ladder. The ladder twisted suddenly, he gave a cry, fell into the water, and was dead when picked up. The medical evidence was that death was due to heart failure, and not to drowning, and that the heart was in such a state that any slight exertion might have caused its failure. It was held that there was evidence to support the finding of the county court judge that death was due to "accident arising out of and in the course of the employment." *Trod-*

den v. J. McLennard & Sons (1911) 4 B. W. C. C. (Eng.) 190.

A miner, with other employees, on going down into a mine to engage in their usual work, found the place at which they were to work so full of smoke that they could not remain with comfort or safety, and for that reason returned to the top of the mine. Immediately after the miner came out of the mine, he walked a short distance to a stairway, sat down on one of the steps, and then fell over. On being carried into the office he was found to be dead. On examination at an autopsy held by the coroner, it was found that he had been afflicted with a serious chronic heart disease. The evidence showed that the smoke which caused the employees to leave the mine had been produced by firing explosives early that morning for the purpose of loosening the coal, so that it could be more easily and more rapidly mined, and sufficient time had not elapsed for the air to become pure again before the men went down to work. Where air is impregnated with smoke of this kind, it has a bad effect on persons who breathe it, and if inhaled too long will prove fatal. Several others were made sick by inhaling the smoke. Two physicians who attended the autopsy testified that in their opinion the man's death did not result from inhaling the impure air in the mine, but from chronic heart disease. There was no direct evidence that the smoke-laden air hastened the death, but the court held that it was not necessary to establish that fact, where other proven facts would warrant such an inference, and sustained an award in favor of the claimant. The court said: "It was the province of the industrial board to draw any reasonable inference from such facts. It evidently drew the inference that the same elements in the air of the mine which caused other workmen to become weak, dizzy, and blind, to have rapid pulsations, headache, and shortness of breath, to become sick and vomit, so affected the decedent that death followed, because his diseased heart was unable to withstand the added burden placed on it by inhal-

ing the smoke-laden air while in the mine, and in making an effort to escape from its evil effects. With such an inference in support of the finding in question, it is fully sustained by the evidence. We are unable to say that it is not a reasonable inference, and therefore we have no right to disregard it, although we might consider a contrary inference equally as reasonable." *Utilities Coal Co. v. Herr* (1921) — *Ind. App.* —, 132 N. E. 262.

A woman with a weak heart was employed in dragging carpets over a table. She testified that while so working she felt something give, but thought it would pass away. She continued to work until it was time for lunch. She started to eat her lunch, but could not eat any, and went to work again; then she felt something else give way. Other witnesses testified that the woman had claimed that she "had an awful pain under her heart." The arbitration committee found that the work the woman was doing aggravated her weak heart so as to incapacitate her for work. It was held that there was evidence to justify this finding. *Madden's Case* (1916) 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379.

A workman was employed in loading heavy bags onto trucks, and then pushing the loaded trucks onto a railway. The work was heavy, and three men were employed on it so that one man might rest while the other two worked, except that all three pushed a truck. The workman had been working all morning, and in the afternoon he had just joined with the other two men in pushing a truck, when he fell, and died soon afterwards. The medical evidence was that the workman was suffering from fatty degeneration of the heart, but that the disease was not so far advanced that he would have died without being subjected to some strain. It was held that there was evidence to support the finding of the county court judge that the man died of a strain arising "out of and in the course of" his employment. *Doughton v. Hickman* [1913] W. C. & Ins. Rep. (Eng.) 143, 6 B. W. C. C. 77.

Where the evidence adduced is equally consistent with the fact that heart failure was not the result of an accident, as with the fact that it was, and there is no evidence of any strain, it will not be inferred that it was the result of an accident arising in the course of employment. *Kerr v. Ritchie* (1913) S. C. 613, 50 Scot. L. R. 434, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419.

A miner was injured by being caught between two coal cars, bruising his body in the region of the lower left ribs. He was fifty years old, and before the accident had worked on a farm, and for four or five months prior to the accident had worked in this coal mine. He had always been able to do such work, and testified that he had never had any kind of heart trouble or internal trouble before his injury; that at the time of the accident he did not think he was hurt, and went back to his work, but could not get his breath, and was sent home in a buggy; that a doctor bandaged him, and he had been under the care of that doctor and another since his injury; that his heart ached, his head felt like it was going to burst, and his heart felt filled up and heavy. The doctor who treated applicant at the time of the injury and bandaged him, and also treated him at different times up to the hearing, testified that he was suffering from myocarditis, an organic disease of the heart caused by infection, and consisting of degeneration of the heart muscles; that the disease is never the result of an outside injury or force applied to the body; that he had examined the applicant thoroughly since the injury, and he was in a bad condition, weak and emaciated, but there were no results remaining from the injury which could possibly cause myocarditis; and that he had a temporary disability, only, from the injury. The other doctor who had treated the applicant testified that when he saw him after the accident he had received an injury of the left lower ribs, which, from the nature of the injury, appeared to be a light blow; that he had been strapped for

the injury, and was having considerable trouble with his heart, and abnormal respiration, and that the squeezing he had could have aggravated the condition that was already there, but the heart disease was present before the time of the injury. It was held that the evidence was insufficient to sustain a finding that the condition of the applicant was due to the injury, the court saying that, while compensation might be awarded where an injury had aggravated or intensified an existing disease, there was no evidence tending to show that such was the case. *Springfield Dist. Coal Min. Co. v. Industrial Commission* (1921) 300 Ill. 28, 132 N. E. 752.

An employee was engaged in his ordinary work as a surface laborer for a mining company, consisting, on the day of his injury, of unloading a car of ties on a coal trestle, when he collapsed and fell a short distance, receiving superficial scratches or bruises on his face. He died shortly of heart failure. Prior to the alleged injury he had been confined to his home for some months, and a part of that time to his bed, suffering from organic heart trouble, described by physicians as being a leakage of the valves of the heart. The testimony of the physicians was to the effect that, in the condition the workman was in, death might have come to him while lying quiet, even while taking a breath. It was held that the evidence was not sufficient to sustain a finding that the death was attributable to an injury received in the course of the employment. *Johnson v. Mary Charlotte Min. Co.* (1917) 199 Mich. 218, 165 N. W. 650.

A workman, while engaged in the duties of his employment, sustained injuries consisting of a dislocated shoulder and contusions. The dislocation was immediately reduced, and he remained under the care and treatment of a physician for a month. He never returned to work. About two months after his injury he fell on the street and was assisted to his home, where he died the same day without medical attendance. The death certificate filed in the depart-

ment of health recited that the chief and determining cause of death was "chronic cardiac valvular disease." There was no evidence that the workman had heart disease at the time of his accident. There was no evidence, other than the death certificate, that he died of heart disease. The physician who treated the workman after his accident testified that he examined his heart twice during the time he was treating him, and found no heart trouble. When the death certificate was called to his attention he testified that he did not think that the injury had anything to do with his death. The widow testified that he had never had heart trouble, or been sick before the injury. The physician who signed the death certificate never saw the workman during his life. He was not present at his death, nor for three hours thereafter. No autopsy was performed. It was held that a finding that death was caused by heart disease which was aggravated by the injury was not warranted by the evidence. *Nestor v. Pabst Brewing Co.* (1920) 191 App. Div. 312, 181 N. Y. Supp. 477. On a second hearing of this case the additional evidence of a medical expert was given. He testified that, in his opinion, based on the facts disclosed by the record, eliminating the death certificate, the injury was a contributing cause. It was again held that the evidence was insufficient to sustain an award in favor of the claimant. (1921) 195 App. Div. 434, 186 N. Y. Supp. 828.

A farm laborer, apparently in good health, died suddenly while engaged, in the course of his ordinary work, in lifting baskets of corn to feed a bruising machine. It was held that there was no evidence to sustain a finding that the workman died from heart failure, induced by the strain of repeated stooping and lifting the baskets of corn. *Kerr v. Ritchie* [1913] S. C. 613, 50 Scot. L. R. 434, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419.

An employee engaged in baling scrap copper was found lying on the floor with a completed bale, also on the floor, about 2 feet from him. He was still breathing, and died within

half an hour of heart disease. There was no evidence tending to prove any accidental injury. There was no mark on his person, and nothing from which it could be inferred that an accident had occurred, the claimant relying solely on the fact that the heavy work which the workman was doing caused or hastened his death. It was held that a finding denying compensation on the ground of insufficiency of evidence was justified. *Jakub v. Industrial Commission* (1919) 288 Ill. 87, 123 N. E. 263.

A workman was employed as a machinist by a shipbuilding company. While engaged with fellow workmen in repairing a gear, he fell and was found by the fellow workmen lying on the floor. When a doctor arrived he was found to be dead. The medical evidence was to the effect that he died of heart disease. The temperature of the room in which he was working was from 75 to 78 degrees, the room was ventilated by two portholes, and his physician testified that the temperature was not excessive, and would not have produced death from heart disease. The work he was doing when he fell was lifting, with the aid of two others, a metal cover weighing about 100 pounds. There was no evidence that there was anything specially heavy about the work, or that he made any special effort, or suffered a strain. There was no evidence of a slip, and there was evidence that there was nothing present to cause a slip. It was held that the evidence was insufficient to warrant a finding that the death was due to an injury received in the course of the employment. *Guthrie v. Detroit Shipbuilding Co.* (1918) 200 Mich. 355, 167 N. W. 37.

A workman suffering from a diseased heart had to leave work, owing to shortness of breath and faintness caused by failure of his heart. The county court judge inferred, from a consideration of his condition before and after the day when he left work, that he must have suffered from a strain at his work, and that this arose out of the employment. It was held that there was no evidence to support the inference. *Beaumont v. Under-*

ground Electric R. Co. (1912) 5 B. W. C. C. (Eng.) 247.

A workman collapsed at work, and died the same day from angina pectoris. His heart had long been in a bad condition, and angina pectoris, according to the medical evidence, might have been brought on by slight exertion, or by other causes. The county court judge found that the angina had been brought on by exertion at work, that this exertion was an accident, and that the accident arose out of the employment. It was held (without deciding whether the occurrence was an accident) that the burden had not been discharged of proving that the death arose out of the employment, the evidence being equally consistent with various inferences as to the cause. *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 K. B. (Eng.) 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178.

In arbitration proceedings to recover compensation, the arbitrator found that the claimant, while, in the course of the employment, lifting a derailed hutch, felt a sharp pain near the heart, followed by palpitation and shortage of breath, and that on being examined the claimant was found to be suffering from advanced disease of the heart, which was of long standing, was in its nature progressive, and bound to manifest itself sooner or later. He thereupon held that it was not proved that the lifting of the hutch accelerated the disease. It was held that the arbiter was entitled to find that the claimant had not proved that he had sustained an accident arising out of and in the course of his employment. *Spence v. William Baird & Co.* [1912] S. C. 343, 49 Scot. L. R. 279, [1912] W. C. Rep. 18, 5 B. W. C. C. 542.

See also *supra*, II. b.

x. Heat stroke.

An employee received a personal injury from sunstroke while working in a gravel or sand pit, in the usual course of his employment. The day of his injury was one of the hottest of the summer. The pit had high banks,

which attracted the extreme heat and shut out the wind except from the south. The nature of his work required him to remain at it steadily. While he had the same right to leave his employment as any employee had when sickness overtook him, he had no prior warning of the attack of sunstroke, was taken unawares, and was overcome thereby. The heat in the gravel pit was greater than the heat to which the ordinary worker was exposed on the day of the injury. It was held that the evidence was sufficient to sustain a finding that the disability of the workman was due to his employment. *McCarthy's Case* (1919) 232 Mass. 557, 123 N. E. 87.

A workman was engaged in shoveling coal in the regular course of his employment. The day was unusually hot, as had been the three preceding days. During the morning he felt the effects of the heat, and at 11 o'clock in the forenoon he collapsed as a result of the heat. At all times after the collapse he had a very high temperature, and on the same day he died of sunstroke, or thermic fever. The employment did not expose the workman in a substantially greater degree to heat and the effects of the sun than others in the same employment, but his exposure was far greater than the exposure of the community generally. It was held that the evidence was sufficient to support a finding that the injury and death were attributable to his employment. *Ahern v. Spier* (1918) 93 Conn. 151, 105 Atl. 340. See to the same effect, *Cunningham v. Donovan* (1919) 93 Conn. 313, 105 Atl. 622.

An engineer, employed in the engine room of a ship sailing in the tropics, collapsed from heat stroke, and subsequently died. The temperature of the engine room was 114 degrees Fahrenheit. There was evidence that the engineer was physically unfitted to withstand the normal heat of a tropical climate. It was held that the evidence warranted a finding that the death resulted from an accident arising out of and in the course of his employment. *Maskery v. Lancashire*

Shipping Co. [1914; C. A.] W. C. & Ins. Rep. (Eng.) 290, 7 B. W. C. C. 428.

A workman was employed as an engineer at a pumping station. He was fifty-seven years old, was about 5 feet, 10 inches, tall, and weighed about 200 pounds. On July 30 it was very hot, the thermometer registering over 100 degrees, as it had for several days before. He went to work Sunday morning, and was seen at work in the engine room about 12 o'clock, standing in front of the compressor, which he was wiping with some waste. Soon after 1 o'clock his wife came to the building to bring him his lunch, and found him unconscious on a bench in the room. He was taken home in an ambulance, and died in a few minutes after the arrival of a physician, who had been summoned, and who testified that he died from heat stroke. There was evidence that the temperature in the pumping station was considerably higher than that outside. It was held that a finding that the man's death was due to his employment was sustained by the evidence. *Joliet v. Industrial Commission* (1920) 291 Ill. 555, 126 N. E. 618.

A workman was engaged in unloading lumber from a box car. The temperature was 90 degrees and the humidity was 82. When called to work in the morning by a fellow employee, he complained that he was not feeling well, that he had been up all the night before vomiting. After going to work he again complained of being sick, and had to rest. He wished to leave the work, but was persuaded to remain until nearly noon. At 6 o'clock that evening he was found lying dead among the lumber piles. The coroner's inquisition contained the statement that he came to his death by "heat insolation." The employer testified that the deceased had complained to him of being sick, and he had told him to rest up; that probably the heat had gotten him a little. It was held that, while the evidence was chiefly made up of hearsay statements and declarations, they were received without objection, and could not then be objected to, and that it was sufficient to sustain an award in

favor of the claimant. *Hernon v. Holahan* (1918) 182 App. Div. 126, 169 N. Y. Supp. 705.

A teamster in the employ of a coal company suffered an attack of sunstroke while engaged in his duties of delivering coal. There was no evidence to show that he was, while engaged in delivering coal, peculiarly exposed to the danger of sunstroke by reason of the nature of his work. It was held that a finding that the claimant had not satisfied the burden of proving that the heat prostration was occasioned by, or casually related to, a personal injury which arose out of the employment, was warranted by the evidence, the court saying that the hazard of injury from sunstroke would not seem to have been greater or different from that to which persons in general, in that locality, who worked in the open, were exposed. *Dougherty's Case* (1921) 238 Mass. 456, 16 A.L.R. 1036, 131 N. E. 167.

A driver of a brewery wagon engaged in the delivery of beer was overcome by heat. The day was excessively hot. During the forenoon he had delivered ninety-one half barrels of beer. About 3 o'clock in the afternoon, while he was driving the wagon, he stopped the horses, alighted from the wagon, and walked around apparently suffering from the heat. In about ten minutes he dropped dead. He was accompanied by an assistant, who presumably exerted himself as much as the driver and who testified that he was not specially affected by the heat, except that it caused him to perspire. There was a large umbrella on the wagon that protected him from the direct rays of the sun. It was held that the evidence warranted a finding that the driver was not, by reason of his employment, subjected to a special and increased hazard not common to the public generally, and the inference that the heat prostration which caused his death did not arise out of his employment. *Campbell v. Clausen-Flanagan Brewery* (1918) 183 App. Div. 499, 171 N. Y. Supp. 522.

A fireman on board ship in the Red sea died from the effects of the heat.

He had complained of the heat for four or five days before his death. He complained of being sick from the heat on the day before and the day of his death, and was given medicine. After taking the medicine on the day of his death, he worked for a few hours, with occasional intervals for rest and refreshment, when he collapsed and died. The certificate of death signed by the master and chief engineer gave the cause of death as "heat stroke." The conditions were not abnormal for the Red sea. There was no evidence that the fireman was delicate. It was held that the evidence was not sufficient to show that he died from an accident arising out of and in the course of his employment. *Pyper v. Manchester Liners* [1916] 2 K. B. (Eng.) 691, 85 L. J. K. B. N. S. 1459, [1916] W. C. & Ins. Rep. 301, 115 L. T. N. S. 406, 60 Sol. Jo. 706, 32 Times L. R. 723, 9 B. W. C. C. 580.

y. Hemorrhage.

A fireman, while firing on a switch engine, fell therefrom and death resulted. On an autopsy the physicians found a portion of the brain soft, and that a hemorrhage apparently had emanated from that portion of the brain, and it was found that the workman died from hemorrhage of the brain and fracture of the skull, but it was uncertain whether the hemorrhage was caused by the fracture. One physician then present testified that this strain on the brain was caused by a ruptured blood vessel; that in his judgment the fall could not have produced that condition; that the cause of the condition was syphilis—that the scars on the other parts of the workman's body indicated that condition; that the fall would aggravate such a condition and hasten results; and that the exercise of shoveling would cause blood pressure, and might cause a ruptured blood vessel. It was held that the evidence justified a finding that the injury resulted from an accident arising out of the employment. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632.

A workman was assisting in cutting

a large piece of granite, using a 20-pound hammer. The blows were required to be struck from the side, necessitating the striker's assuming a crouching position. The day was very cold. He struck about 130 blows in an hour and a quarter with the heavy hammer, after which he was considerably exhausted and perspired freely. After lunch he resumed the work of striking for about half an hour with a 15-pound hammer. After this, while engaged in manipulating an overhead traveler, he fell over a pile of stone, his head striking a piece of granite, cutting a large gash over his right eye, and died a few minutes thereafter. It was found that the cause of death was cerebral hemorrhage, due to a ruptured blood vessel, and that he came to his death as the result of an accident arising out of and in the course of his employment. The evidence was held to be sufficient to justify this finding and to support an award. *State ex rel. Simmers v. District Ct.* (1917) 137 Minn. 318, 163 N. W. 667, 14 N. C. C. A. 527.

A workman's employment required him to break rock in a quarry with a 16-pound sledge, and load the rock into a car, which was hard work. At noon he was in apparently good health and spirits, and ate all of the lunch which his wife brought to the quarry for him. In the afternoon, while at his working place, and shortly after he was seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant, an exceedingly dusty place. The medical testimony was to the effect that working in the dusty sacking department, and the heavy work of breaking the rock, might cause a hemorrhage, and would have a tendency to cause it. It was held that the evidence was sufficient to sustain a finding that the death was due to an injury received in the course of the employment. *Gilliland v. Ash Grove Lime & P.*

Cement Co. (1919) 104 Kan. 771, 180 Pac. 798.

A workman employed as a mason, while rolling a wheelbarrow loaded with tools along an alley from one place of work to another, was suddenly stricken with severe pain and paralysis of the lower limbs, and collapsed. The loaded wheelbarrow weighed about 130 pounds. The alley on which he was rolling it was rough and full of holes, and for a part of the distance there was a steep grade. His physician, who reached him within a few minutes, testified that he had sustained a hemorrhage or rupture of the spinal cord, and that in his opinion it came from the exertion at the time. It was held that the evidence was sufficient to sustain a finding that the cause of the rupture of the blood vessel and its fatal results were the muscular strain and exertion employed by him in propelling the loaded wheelbarrow, and an award in the claimant's favor, based thereon. *State ex rel. Puhlmann v. District Ct.* (1917) 137 Minn. 30, 162 N. W. 678.

An employee was engaged in getting sand out of a sand pit. His particular work at the time he was injured was helping to shove a flat car, which work was proven to be strenuous. The day was excessively hot, and the radiation of heat from the surrounding sand and gravel intensified it. No breeze was stirring. While performing this work the employee suffered a cerebral hemorrhage, from which he died. It was held that the evidence was sufficient to sustain a finding that the death was attributable to the employment. *Murray v. H. P. Cummings Constr. Co.* (1921) 197 App. Div. 903, 188 N. Y. Supp. 193, affirmed without opinion in (1921) 232 N. Y. 507, 134 N. E. 549.

A workman, while engaged in his employer's colliery in loading coal, complained of receiving a strain or hurt in his stomach. Three days later he died. He was an unusually healthy man, never having complained of stomach trouble or other sickness, and worked regularly. He immediately made known to his fellow workmen that he had received an injury in the

abdomen while engaged at his work, and on reaching home complained of pain in his stomach, informed his wife that he was "lifting something in the mines and strained himself," retired to bed, and remained there until his death three days later, in the meantime "suffering with copious hemorrhages in the stomach and bowels." The medical testimony showed that the hemorrhages could have been caused by the rupture of a blood vessel, the result of a strain. It was held that the evidence was sufficient to sustain a finding that his death was attributable to his employment. *Zukowsky v. Philadelphia & R. Coal & I. Co.* (1921) 270 Pa. 118, 113 Atl. 62.

At the time of receiving his injury the claimant's husband, with two others, was engaged in rolling a log approximately 28 feet in length and 16 inches in diameter. They were using cant hooks to turn the timber, when the hook used by one of the workmen slipped, throwing the log back, and causing it, claimant asserted, to jar or strike her husband, inflicting the injury from which he subsequently died. To establish this contention the evidence of two persons working with the husband was that the timber, a V-shaped stick, required considerable effort to roll, and that the cant hook of one of the workmen slipped, allowing the log to roll back, "jarring" or knocking the hook from the husband's hand. This happened practically at quitting time, and upon his arrival home he was faint and weak, and was undressed and put to bed by members of his family. A doctor was called, who found him passing blood and suffering from a "hemorrhage from the kidneys, most likely, or from the bladder," which condition, the doctor said, probably resulted from a jar of the body or a strain. An examination by the doctor disclosed "a tenderness and immobility. He was sore all across the lumbar region . . . and particularly over the bladder." He was sent to the hospital on the 16th of July, and died on the 18th. Other physicians called by defendant testified that a jar to the person, such as indicated above, might rupture a blood

vessel and produce the condition from which he suffered. It was held that the evidence warranted a finding that the death resulted from an accidental injury, suffered in the course of the employment. *Kiercok v. Philadelphia & R. Coal & I. Co.* (1921) 270 Pa. 17, 112 Atl. 746.

An employee was engaged in loading a car with grain. The grain was in bags containing 100 pounds each, which were piled on each other in the car, two workmen lifting and placing the bags. While lifting a bag onto the pile the employee was noticed to lurch a little, and the same thing was noticed when he helped swing a second bag up. A few moments later, when he started to lift a third bag, he fell across the bag and could not lift it. He was assisted into the store-room, where he became unconscious, and was then removed to a hospital and died there a few hours later of cerebral hemorrhage. It was held that the evidence was sufficient to justify a finding that the hemorrhage was attributable to the work in which the workman was engaged. *Patrick v. J. B. Ham Co.* (1921) 119 Me. 510, 13 A.L.R. 427, 111 Atl. 912.

An employee of a construction company, while working in the cellar of a building, collapsed and fell. No one saw him fall, but immediately thereafter he was observed by his coemployees, who went to his assistance and found him in an unconscious condition, trembling and frothing at the mouth. They threw water in his face, and shortly thereafter he revived and was taken to a hospital, where he died the following morning. A post-mortem examination disclosed that his death was due to a blood clot and pressure on the brain. Holding that the evidence was insufficient to support a finding that his death was attributable to an injury in the course of his employment, the court said: "At the time he collapsed he was working on a dirt floor, and there is nothing to indicate that his fall was due to anything connected with his employment; on the contrary, all of the evidence shows that it was due to an injury which he had previously

sustained, or disease with which he had been afflicted. One of the persons with whom he was working at or immediately prior to the time he collapsed testified that he stood within a few feet of him, and while he did not see him fall, he did immediately thereafter see him lying on the floor; that he went to his assistance, and there was nothing to indicate the cause of his fall; that there were no obstructions upon the floor, no pillars or posts near where he fell, or anything to show that the cause of his fall was other than a collapse. The witness was corroborated by another, to the effect that he saw the deceased immediately after he fell; that he was then lying upon his back, frothing at the mouth, and trembling; that there was nothing to indicate he had tripped or fallen by reason of anything upon the floor, and there were no marks upon his face or head which showed in any way that he had been injured, except a slight scratch upon his cheek. When he reached the hospital he was immediately put to bed, a careful examination made of his person, and the only evidence of an external injury which could be discovered was an abrasion over his forehead about as big as a quarter of a dollar. There was no evidence of a fracture or concussion of any kind. After his death an autopsy was performed, and this disclosed a subdural hemorrhage, which, according to the physician making the autopsy, had existed for some time prior to his collapse; that there was no evidence whatever of traumatism or concussion received at that time, or that his death was in any way caused by an injury then received. Under such circumstances I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture." *Hansen v. Turner Constr. Co.* (1918) 224 N. Y. 331, 120 N. E. 693, reversing (1918) 185 App. Div. 901, 171 N. Y. Supp. 1087.

A foreman in a coal yard had some trouble with a teamster over the kind of coal the teamster was loading. During the altercation the teamster threatened the foreman with a heavy

piece of timber, but did not actually strike him. Soon after the foreman was seen to fall. He was assisted to the office and later carried to his home. The medical testimony showed that the man had had a hemorrhage of the brain and a paralytic stroke; that that condition could have been produced by a quarrel or fight, but it was impossible to say whether it was caused by the altercation between the men, as it might have come from a variety of causes. It might come while a man was asleep, or after he had eaten heartily. That it was impossible to determine the cause of the hemorrhage, but, from the circumstances of the case, the quarrel was probably the exciting cause, though this was admittedly a matter of conjecture. The court held that the evidence was not sufficient to sustain an award in favor of the claimant. *Ideal Fuel Co. v. Industrial Commission* (1921) 298 Ill. 463, 131 N. E. 649.

A workman employed in handling a scraper on a railroad embankment became sick while at work, and died in the course of a few days. It appeared at the autopsy that he had sustained a rupture of the veins in the intestines, causing internal hemorrhage. It was not shown that he sustained any blow or strain on the day when he became sick. It was held that the burden of showing an accidental injury arising in the course of the employment was not sustained. *Englebreton v. Industrial Acci. Commission* (1915) 170 Cal. 798, 151 Pac. 421, 10 N. C. C. A. 545.

On January 25, 1917, a workman, during the course of his employment, fell and struck on his head, and was unconscious for a few minutes. Two or three days afterward he resumed his duties and performed his work as usual for a week or more, when he was discharged. During this period he appeared to be in his normal condition, except that an impediment in his speech seemed to be more pronounced than theretofore. On February 19 he entered a hospital, where he died on March 3. The doctor who made an autopsy testified that death resulted from a hemorrhage on the

brain of traumatic origin, and that a microscopical examination disclosed "repair cells," which showed that the original injury had been received several weeks previously. It was held that the evidence was sufficient to sustain a finding that the death resulted from the injury. *State ex rel. London & L. Indemnity Co. v. District Ct.* (1918) 139 Minn. 409, 166 N. W. 772.

A fireman on board ship was seen frequently drinking water while in the stokehole. Soon afterwards he was found to be very ill; later he became unconscious and died. The medical evidence as to the cause of death was conflicting. The county court judge came to the conclusion, there being medical evidence to that effect, that the cause of death was cerebral hemorrhage, caused by the heat and drinking of excessive quantities of water, and that the fireman had sustained a "personal injury by accident arising out of and in the course of the employment." On appeal, the finding was sustained. *Johnson v. The Torrington* (1909) 3 B. W. C. C. (Eng.). 68.

As to hemorrhage resulting in paralysis, see *infra*, II. 11.

s. Hernia.

A workman who up to the time of his injury had been in good health was engaged in work which involved lifting heavy weights. He suddenly complained of severe internal pain, left his work and took to his bed, and died in a week from internal strangulated hernia. The medical evidence was to the effect that this could have been caused either by natural causes or by a heavy strain at his work. It was held that the evidence was sufficient to warrant a finding that the physical condition and resultant death of the workman arose out of and in the course of his employment. *Lancaster v. Blackwell Colliery Co.* (1919; H. L.) 89 L. J. K. B. N. S. (Eng.) 609, [1920] W. C. & Ins. Rep. 165, 122 L. T. N. S. 162, 12 B. W. C. C. 400, 64 Sol. Jo. 115, reversing (1918; C. A.) 88 L. J. K. B. N. S. 104, [1918] W. C. & Ins. Rep. 345, 11 B. W. C. C. 190, 120 L. T. N. S. 3.

A workman employed in lifting heavy objects was taken sick two days after he had lifted a heavy iron pipe. There was no proof of any antecedent infirmity on his part. A medical examination disclosed hernia, and the opinion of the physician was that the hernia was caused by a recent strain. It was held that the evidence was sufficient to justify a finding that the hernia was the result of an accident in the course of his employment. *Poccardi v. Public Service Commission* (1915) 75 W. Va. 542, L.R.A. 1916A, 299, 84 S. E. 242, 8 N. C. C. A. 1065.

A workman had been affected with hernia for about three years, but apparently it was not of such a nature as to inconvenience him, or to interfere with his work. On the morning of the accident he went to his work in his usual good health. During the course of his work he was required to lift a bale of wire weighing 150 pounds to a height of 4 feet, when he suddenly became sick and unable to work. On examination it was found that there was a protrusion of an intestine into the existing hernial sac, or aperture, necessitating an immediate operation. His physician testified that, where there was an opening or hernial sac, pressure was liable to cause a protrusion, and that in his opinion the lifting of the weight caused the pressure resulting in the protrusion. It was held that the evidence was sufficient to sustain a finding that the injury was attributable to his work. *Puritan Bed Spring Co. v. Wolfe* (1918) 68 Ind. App. 330, 120 N. E. 417.

A workman employed to paint gas engines was ruptured by the extra strain caused by a 600-pound engine, which he was moving, sticking to the floor. It was held that the evidence supported a finding that he suffered an accidental injury arising out of and in the course of his employment. *Robbins v. Original Gas Engine Co.* (1916) 191 Mich. 122, 157 N. W. 437.

A workman, while pushing or pulling a truck loaded with castings, complained of a sudden pain in his back. He reported to his foreman, telling

him he had hurt his back and could not work. A fellow workman, who was helping claimant with the truck, testified that it dropped into a hole and gave the claimant a sudden jerk. The claimant consulted a physician, who took him to a drug store and bought him a belt. The employer reported that claimant was involved in an accident, the nature of his injury being a rupture, "lifting casting." It was held that there was sufficient evidence to sustain a finding that the hernia was due to an injury received in the course of the employment. *Schanning v. Standard Casting Co.* (1918) 203 Mich. 612, 169 N. W. 879.

A workman was employed in work on automobile bodies which required frequent lifting of them. During a storm a window in the room where he was working was put down and became swollen so that it stuck. After the storm the claimant raised the window, and it required considerable extra exertion. He testified that after lifting the window he felt a pain in the neighborhood of the right groin, and on examination found a lump about the size of an egg. When he reached home a physician was called, who found him suffering with hernia. The medical testimony was to the effect that the lifting of automobile bodies and the putting up of the window caused the hernia. It was held that there was evidence to support a finding that the claimant's trouble was due to a distinct and unusual exertion during the course of his employment. *Bell v. Hayes-Ionia Co.* (1916) 192 Mich. 90, 158 N. W. 179.

A stoker suffering from rupture, and wearing a truss, suffered a strangulation of the hernia while engaged in performing his duties of stoking. These duties involved great abdominal strain. It was held that his death was due to an accident arising out of and in the course of his employment. *Scales v. West Norfolk Farmers' Manure & Chemical Co.* [1913; C. A.] W. C. & Ins. Rep. (Eng.) 165, 6 B. W. C. C. 188.

A workman, who had been ruptured, and wore a truss, strained himself by accident while at work for his employ-

ers. Next day it was found that the bowel had come down, and he was operated on and the hernia reduced. Two days later the bowel came down again. Two days afterwards he was again operated on for strangulated hernia, and died from exhaustion following the operation. It was held that there was sufficient evidence to support a finding that the death was the result of the accident. *Jones v. Wrexham & A. Collieries* [1918] W. C. & Ins. Rep. (Eng.) 48, 10 B. W. C. C. 607.

A workman employed as a carpenter sustained an injury which he claimed resulted in and produced a hernia. It was conceded that the hernia appeared suddenly, and immediately following the injury, and that the injury was accompanied by pain. But it was contended that the evidence was not sufficient to show that the hernia complained of did not exist in any degree prior to the injury, as required by the Texas statute. The claimant testified that about seven years prior to the injury, while working on a building, he had received an injury which resulted in a hernia on his right side. That thereafter he wore a truss, and was wearing it at the time of the injury complained of, but that the old hernia was not giving him any trouble except the inconvenience of wearing a truss. His attending physician testified that he found the claimant suffering from two separate and distinct hernias, an old one and a new one; that there were two separate and distinct openings, and in reality two hernias; that the new hernia was about half an inch above the old one, which was well; that an operation was performed for the new hernia, and that the old hernia did not contribute to the new hernia's existence. The physician who performed the operation testified that what he found he would call two distinct sacs; that he did not know whether to call it two separate and distinct hernias, or not; that it was just one hernia with two sacs or openings; and that if the claimant had not had a hernia prior to the time he claimed to have sustained a new hernia, the work he was then engaged in would not have pro-

duced the hernia for which he sought to recover. It was held there was substantial evidence to support a finding that the hernia complained of did not exist in any degree prior to the injury. *United States Fidelity & G. Co. v. Ross* (1920) — *Tex. Civ. App.* —, 221 S. W. 639.

A workman accidentally ruptured himself in the course of his employment, and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering from another hernia of long standing, and both hernias were operated on at the same time. He subsequently died, the cause of death being found to be heart weakness and degeneracy "set up by the strain of the accident." The employers maintained in defense to the claim for compensation that, death being due to an operation, part of which was rendered necessary by the accident, the operation was a *novus actus* intervening to break the chain of causation between the accident and the death. It was held that on the facts stated there was evidence to justify the arbitrator in finding that death was the result of the accident the workman had sustained in the course of his employment. *Thomson v. Mutter* [1913] S. C. 619, 50 *Scot. L. Rep.* 447, [1913] 1 *Scot. L. T.* 213, [1913] *W. C. & Ins. Rep.* 241, 6 *B. W. C. C.* 424.

A brewer's assistant was lifting a heavy cask standing on a shelf 5 feet from the ground, when he felt a severe internal pain and became faint and sick. Afterwards he found that he had ruptured himself. Twenty-two years before he had had a rupture in the same place, for which he wore a truss for many years, but during the last four or five years he had left it off, having found that he could do his work without it. The county court judge held that although there was "injury by accident," it did not arise "out of the employment," but was the result of a gradual weakening, and not of any unusual strain. It was held that, "accident" having been found, the evidence proved that it arose "out of the employment." *Brown v. Kemp* [1913] *W. C. & Ins. Rep. (Eng.)* 595, 6 *B. W. C. C.* 725.

A workman was employed in a school to carry and throw into furnaces sticks of cordwood. On the day of his injury, his wife saw him go from his house to the school building in his usual good health. Later in the morning she saw him come out of that building and return to their house. As he came out, she noticed that he walked as if suffering pain, and held his hand against his body. It was found that he was suffering from a fresh rupture, or hernia. By his physician's advice, he went to a hospital to undergo an operation to cure the hernia. Medical evidence showed that hernia was an injury very likely to result from such work. It was held that a finding that the accident arose out of and in the course of the employment would not be disturbed. *Eddles v. School Dist.* (1912) 22 *Manitoba L. R.* 240, 2 *D. L. R.* 696, 21 *West. L. R.* 214.

A workman, who was employed in lifting weights in a sawmill, went to his work about 6 A. M. He returned home about three hours later, and was seen by his wife at 10 A. M., lying on his bed and vomiting. He was also seen with his hand on his stomach and vomiting blood in a place close to his work, but not part of the place where he was working. He died nine days later of a strangulated hernia. No one was produced who saw the deceased at work, and the foreman of the sawmill, who was in court during the hearing, was not examined by either side. It was held that, while the facts afforded evidence from which the county court judge could have drawn the inference that the accident (if any) arose out of and in the course of the employment, there must be a new trial, because the judge had allowed his mind to be influenced by inadmissible evidence. *Shea v. Wilson* [1916] *W. C. & Ins. Rep.* 197, 50 *Ir. L. T.* 73, 9 *B. W. C. C.* 633.

In *Veneroni v. Bausch & L. Optical Co.* (1920) 192 *App. Div.* 937, 181 *N. Y. Supp.* 957, affirmed in (1920) 229 *N. Y.* 628, 129 *N. E.* 935, the court, without setting out the evidence, held that it was sufficient to show that a hernia was attributed to the employment.

A workman claimed to have received an injury while engaged in his duties, which caused an inguinal hernia. He testified that he was engaged in repairing certain electric wires extending along or over the top of a high board fence. For that purpose he climbed on the fence, which act was accomplished by reaching his arms up and over the fence and throwing his leg over the plank at the top. As he made that movement he felt a sharp pain in his right groin, but went on with his work. He had never experienced such a pain before, nor had he ever before developed a hernia, and did not at the time realize the nature of his hurt. This incident occurred on September 14, 1916. He did not report the matter to the defendant or consult a physician, until October 2, 1916, when he called upon a doctor, who discovered a small hernia in the groin, and advised the use of a truss. He procured a truss, and continued work as before, until February 3, 1917, when he was discharged. He said that after the alleged hurt, and before he applied the truss, he suffered frequent pains at that point, compelling him sometimes to suspend work. His physician testified that a common immediate cause of such a hernia was a "strain from exertion or something of that sort;" that a man "might continue at work with a traumatic hernia until after several days had gone by." It was not, he said, an unusual thing for a man to suffer hernia and "continue at work for a period of several days, and put up with the pain. This was true of enough cases to justify the statement." It was held that a finding that the hernia did not result from an injury arising out of the employment would be sustained, as the evidence was sufficiently vague and uncertain to bring the case within the rule which makes the findings of the commission final on questions of fact. The court set out the general rules as to the weight and sufficiency of evidence applicable to cases of this kind, as follows: "It is not true, as a matter of law, that, to justify a finding of compensable injury by hernia or other

bodily misfortune, the claimant must be corroborated, or that the claimant broke down and was compelled to cease work, or that he reported to his employer immediately, or was compelled to seek medical assistance. Such circumstances are, of course, admissible in testimony, and may be considered with other facts and circumstances in arriving at the truth as to the alleged fact of injury, and of its nature and extent; but the absence of any one or more, or even of all, of these so-called tests, is not necessarily conclusive against the claimant. Where there is no statute requirement of corroboration, it is not within the province of any court to lay down an iron-clad rule that a party seeking the enforcement of a legal right will be denied a remedy unless he produces corroboration of his claim. It ought to go without saying that it is still possible for a claimant of compensation to be an honest man, and that his testimony may be so candid and so inherently probable as to command the confidence of a fair-minded court or juror, even though he is unable to produce any other witness to corroborate him. To turn such a party out of court for no better reason than his inability to offer corroboration would be a perversion of the forms of legal justice. Still less is it permissible to say that the claimant in such case must, as a condition precedent to a recovery, show that his alleged injury was followed by an immediate breakdown and cessation of work. To so hold is in effect to ingraft a judicial amendment upon the compensation statute. No court is so letter-perfect in human anatomy, or so accomplished in surgical or medical lore, that it can say that every case of traumatic hernia produces immediate prostration. On the contrary, notwithstanding the learning of the books and the dogmatic declarations of expert witnesses, it is a matter of common knowledge that thousands of men suffer from inguinal hernia, and that many of them are able to point to the time and place where it developed, and the physical strain or exertion which occasioned it, and yet were nev-

er prostrated by it. It is doubtless true that in very many cases the lesion takes place from the gradual enlargement of the inguinal rings, and is not traceable to any accident, or unnatural strain or exertion; and that much difficulty exists in determining whether, in a given case, the hernia, if one is found, is of a compensable character. This difficulty justifies the arbitration committee and the commissioner in closely scrutinizing the testimony and satisfying themselves as nearly as possible as to the origin of the alleged injury, in order that they may do equal and exact justice between the parties; but the rule applicable is the same as in other cases, and requires only a preponderance of evidence." *Buncle v. Sioux City Stockyards Co.* (1921) — Iowa, —, 185 N. W. 139.

A fireman met with an accident to his knee while working on board a ship. About ten days later he was found to be suffering from a rupture in the groin, which had ultimately to be operated on. The medical evidence was that the rupture was an old one and must have been in existence before the date of the accident. It was held that the evidence was sufficient to support a finding in favor of the employers, and that the workman was properly denied compensation. *Clarkson v. Charente S. S. Co.* [1913; C. A.] W. C. & Ins. Rep. (Eng.) 422, 6 B. W. C. 540.

A workman in a mine alleged that he met with an accident on March 20, 1913, while lifting a tram in the course of his employment, with the result that he sustained a rupture. He was subsequently incapacitated and had to be operated on. There was a conflict of medical evidence as to whether the rupture was new, or of old standing at the date of the alleged accident. It appeared that on the day of the alleged accident the workman made his way out of the mine and walked to his home a mile away. The county judge held that the hernia was of old standing, and that the incapacity arose from the old hernia, and not from anything that occurred on March 20, 1913, and made his award in favor

of the employers. It was held that there was evidence to support this finding. *Legge v. Nixon's Nav. Co.* [1914] W. C. & Ins. Rep. (Eng.) 306, 7 B. W. C. 521.

A workman was employed as a cylinder feeder by a firm of printers. His work required him to lift a bundle of paper weighing from 40 to 60 pounds from the floor to his shoulder, and carry it up two or three flights of steps to his press. While doing this work he felt a pain which indicated to his physician, upon examination, that he had sustained a rupture. There was no blow or unusual exertion, nothing out of the ordinary, to suggest to the employee that anything that he then did caused the pain. He thought it was due to a disordered stomach, and took a physic. No medical evidence was given before the commission as to the nature or cause of hernia, and no attempt was made to prove that the lifting in this case could have produced the rupture which later developed. It was held that the evidence did not warrant a finding that the hernia was due to an injury received in the course of his employment, the court saying that a rupture cannot be held to have been caused by injury arising out of and in the course of the employment, in the absence of any evidence that there was a strain on the part affected, and that the work of the employee caused the rupture. *Alpert v. Powers* (1918) 223 N. Y. 97, 119 N. E. 229.

A laborer while engaged in the performance of his duties, which at the time consisted in pushing a pipe about 14 feet long, complained of a pain in his right side. He stopped work for about ten minutes, and then continued his employment until quitting time, about twenty minutes longer. On the following day a physician diagnosed his injury as right inguinal hernia. There was no evidence to show whether or not the hernia had existed before the accident, nor in what part of his side the pain complained of was located. There was no visible injury. It was held that the evidence was insufficient to show that the hernia was attributable to an injury sustained in

the course of the employment. The court said: "There is no testimony whatever tending to show that there was any connection between this 'right inguinal hernia' and the 'severe pain in the right side' of the claimant; no evidence that a hernia could be produced by anything which was shown to have occurred on the 11th day of March, 1919. We know judicially that hernia is a disease arising out of natural causes, as well as from accident (*Alpert v. Powers* (N. Y.) supra), and the Workmen's Compensation Law does not insure against disease, except where the disease or infection 'naturally and unavoidably' results from an injury (*Richardson v. Greenberg* (1919) 188 App. Div. 249, 176 N. Y. Supp. 651. It does not follow that because a man has a pain in his side while doing his ordinary work, without slipping, falling, or other mishap, and a physician finds an inguinal hernia the next day, that the hernia resulted from accidental injuries, even though the physician adds to his declaration, in parentheses, the word 'traumatic.' This word, however much abused in matters relating to insurance, contemplates some external violence, some wounding or bruising of the body, and no one pretends that anything of the kind occurred in this case. The claimant himself merely says that he was doing his usual work, making no suggestion of anything happening, except that he felt a 'severe pain in the right side,' such as all persons experience, no doubt, at some time in their lives, and the next day a 'right inguinal hernia' is discovered, and this simple pain in the side is translated into an accident, within the meaning of a statute designed to protect against the extraordinary risks of certain designated employments. *Alpert v. Powers* (1917) 181 App. Div. 902, 167 N. Y. Supp. 385. There is not even a suggestion that this hernia had not existed, to the knowledge of the claimant, prior to this alleged injury. It is not an uncommon thing for men with hernia to work at heavy labor and to suffer at times from exertion, and there is not a particle of testi-

mony from which it may be legitimately inferred that this was not the case with the claimant. No connection whatever is shown between the performance of the labors of the claimant and the hernia for which this award has been made; no identity of time or of place, and nothing which brings the case within any of the provisions of the statute." *Cavalier v. Chevrolet Motor Co.* (1919) 189 App. Div. 412, 178 N. Y. Supp. 489.

In *Hager v. Griffin Mfg. Co.* (1920) 193 App. Div. 820, 184 N. Y. Supp. 750, the claimant was employed as an elevator operator. He was shown to be suffering from right inguinal hernia. He filed a claim for compensation, alleging that while lifting a sliding door from the elevator leading into the street, he felt a sting on the right side. He testified that he did not know exactly what was the cause of his rupture. He could not say positively that it was caused by lifting the elevator door, but that was the only cause to which he could attribute it. There was no evidence of any heavy lifting other than that involved in his everyday work of operating the elevator and lifting the doors, and there was no medical or other evidence to show that the alleged lifting of the elevator doors could produce hernia. It was held that the evidence was not sufficient to warrant the conclusion that an injury happened to him in the course of his employment.

A workman was employed as an engineer in the capacity of an "engine tamer," it being his duty to take locomotives which had been overhauled and repaired, and break them in before they were put into regular service. This was done by running the engine back and forth in the yard limits. The fireman testified that in handling one engine they ran it back and forth along a 2-mile track about twenty-five times; that in throwing the reverse lever it worked hard, and on one occasion the workman requested him to assist him in throwing it; that it required considerable exertion for the two of them to throw the lever; that the workman made no complaint of being hurt that day, and that

the next day they handled another engine, and the next time he saw the workman was two days later, when the latter complained of not feeling well and stated that he was going home. The workman died following an operation for strangulated or incarcerated hernia. It was held that, excluding certain testimony improperly admitted, there was nothing on which to base the conclusion that death was caused by an accidental injury arising out of and in the course of his employment. The court held that the burden rested on the administratrix to prove that the injury was so received, and that it would not be inferred that the injury had been so received from the mere fact that the workman, in his employment, was engaged in work which caused him to undergo a severe physical strain. *Chicago & A. R. Co. v. Industrial Bd.* (1916) 274 Ill. 336, 113 N. E. 629.

A claimant was shown to be suffering from hernia. He testified that while engaged in his work of hauling hides he felt a strain. A fellow workman testified that, while working with claimant in hauling hides, he stated that he had gotten hurt—that he had gotten a strain. The attending physician did not testify, but in his report to the state industrial commission stated that the symptoms from which the man was suffering were due entirely to his injury, and that no previous sickness, injury, or disease contributed to his disability. A second physician testified that he believed the hernia to be one of long standing. It was held that the evidence was insufficient to sustain an award in favor of the claimant, the court saying: "It ought to show that the conclusion of the commission had for its foundation something more substantial than a guess as to the cause and from that evolve the effect. Evidence should be and is required so that the court can trace the cause through to the effect before compensation is awarded. This standard, if correct, is not met by the statement of the physician, in his report, that claimant's hernia came from the injury, without any facts to show how he reached the con-

clusion." *Gentelong v. American Hide & Leather Co.* (1920) 194 App. Div. 9, 184 N. Y. Supp. 808.

A workman employed as a millwright's helper was engaged with two others in working the handle of a jack up and down in order to raise a stack. He complained of a pain in the region of the groin, and was sick at his stomach. He went home and about three days later was operated on for simple hernia. Of the three men working the jack the claimant was the tallest. There was no medical evidence, and no evidence of any unusual happening was given, or that the condition prevailing at the time would be likely or could produce the condition of which the claimant complained, except the fact that he was taller than his fellow workers. It was held that the evidence was insufficient to sustain an award in favor of the claimant. *Noble v. Mathieson Alkali Co.* (1921) 196 App. Div. 245, 186 N. Y. Supp. 752.

The finding of the industrial board that inguinal hernia did not result from a fall and the striking of the right groin upon the point of a chair runner was sustained in *Gardiner v. Cochran Chair Co.* (1922) — Ind. App. —, 134 N. E. 873, under the rule that findings of the board have the same force as the finding of the court or the verdict of a jury, and are not to be set aside if there is any evidence on which they can rest, there being expert testimony which, though contradicted, was to the effect that such a blow could not have caused the condition.

A workman was engaged at the moment of his injury, a rupture, in his usual and ordinary employment, in the usual and ordinary way. In the course of his employment it was his duty to lift an iron bar about 3 feet long, and weighing about 90 pounds, once in about every fifteen minutes, ninety or one hundred times a day. It was held that the evidence exclusively showed that he had not suffered an accident or received an injury arising out of or in the course of his employment. *Kutschmar v. Briggs Mfg.*

Co. (1917) 197 Mich. 146, L.R.A.1918B, 1133, 163 N. W. 933.

A workman claimed to have been injured by a crowbar, with which he was working, slipping and striking him in the left groin. He continued to work for about two days and then reported his injury and was sent to a doctor. At the time of his injury he was engaged in helping to unload a car with a group of eight or ten other employees. He said nothing to any of them of his injury, and it was in evidence that no one saw it happen, or saw anything to indicate that an accident had happened. The medical evidence showed an extensive suppuration and breaking down of the tissues. An operation for hernia was performed both on the right side and left. The suppuration was so persistent that the doctors found it impossible to heal the surgical wounds. The doctors refused to say that the condition of the applicant was due to the alleged injury, though one testified that he could not find any other cause, but that the only evidence he had of an injury was the patient's statement. It was held that a finding that the disease was not caused by an injury arising in the course of the employment was justified by the evidence. *Miller v. Gardner* (1921) 190 Iowa, 700, 180 N. W. 742.

A workman sustained a strain to his back and a contusion of the hip in a fall from a ladder in the course of his employment as a steam fitter. He was treated at a hospital, and later entered into an agreement with his employer for the payment of compensation. He resumed his employment, making several changes in employers. About two and a half years after the accident he petitioned for compensation on the ground that he had received a hernia at the time of the accident. The claimant testified that about the time of the accident he noticed a small swelling, which was afterwards determined to be hernia. The hospital records made no suggestion of hernia, and there was no evidence to show that he did not have it before the accident, or that it was not caused by his work for other em-

ployers subsequent to the accident. The expert called by the commission testified that, from reading the hospital record and considering the testimony of the claimant, the hernia was, in his opinion, attributable to the injury. It was held that the evidence was insufficient to sustain an award. *McCarthy v. Globe Automatic Sprinkler Co.* (1921) 196 App. Div. 619, 188 N. Y. Supp. 118.

An employee, helping to operate an automatic screw machine, claimed to have slipped and received an injury which resulted in inguinal hernia. There was no evidence that he suffered any pain immediately after the injury, and he continued his work for two weeks thereafter. It was held that the commission was justified in taking judicial notice that inguinal hernia rarely results from accident; that it comes from inherited or acquired weakness and develops gradually. It was accordingly held that, in the absence of evidence that the accident was such as could produce hernia, that the hernia appeared immediately after the accident, and that it was followed by pain immediately disabling the applicant, the commission was justified in denying the petition for compensation on the ground of insufficiency of evidence. *Meade v. Wisconsin Motor Mfg. Co.* (1918) 168 Wis. 250, 169 N. W. 619.

A workman suffered an accident, during the course of his employment, that resulted in epigastric or ventral hernia. Prior to the accident he was suffering from inguinal hernia; that is, hernia of the groin. When the operation for epigastric hernia was about to be performed, the workman employed the physician to operate, also, for the inguinal hernia at the same time. He died from the postoperative shock. The inguinal hernia was not serious, and an operation therefor was not imperative. It was held that his death was not shown by the evidence to be due to the operation for the epigastric hernia suffered in the course of his work, and inasmuch as there was no evidence to show that the accident affected the inguinal hernia, there could be no re-

covery. *Dulac v. Procter & B. Co.* (1921) — Me. —, 114 Atl. 293.

A workman suffering from hernia was employed as an underground hauler in a colliery, to regulate the supply of empty trains at or near the pit bottom. After hauling the allotted quantity of trains from one heading, occupying about an hour in so doing, he led his horse into another heading to do similar work there. Shortly afterwards he was heard to call out, complaining of being very ill and that he had a lump coming in his groin. He died of strangulation of a right scrotal hernia of the ordinary inguinal type. On appeal, it was held that the evidence was not sufficient to justify the finding of the county court judge that the strangulation was the result of some act of exertion which the workman underwent while he was at work lifting a train, or some other act. *Parry v. Ocean Coal Co.* (1912) 106 L. T. N. S. (Eng.) 713, [1912] W. C. Rep. 212, 5 B. W. C. C. 421.

A workman had to go in the course of his employment, from a powder magazine to his employer's office, 200 yards away down a steep path. At the magazine his clothes were clean and he was apparently in good health, but he arrived at the office covered with mud and in great pain. He was seen that afternoon by a doctor, who found him to be suffering from shock and complaining of pain in the abdomen. At the time the doctor examined the seat of an old rupture and found nothing wrong with it. That night the workman was sick two or three times, and next day the doctor found him to be suffering from strangulated hernia, and he died after being operated on in the hospital. Both the hospital doctor and the doctor who attended the man said that the vomiting might have caused the hernia to protrude so as to cause strangulation. It was held that the county court judge was justified in holding that it has not been proved that the injury which resulted in the death of the workman was caused by an accident arising out of and in the course of the employment. *Marshall v.*

Sheppard [1913] W. C. & Ins. Rep. (Eng.) 477, 6 B. W. C. C. 571.

By the Colorado act it is provided as follows: "A workman in order to be entitled to compensation for hernia must clearly prove: (1) That the hernia is of recent origin, (2) that its appearance was accompanied by pain, (3) that it was immediately preceded by some accidental strain suffered in the course of the employment, and (4) that it did not exist prior to the date of the alleged injury." Applying this provision, it has been held that the following evidence was insufficient to meet any of the requirements of the act, and an award based thereon was reversed: A carpenter, while engaged in the duties of his employment, suffered a hernia. He testified that in 1909 he had a double hernia; that he could not tell how it occurred, but that it came on him while he was engaged in the lightest kind of work; that he suffered no pain and lost no work on account of it; that he was operated on, and thereafter wore a truss. As to the appearance of the hernia being accompanied by pain, he testified that all at once he felt a pain, and that when he started to plane it would hurt; that he felt the pain about 3 o'clock, but the hernia must have occurred either an hour before or an hour afterwards. As to the appearance of the hernia being preceded by some accidental strain, he testified that he felt the pain while he was turning one of the doors in a vice; that he was doing no heavier work than usual; that he did not slip or fall, and that nothing unusual happened, and that he could not say that he had strained himself immediately preceding the injury. This was the only evidence aside from the report of the examining physician, which was to the effect that it was probable that the abdominal wall was weakened by more or less previous coughing, the claimant being afflicted with tuberculosis, and that with this weakness the hernia came on as result of planing. *McPhee & M. Co. v. Industrial Commission* (1919) 67 Colo. 86, 185 Pac. 268.

aa. Hodgkin's disease.

An employee died from what is known as Hodgkin's disease. He had followed the occupation of a tinner and plumber for more than twenty years, and was employed in that capacity when taken ill. The physician he first consulted treated him for the gripe, and later for Bright's disease. A second physician testified that on examination he found ulcerated spots on the septum of the nose. That in his opinion the ulcerations were caused by inhaling the fumes of hydrochloric acid used by the deceased in soldering operations, and that the Hodgkin's disease resulted from these ulcerations. It was shown that hydrochloric acid was constantly used by tanners in their soldering operations, to clean the metal, and they frequently inhaled fumes from it. It was conceded that these fumes were sterile, containing no disease germs, and, so far as the evidence discloses, no deleterious effects result to the tanners from inhaling them. The deceased had used this acid in his work for more than twenty years, and, so far as appears, never claimed to have suffered any injury or inconvenience from the fumes. The inhalation which was claimed to have caused the ulcerations in question occurred more than a month before the discovery of the sores. The doctor testified that he was unable to say how long those sores had existed, and that they might have developed within two or three days after the injury or irritation which caused them. He stated that they might have been caused by inhaling dust or dirt, or in many other ways. He also stated that in his opinion they might have been, and in this case probably were, caused by inhaling strong fumes of hydrochloric acid which burned the membrane, but admitted that he had never known of such a case, although he had known of many instances in which such fumes had been inhaled. He also stated that he did not know the origin of the disease, or what caused it, and that it was the only case of that disease which he had ever found or treated in his practice. Other physi-

cians testified that the causes for that disease had not yet been discovered. It was held that the evidence was insufficient to sustain a finding that the disease was attributable to the employment, the court saying that the doctor's "statement that in his opinion Mr. Hoerneman became afflicted with Hodgkin's disease because of the ulcerations of the mucous membrane of his nose, when taken in connection with the doctor's further statement that he does not know how that disease originates or what causes it, can be considered only as a mere guess." *State ex rel. Johnson Hardware Co. v. District Ct.* (1920) 145 Minn. 444, 177 N. W. 644.

bb. Hydrophobia.

An employee was engaged as a delivery man by the owner of a meat and grocery store, and for his work he was given the use of an automobile. It was customary for him, when he was unable to make all the deliveries of the day, to bring with him to his home such undelivered packages, and deliver them the following morning while on his way to work. On a certain morning, while on his way from his place of residence to the garage to get the automobile, and while making delivery of meat for his employer which was undelivered the day before, he was attacked and bitten in his hand by a dog. He later developed hydrophobia, caused by the bite of the dog, and which resulted in his death. It was held that the hydrophobia was attributable to an injury which arose out of the employment, entitling the claimant to an award. *Chandler v. Industrial Commission* (1919) 55 Utah, 218, 8 A.L.R. 930, 184 Pac. 1020.

cc. Influenza.

A hospital steward, while engaged in the duties of his employment, was taken with influenza and died. The evidence showed that an epidemic of the disease was raging in the city at the time, that the disease is highly infectious, and was so general that one out of every ten in the city contracted it, and that every member of the community was exposed to it to

a more or less extent. On the other hand, the evidence showed that the incubation period of the disease is from one to four days; that the steward, in the course of his duties during the five days preceding his being taken ill, had had to handle, and had been exposed to, at least twelve developed cases of influenza; that, so far as known, he was not exposed to any cases except in the course of his employment; that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard, and had gone directly from his home to his work, and from his work to his home, and had not been out; that his exposure because of his work was far greater than that of the average person; and that, among the nurses in the hospitals of the city, a class exposed in much the same degree as the steward, the proportion who contracted the disease ran from 50 to 85 per cent, as against 10 per cent for the community in general. The preponderance of the medical testimony also was to the effect that he contracted the disease as a result of his peculiar exposure to it, incidental to his employment. It was held that there was sufficient evidence to sustain an award in favor of the claimant. The court said: "It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did. This we cannot say in the present case. If there had been no epidemic in San Francisco at the time, and it appeared that Slattery, as hospital steward, had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of in-

cubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incident to his employment, or because of the exposure general to the public, would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that, of persons exposed as was Slattery, the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations." *San Francisco v. Industrial Acci. Commission* (1920) 183 Cal. 273, 191 Pac. 26.

A similar ruling, based largely on the decision in the above case, was made in *Engels Copper Min. Co. v. Industrial Acci. Commission* (1920) 183 Cal. 714, 11 A.L.R. 785, 192 Pac. 845. It was there held that an employee of a mining company, who, during an epidemic of influenza, devoted most of his time to caring for employees of the company who had contracted the disease, and himself contracted it, was properly awarded compensation for an accident arising out of and in the course of his em-

ployment. The point was also made in this case that the nursing of his coemployees was no part of the duty of the claimant, but that he had voluntarily assumed it. There was evidence, however, that he did so at the request and direction of the company's superintendent, and this was held to be sufficient to take his services out of the class of purely voluntary services, and place them within the scope of his employment. The court criticized the case of *Martin v. Manchester Corp.* (Eng.) set out *infra*, in II. rr, wherein it was held that an employee of a scarlet fever hospital particularly exposed to the disease, and who was attacked by it, could not be said to have acquired it through the exposure incidental to his employment.

dd. Insanity.

A workman received an injury in the course of and arising out of his employment, through a splash of molten lead into his eye September 17, 1913. He was treated at a hospital until October 13, 1913, when he threw himself from a window and was fatally injured. There was evidence tending to show that, although for a time after the injury the deceased was in his normal temperament, which was hopeful and joyous, he then became silent and moody, and was depressed, and suffered from certain kinds of hallucinations. He did not appear affectionate, as he always theretofore had been, toward his wife and young children. Two witnesses testified that when he jumped from the window he had a wild and vacant stare in his eyes. The medical testimony was to the effect that probably there was developed from the accident a mental disturbance, accompanied by delusions and hallucinations, and that as a result he committed suicide. It was held that the evidence was sufficient to justify a finding that the insanity was incurred as a result of the accident received in the course of the employment, the court saying that, although the finding in this respect was supported by a rather slender thread of evidence, it was not unsupported,

and therefore must stand. *Sponatski's Case* (1915) 220 Mass. 526, L.R.A. 1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

An insurance collector received an injury consisting of a fractured skull and a laceration of the brain, caused by bone fragments which had been driven into it, after which time he was not always rational. There was no direct evidence of how the accident occurred. He was seen by two men to collect money from another, and left the house where a collection was made with these two men, one of whom was explaining his inability to pay a premium which he owed. In a few minutes the collector returned to the house, injured, was unable to give an account of what had taken place, became unconscious, and was taken to a hospital. The two men with whom he left the house disappeared, and were never heard of again. The court held that the disappearance and flight of the two men, who coupled with the other facts, were sufficient to warrant an inference that they had committed an assault and battery on the collector, which resulted in his injury, and that his irrational condition was attributable to his employment. *Empire Health & Acci. Ins. Co. v. Purcell* (1921) — Ind. App. —, 132 N. E. 664.

In *Kingan & Co. v. Ossam* (1918) — Ind. App. —, 121 N. E. 289, the court, without setting out the evidence, held it to be sufficient to sustain a finding that the insanity or hysterical nervousness of the injured workman was attributable to his employment.

A man working as a miner was injured by a heavy bar falling on his hand. Immediately following the accident he was depressed, and kept getting worse; was always talking about it; he did not work and he did not sleep for weeks. Later he attempted to work, but could not do it, complaining in the same manner. There was no history of insanity in his family. The medical evidence showed that, immediately on the happening of the accident, he was mentally very perturbed, suffering great pain, and that his mental perturbation never cleared up, but got worse. A specialist testified

that the man was suffering from insanity; that, the depression beginning at once, the melancholia followed, and then, following a progressive course, culminated in insanity. It was held that there was sufficient evidence to support a finding that the depression, melancholia, and subsequent insanity were occasioned by the shock of the accident happening during the course of his employment, and not by his mind preying on the consequences of the accident; and that this was true, although there was no discoverable structural injury to the brain itself to the effect of which the insanity might have been directly attributable. The test as to whether the insanity was the result of an accident happening in the course of the employment was said by the court to be the fact that it resulted from the injury, causing depression which might culminate in insanity. In other words, it must have resulted directly from the injury, and not indirectly in consequence of a state of mind brought about by the consequences of the injury, developing, as in some cases, some time afterwards, when the consequences of the accident began to prey on the mind. *Marriott v. Maltby Main Colliery Co.* [1921; C. A.] W. N. (Eng.) 7, 90 L. J. K. B. N. S. 349, 124 L. T. N. S. 489, 13 B. W. C. C. 353, [1921] W. C. & Ins. Rep. 97.

In *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 84 L. J. K. B. N. S. 847, 8 B. W. C. C. 69, [1915] W. N. 43, 59 Sol. Jo. 233, [1915] W. C. & Ins. Rep. 250, 112 L. T. N. S. 840, it appeared that a workman was injured by a splinter of metal getting into his eye. He went on with his work, although he was attended by his doctor for fourteen days. Then suddenly the specialist told him that he might lose his eye; he went back to work the next morning, and shot himself. It was held that the evidence was not sufficient to support a finding that insanity, during which the man committed suicide, was the result of an accident received during his employment. The court, in *Marriott v. Maltby Main Colliery Co.* (Eng.) supra, distinguishes this case on the

ground that the symptoms of insanity did not immediately follow the accident itself, but appeared some time later, when the consequences of the accident became fully known to him and began to prey on his mind.

Similarly, in *Withers v. London, B. & S. C. R. Co.* [1916] 2 K. B. (Eng.) 772, (1916) W. C. & Ins. Rep. 317, 85 L. J. K. B. N. S. 1673, 115 L. T. N. S. 503, 32 Times L. R. 685, 61 Sol. Jo. 8, 9 B. W. C. C. 616, it was held that the evidence was not sufficient to support a finding that insanity, leading to suicide, was the result of an accident to his thumb incurred by an employee in the course of his employment, where it appeared that, some time after the accident, the workman, believing that the injury to his thumb would forever prevent him from returning to his work, committed suicide.

Likewise, it has been held that a finding that a workman committed suicide while insane as the result of an injury, where his body was found in a canal, and there was no evidence to show how he came to be in the canal, and there had been no symptoms of a suicidal tendency, although he had become depressed, and irritable, and restless as a result of the injury, was not supported by the evidence. *Southall v. Cheshire County News Co.* (1912) 5 B. W. C. C. (Eng.) 251.

On February 28, 1912, a workman in the course of his employment received a severe scalp wound, which incapacitated him from work. The workman, at some time not later than September, 1914, became insane. There was no proof that the insanity was due to the accident, nor, on the other hand, was there any proof of a new cause intervening to account for the insanity. It was held that the evidence was not sufficient to prove that the insanity was due to the accident, the burden of proving which was on the workman, and therefore that an award in his favor could not be sustained. *Brownlee v. Coltness Iron Co.* [1917] S. C. 409, 54 Scot. L. R. 311, [1917] W. C. & Ins. Rep. 235, 10 B. W. C. C. 462.

cc. Kidney disease.

A girl was employed as a sales-

woman in the hardware department of a store. She received, during the course of her employment, an injury to her back and side in the region of the left kidney, producing a small flow of blood in passing urine. After examination a physician testified, that she was suffering from a tipped uterus, and that her right kidney was dropped, which diagnosis was confirmed by a subsequent operation. Two physicians testified that her condition was not in their opinion, due to the injury. A third physician testified that the accident might have weakened or bruised her kidney, and the insertion later by one of the attending physicians of a pessary might have carried infection to the injured kidney. The surgeon who performed the operation testified that, if the alleged injury resulted in a hemorrhage of the kidney, this condition might have remained dormant and eventually have developed the condition of the kidney which he found on the operation. The surgeon's testimony and the statement of the claimant as to the flow of blood were the only evidence tending to show that the disease was produced by the accident. It was held that the evidence was insufficient to support an award in favor of the claimant. *Kade v. Greenhut Co.* (1920) 193 App. Div. 862, 185 N. Y. Supp. 9.

ff. Lead poisoning.

A person who had worked as a printer for fifteen years became ill from lead poisoning. There was no evidence that lead fumes or dust are given off by type, or that the handling of type is liable to cause lead poisoning. It was held that there was no evidence to show that the lead poisoning was contracted in the employment. *Doherty's Case* (1915) 222 Mass. 98, 109 N. E. 887.

In *Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843, it was held that, where the physical incapacity of a lead grinder had been found by the industrial accident board to have been caused by the gradual absorption of poison into his system, there was no reasonable conclusion other than that such injury arose out

of and in the course of his employment.

gg. Locomotor ataxia.

A longshoreman, in attempting to remove a skid from a ship to the wharf, slipped and fell into the river landing on some wooden piling, and injured his head and spine. The injury was immediately followed by paralysis of the arms and legs, which was succeeded by, as if it had developed into, what the physicians diagnosed as locomotor ataxia. Before the accident he was apparently in ordinarily sound health, attending to his daily occupations and working regularly. It was held that the evidence was sufficient to sustain a finding that the disease was incurred in the course of his employment, whether it was dormant in his system prior to the accident or not. *Behan v. John B. Honor Co.* (1917) 143 La. 348, L.R.A.1918F, 862, 78 So. 589.

hh. Mastoiditis.

An award in favor of a woman of compensation for mastoiditis, claimed to have been caused by infection through a vaccination wound, was set aside where the only evidence that it was received in the course of her employment was that the infection occurred while she was employed by the defendant. *Krout v. J. L. Hudson Co.* (1918) 200 Mich. 287, L.R.A.1918F, 860, 166 N. W. 848, wherein it was said: "Assuming, then, as found by the board, that the mastoiditis was caused by the invasion of the germs through the vaccination wound (though the testimony contained in the record seems strongly to discredit this theory), there is still an absolute lack of evidence tending to show that the germ secured lodgment in claimant's arm in the course of her employment. In this respect, the case is distinguishable from *Blaess v. Dolph* (1917) 195 Mich. 137, 161 N. W. 885, and *Dove v. Alpena Hide & Leather Co.* (1917) 198 Mich. 132, 164 N. W. 253. See also *Chandler v. Great Western R. Co.* [1912] W. C. Rep. (Eng.) 169, 106 L. T. N. S. 479, 5 B. W. C. C. 254; *Bellamy v. J. Humphries & Sons* (1913) 6 B. W. C. C. (Eng.) 53. It seems quite clear to us that claimant

has failed to show any connection between her employment in the store of respondent and the infection following vaccination. There was nothing in her employment which made her more susceptible to the reception of the germ infection than if she were walking upon the street, or attending a theater or church. In other words, the risk of infection was such, and such only, as that to which the general public is exposed."

ii. Nephritis.

There were about two big wagon-loads of steaming pulp in the basement room where a workman was required to work, which had run out of a broken iron pipe. His foreman directed him to remove it by flushing it out into the sewer with water, to do which he was required to use a hose through which hot water from the exhaust of the engine was forced. His working place became very hot in consequence of the pulp and water, and he perspired profusely. On his way home for dinner he became chilled, and acute nephritis developed. It was held that the evidence was sufficient to sustain a finding that the condition of the claimant followed directly from the enforced exposure to which he had been subjected in his work. *United Paper-board Co. v. Lewis* (1917) 65 Ind. App. 356, 117 N. E. 276.

jj. Neurasthenia.

On September 11, 1911, a workman met with an accident in the course of his employment. His employers paid him compensation for three weeks, when he returned to work and continued at work for five weeks, when he was discharged. Thereafter, until March 13, 1913, when he first made his claim for compensation, he was attended at intervals by doctors, and was for three months in a hospital. He was admittedly unfit for work. The finding of the county court judge that he was suffering from neurasthenia, the result of the accident, was held to be warranted by the evidence. *Morris v. Turford & Southward* [1913; C. A.] W. C. & Ins. Rep. (Eng.) 502, 6 B. W. C. C. 606.

kk. Osteomyelitis.

While engaged in the duties of his employment, which consisted of loading and unloading barrels of meat, a workman received an injury to his leg by the falling of a barrel of meat weighing 500 pounds. He returned to his home after the last half day he worked, lame, complained of his leg hurting him, said he was sick, and went to bed. Nine days later he was taken to the Cook County Hospital. The surgeon who treated him there testified that he had an abscess on the left thigh, which contained pus. The doctor opened it and drained the pus. He testified that the abscess was the result of an injury to the leg. After it was drained, the patient got better, but later osteomyelitis developed, necessitating an operation on the bone which weakened the bone. When the operation was performed, January 15, 1915, he was pale, anemic, had lost flesh, and could hardly walk. His general physical condition, due to infection, was run down and weakened, and his vitality and powers of resistance lowered. The attending physician ordered him kept in bed, but subsequently an intern in the hospital permitted him to get out of bed. He fell and broke the bone at the place where it was diseased, which caused a severe hemorrhage. Afterwards, on September 6, 1915, another operation was performed, and a few hours later he died. The doctor testified the death resulted from osteomyelitis, lowered resistance from long illness, hemorrhage, and shock. Over the contention that the evidence showed that the death resulted from the fall in the hospital, which intervened between the accident received where he was employed and the death, it was held that a finding that death resulted from the injury was warranted by the proof. *G. H. Hammond Co. v. Industrial Commission* (1919) 288 Ill. 262, 123 N. E. 384.

A workman was engaged in moving rails in a colliery, and on April 18, while dragging a rail along, he backed into a prop, with the result that the rail struck him a blow on the inside of the thigh. He went on working until May 29, when he suffered so

much pain in the thigh that he had to stop work. His panel doctor treated him for contused tissue. He grew worse, and on June 10 a consulting doctor was called in, who diagnosed the case as osteomyelitis and septicemia, and operated at once, but the man died that night. It was held that there was evidence on which the county court judge was justified in finding, as he did, that the workman met his death as the result of an accident arising out of and in the course of his employment. *Mills v. Dinnington Main Coal Co.* [1917] W. C. & Ins. Rep. (Eng.) 11, 116 L. T. N. S. 181, 86 L. J. K. B. N. S. 231, 61 Sol. Jo. 202, 10 B. W. C. C. 153.

The finding of the board that an employee's death from osteomyelitis resulted from stepping on an upholstery tack, while at work a few days before, was held in *Calderara v. P. Nathan & Co.* (1922) 200 App. Div. 298, 192 N. Y. Supp. 737, to be justified by evidence that he arrived at his work without limping, and later in the day was noticed by a coemployee pulling a tack from the sole of his left shoe, and was observed to limp thereafter, and the third day thereafter complained to his parents that he had a pain in his foot and had injured himself, and was examined by a physician, who discovered a small punctured wound in the left foot, about the spot indicated by the coemployee, which in the opinion of the physician had a causal relation to the osteomyelitis.

U. Paralysis.

An employee of a piano company suffered a cerebral hemorrhage resulting in paralysis, while helping to carry a piano up a steep stairway. He and another employee were the only experienced men engaged in carrying the piano up the stairs. This work was usually done by four or five experienced men. The only assistance the two had was that of a woman and an inexperienced man, who was said to be very weak. When the last step was reached the applicant testified that he felt something give way in his head. He immediately became ill, and

a doctor was summoned, who testified that he found a rupture of a blood vessel in the brain, which resulted in paralysis of the left side. The applicant at the time of the accident was suffering from arteriosclerosis. It was held that the evidence was sufficient to sustain a finding that the condition of the applicant was attributable to an injury received in the course of his employment. *St. Clair v. A. H. Meyer Music House* (1920) 211 Mich. 285, 178 N. W. 705.

An employee who was engaged in making bouillon from beef, by boiling and other processes, suffered a cerebral hemorrhage and resultant paralysis of one side. The weather was hot and a high degree of heat was required. At the time of the injury an extra amount of bouillon was being made, necessitating more than the ordinary exertion on the part of the claimant. The medical testimony was to the effect that the probable cause of the paralysis was a cerebral hemorrhage caused by the heat and overexertion, together with a diseased condition of his arteries known as arteriosclerosis, of some years' standing. It was held that there was sufficient testimony on which the accident board could base a finding that the disease was attributable to the employment. *La Veck v. Parke, D. & Co.* (1916) 190 Mich. 604, L.R.A.1916D, 1277, 157 N. W. 72.

A workman, while engaged in the course of his employment in moving a weight, had an attack of cerebral hemorrhage as the result of the exertion he was using. The work was being performed in the usual manner. Four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, rendering the recurrence of an attack likely. It was held that the workman's final disablement was caused by accident arising out of and in the course of his employment. *M'Innes v. Duns-muir* [1908] S. C. 1021, 45 Scot. L. R. 804, 16 Scot. L. T. 214.

The plaintiff testified that, while engaged in mining coal, a mine prop struck him on the side of the head,

midway between the center of the top of his head and the top of his ear, and knocked him 15 feet away; that the top of his head was affected and his skull fractured; that he was taken to the hospital, where pieces of his skull and "bruised blood were taken out;" that the injury caused all his strength to leave him; that he could not use his right hand or his right leg; and that the right side of his body was paralyzed, and he could scarcely walk. His evidence was supported by that of three physicians to the same effect. It was held that the evidence amply sustained the finding that he was injured while in the course of his employment. *Frey v. Kerens-Donne-wald Coal Co.* (1915) 271 Ill. 121, 110 N. E. 824.

A workman put to do heavy work was found half an hour later to be suffering from some injury which necessitated ambulance aid and removal to his home. He stated that he had fallen and hurt himself. He returned to work two weeks later, but complained of pain. Five and a half months later he had to go to a hospital, where he remained until he died six months after. The death was due to paralysis from the fracture of one of the lumbar vertebræ. This, according to the medical evidence, might have happened when he first complained of pain. It was held that the evidence was sufficient to warrant a finding that his death was due to an injury arising out of the employment. *Hewitt v. Stanley Bros.* [1913; C. A.] W. C. & Ins. Rep. (Eng.) 495, 109 L. T. N. S. 384, 6 B. W. C. C. 501.

A workman while employed at defendant's colliery breaking rock, his usual work, was noticed by his fellow workmen to cease work, rest on the frame of the coal chute, and move his hand and leg up and down; that at the time his body was shaking, and he would have fallen to the floor except for the support given him by others. He was sent to his home in an ambulance, and at once attended by a physician, who found him unconscious, and paralyzed on the right side, the result of cerebral apoplexy. Other medical testimony, additional to that

of the doctor first called, was to the effect that claimant was afflicted with an enlarged heart and also arteriosclerosis, which caused his arteries to degenerate and become weakened. They, however, did not say the apoplexy from which he was suffering was brought on by the work in which he was engaged. It was held that the evidence was sufficient on which to base a finding that the injury was attributable to his employment. *Lesko v. Lehigh Valley Coal Co.* (1921) 270 Pa. 15, 112 Atl. 768.

Paralysis may be found to be the result of an injury, where the substance of the testimony of a number of physicians who examined the plaintiff was that his condition was or might have been the result of the injury, although physicians testifying for the defendant stated that his condition was the result of a progressive arteriosclerosis, and could not have been the result of his injury. *Manning v. Pomerene* (1917) 101 Neb. 127, 162 N. W. 492.

An employee claimed to have been struck and knocked down by the opening of a swinging door as he approached it, which caused paralysis on one side of his body. No marks of physical injury appeared, and his eyeglasses, which were unprotected by rims, were still intact on his nose after the occurrence. The medical testimony showed that he was suffering before the accident from diabetes and arteriosclerosis, and that in this condition the man was liable to have a stroke any day; that it would require a severe blow to cause traumatic apoplexy; and that, in the absence of marks indicating a blow of some violence, the stroke suffered by the applicant could not reasonably be attributed to the accident assigned. This evidence was held to be insufficient to warrant a finding that the applicant's physical condition was caused by an injury received during the course of his employment. *Fink v. Sheldon Axle & Spring Co.* (1921) 270 Pa. 476, 113 Atl. 666, wherein it was said: "Both the courts and the administrative authorities have, very properly, been most liberal in construing the Work-

men's Compensation Law, holding that claims thereunder need not be made out with the same exactness of proof required in suits at common law. It must be understood, however, that, when in cases of this class expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further, and testify, at least, that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged. Here the strongest expert evidence to sustain the claim is that Fink's paralysis 'could be due to a blow on the head; ' and, as just indicated, this is not enough to justify or support a finding that the blow, or jar, testified to in this case, caused the paralysis which afflicts plaintiff."

mm. Paresis.

The claimant suffered a fractured wrist while engaged in the duties of his employment. About a week thereafter he began to act queerly, and about three months thereafter went to a hospital, where he afterward remained, suffering from paresis. At the time of the injury he had a syphilitic infection. It was testified that paresis is due to syphilis, and that any injury, whether a fractured wrist or otherwise, in a syphilitic person, might be an activating factor in the development of paresis. It was held that a finding that the disease was due to an injury received in the course of the employment, which accelerated an already diseased condition, resulting in paresis, was warranted by the evidence. *Finkeloay v. Henry Heide* (1920) 193 App. Div. 338, 183 N. Y. Supp. 912, affirmed without opinion in (1921) 230 N. Y. 598, 130 N. E. 909.

nn. Peritonitis.

A coal heaver while engaged in coaling a ship was struck in the stomach. He suffered great pain and left his work. Four days afterwards an operation was performed, and it was 20 A.L.R.—5.

found that he was suffering from perforation of the bowel, and also from appendicitis of long standing. A post-mortem examination revealed a second perforation which had not existed more than twelve hours, and the cause of the death was certified as peritonitis, caused by the second perforation. It was held that the evidence warranted a finding that the death resulted from the injury in the course of the employment, in the sense that the accident gradually produced perforation of the bowel, and so accelerated his death. *Woods v. Wilson, Sons & Co.* (1915; H. L.) 84 L. J. K. B. N. S. (Eng.) 1067, [1915] W. C. & Ins. Rep. 285, 8 B. W. C. C. 288, 113 L. T. N. S. 243, [1915] W. N. 109, 31 Times L. R. 273, 59 Sol. Jo. 348.

A workman suffered a double hernia while engaged in the duties of his employment. Within a few days he was operated on by two surgeons, one of whom removed the appendix, in addition to operating for the hernia. He was taken to his home where he remained for two weeks, when he was returned to the hospital and died in a short time of peritonitis. An autopsy was performed. One of the surgeons who was present at the autopsy testified that the two operative wounds were free from infection, had fully healed, and were clean wounds. He also testified that the body of the deceased was full of abscesses all over the abdominal cavity. The other surgeon testified that when the deceased left the hospital there had been no steady rise of temperature, no rapid pulse, or distension of the abdomen; that all these indications of peritonitis would have appeared in seventy-two hours, if the operation had been the cause. In his opinion the peritonitis came from the bursting of pus sacs, the presence of which in the abdomen was due to disconnected causes. That the operation for the removal of the appendix had been performed at the request of the deceased. It was held that, even if the evidence justified a finding that the peritonitis was caused by the operation for the removal of the appendix, it was not sufficient to show that that operation

was necessitated by the injury causing the hernia, and hence was not sufficient to sustain a finding that the peritonitis was due to an injury arising in the course of the employment. *Hoffman v. Pierce-Arrow Motor Car Co.* (1920) 193 App. Div. 123, 183 N. Y. Supp. 766.

eo. Phlebitis.

A workman was injured in an accident by the breaking of his left leg. The fracture was reduced and union obtained, and he continued in his employment as a structural iron worker, without suffering any pain or inconvenience. About eight years after the accident to his left leg, he suffered an accident to his right leg, arising out of and in the course of his employment. As a consequence his right leg was amputated twice. An infective process followed the second operation, and for a time he was in a critical condition. When the stump of the right leg was sufficiently healed so that it was practical for the injured man to get into a chair, it was found that the left leg could not be lifted or used without having it lifted by another. An examination revealed a marked phlebitis in the left leg. It was held that the evidence was sufficient to warrant a finding that the phlebitis in the left leg was attributable to the injury to the right leg. *Saddlemire v. American Bridge Co.* (1920) 94 Conn. 618, 110 Atl. 63.

pp. Pneumonia.

A workman was engaged in stacking boxes of paint in stacks of four or five boxes. While so engaged he ruptured a blood vessel in his lungs, and subsequently died of traumatic pneumonia. The medical testimony was to the effect that the pneumonia was caused by the rupture of the blood vessel. It was held that the evidence was sufficient to show that his death was due to an injury received in the course of his employment. *Southwestern Surety Ins. Co. v. Owens* (1917) — Tex. Civ. App. —, 198 S. W. 66.

A workman, while engaged in his duties, fell from a ladder and sustained severe bruises, his body being discolored in places. He suffered much

pain, headache, and restlessness, and shortly afterwards developed pleurisy and pneumonia, from which he died. The medical testimony was to the effect that the injuries received in the fall were likely to result in pleurisy and pneumonia. It was held that the evidence was sufficient to sustain a finding that the death was due to the injuries received in his work. *A. Breslauer Co. v. Industrial Commission* (1918) 167 Wis. 202, 167 N. W. 256.

An employee, while engaged in the duties of his service, received a cut in the foot with an ax. Immediately after the injury he was taken to a bunk house located near the place of the accident, where he received first aid. The wound bled somewhat profusely, leaving him in a weakened and fainting condition. After the wound was dressed he was placed in bed, but, complaining of the cold, he was taken to a stove in the bunk house, where a hot fire was burning. The accident happened at about 10 o'clock in the morning, and later in the day, possibly about the middle of the afternoon, he desired to be taken to his home, some 12 miles distant. An automobile was called, which could not approach the camp nearer than about 1 mile, and this distance he was compelled to walk. The weather was cold and otherwise inclement at the time, and he was exposed to it until he arrived at his home at about 7 o'clock in the evening. Shortly thereafter his wound was again dressed. At this time he again complained of being cold, and on the same evening had a chill. Two days later he developed a case of lobar pneumonia, and died from its effects. The medical testimony was to the effect that, although the ax wound of itself would not have caused pneumonia, the resultant weakened condition rendered the deceased much more susceptible to the disease than he otherwise would have been, and that it was not beyond probability that he acquired pneumonia from the exposure to the weather because of his weakened condition, and there was some evidence that it was highly probable that he did so. It was held

that the evidence was sufficient to sustain a finding that the injury was the proximate cause of the death. *Anderson v. Industrial Ins. Commission* (1921) — Wash. —, 199 Pac. 747.

A carpenter engaged at his work was struck by a piece of wood flying from a circular saw. He subsequently died of pneumonia. His employer reported the accident as an injury to his hand. His widow testified that when he came home his hand was injured and he complained of a pain in his chest. A fellow workman testified that he heard the piece of wood fly from the saw, and on looking up saw the injured man holding his hand to his side as if hurt. The physician who attended him testified that his hand was injured, and that he found an injury to the chest as if from a blow; that in his opinion the pneumonia was caused by the blow in the chest. It was held that there was sufficient evidence to justify a finding that the pneumonia was attributable to an injury received in the course of the employment. *Hanna v. Michigan Steel Castings Co.* (1918) 204 Mich. 139, 170 N. W. 6.

A workman was employed as a helper to machinists. While in the act of bending over to pick up some blocks of wood lying near a moving belt, the belt broke and struck him in the face, and some of the testimony showed that he was knocked down. He was helped out into the air by his coworkers, and after a short time he returned to his work. He worked a few days following the accident, when he gave up and went home, and his wife called the family physician. The physician found him suffering from traumatic pleurisy of his right side. As a result of the pleurisy he developed pneumonia, and later typhoid fever, and as a result of both maladies died. The medical testimony was in conflict, but there was evidence that pneumonia often developed from traumatic pleurisy. It was held that the evidence was sufficient to sustain a finding that the pneumonia was attributable to an injury received in the course of the employment. *Vogele v. Detroit Lumber Co.* (1917) 196 Mich. 516, 162 N. W. 975.

An employee received a blow in his chest while engaged in his regular duties. When he straightened up he swore, but said little, if anything, of his injury that day. His work was not active, and much of the time he remained seated. The next day he complained of sickness and of the injury, and was sent for first aid. He ate no lunch, and went to his home and to bed. Two days later a physician was called, who pronounced it pneumonia. A consultation of physicians was held. He died of pneumonia four days after the injury. The testimony was conflicting as to whether the pneumonia was on the same side as the injury. Two physicians testified that in their opinion the injury was the inciting cause of the pneumonia; others testified to the contrary. The employer claimed that influenza was the cause of the death, and it was shown that an epidemic of influenza had broken out in a military camp about 1½ miles distant, but there was no evidence definitely tracing the pneumonia to the influenza. It was held that the evidence warranted a finding that the disease was caused by the injury received in the course of the employment. *Delso v. Crucible Steel Co.* (1921) 195 App. Div. 288, 187 N. Y. Supp. 66.

A workman, while at work for his employer as helper and driver at a brewery, fell on a cement floor, striking the back of his head and cutting a large gash. The wound was dressed by a physician and he was taken home, and a few days later erysipelas developed, followed by an attack of pneumonia, from which he died. About two months previously he had suffered a slight attack of pneumonia which had cleared up in about two weeks, and he had returned to work. The medical evidence was to the effect that the erysipelas was the result of an infection through the wound, and that pneumonia followed, with that as one of the producing causes. It was held that the evidence warranted a finding that the death was due to an injury received in the course of the employment. *Wanda v. Jamestown*

Brewing Co. (1920) 191 App. Div. 17, 180 N. Y. Supp. 694.

A workman employed as a driver of a lumber sleigh complained of an injury to his left side, caused by lifting the sleigh when the runners stuck. On the day of the accident he notified his employers of the nature of the injury. He also told a fellow employee at the time, and on going home complained of having hurt his side while lifting the sleigh. He was unable to lift a weight with his left arm, and bathed his side with liniment. The accident occurred on Wednesday, and after several attempts to work he ceased entirely on the following Monday, and on Tuesday called in his physician. The doctor testified that he found him suffering from tenderness of the lower part of the left lung. He continued to grow worse, and finally died of pneumonia. The medical testimony was that such an injury as he claimed to have suffered might cause pneumonia, and one physician testified that in his opinion the pneumonia was caused by the injury. It was held that the evidence was sufficient to sustain a finding that the death was attributable to his employment. *Folts v. Robertson* (1919) 188 App. Div. 359, 177 N. Y. Supp. 34.

A workman received an injury to his arm during the course of his employment. The medical testimony was to the effect that, on examination of the arm about four months after the injury, it was found that the wound from the injury had not healed, there being at the time an open sore on the arm, which became infected with erysipelas, which spread over the neck to the side of the face and finally developed into pneumonia, from which he died. The doctor testified further that in his opinion the primary cause of the erysipelas was the unhealed portion of the injury, and that it was rather common for pneumonia to follow such infection. The court held that the evidence fully sustained a finding that the man died as a result of the injury received. *Ft. Wayne Rolling Mill Corp. v. Buanno* (1919) 69 Ind. App. 464, 122 N. E. 362.

In the performance of his duties as

superintendent of an amusement resort, an employee organized a fire brigade to protect the property of his employer. He was also a member of the local fire department and received a nominal sum for his services, and was subject to a fine for failure to answer a call to a fire. A fire broke out in a building 40 feet from the property of his employer. He responded with the fire-fighting apparatus of his employer, and when that gave out assisted the local company with their apparatus. The inhalation of damp smoke and drenching with water resulted in lobar pneumonia, from which he later died. It was held that the death was due to an injury received in the course of the employment. *McPhee's Case* (1915) 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257.

A workman received an injury to his ankle on September 26, 1916, while engaged in the duties of his employment, and was taken to a hospital, where an operation was performed on October 14, and a bone called the astragalus removed. About four weeks later he was removed to his home. His doctor's and hospital bills were paid by his employer, whose physician continued to treat him until December 14, after which time he was treated by his family physician. The wound from the operation healed, and he was able to move about the house on crutches, and go out of doors when the weather was pleasant. His foot was kept in a cast for some time, and an ulcer developed on the ball of his foot; also a pimple on the outer side of the leg formed, from which a small amount of pus was discharged, and a short time before his death a large abscess appeared on the back of his neck. On the afternoon of March 2 he went with a friend for an automobile ride, and was out from about 3 o'clock to about 6:30. The temperature was from 30 to 31 degrees. When he returned home he ate his dinner, after which he went to a drug store near by to get some medicine for his injured foot. Later he retired to bed, and at 7:30 o'clock next morning ate breakfast in bed, consisting of coffee and a roll. He made no complaint of

feeling ill. At 9 o'clock he called his wife to his bed, and said he wanted to spit. His wife assisted him to rise up, when his head fell over on her shoulder, and she discovered he was dead. A post-mortem was made by the coroner's physician, who testified that he found the right lung congested and hypostatic pneumonia in the left lung, and gave it as his opinion that he died of pneumonia associated with injuries to the foot. It was held there was competent evidence to support the claim that the death resulted from an accident arising out of and in the course of the employment. *Bergstrom v. Industrial Commission* (1918) 286 Ill. 29, 121 N. E. 195.

A workman was engaged with others in "putting up a set of timbers at the face of the buggy gangway" in one of the mines of his employer, and while placing in position a stick of lumber 6 feet long and 12 inches in thickness, known as a collar, he was "squeezed" or "bumped" by the collar. He immediately complained to his fellow workman of the injury, and of pain in his side, left the mine, and went to his home. His wife testified that upon examination of his body on his return home she found a "streak of red, a red mark turning to a black." The family physician described the mark as "being on the right side, about the ninth or tenth rib, and was a slight abrasion like a scratch, a discoloration in an area of about 2 or 3 inches in diameter." Another doctor said he found "a discoloration of the skin. It was ragged like, but was not in any way scarred or circumscribed. It had an outline like the map of Europe." During his illness four doctors were called from time to time. The family doctor was of the opinion that the injury caused traumatic pleurisy, which later developed into pneumonia. All the physicians agreed that death was the result of pneumonia, which followed either traumatic pleurisy or influenza, the latter being prevalent at the time. None, however, testified that the development of traumatic pneumonia from an injury such as was indicated by the mark on the body of the workman was improbable or impossible. It

was held that the evidence was sufficient to sustain a finding that the death of the workman was due to an injury received in the course of his employment. *Dumbluskey v. Philadelphia & R. Coal & I. Co.* (1921) 270 Pa. 22, 112 Atl. 745.

A lineman, while engaged in the course of his employment, came in contact with a wire heavily charged with electricity, which caused him to fall from a pole on which he was working, to the street, a distance of 28 feet. On striking the ground his knees "doubled up" and came violently in contact with his chest, causing considerable pain during the day, and indicating the fracture of one or more ribs. Whether or not his ribs were broken the physician who made an examination was unable to determine. The pain in the chest continued, making breathing difficult. After three days he returned to his place of employment, but on account of the constant severe pain in his chest did not engage in his usual work, and later was obliged to return home and again call a physician, who then diagnosed his trouble as lobar pneumonia, from which he died ten days after the accident. It was held that the death was due to an injury received in the course of the employment. In answer to the contention that the evidence was insufficient to support the finding, in that there was no evidence to show that the deceased was not exposed or subject to other conditions from which the disease might have been contracted, the court said: "The findings of the referee clearly show the injury to the chest resulted in continuous pain from the time of the accident until the trouble was diagnosed by the physician as lobar pneumonia, and we find nothing in the record to justify the inference that, between the time of receiving the injury and the development of the disease, there were other causes from which pneumonia might have been contracted. That the physician failed to discover a fractured rib does not detract from the weight to be given the undisputed fact that a blow on the chest was received, followed by continuous pain, resulting a

week later in the disease which finally caused death. The nature of the injury and its resultant effects, followed so closely by the development of the disease, constitute sufficient evidence to support the conclusion of the referee and the court below, particularly as a consideration of the record indicates ample expert medical testimony upon which the referee based his conclusion that the injury to the chest was the proximate cause of the disease which terminated in the death of the claimant's husband. *Murdock v. New York News Bureau* (1919) 263 Pa. 502, 106 Atl. 788.

A night watchman went to his work at the usual time, and the next morning was found at his place of work in a state of collapse. He developed pneumonia and peritonitis, and after a few days died. When he went on duty he was in good health, and was left by his fellow workman in a mirthful mood. When discovered in the morning he said that he had been hurt. On the body of the deceased there was a mark, or marks, which turned black and blood poisoning set in. There was some medical testimony that the symptoms were more consistent with traumatic pneumonia than with illness otherwise caused. It was held that the evidence was sufficient to sustain a finding that his death was attributable to his employment. *Mailman's Case* (1918) 118 Me. 172, 106 Atl. 606.

A workman was employed by a moving and storage company. His duties consisted largely in the moving of pianos. On May 4, about 4:30 in the afternoon, he was engaged in moving a piano with the assistance of two other men. Upon his return home that evening he complained to his wife of severe pain in his back. On the next day, May 5, he told an employee that he thought he had injured himself in moving a piano the day before. He also made a similar complaint when he subsequently consulted a physician. He continued to work at his customary employment until noon of May 13, when he was obliged to give up work. A physician was called and found that he was suffering with severe pain in

the right side, extending down through the abdomen to the leg. On May 16, on the advice of his attending physician, he was sent to a hospital, where he died on May 20. About a week after his death the body was exhumed and a post-mortem held. This disclosed a narrowing in one place of the intestines; the lungs showed solidification, due to pneumonia. It was held that the evidence was sufficient to support a finding that the death was attributable to an injury arising out of his employment. *Wolford v. Geisel Moving & Storage Co.* (1919) 262 Pa. 454, 105 Atl. 831.

A finding of the commission that death from pneumonia was the result of severe burns received by deceased several months before was affirmed in *Ballou's Case* (1922) — Me. —, 116 Atl. 591, upon evidence that, from the time of the fire to the date of his death, deceased gradually lost weight and strength and developed a cough which continued with increasing intensity until his death, and the testimony of a physician that the injury from the burns must have had something to do with the condition of the lungs.

A miner, because of the breaking down of a pump, was compelled to stand knee-deep in cold water while waiting for a cage. He contracted a chill, and five days later was found to be suffering from pneumonia of which he subsequently died. It was held that the evidence was sufficient to sustain a finding that the death was the result of an injury arising out of his employment. *Alloa Coal Co. v. Drylie* [1913; Ct. Sess.] W. C. & Ins. Rep. 213, [1913] S. C. 549, 50 Scot. L. R. 350, 1 Scot. L. T. 167, 6 B. W. C. C. 398, 4 N. C. C. A. 899.

Owing to an accident in the shaft of the pit where a miner was working, he and his fellow workers were ordered to ascend to the surface by the shaft of another pit, this being the downcast shaft for the air current which ventilated the mine. They were left waiting at a mid-landing for an hour and a half until the men who usually ascended by this shaft had been raised, and were exposed to a cold

down draft. As a result of this exposure the miner caught a chill, which brought on pneumonia from which he died. It was held that the evidence was sufficient to show an injury arising out of and in the course of his employment. *Coyle v. Watson* [1915; H. L.] A. C. (Eng.) 1, 83 L. J. P. C. N. S. 307, [1914] W. C. & Ins. Rep. 228, 111 L. T. N. S. 347, [1914] W. N. 195, 30 Times L. R. 501, 58 Sol. Jo. 533, [1914] S. C. 44, 51 Scot. L. R. 492, 7 B. W. C. C. 259, reversing [1913] S. C. 593, 50 Scot. L. R. 415, 6 B. W. C. C. 416.

Two workmen were lifting a drill weighing 1½ hundredweight, when the drill slipped. One of the men on getting back to his home told his wife that he had a pain in his side. Two days later the wife called the doctor. The doctor treated the pain in the man's side as being due to a strain. Five weeks later the man died from bronchial pneumonia, and the doctor then expressed the opinion that the man had strained his liver, and that the injury had extended ultimately to the lungs. The widow further gave evidence that during the time that the man was ill he was visited by his employer, who asked him what was the matter, and the man said he had strained himself lifting the drill, whereupon the employer gave him a sum of money "to go on with," and told him the sum that his compensation would amount to. It was held that there was sufficient evidence to support a finding that the pneumonia was due to an injury which occurred in the course of the employment. *Chantler v. Bromley* [1921; C. A.] W. C. & Ins. Rep. (Eng.) 171, 14 B. W. C. C. 14.

Where it was admitted that an accident occurred in the course of employment, it was held that it was sufficiently proven that pneumonia following was caused thereby, by evidence, in addition to the testimony of expert doctors, tending to show discoloration on parts of the body, pain and suffering, headache, and restlessness, indicating that the trauma caused by the fall was likely to result in pneumonia. *A. Breslauer Co. v.*

Industrial Commission (1918) 167 Wis. 202, 167 N. W. 256.

A man working in the hold of a ship was seen to climb out, apparently in great pain. He went home, and a doctor who saw him found injuries to his ribs. Pneumonia supervened, and he died in a few days. The pneumonia was due to the rib injuries. It was held that there was evidence to support the inference that the accident arose out of the employment. *Losh v. Richard Evans & Co.* (1902) 19 Times L. R. (Eng.) 142; 51 Week. Rep. 243, 5 W. C. C. 17.

A healthy and steady workman was employed to pick up cotton waste on the deck of a ship. At 1 P. M. he was sent to work in No. 6 hold; at 3 P. M. he climbed up the ladder of the hold, apparently in great pain, and was sent home. He was medically attended, and marks were found on his ribs; three days later he developed pneumonia, attributed by the doctor to the injury to his sides, of which he died. It was held that there was evidence that the workman had died from "personal injury by accident arising out of and in the course of the employment." *Lovelady v. Berrie* (1909) 2 B. W. C. C. (Eng.) 62.

An undertaker's workman had, as a part of his work, to lift coffins into vans. He went to work one day well, and returned home with bruises and a swollen leg. He died within a week of pneumonia supervening on pleurisy, caused by these injuries. The recorder found that the accident causing the injuries arose out of the employment. It was held that there was evidence to support the finding. *Re Workmen's Compensation Act* [1911] 2 Ir. R. 301, 45 Ir. L. T. 82, 4 B. W. C. C. 482.

A teamster, required in the course of his work to handle heavy boxes, quit before the end of the day, complaining of a pain in his back. The next day he was found to have bruises on his back and side. He later died from traumatic pneumonia. It was held that a finding that he had sustained an injury arising out of and in the course of his employment was justified. *Armour & Co. v. Industrial Bd.* (1916) 273 Ill. 590, 113 N. E. 138.

On or about March 18, 1917, a stevedore ruptured himself by an accident arising out of and in the course of his employment. On April 2 he was operated on in a hospital, and a radical cure of the rupture was effected. He came out of the hospital cured, but in a weak condition, on April 14, but got worse, and was sent to an infirmary on September 22, where he died on December 12 of pulmonary pneumonia. It was held that the evidence was not sufficient to show that his death from pneumonia was attributable to his employment. *Kemp v. Clyde Shipping Co.* [1918] W. C. & Ins. Rep. (Eng.) 258, 87 L. J. K. B. N. S. 861, 119 L. T. N. S. 131, 11 B. W. C. C. 109.

An engine driver who had to take out an early train was, on a morning in March which was bitterly cold and snowy, called late by a fellow workman, and hurried to his engine insufficiently clad, and without his usual food; on the same or the following day, as to which there was a conflict of evidence, while engaged in his employment, he collapsed, and subsequently died of pneumonia. It was held that his death was not the result of an accident arising out of his employment, but that, even assuming that it was such an accident, the evidence was not sufficient to show that it arose in the course of his employment, as his going out insufficiently clothed and without food happened at his own home, and before his employment had begun. *Dennis v. Midland R. Co.* [1921; H. L.] W. N. (Eng.) 160, 65 Sol. Jo. 511, 37 Times L. R. 623, 90 L. J. P. C. N. S. 144, 125 L. T. N. S. 545, 14 B. W. C. C. 71.

A driver for a firm of teamsters had suffered an injury some four or five years previously, which caused an impairment of his memory. While in charge of one of his employer's teams he suffered a lapse of memory and, in attempting to get the horses to the stable, lost his way and wandered from his wagon into a swamp, and suffered exposure during the night which caused him to contract pneumonia, from which he died. It was held that the evidence was insufficient to show that the disease arose out of

his employment, as there was nothing in the employment of driving a wagon which made it likely that the employee would alight from his wagon and wander to, and fall into, a swamp, and lie there all night. *Milliken's Case* (1914) 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512.

A brusher went to the bottom of the pit shaft to be taken to the surface just at the time of the beginning of the daily statutory shaft inspection, of which he knew. The inspection took an hour that morning, instead of the usual half hour, owing to the breakdown of the bell wire, and during that time the workman stood about in a strong current of cold air. He contracted a chill, and died of pneumonia. It was held that the evidence supported the finding by the arbitrator that the deceased had not been injured by an accident arising out of and in the course of his employment. *Lyons v. Woodilee Coal & Coke Co.* (1917) 117 L. T. N. S. (Eng.) 65, 86 L. J. P. C. N. S. 137, [1917] W. N. 151, 61 Sol. Jo. 490, affirming [1916] S. C. 719, 53 Scot. L. R. 538, 9 B. W. C. C. 655.

A workman died of pneumonia. His dependents contended that the pneumonia resulted from lowered vitality caused by an accident to him, arising out of and in the course of his employment. The medical referee reported that pneumonia could not have been caused by the alleged accident, the only evidence of which consisted of several inconsistent statements made by the workman to various persons on the day after the accident, which were admitted in evidence without any objection being taken. It was held that there was no evidence that there was any accident arising out of and in the course of his employment. *Langley v. Reeve* (1900) 3 B. W. C. C. (Eng.) 175.

qq. Rheumatism.

A mine brusher was directed to bail out of the pit the water which had accumulated owing to the breakdown of the pump. This necessitated his standing immersed in water up to his chest for eight hours. Thereafter he was incapacitated for work for several

days by rheumatism, owing to the extreme and exceptional exposure to cold and damp which his work of bailing had entailed. On these facts, the arbitrator held that there was evidence that the workman was incapacitated by an injury caused by accident arising out of and in the course of his employment. And, on appeal, it was held that there was evidence on which the arbitrator could so find. *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. (Eng.) 1, 10 B. R. C. 308, Ann. Cas. 1916E, 161, 114 L. T. N. S. 809, [1916] W. C. & Ins. Rep. 79, 85 L. J. P. C. N. S. 130, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1916] W. N. 109, affirming [1915] W. C. & Ins. Rep. 463, [1915] S. C. 1020, [1915] 2 Scot. L. T. 123, 52 Scot. L. R. 798.

A workman was employed as a fireman. His employer had recently removed its plant, and some of the employees, according to custom, worked in the evening after regular hours, getting the new plant into shape. One evening, after he had finished his work on a defective valve, he went to a room where a fellow workman was working, who had not finished, and helped him to finish this work. While helping the fellow workman, he pinched his finger, causing a blister to form. Blood poisoning set in, and later inflammatory rheumatism, and he finally died. The employer reported the accident, and entered into an agreement for compensation. It was held that the evidence was sufficient to sustain a finding that the death was caused by an injury received in the course of the employment. *Perdew v. Nufer Cedar Co.* (1918) 201 Mich. 520, 167 N. W. 868.

A workman injured his foot by slipping when coming down a telephone pole, falling about 7 feet, and hitting his foot on a brick. He testified that when he went home his foot was swollen and pained him, and he thought he had sprained it. He developed rheumatism, which was located in the knee, shoulder, and several different joints, as well as in the foot. His attending physician testified that he could not say whether the condition of the applicant was due to the

injury or not. Two other physicians expressed the same opinion, and a third testified positively that the applicant's condition was due wholly to rheumatism with which the injury had nothing to do. It was held that there was evidence to justify a finding that the disease was not attributable to the employment. *Jackson v. Iowa Teleph. Co.* (1920) 190 Iowa, 1394, 179 N. W. 849.

See also *infra*, II. ss.

rr. Scarlet fever.

A porter in a scarlet fever hospital had an attack of influenza and returned to his work on March 22. On April 1 he was, in the course of his duty, in the scarlet fever wards, and he also cleaned the mortuary for the first time after his return. About three or four hours afterwards he was sick, and for the next three days he was very unwell. On April 5 he was found to be suffering from scarlet fever. As a result of his illness his heart was affected and he suffered from nephritis, and at the date of the application he was totally incapacitated for work. He could not say that there had been in the mortuary, shortly before the day he cleaned it, any bodies of persons who had died from scarlet fever, but he said that it was very likely there had been. It was held that the evidence did not show that there was an accident arising in the course of the employment. *Martin v. Manchester* (1912) 106 L. T. N. S. (Eng.) 741, 76 J. P. 259, 10 L. G. R. 996, 28 Times L. R. 344, [1912] W. C. Rep. 289.

ss. Sciatica.

A pilot was employed to take a ketch out of the harbor on a rough night with a high wind. Having piloted the ketch out of the harbor, and having been paid, the applicant attempted to get into his own boat, which was being towed astern of the ketch, for the purpose of going ashore. He jumped into the boat, alighting somewhere near the bows, with the result that they went under water, and he got wet to his thighs. He was pulled up on board the ketch again, and later rowed ashore. Subsequently he suffered

from sciatica. The county court judge found that the applicant's boat filled with water by accident, that he got wet by accident when he first jumped into the boat to go ashore, that the sciatica was the result of this accident, and that the accident arose out of and in the course of his employment. On appeal, it was held that there was sufficient evidence on which the county court judge could find as he did. *Barbeary v. Chugg* [1915] W. C. & Ins. Rep. (Eng.) 174, 112 L. T. N. S. 797, 84 L. J. K. B. N. S. 504, 31 Times L. R. 153, 8 B. W. C. C. 37.

An employee of a smelting company, while tending a furnace, was affected by smoke and gas from the furnace, and became dizzy and vomited. After lying down for a short time he walked home with the aid of a fellow workman. He complained of a pain in his stomach and in the calf of his right leg. He was treated by several physicians. One, connected with the dispensary of a hospital to which he went, testified that he showed symptoms of lead poisoning, for which he treated him; also, that he had sciatic neuritis, which could come from local infection and could also come from lead; that he had pyorrhea, and might have been suffering from a pus infection; that the fact that the sciatica did not respond to the treatment for lead poisoning impelled him to doubt that poisoning might be a contributing cause of the sciatica. Other physicians testified that they found no traces of lead poisoning, but did find symptoms of several diseases, and were of the opinion that the sciatica was not due to lead poisoning, but to the other ailments from which the man was suffering. It was held that the evidence was not sufficient to sustain a finding that the diseased condition of the man was attributable to his work. *St. Louis Smelting & Ref. Co. v. Industrial Commission* (1921) 298 Ill. 272, 131 N. E. 617.

tt. Sleeping sickness.

In *Donovan v. Alliance Electric Co.* (1920) 191 App. Div. 303, 181 N. Y. Supp. 823, the claimant, in the course of his employment, hit his head

against a desk. He worked regularly thereafter for about three weeks, when he developed encephalitis, commonly known as sleeping sickness. At one stage of the disease the physicians thought the symptoms indicated a fractured skull, but subsequent developments caused them to change their opinion. No physician testified that in his opinion the injury caused the sickness. It was held that the evidence was not sufficient to sustain a finding that the disease was attributable to the employment. The court said: "It cannot be that a tentative diagnosis in a partially developed case subject to future developments, and which is changed by the later history of the case, has any probative force. At most, a statement of a witness out of court inconsistent with his testimony discredits the witness, but is never received as evidence of the fact contained in such inconsistent statement. No physician in this case has ever testified to a fractured skull, and no physician connects the present disease with the blow to the head. The commission, in its effort to make such connection, has based its finding on the erroneous hypothesis of a fractured skull, of which there is no evidence." After resubmission to the commission, an award was again made in favor of the claimant. The medical testimony on the second hearing was to the effect that the sleeping sickness was not the result of trauma, but of infection, and the fact that the claimant developed sleeping sickness following the bump on his head was merely a coincidence. The award was again reversed, with directions to the commission to award the claimant for the bump on the head, but not for the sleeping sickness. (1921) 195 App. Div. 678, 186 N. Y. Supp. 818.

uu. Spondylitis deformans.

A laborer was injured through the falling of a platform over which he was wheeling a truck loaded with boxes filled with goods, in the course of his employment. About fifteen months after an award had been made by the commission in his favor, he filed a second petition, alleging that

the injury had caused to develop an inflammatory condition of some of the lumbar vertebræ, known as spondylitis deformans. The evidence showed that the claimant was a man in excellent health before the injury, and that the disease in question was very apt to be caused by a weakened condition of certain portions of the body, such as was caused by the injury. It was held that the evidence was sufficient to sustain a finding that the disease had its inception in the course of his employment. *Squire-Dingee Co. v. Industrial Bd.* (1917) 281 Ill. 359, 117 N. E. 1031.

vv. Tetanus.

A workman was employed in a machine shop as an operator of a drill press. While engaged in such work on December 19, 1919, he stepped on a steel shaving, which entered his foot near the little toe. He did not appear greatly concerned about it, and worked until December 25. On that day he became ill. From that time he rapidly grew worse, and died on December 29 of tetanus. It was shown that the deceased had, on December 1, scratched or punctured his foot by coming in contact with an old nail while doing some work in his cellar, and that the injury caused by the steel shaving was in the same place as the nail injury. The medical witnesses testified that he died of acute tetanus, and that acute tetanus usually developed in six or seven days after the injury, and not longer than nine days; that the nail injury might have developed chronic tetanus, but that deceased died of acute tetanus. It was held that there was sufficient evidence to justify a finding that the tetanus was caused by the injury from the steel shaving, received in the course of the employment. *Bresee v. Clark Equipment Co.* (1921) 214 Mich. 235, 183 N. W. 19.

On the morning of August 14 a collier started to his work in his employer's coal mine, having made no complaint to anyone, nor did anyone see him walking as if there was anything the matter with his feet. Later on he came out of the stall where he

had been working, and complained to the head man that his feet hurt him. The head man found on the floor in the stall a piece of rock weighing about 3 or 4 pounds, which had fallen from the roof during the working hours. On August 19 a doctor examined the foot and found a small wound about half an inch in length, of a kind that might have been caused, in the doctor's opinion, by a piece of stone falling on it. A scratch or nearly healed scar on the sole of the foot was also discovered. On August 25 the workman was found to be suffering from tetanus, from which he died the next day. It was held that a finding that the injury was caused by an accident in the course of the employment was sustained by the evidence. *Stapleton v. Dinnington Main Coal Co.* (1912) 107 L. T. N. S. (Eng.) 247, [1912] W. C. Rep. 376, 5 B. W. C. C. 602.

A carpenter, while engaged in the duties of his employment, stuck a nail in his foot. He had it treated from time to time by a doctor, but he finally developed tetanus from which he died. The doctor testified that in his opinion the disease was attributable to the accident. The evidence was held to be sufficient to sustain an award in favor of the claimant. *Snyder v. Industrial Commission* (1921) 297 Ill. 175, 130 N. E. 369.

Where a gardener was injured while at work in the garden by a nail passing through his boot and piercing the large toe, and died from tetanus which subsequently set in, it was held that the evidence, as shown together with testimony that persons working in stables and gardens were peculiarly subject to contract the disease of tetanus in suffering from any wound or cut, was sufficient to prove that the accident arose out of and in the course of his employment, although it was not shown that he might not have contracted the disease elsewhere. *Walker v. Mullins* (1908) 42 Ir. L. T. 168, 1 B. W. C. C. 211.

vv. Tuberculosis.

While the claimant was working for his employer operating a crane, one of the timbers broke, and to save him-

self from injury he jumped into the river, a distance of some 10 feet, the water coming up to his knees. He waded to the shore and contracted a heavy cold and pleurisy, which developed into pulmonary tuberculosis. It was held that the evidence sustained the finding that his condition was the result of an accidental injury arising out of and in the course of his employment. *Rist v. Larkin* (1916) 171 App. Div. 71, 156 N. Y. Supp. 875.

An employee, while engaged as a car washer in a garage, was crushed between two cars, injuring his abdomen and chest. He later developed tuberculosis from which he died. The medical evidence was in conflict, being to the effect, on the one hand, that the injury in no way contributed to the disease, and, on the other hand, that it might have. An expert called by the commission testified that in his opinion the injury was an activating agency, and contributed to, or quickened the progress of, an otherwise dormant tubercular condition. It was held that the evidence, though weak, was sufficient to sustain an award in favor of the claimant, particularly in view of the aid given by the statutory presumption that claims come within the provisions of the act. *McGoey v. Turin Garage & Supply Co.* (1921) 195 App. Div. 436, 186 N. Y. Supp. 697.

A workman employed as a mason fell from a ladder a distance of 18 or 20 feet, striking his side on a pipe or box, and strained his left side, back, and ankle. The physician who attended him testified that some of his short ribs were fractured and loosened. He did some work after the accident, but did not recover to any extent his strength or previous health, and in about one year developed tuberculosis of the right lung, from which he died. Doctors on both sides agreed that for a period of time after the injury the several examinations did not disclose tuberculosis, and that there was an absence of any symptoms denoting the active presence of that disease. It was held that the evidence was sufficient to sustain a finding that a latent tubercular condition was light-

ed up by the injury, so as to cause death from pulmonary tuberculosis. The court said: "The evidence here for claimant is not uncorroborated hearsay evidence; it was the evidence of the physician who knew deceased before the accident, and treated him almost continuously after the accident until his death. Immediately, or within three days after the accident, his lungs were examined, and soon thereafter his blood pressure was taken, and both found practically normal; he was a strong man doing the hard work of a mason, and never sick or ailing; this physician treated claimant for some years before her husband was injured, and he knew. His evidence was as positive as any that can be given by a physician of internal conditions, and is such evidence as is relied upon generally in the vicissitudes of everyday life." *Van Gordon v. Hires Condensed Milk Co.* (1920) 193 App. Div. 601, 184 N. Y. Supp. 402.

A workman, during the course of his employment, suffered an injury consisting of a blow on the head. Twenty-three days thereafter he died from tuberculosis of the brain. One doctor testified that he found a distinct tuberculosis of the base of the brain. All the medical testimony was to the effect that a trauma of the kind which the employee had received could excite a dormant tubercular condition into activity, and accelerate death. There was no evidence to the contrary, but there was evidence that there were no traumatic indications at the time of death, more than three weeks after the trauma. It was held that the evidence was sufficient to justify a finding that the blow on the head was the inducing cause of the active manifestation of an otherwise dormant disease. *Schlenker v. Garford Motor Truck Co.* (1918) 183 App. Div. 166, 170 N. Y. Supp. 439.

An employee, while engaged in lifting a box weighing some 30 or 40 pounds, fell against a vise located on his workbench, striking his neck just above his collar bone. About the time of the accident, but whether before or after the evidence did not show, he

had a slight hemorrhage or spitting of blood. He remained away from work for three weeks. On his return he only worked for a few days, when he stopped for good, and about nine months thereafter died of tuberculosis. The medical testimony was to the effect that the man was suffering from tuberculosis at the time of his injury; that such an injury might accelerate the disease. It was held that a finding that his death was attributable to the injury received in the course of his employment was supported by the evidence. *Van Keuren v. Dwight Divine & Sons* (1917) 179 App. Div. 509, 165 N. Y. Supp. 1049, affirmed without opinion in (1918) 222 N. Y. 648, 119 N. E. 1083.

An employee was injured by an explosion which enveloped him with steam and gas, and struck him with debris, injuring his head, hip, and side. He was confined to his bed for a month. He was apparently a healthy man up to the time of his injury, but the physician testified that there was evidence of chronic disease, and the examination, his cough, and the history show tuberculosis of the lungs. He was never well after the accident, and the physician testified that the history would indicate that his trouble was the result of his injury. It was held that the evidence was ample to sustain a finding that the injury resulted in a weakened vitality and resistance, and that the latent tuberculosis was aggravated and accelerated into active tuberculosis, from which he died. *Republic Iron & Steel Co. v. Markiewicz* (1921) — Ind. App. —, 129 N. E. 710.

A workman, while driving his employer's wagon in the course of his duties, was thrown against the hub of a wheel, and thence to the ground, through the striking of his wagon by an automobile. His ribs, chest, and back were injured, and he developed tuberculosis, from which he later died. There was evidence that at the time of the accident he was suffering from pulmonary tuberculosis, and that the injury, while not causing the disease, hastened its progress or excited it to a fatal termination. This was

held to be sufficient to warrant a finding in favor of the claimant. *Glenon's Case* (1920) 236 Mass. 542, 128 N. E. 942.

A night watchman, while engaged in the performance of his duties, fell over a pile of scrap iron and injured his knee. The knee became so painful that he was taken to a hospital, where he remained for about three months. He thereafter returned to work as a night watchman, and was so employed for about three months, when his knee again became painful, and he was taken to the hospital. Tuberculosis of the bone set in, which necessitated the amputation of his leg. It was held that the evidence was sufficient to justify a finding that the disability was the result of the accident, and the fact that the applicant was predisposed to tuberculosis of the bones did not affect his right to recover. *Wabash R. Co. v. Industrial Commission* (1918) 286 Ill. 194, 121 N. E. 569.

A carpenter, while working pursuant to his employment, received a severe injury to the lower part of his back, as the result of a fall, which disabled him at that time for a period of nineteen days, and he was then paid compensation for five days; soon thereafter he tried to work at his trade as a carpenter, but was unable to continue because of the effects of his injury; about a month subsequent to his injury he went to Chicago to visit and rest, and remained there for more than a month; subsequently he went to Albany, where he worked for a news company as a caller until May 10, 1916, when he became severely ill and returned home, but was unable to secure any permanent improvement in his health; he was injured across the small of the back, and complained of his back, side, and kidneys. He was taken to a hospital where he received treatment, and on his return home was confined to his bed until his death in July, 1917. The medical testimony was that he died from tuberculosis following nephritis, and that the injury to his back and kidneys was such as might, and probably did, cause nephritis, which so weakened

him that he either became susceptible to tuberculosis, or the disease theretofore latent in his system was aggravated and accelerated, and eventually caused his death. This evidence was held to be sufficient to sustain a finding that the death was attributable to the injury received in the course of his employment. *Retmier v. Cruse* (1918) 67 Ind. App. 192, 119 N. E. 32.

A workman fractured his ankle in August, 1918, in an accident arising out of and in the course of his employment. In May, 1920, he died of tuberculosis. His attending physician testified that the tuberculosis was the result of the accident of 1918. There was no other evidence. It was held that a finding in favor of the complainant was justified by the evidence. In answer to the contention that the physician was inexperienced, and his deductions so unscientific that no weight should be given his opinion, the court said: "The doctor is a general practitioner, and not a specialist; but he has been engaged in practice for eleven years. He treated Mr. Gray for about a year and a half. He made some examinations of the injured ankle, having an X-ray photograph taken to facilitate the examination. He treated the fracture, and his treatment is not criticized. According to his testimony, he discovered that the bones were not uniting, made an incision, found the ankle joint destroyed, and amputated the leg. In January, 1919, the symptoms of the patient suggested to the mind of the doctor a tubercular condition of the bones. Considerably later, he had an analysis of the sputum made at the state laboratory. The doctor was subjected to a searching cross-examination. His testimony was shaken, but not destroyed; weakened, but not annihilated; torpedoed, but not sunk." *Gray v. St. Croix Paper Co.* (1921) — Me. —, 113 Atl. 32.

A workman, while engaged in the duties of his employment, suffered a fracture of the ribs. From the date of his injury he became broken down in his general health, and went into a steady decline, gradually growing weaker until the date of his death

about ten months later. The medical testimony was in sharp conflict, there being evidence on the one hand that he died of tuberculosis contracted as a result of his injury, and on the other hand, evidence that his death was not attributable to an injury, but was due to heart disease as a result of rheumatism. It was established that before his injury he was a man in full health and vigor. It was held that there was sufficient evidence to warrant a finding that the death was attributable to the injury received in the course of employment. *Lundy v. George Brown & Co.* (1919) 93 N. J. L. 107, 106 Atl. 362, affirmed in (1919) 93 N. J. L. 469, 108 Atl. 252.

A workman, while in his master's employment, suffered in July a serious accident, which affected his brain and general health, and he died in the following December. A post-mortem examination showed that he died from acute tuberculosis, which had been latent for some time, but there was medical evidence that the disease might have been accelerated or aggravated by his lowered state of vitality, due to the accident. It was held that there was sufficient evidence on which the county court judge could properly find that the death resulted from the accident, which set up the disease from which the workman died. *Beare v. Garrod* [1915] W. C. & Ins. Rep. (Eng.) 438, 85 L. J. K. B. N. S. 717, 113 L. T. N. S. 673, 8 B. W. C. C. 474, 10 N. C. C. A. 756.

It has been held that the death of an employee, who, prior to his injury, was shown to be a seemingly strong and healthy man, and who was burned on his hands and face by an explosion of gas, and subsequently complained of pains in his throat and chest, and was in a run-down condition, and died about four months after his injury, of miliary tuberculosis, may be found to have been proximately caused by the gas explosion. There was expert testimony to the effect that the inhalation of the gas fumes would furnish an opportunity, if the infection of the disease existed in a latent condition at the time, for the latent condition to be

kindled into an active condition; and that if the infection was not existent, the inhalation of gas would bring about the destruction of air cells in the lungs, and would lower his vitality, and make the person more susceptible to such infection; and that the usual time for the course of miliary tuberculosis was from four to six weeks, but that it might continue for three or four months. *Heileman Brewing Co. v. Industrial Commission* (1915) 161 Wis. 46, 152 N. W. 446.

In *McCarthy's Case* (1918) 231 Mass. 259, 120 N. E. 852, the court, without stating specifically of what the evidence consisted, held that it was sufficient to sustain a finding that tuberculosis, of which the workman died, was attributable to an injury received in the course of his employment.

A miner had his back crushed by a fall of coal. He received compensation for six months, when he returned to the light work of painting wagons. He did this work regularly for eighteen months, when he was taken ill with tuberculosis of the lungs, and died of this disease just over two years after the accident. It was held that the evidence was not sufficient to show that the disease was contracted in the course of his employment. *Comery v. New Hucknall Colliery Co.* (1919; C. A.) 88 L. J. K. B. N. S. (Eng.) 462, [1919] W. C. & Ins. Rep. 63, 12 B. W. C. C. 1, 120 L. T. N. S. 456.

An employee was engaged as the driver of a milk wagon. His wife testified that on coming home one morning he acted in a silly manner, so that she thought someone had doped him. He was irrational on that day, and could give no account of how he was injured. She testified that the next day he was rational, and told her that he had slipped on the ice in the wagon, and fallen and hurt the back of his head. He was not able to make any intelligent communication at any time subsequent to the day following the accident. After that he lapsed into semiconsciousness, and grew worse until his death, about two weeks later. His attending physician testified that

on the day that he was conscious he stated that something had happened to him; that he thought he fell; that he had hurt himself, but that he did not know when, where, or how. With another physician, he examined him thoroughly, the examination being absolutely negative, aside from a slight abrasion on one of his legs, which could not have contributed to his condition in any way. An autopsy showed that the chief and determining cause of death was tubercular meningitis, and the contributing cause chronic pulmonary tuberculosis. It was held that the evidence was insufficient to sustain an award in favor of the claimant, the court saying: "The autopsy discloses an adequate cause of the death, with no evidence whatever of any injury which could have contributed to the death. It thus appears not only that there is no evidence of probative force to support the conclusion that the death resulted from an accident, but that it affirmatively appears that the death was due to disease which is not shown to have had any relation whatever to any alleged accident. The presumptions declared in § 21 of the act do not help the claimant; they do not relate to the fundamental question of the happening of the accident, which is in the nature of a jurisdictional fact, to be supported by direct or circumstantial evidence; and the presumptions do not prevail over 'substantial evidence to the contrary.' Workmen's Compensation Law, § 21. If any authority is needed for this proposition, it is to be found in *Carroll v. Knickerbocker Ice Co.* (1916) 218 N. Y. 435, 113 N. E. 506, Ann. Cas. 1918B, 540, and we are clearly of the opinion that hearsay testimony, unsupported by facts and circumstances to justify a reasonable inference, is not sufficient to establish the primary fact of an 'accidental personal injury sustained by the employee arising out of and in the course of his employment.' Workmen's Compensation Law, § 10. The jurisdiction of the state industrial commission to make an award depends upon the happening of an accident under the conditions named in the statute, and this

requires evidence of probative force. Hearsay testimony is competent in explanation or corroboration, no doubt, but it must itself be corroborated by relevant facts, or it cannot be made the basis of an award under the statute here considered." *McHale v. Sheffield Farms Co.* (1920) 193 App. Div. 541, 184 N. Y. Supp. 576.

In *Albaugh-Dover Co. v. Industrial Bd.* (1917) 278 Ill. 179, 115 N. E. 834, the workman whose death was the subject of inquiry, and another, were wheeling a load of castings in a box on a truck down an inclined runway, the other man being at the upper end, holding the handles of the truck, and the workman in front of it, holding it back. The other man slipped and fell, and the truck ran against the workman and pushed him over and swung him around against a door. The box hit him on the left side, between the navel and the hip, and a little lower than the direct line. In reply to the question of the straw boss as to whether he got hurt, he replied that he did not, but got a strain as though they had put an electric wire on him, or an electric shock, and continued to work. Later he developed a suppurating sinus in the region of the epididymis, which was remote from the point of injury, and died of miliary tuberculosis of the lung. The medical evidence was unanimous that a tubercular condition resulting from a blow would develop at the point of the blow as the seat of the condition, and could not develop from a strain. It was held that the evidence failed to sustain a finding that the workman met with an accident arising out of the employment.

xx. Tumor.

A workman, fifty-one years of age, died from the effects of an operation upon a malignant tumor of the kidneys. About sixteen months before his death he met with a severe accident in his employment, a heavy strut falling on his back near the region of the kidneys. After this accident he was away ill for about four months, when he returned to work for about seven months. He then went into a hospital, when the tumor was dis-

covered and excised. He ultimately died from the effect of the operation. The medical evidence was that the tumor might have been congenital, or might have been caused by a blow, or might have been made malignant by a blow, or by other causes. There was no evidence of any other cause except the accident. There was evidence that, before the accident, the deceased was a strong healthy man, having no trouble with his kidneys, and that after the accident he was never able to do his work as he did before the accident. The county judge found that the accident caused the tumor (which then existed in a quiet condition) to become malignant, and that the death, therefore, resulted from injury by accident arising out of and in the course of his employment. It was held that there was evidence to justify the finding of the county court judge. *Lewis v. Port of London Authority* [1914] W. C. & Ins. Rep. (Eng.) 299, 7 B. W. C. C. 577, 58 Sol. Jo. 686.

yy. Typhoid fever.

A workman whose duty it was to clean pumps used in connection with sewage discharge, contracted typhoid fever. It was proved that he might, while handling the sewage, have come in contact with typhoid germs, but there was no evidence that he had done so. It was held that the evidence did not establish that the accident arose in the course of his employment. *Finlay v. Tullamore Union* [1914] 2 Ir. R. 233, [1914] W. C. & Ins. Rep. 222.

zz. Uremia.

A collier suffering from Bright's disease told a mate that he had hurt himself, and the mate saw marks of a tub, which the deceased had been filling, having come off the rails, though the tub was then on the rails. He went home, and died in a short time of uremia, as the post-mortem proved. It was held that an award in favor of the employers, on the ground that the evidence was insufficient to show that the man's death was attributable to his employment, was proper. *Ashley v. Lilleshall Co.* (1911) 5 B. W. C. C. (Eng.) 85.

aaa. Miscellaneous.

A workman in a lumber camp was required to board and lodge in the quarters supplied by his employer, during the logging season. The employer furnished bunks, where he and the other men slept. The bedding furnished was very old and in poor condition, the straw sticking through the ticks. The claimant slept in a lower bunk. While lying in his bunk with a fellow workman, a piece of straw dropped from the bunk above him and lodged in his throat. He made an effort to remove the straw, calling the attention of his fellow workman to his condition, but was unable to dislodge it. Infection set in, which resulted in disability. It was held that the evidence was sufficient to show that the disability of the claimant was due to an injury arising out of and in the course of his employment. *Holt Lumber Co. v. Industrial Commission* (1919) 168 Wis. 381, 170 N. W. 366.

A workman, while employed as a watchman or gatekeeper on a highway, suffered an accidental injury to his foot, which became infected. As the infection progressed he grew weaker and became delirious, after which vomiting set in with an extension of the abdomen, and his bowels would not move, and in three days he died. The attending physician testified that in his opinion the immediate cause of death was obstruction of the bowels, the infected condition of the foot being a contributing cause. It was held that a finding that death was caused by an accident received in the course of the employment was sustained by the evidence. *Doherty v. Grasse Isle Twp.* (1919) 205 Mich. 592, 172 N. W. 596.

A workman suffered a broken leg while engaged in the duties of his employment. Twelve days later he died. It was contended by the employer that the death was caused by cerebral embolism; that is, that the man had had a bad case of arteriosclerosis, and that part of the lining of the artery became detached and formed a clot, that lodged in and plugged an artery in the brain. The claimant contended that the man died of pulmonary embo-

lism—the plugging up of an artery in a lung by a blood clot which came from the site of the fracture. There were an equal number of doctors who testified on each side. It was held that it could not be said that there was not sufficient evidence to sustain a finding that death was due to the injury. *Klage v. Bunsen Coal Co.* (1915) 201 Ill. App. 58.

An employee, while engaged in the duties of his employment, attempted to open a door, when the knob came off and he fell backwards to the ground. The fall rendered him unconscious for a time, and when he regained consciousness he had to be assisted to his feet. He was taken home and did not resume work for six days, when, after working for about a week, he was compelled to cease all work because of total disability which continued until his death. About a year previous he had fallen, and had ceased work for sixteen weeks because of sickness. Prior to the accident he had been in reasonably good health, though there was conflicting evidence as to whether he was afflicted with syphilis at the time of the accident. It was held that the evidence was sufficient to show that death was due to an injury received in the course of the employment. *Indianapolis Abattoir Co. v. Coleman* (1917) 65 Ind. App. 369, 117 N. E. 502.

A workman was injured while engaged in his regular duties, by inhaling gases and fumes from molten brass, and later died. He was suffering from a disease at the time of the accident. The court, without setting out the evidence in detail, held it to be sufficient to show that the immediate cause of death was the inhalation of the noxious gas, and that if it accelerated a pre-existing latent disease so as to cause death, the injury must be regarded as the cause of the death. *General American Tank Car Corp. v. Weirick* (1921) — Ind. App. —, 133 N. E. 391.

A workman was employed in helping to unload boxes of steel from a car. A box slipped and fell on his toe. When he arrived home he was limping, and when he undressed it was

found that his toes were red and bruised, and that there was a redness on his leg about 4 or 5 inches above the knee. He complained more about the leg than he did about the toe. The workman who was with him at the time of the accident testified that, while trying to raise the box of steel high enough to permit the placing of a 2-inch roller under it, it slipped and grated the toe. The medical testimony was to the effect that the condition of the injured workman's leg resulted in thrombosis, or stoppage of the saphenous vein in the thigh by a blood clot, finally resulting in death; that the injury to the toe in no way contributed to it. It was held that, after excluding certain inadmissible hearsay evidence, tending to show that the injury was to the leg as well as the toe, the evidence remaining was not sufficient to sustain a finding that death was due to an injury received in the course of the employment. *Ginsberg v. Burroughs Adding Mach. Co.* (1918) 204 Mich. 130, 170 N. W. 15.

A carpenter during the course of his duties was required, at intervals, to assist in repairing a tank in which a preparation of chemicals was placed. The chemicals were not of a dangerous nature, and there was no risk of suffocation or poisoning from their use, or contact with them. Prior to the day of his sickness the workman had been in good health. On that day he was found sitting on a box, and complained of feeling ill. A physician was sent for, and when he arrived found the man in a semiconscious state, frothing at the mouth and stiffening up on one side. He was sent to a hospital, and soon after died. Several physicians who attended or saw him testified that they were unable to state the cause of death. It was held, over the contention that the evidence showed the death to be due to poisoning from fumes of chemicals used at the place of work, that a finding that the cause of death was doubtful, being wholly a matter of conjecture, was warranted by the evidence. *Murphy's Case* (1918) 230 Mass. 99, 119 N. E. 657.

A workman was employed as a driver in a coal mine. On leaving home in the morning he was apparently in good condition and sound health. At noon, when he came to eat dinner, he was limping. He continued to work for about two hours, when he quit and went home. He was limping when he reached home, and his leg was swollen. Several days later he was taken to a hospital, and an operation was performed on the leg halfway between the knee and hip, disclosing a diseased condition of the periosteum. The infection spread through the body, resulting in death about a month after the operation. There were no eyewitnesses of any accident, and statements made by the workman to others that he was hurt by a falling rock were excluded as hearsay. There was no evidence of any fall of rock in the mine. The medical testimony was to the effect that the condition of the workman was caused by an injury, or from either hereditary or acquired syphilis, but that they were unable to determine which. It was held that the evidence was not sufficient to sustain the burden on the claimant of proving that the diseased condition was attributable to an injury arising in the course of the employment. *Mayeur v. J. R. Crowe Coal & Min. Co.* (1920) 106 Kan. 123, 186 Pac. 1035.

A pin setter employed at a bowling alley was hit on the thigh by a flying pin which broke the thigh bone. He was taken to a hospital, and when discharged the bone was not entirely healed. About seven months later he went to another hospital, where he died in about two weeks. Two physicians testified that they could not say what was the cause of death, and one, who had taken an X-ray of the injured leg, testified that he did not think that death was due to the fracture. The claimant, the mother of the workman, testified that when she saw him at the hospital the day before his death, he had a large cut on his head about 4 inches long; that the nurse told her he fell when he tried to get up during the night. It was held that

there was no evidence to warrant a finding that the deceased died as a result of the injury he had sustained to his leg. *Perry v. Woodward Bowling Alley* (1917) 196 Mich. 742, 163 N. W. 52.

In October a workman sustained a fracture of the skull. After two months' hospital treatment he was discharged. Two days later he was taken with headache and vomiting, and later died. There was testimony

that these symptoms might have been caused by pressure on the brain from the fracture, or might have resulted from other causes. No physician expressed an opinion that death resulted from the fracture. It was held that a finding that the death was the result of an accident received in the employment was not sustained by the proof. *Reimers v. Proctor Pub. Co.* (1914) 85 N. J. L. 441, 89 Atl. 931, 4 N. C. G. A. 733. M. B.

MELKON SEMONIAN

v.

JAMES PANORAS.

Rhode Island Supreme Court—April 3, 1922.

(— R. I. —, 116 Atl. 417.)

Principal and agent — liability of agent for trespass.

1. A trespasser cannot relieve himself from liability by showing that a third person directed, ordered, or authorized him to do the illegal act complained of.

[See note on this question beginning on page 97.]

Trial — when verdict directed.

2. A verdict should not be directed for defendant if on any reasonable view of the evidence the plaintiff could recover.

[See 26 R. C. L. 1077.]

Evidence — materiality.

3. In an action for conversion of a machine a question is immaterial as to the purpose of putting a store in the name of witness, where it resulted from foreclosure of a mortgage which did not include the machine.

Replevin — by lessor — effect.

4. The bringing of an action of replevin by the lessor of a machine

against a third person who has taken possession of it is an election to recover possession discharged from the lease.

Trespass — right of lessor to maintain.

5. The lessor of a machine who has reasserted title to it may maintain trespass de bonis against a third person who wrongfully takes it away.

Appeal — conclusiveness of verdict.

6. A verdict supported by sufficient evidence and approved by the trial judge will not be disturbed on appeal.

[See 2 R. C. L. 193 et seq.; 1 R. C. L. Supp. 433.]

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties (Sumner, J.) made during the trial of an action brought to recover the value of a pop-corn machine, which resulted in a verdict for plaintiff and the denial of a new trial. *Overruled.*

The facts are stated in the opinion of the court.

Mr. Hugo A. Clason, for defendant:

An action of trespass de bonis asportatis cannot be maintained by an owner of personalty who had neither actual or constructive possession nor

right to immediate possession, the personalty not having been destroyed.

26 R. C. L. 954, 955; 38 Cyc. 1031, 1033; *Hunt v. Pratt*, 7 R. I. 283; 2 Greenl. Ev. 561; *Lunt v. Brown*, 13

Me. 236; *Clark v. Carlton*, 1 N. H. 110; *Keyes v. Howe*, 18 Vt. 411; *Bourne v. Merritt*, 22 Vt. 429; *Hurd v. Fleming*, 34 Vt. 169; *Putnam v. Wyley*, 8 Johns. 432, 5 Am. Dec. 346; *Boswell v. Carlisle*, 70 Ala. 244; *Roberts v. Wentworth*, 5 Cush. 192; *Wilson v. Haley Live Stock Co.* 153 U. S. 39, 38 L. ed. 627, 14 Sup. Ct. Rep. 768; *Temple v. Duran*, — Tex. Civ. App. —, 121 S. W. 253.

Messrs. Cooney & Cooney, for plaintiff:

Defendant cannot relieve himself from liability by showing that a third person directed, ordered, or authorized him to do the illegal act complained of.

26 R. C. L. 961, 962, and cases cited in note 12; *Woodbridge v. Conner*, 49 Me. 353, 77 Am. Dec. 263; 1 *Waterman, Trespass*, § 606; *McPheters v. Page*, 83 Me. 234, 23 Am. St. Rep. 772, 22 Atl. 101; *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541.

Sweeney, J., delivered the opinion of the court:

This is an action of trespass *de bonis asportatis* to recover the value of a pop-corn machine. After the trial in the superior court the jury returned a verdict for the plaintiff in the sum of \$627.87. The defendant's motion for a new trial was denied, and he has duly prosecuted his exceptions to this court.

It appears from the record that the writ was issued August 14, 1918, and was duly filed in court, with a declaration containing two counts, one alleging trespass *de bonis*, and the other trover and conversion of a pop-corn machine. The defendant filed a plea of the general issue, and a special plea stating that when he committed the alleged trespass it was by leave and license of the plaintiff first given and granted. The plaintiff filed a replication denying the averments of this special plea.

During the trial of the case and after the defendant had introduced the testimony of one witness, he was given permission by the court to withdraw his special plea of leave and license, against the objection of the plaintiff, and the trial proceeded under the plea of the general issue.

At the close of the testimony the

defendant made a motion for the direction of a verdict in his favor on the ground that the plaintiff did not have possession of the machine at the time of the trespass. The court denied this motion, and its denial is the defendant's first exception.

The testimony of the plaintiff tended to prove that he was the owner of the machine, with the right of immediate possession; that he had constructive possession of it while it was in the actual possession of his brother; and that against said brother's protest the defendant took possession of the machine and sent it to Agnes Semonian. The testimony for the defendant tended to prove that the plaintiff had sold the machine to said Agnes Semonian, and that the defendant, while acting as her agent and with the help of the plaintiff's said brother, sent the machine to her. Upon this conflicting evidence it would have been error for the court to have directed a verdict for the defendant, for it is settled that a verdict should not be directed for the defendant if, on any reasonable view of the testimony, the plaintiff can recover (*Baynes v. Billings*, 30 R. I. 53, 73 Atl. 625; *Reddington v. Getchell*, 40 R. I. 463, 101 Atl. 123); especially in this case, where the burden of proof was on the defendant to justify the taking (*Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998; *Shibley v. Gendron*, 25 R. I. 519, 57 Atl. 304). The defendant's exception to the denial of his motion for the direction of a verdict is overruled.

Another exception claimed by the defendant is to the exclusion of his question, "What was the purpose of putting the store in your name?" asked of his witness Agnes Semonian. It appeared in evidence that the witness was the purchaser of her husband's store at a mortgagee's sale of the same, and that the pop-corn machine was neither mortgaged nor included in the sale. This being so, the ques-

**Trial—when
verdict directed.**

**Evidence—
materiality.**

tion excluded was immaterial and irrelevant, and the exception is not tenable.

The defendant claims two exceptions to that portion of the charge relating to the legal effect of the lease of the machine by the plaintiff to his brother, wherein the trial justice said: "The lessee doesn't come in here and dispute the title; someone else does. And, where there is a taking of this kind, a case could have been brought either by the lessor—that is, by Melkon—or by his brother. Of course, both of them had a property in it. One had a general property, as it is called; one had a special property; and as long as those two don't disagree, it is proper for the lessor to bring this suit for him."

The defendant claims that it was error for the court to charge that the action could have been brought either by the lessor or the lessee. This claim of error is based upon the assumption that the lessee was in possession of the machine under a lease for a definite term when it was taken, August 7, 1917, by the defendant and sent to Agnes Semonian. This assumption is not justified by the evidence, for, although it appeared that the plaintiff had leased the machine to his brother, Baghdasar, February 21, 1917, for a definite term, it also appeared that in the following April the defendant took possession of it when he foreclosed the mortgage which he held upon Baghdasar's store. The lease required the lessee to take good care of the machine and not to underlet it, and gave the lessor the right to take possession of the same for breach of any condition. Soon after the defendant took the machine from the lessee, the plaintiff brought an action of replevin against the defendant to recover possession of it, and April 21, 1917, the defendant signed an affidavit in which he stated that he made no claim to the machine, and that the plaintiff might take judgment for it against him.

The bringing of the action of

replevin by the plaintiff was an election on his part to recover possession of the machine discharged from the lease as well as from any claim of the defendant. Baghdasar Semonian never had possession of it as lessee after this time. He appeared as a witness for the plaintiff and made no claim to the machine under the lease. The machine was left in the store of Agnes Semonian from April 27 until the following August, when it was taken therefrom by the defendant soon after he foreclosed his mortgage upon her store. She claimed that during the time the machine was in her store it belonged to her.

The vital question is whether the plaintiff (the former lessor) can maintain the action. As this court is of the opinion that he is entitled to maintain the action, that portion of the charge which was to the effect that the former lessee could also maintain the action was not prejudicial to the defendant, and the defendant's exceptions thereto are overruled.

The defendant claims that he should not be held liable as a trespasser for taking the machine because he acted only as agent for Agnes Semonian. This claim is unavailing, because a trespasser cannot relieve himself from liability by showing that a third person directed, ordered, or authorized him to do the illegal act complained of. *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541; 26 R. C. L. 962.

The defense to this action was that on April 27, 1917, the plaintiff gave Agnes Semonian a bill of sale of the machine. The defendant and two witnesses testified to this effect, and the plaintiff denied that he had sold her the machine. This issue was submitted to the jury, under proper instructions, and their verdict in favor of the plaintiff has been approved by the trial justice.

Replevin—by lessor—effect.

Trespass—right of lessor to maintain.

Principal and agent—liability of agent for trespass.

As there is sufficient evidence to support the verdict, and it does not appear that the trial justice was in error in approving it, under the established rule it will not be disturbed by this court.

All of the defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment for the plaintiff upon the verdict.

A petition for rehearing having been filed, the following Per Curiam response was handed down May 26, 1922 (— R. I. —, 117 Atl. 235);

After the opinion of this court was filed April 3, 1922, the defendant, by leave of court, filed a motion for reargument. This motion has

been considered and, as it does not contain any matter which was not fully considered and passed upon by the court before delivering its opinion, the motion for reargument is denied and dismissed.

NOTE.

Personal liability of a servant or agent to a third person for injuries caused by the performance or nonperformance of his duties to his employer is the subject of an extended annotation following E. H. EMERY & Co. v. AMERICAN REFRIGERATOR TRANSIT Co. post, 97. Specifically, as to the servant's or agent's liability to a third person for trespass, see subdivision III. b, of that note.

E. H. EMERY & COMPANY

v.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Appt.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY,
Garnishee, Appt.

Iowa Supreme Court — October 18, 1921.

(— Iowa, —, 184 N. W. 750.)

Principal and agent — liability of agent to third person for misfeasance.

1. A refrigerator company which contracts with a railroad company to supervise the loading of fruit into cars and ice the cars so as to preserve the fruit is liable to the shipper for negligent performance of its undertaking to such an extent that the fruit is injured in transit.

[See note on this question beginning on page 97.]

Appeal — interference with verdict — jury question.

2. The supreme court will not interfere with a verdict supported by sufficient evidence upon an issue proper for the jury to determine.

[See 2 R. C. L. 196, 197; 1 R. C. L. Supp. 433.]

Evidence — transcript of evidence taken at former trial.

3. Evidence taken at a trial of an action against a railroad company and a refrigerator company for injury to a shipment of fruit, which was dismissed without prejudice to the merits as between plaintiff and the refrigerator company, after holding

the railroad company not liable, is admissible in a subsequent action against the refrigerator company for the same cause, under a statute providing that any transcript of the official reporter, when material and competent, shall be admissible in evidence at any retrial of the case or proceeding in which the same was taken.

[See 10 R. C. L. 972; 2 R. C. L. Supp. 1124.]

— deposition taken for former trial.

4. A deposition taken for and used at the first trial of a cause may be read in evidence upon a second trial.

[See 8 R. C. L. 1140.]

APPEALS by defendant and garnishee from a judgment of the District Court for Wapello County (Anderson, J.) in favor of plaintiff in an action brought to recover damages sustained in the shipment of fruit, alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Faville, J.:

Action at law to recover damages claimed to have been sustained in the shipment of nineteen carloads of peaches. Judgment was rendered in behalf of the plaintiff, and the defendant appeals. The garnishee also appeals, and the plaintiff files a cross-appeal, conditioned on a reversal on defendant's appeal.

Messrs. Brammer, SeEVERS, & Hurlburt, for appellant Transit Company:

There was no duty imposed by law in favor of the plaintiff as against the defendant,—hence no tort.

National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Boston Ins. Co. v. Chicago, R. I. & P. R. Co. 118 Iowa, 423, 59 L.R.A. 796, 92 N. W. 88; Dillon v. Iowa C. R. Co. 118 Iowa, 645, 92 N. W. 855; Galbraith v. Illinois Steel Co. 2 L.R.A.(N.S.) 799, 66 C. C. A. 359, 133 Fed. 485; Daugherty v. Herzog, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710; Ellis v. Interstate Commerce Commission, 237 U. S. 434, 59 L. ed. 1036, 35 Sup. Ct. Rep. 645; Cramblitt v. Percival-Porter Co. 176 Iowa, 733, L.R.A.1917C, 77, 158 N. W. 541; Cooley, Torts, 2d ed. 140.

Plaintiff's misfeasance theory is not tenable in the absence of an existing duty to it. This is particularly true in the absence of active negligence or trespass. It does not appear that there was any breach of the duty owing to defendant's principal, the Missouri, Kansas & Texas Railway Company.

Williams v. Dean, 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931; Cramblitt v. Percival-Porter Co. 176 Iowa, 733, L.R.A.1917C, 77, 158 N. W. 541; Dean v. Brock, 11 Ind. App. 507, 38 N. E. 829.

The defendant, in its capacity of intermediate agent, is not liable to anyone other than its principal for the performance of its contract.

Williams v. Dean, *supra*; Stone v. Cartwright, 6 T. R. 411, 101 Eng. Reprint, 622, 3 Revised Rep. 220, 9 Mor. Min. Rep. 672; Bacheller v. Pinkham,

68 Me. 253; Bianki v. Greater American Exposition Co. 3 Neb. (Unof.) 656, 92 N. W. 615; Brown v. Lent, 20 Vt. 529.

Even if the work of loading were done in a negligent manner, the completion and acceptance thereof by the principal absolves the defendant from liability to the plaintiff.

First Presby. Congregation v. Smith, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Thornton v. Dow, 60 Wash. 622, 32 L.R.A.(N.S.) 968, 111 Pac. 899.

There is no liability on the part of the defendant in the absence of a showing as to what part of the loss its alleged acts occasioned.

Rice v. Whitley, 115 Iowa, 748, 87 N. W. 694; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191; Burruss v. Hines, 94 Va. 413, 26 S. E. 875; Becker v. Janinski, 15 N. Y. Supp. 675.

It was error to admit in evidence certain exhibits, and to permit plaintiff to read therefrom.

Walker v. Walker, 117 Iowa, 609, 91 N. W. 908; Re Wiltsey, 122 Iowa, 423, 98 N. W. 294; Spiers v. Hendershott, 142 Iowa, 446, 120 N. W. 1058.

It was also error to permit plaintiff to read in evidence the depositions of T. M. Boles, the same having been taken in different cases.

1 Deemer, Pl. & Pr. § 500, p. 887; Searle v. Richardson, 67 Iowa, 170, 25 N. W. 113; Borland v. Chicago, M. & St. P. R. Co. 78 Iowa, 94, 42 N. W. 590.

Messrs. Fred W. Lehmann, Jr., and McNett & McNett also for appellant.

Mr. W. D. Eaton for appellant garnishee.

Mr. Chester W. Whitmore, for appellee:

The doctrine of misfeasance governs.

Williams v. Dean, 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931; Carter v. Sioux City Service Co. 160 Iowa, 78, 141 N. W. 26; Hough v. Illinois C. R. Co. 169 Iowa, 225, 149 N. W. 885; Mechem, Agency, 2d ed. 1914, §§ 1451 et seq.; 2 Shearm. & Redf. Neg. 6th ed. § 244; 8 Thomp. Neg. 1901 ed. §§ 5771, 5776; Wharton, Neg. 2d ed. § 535; Huffcut, Agency, 2d ed. § 290;

Clark & S. Agency, 1905 ed. § 595; Jaggard, Torts, 1895 ed. § 98; R. C. L. Misfeasance; Illinois C. R. Co. v. Foulks, 191 Ill. 57, 60 N. E. 890; Ellis v. McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; Nashville, C. & St. L. R. Co. v. Price, 125 Tenn. 646, 148 S. W. 219; Howe v. Northern P. R. Co. 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Ward v. Pullman Car Corp. 131 Ky. 142, 25 L.R.A.(N.S.) 343, 114 S. W. 754; Baird v. Shipman, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; Lough v. John Davis & Co. 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491, 17 Am. Neg. Rep. 146; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Bell v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741; Hagerty v. Montana Ore Purchasing Co. (Hagerty v. Wilson) 38 Mont. 69, 25 L.R.A.(N.S.) 356, 98 Pac. 643; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Consolidated Ice Mach. Co. v. Keifer, Admr. 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799.

The testimony of Boles as to loading was competent.

Colsch v. Chicago, M. & St. P. R. Co. 171 Iowa, 78, 153 N. W. 327; Betts v. Chicago, R. I. & P. R. Co. 92 Iowa, 343, 26 L.R.A. 248, 54 Am. St. Rep. 558, 60 N. W. 623.

The transcripts and depositions were competent.

Lanza v. Le Grand Quarry Co. 124 Iowa, 659, 100 N. W. 488; Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 618; Re Wiltsey, 135 Iowa, 43, 109 N. W. 776; Wigmore, Ev. § 1388; 8 R. C. L. Depositions; 18 C. J. 750; Lyon v. Rhode Island Co. L.R.A.1916A, 990, note; 1 Deemer, Pl. & Pr. (Iowa) § 500, p. 887.

The fact that the fifty-nine cars from orchard forty-two arrived in damaged condition is competent evidence.

Heilman v. Chicago & N. W. R. Co. 167 Iowa, 313, 149 N. W. 436.

The Refrigerator Company assumed the duties of the "Katy" system as to refrigeration, and is liable for negligent performance of such work.

C. C. Taft Co. v. American Exp. Co. 133 Iowa, 522, 10 L.R.A.(N.S.) 614; 119 Am. St. Rep. 642, 110 N. W. 897;

Beard & Sons v. Illinois C. R. Co. 79 Iowa, 518, 7 L.R.A. 280, 18 Am. St. Rep. 381, 44 N. W. 800; Blessing v. Chicago, R. I. & P. R. Co. 168 Iowa, 379, 150 N. W. 661; Lamb v. Chicago, M. & St. P. R. Co. 101 Wis. 138, 76 N. W. 1123; Brennisen v. Pennsylvania R. Co. 100 Minn. 102, 110 N. W. 362, 10 Ann. Cas. 169; B. Presley Co. v. Illinois C. R. Co. 120 Minn. 295, 139 N. W. 609; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 Atl. 193; Orem Fruit & Produce Co. v. Northern C. R. Co. 106 Md. 1, 124 Am. St. Rep. 462, 66 Atl. 436, 111 Md. 356, 73 Atl. 571; Gibson v. Little Rock & H. S. W. R. Co. 93 Ark. 439, 124 S. W. 1033; St. Louis, I. M. & S. R. Co. v. Lasser Grain Co. 120 Ark. 119, 179 S. W. 189, 12 N. C. A. 1071; Fremont Canning Co. v. Pere Marquette R. Co. 180 Mich. 283, 146 N. W. 678; Johnson v. Toledo, S. & M. R. Co. 133 Mich. 596, 103 Am. St. Rep. 464, 95 N. W. 724; Dean v. Toledo, St. L. & W. R. Co. 148 Mo. App. 428, 128 S. W. 10; International & G. N. R. Co. v. Woldert Grocer Co. — Tex. Civ. App. —, 175 S. W. 613.

Faville, J., delivered the opinion of the court:

The appellee is a copartnership engaged in conducting a wholesale fruit business in the city of Ottumwa. The appellant is a corporation engaged in owning and operating certain refrigerator cars, which said cars are transported on various lines of railway throughout the country. The Missouri, Kansas, & Texas Railway Company is a corporation operating a line of railway in the state of Texas and other states.

In the year 1912 the appellee entered into a contract with one Gidcumb, a fruit grower at Chatterton, Texas, to purchase from the said Gidcumb his entire output of peaches. The Gidcumb orchard is situated on the lines of the Missouri, Kansas, & Texas Railway, about a mile from a station known as "Orchard Park." The record discloses that early in June, 1912, the appellee wrote to officers of the appellant regarding the securing of equipment for the transportation of fruit, and received a reply that appellant would furnish the neces-

sary refrigerator equipment for handling the peach shipment, and that orders for cars should be placed by the appellee with the agent of the Missouri, Kansas, & Texas Railway at Chatterton, Texas, and also stating that the cars would be iced at Shreveport and re-iced at Chatterton. The appellee also received a letter from officials of the Missouri, Kansas, & Texas Railway Company, advising appellee that said railway had made arrangements with the appellant to furnish cars for the handling of all fruit and vegetables moving under refrigeration. In pursuance of this arrangement, the appellee ordered cars from the said Railway Company, as required for the shipment of the peaches in question from Chatterton, Texas. Cars were delivered and loaded with peaches and shipped to the appellee. This action was brought against the appellant, charging it with negligence in the manner in which it loaded the peaches in the said refrigerator cars, and also in the failure to properly ice said cars.

The record shows that the Missouri, Kansas, & Texas Railway Company had entered into an agreement with the appellant regarding the furnishing of refrigerator cars by the appellant, and the transportation of the same by the said Railway Company. In said agreement the appellant herein is referred to as the "Refrigerator Company" and the Missouri, Kansas, & Texas Railway Company is referred to as the "Katy Company," and the said parties are so designated throughout this case, and will be so referred to by us. By said agreement, appellant herein agreed to handle the fruit, melon, and vegetable shipments originating on the line of the Katy Company. The agreement provided that the Katy Company should pay to the Refrigerator Company 12½ per cent of the Katy freight revenue, exclusive of switching, bridge tolls, and other terminal charges. The agreement provided that the Refrigerator

Company should furnish to the Katy Company sufficient suitable cars, up to 600 in number, and as many more as it was able to furnish, for transportation of fruit as needed. The contract provided that the Refrigerator Company (appellant) should ice cars containing perishable commodities in shipments originating on the lines of the Katy Company. Also by its terms the Refrigerator Company undertook the responsibility of loading all such cars, and was allowed a supervision charge therefor.

This cause involves a shipment of nineteen cars. The appellee claims that the peaches in said cars were damaged because the appellant, as agent of the said Katy Company under said contract with it, undertook to load, brace, stow, and ice said cars, and did the same in such a careless, negligent, and unskilful manner that a large amount of the peaches was lost and destroyed, and appellee was put to additional expense to care for and market the remainder. The appellee's cause of action was pleaded in six different counts, or on six different "theories." The only one, however, submitted to the jury, was upon the theory of the alleged misfeasance of the appellant as agent of the Katy Company under said contract; the particular misfeasance charged being in regard to the manner of loading and icing the cars in question.

I. It is to be noticed at the outset that appellee's action is not brought against the Railway Company as initial carrier, nor is recovery sought under and by virtue of the so-called "Carmack Amendment," or otherwise as against the shipper. This action is against the Refrigerator Company to recover damages claimed to have been suffered by the appellee because of the negligent and careless manner in which the appellant, Refrigerator Company, performed its work of loading and icing the cars in question under its contract with the carrier, the

Katy Company. There is no contention that there was any privity of contract between the appellant and the appellee. The action sounds in tort, if it can be maintained at all.

The question for our determination at this point is whether or not the appellee can maintain an action for damages against the appellant, Refrigerator Company, as the agent of the Railway Company, for its negligence in performing its contract with the latter. It is to be observed that appellant was not a common carrier, under the circumstances disclosed in this case, and is not liable to appellee, if at all, in any such capacity. *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 59 L. ed. 1036, 35 Sup. Ct. Rep. 645.

Appellee's contract was with the initial carrier, the Katy Company. The duty of the latter company to appellee was to carry the shipment safely and with due regard to its perishable character. *Beard v. Illinois C. R. Co.* 79 Iowa, 518, 7 L.R.A. 280, 18 Am. St. Rep. 381, 44 N. W. 800.

Under the contract between the Refrigerator Company (appellant) and the Katy Company, the former became the agent of the latter company, and undertook, as its agent, to perform certain things required of said Railway Company under the contract of shipment between it and appellee.

The contention of the appellant is that the appellee has no cause of action whatever against the appellant, and that the trial court should have directed a verdict in appellant's behalf. If the question were one between the appellee and the Refrigerator Company, growing out of a contract between them, or were one between the Refrigerator Company and the Railway Company whereby the latter was suing for failure to properly perform the contract between them, we would have an entirely different question than the one presented here. Assuming that there was sufficient evidence to carry the case to the jury on the question of the negli-

gent manner in which the cars in question were loaded and iced, the pertinent question still remains: Can the appellee recover from the Refrigerator Company for such negligence?

The question of the liability of an agent to a third person for negligence has been frequently before the courts, and there is much confusion and lack of uniformity in the authorities. Cases have frequently arisen where the duty which the agent owed to the public, rather than to an individual, was involved, and liability determined because of such duty. In a general way it may be said that an agent is liable to third parties for his own tortious acts, the same as any other person. The fact of the agency neither increases nor diminishes such liability. *Bannigan v. Woodbury*, 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531; *Humphreys Tunnel & Min. Co. v. Frank*, 46 Colo. 524, 105 Pac. 1093; *Berghoff v. McDonald*, 87 Ind. 549; 2 C. J. 824, § 498.

In determining the liability of an agent to third parties for tortious acts directly connected with and growing out of the agency, the courts have recognized a distinction between malfeasance, misfeasance, and nonfeasance, but the line of demarcation has frequently been lost sight of, and reconciliation of the authorities is utterly impossible.

In *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741, the supreme court of Massachusetts says: "Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all."

In *Williams v. Dean*, 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931, we said: "Nonfeasance is the nonperformance of some act which ought to be performed, and misfeasance is the performance of an act in an improper manner, whereby someone receives an injury."

Applying these definitions to the

instant case, we can eliminate at once the question of "malfeasance," for there was here no doing of an act which ought not to have been done at all.

As early as 1701, in *Lane v. Cotton*, 1 *Ld. Raym.* 646, 91 *Eng. Reprint*, 1332, a distinction was recognized between the liability of an agent to third parties for nonfeasance and liability for misfeasance. The distinction was made by Chief Justice Holt in a dissenting opinion in that case, but it has been made the basis of a differentiation which has been preserved with more or less consistency by text-writers and courts since that time. Some of the later cases, however, have apparently eliminated the distinction entirely. The courts, recognizing this distinction, hold as a general rule that the agent is liable to his principal for nonfeasance,—that is, for an entire failure to perform his contract with his principal,—but that for such nonfeasance a third party cannot recover from the agent. This line of authorities also holds that where the agent has undertaken the performance of his contract, and performs the same in a careless and negligent manner, and injury results to a third party, the latter may recover from the agent because of his misfeasance. To state the proposition in another way: The agent is liable to his principal for nonfeasance, and may be liable to third parties for misfeasance. As bearing on these propositions, see *Levi L. Brown Paper Co. v. Dean*, 123 *Mass.* 267; *Murray v. Usher*, 117 *N. Y.* 542, 23 *N. E.* 564; *Greenberg v. Whitcomb Lumber Co.* 90 *Wis.* 225, 28 *L.R.A.* 439, 48 *Am. St. Rep.* 911, 63 *N. W.* 93; 2 *C. J.* 824, § 499.

Williams v. Dean, *supra*, was an action wherein suit was brought against the officers of an agricultural society, charging them with negligence in the erection of a wire screen on the grounds of the society. The plaintiff, a spectator at a ball game, was injured by a ball that was thrown or batted through the

screen. In considering the case, the court, speaking by Mr. Justice Deemer, said: "The action sounds in tort, and is manifestly for trespass, or perhaps trespass on the case. Defendants were, of course, agents of the society. They were not the society itself, but were acting purely in a representative character. If liable at all, it is because of what they did. If they were guilty of some misfeasance or trespass, as distinguished from mere nonfeasance, then they were and are liable, and they cannot shield themselves by saying that they were acting as agents for the society. And in this connection it is entirely immaterial whether their acts were ultra vires or within the scope of their authority. No one is permitted to say in an action against him for trespass or for misfeasance that he was acting as an agent in doing the matters complained of, and is therefore not liable. Nor is his liability to be measured by the extent of the authority conferred upon him. On the other hand, no agent is liable to a stranger simply for nonfeasance; that is to say, for failure to do some act which his principal commits to his care. He may be liable for breach of contract to his principal, but not to a stranger for a tort. These views are stated with great force and perspicuity in *Murray v. Usher*, *supra*, and *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 115 *Ky.* 858, 74 *S. W.* 1061. That the same rule applies to officers and directors of corporations, see 3 *Thomp. Corp.* §§ 4090, 4091, 4096, et seq.; *Bruff v. Mali*, 36 *N. Y.* 200, 6 *Mor. Min. Rep.* 574; *Salmon v. Richardson*, 30 *Conn.* 360, 79 *Am. Dec.* 255. Nonfeasance is the non-performance of some act which ought to be performed, and misfeasance is the performance of an act in an improper manner, whereby someone receives an injury. *Illinois C. R. Co. v. Foulks*, 191 *Ill.* 57, 60 *N. E.* 890. So that, as defendants may only be held liable for misfeasance, and can only be held liable for the negligent performance

of some act which they undertook to perform, it must be shown, before they can be held liable, that such ones as are sought to be charged did something in a negligent or improper manner."

In the instant case there is no question of nonfeasance before us, because it is conceded on all hands that appellant undertook the performance of its contract with the Railway Company.

Is *Williams v. Dean* correct in principle, or should it be overruled? Can appellant be held liable to the appellee for misfeasance in performing its contract with its principal?

In *Murray v. Usher*, *supra*, cited by us in *Williams v. Dean*, it is said: "But the agent or servant is himself liable, as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and nonfeasance of the servant, causing injury to third persons, is not, in general, at least, a ground for a civil action against the servant in their favor."

In *Baird v. Shipman*, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384, it is said: "It is not the agent's contract with his principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor

diminished by his entrance upon the duties of his agency, nor can its breach be excused by the plea that his principal is chargeable."

In this case the agent of the owner had control and management of the premises, and was held liable for failure to make repairs resulting in injury to the third party.

In *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503, the plaintiff was a driver of a wagon, and his duties took him to a certain wharf. He stepped into a hole and was injured. The sugar company owned the wharf, and the other defendants were its general agents, and had the management of its business and charge of the wharf. The court said:

"The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

"It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties they are equally responsible with their principals."

In *Horner v. Lawrence*, 37 N. J. L. 46, an agent or employee hauling wood for his employer failed to close a certain fence, in consequence of which hogs escaped from a pasture to a railroad and were killed. It was held that the servant was liable to the owner of the hogs. The court said: "It was his own misfeasance, for which, as servant, he cannot, in any respect, claim exemption against the party injured."

In *Lottman v. Barnett*, 62 Mo. 159, the architect of a building, who superintended its construction, failed to place sufficient girders or columns in the building, and injury resulted to a third person. The court said: "For negligence he is

responsible, not merely to his employer, but to persons injured by reason of his acts."

In *Bickford v. Richards*, 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014, the parties negligently injured buildings in removing them, and were held liable, the court saying: "Whether servants or contractors, they were liable for the damage caused to the plaintiff's property by their tortious acts or misfeasance."

In *Harriman v. Stowe*, 57 Mo. 93, the defendant, as agent for his wife, made a trapdoor on her premises. A third party was injured. The court said: "The present case seems to be one, not of mere nonfeasance or omission, but of strict negligence or wrong."

Lough v. John Davis & Co. 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491, 17 Am. Neg. Rep. 146, was an action against an agent who was authorized to rent and repair a tenement house. The claim was made that the agent permitted the house to become unsafe for want of repairs, which caused the injury complained of. There is a very full discussion and review of the authorities. The court said: "There can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility, there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such

practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages."

It was held that a cause of action was properly pleaded.

In *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113, plaintiff was injured on a defective sidewalk. The question in the case was whether the defendant, as agent of the owner of the premises, could be held liable. The court said: "Irrespective of his relation to his principal, he was bound while doing the work to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require."

In *Stiewel v. Borman*, 63 Ark. 39, 37 S. W. 406, plaintiff sued for injuries in a coal mine by reason of negligence of an agent in allowing gas to accumulate. It was held that the agent was liable. The court said: "The liability of the agent rests upon his failure to discharge a duty as in misfeasance. Having complete control and management of the business, with the power and authority to do what is reasonably necessary to protect third persons against injuries resulting from omissions or commissions in the conduct of the same, he stands in the relation to others which his principal occupies. He is under obligation to so use that which he controls as not to injure another. For a failure to discharge this duty he is liable in damages to the party injured. This is a reasonable rule."

To like effect are *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Ward v. Pullman Car Corp.* 131 Ky. 142, 25 L.R.A.(N.S.) 343,

114 S. W. 754; and *Tippecanoe Loan & T. Co. v. Jester*, 180 Ind. 357, L.R.A.1915E, 721, 101 N. E. 915.

Some of the cases go farther, and indicate that the agent is liable for nonfeasance as well as misfeasance.

In *Ellis v. Southern R. Co.* 72 S. C. 465, 2 L.R.A.(N.S.) 378, 52 S. E. 228, 19 Am. Neg. Rep. 541, the court reviewed the authorities somewhat and held: "The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance."

There is another line of cases a little nearer to the exact proposition involved in this case, and this is the class of cases where an agent or servant undertakes to perform a particular work for the principal or master, and has full charge and control thereof. These cases hold the agent is liable for an act of negligence in said work resulting in injury to a third person, whether it be an act of omission or commission. In such cases an omission of duty imposed upon him is deemed to be a misfeasance.

In *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062, the agent undertook the management of a building for his principal, and entered into the performance of the work. It was held that he was liable for injuries to a third party, caused by his misfeasance.

In *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088, an agent who had the exclusive control and supervision of premises used for tenement purposes was held personally liable for injury received by a tenant who fell into a hole in the passageway.

Likewise, in *Bannigan v. Woodbury*, 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531, an agent in full charge and control of a building was held liable for injuries caused by the fall of a pane of glass,

which was negligently allowed to remain in an unsafe condition.

In *Atkins v. Field*, 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375, the court said: "If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

A leading case announcing the contrary rule is *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456. In this action a child was injured by the falling of a gallery of a house. The agents of the owner, who were bound to keep the building in good order, were sued for the injury. The court said:

"Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence in respect to duties imposed by law upon him in common with all other men.

"An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible."

In *Feltus v. Swan*, 62 Miss. 415,

an agent was sued for negligence in failing to open a drain, because of which lands adjacent to the plantation of which he had charge were injured. It was held that there was no liability, although it was charged that the act was malicious.

See also *Galbraith v. Illinois Steel Co.* 2 L.R.A. (N.S.) 799, 66 C. C. A. 359, 133 Fed. 485; *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829.

We are confident that the rule announced by us in *Williams v. Dean* is sustained by the great weight of authority, and is sound in principle. We therefore hold that for misfeasance in the performance of its contract with its principal, which misfeasance caused injury to appellee's property, the latter had a

right of action in tort against appellant. *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 118 Iowa. 423, 59 L.R.A. 796, 92 N. W. 88, *Dillon v. Iowa C. R. Co.* 118 Iowa, 645, 92 N. W. 855, and *Cramblitt v. Percival-Porter Co.* 176 Iowa, 733, L.R.A.1917C, 77, 158 N. W. 541, cited by appellant, are not inconsistent with this holding.

II. Appellant contends that the rule which exonerates an intermediate servant where an injury has been committed by a subordinate one under circumstances which make the immediate actor and the ultimate principal liable should be applied. See *Williams v. Dean*, 134 Iowa, 216, 11 L.R.A. (N.S.) 410, 111 N. W. 931. We fail to see how the rule contended for has any application to the facts of the instant case. Appellant, under its contract, undertook the work of loading and icing the car, and had full control as to how the work should be done.

III. It is contended that the Railway Company accepted the work of loading and icing, and that this absolves the appellant from liability. There is no evidence from which the jury could have found that the Railway Company knowingly accepted and approved the work of the

appellant in loading and icing the cars even if the rule contended for should be approved.

IV. It is contended by appellant that the evidence does not disclose that the alleged acts of negligence of appellant caused the damages complained of. It is unnecessary to review the evidence on this question. It was fairly before the jury and properly submitted to it. There was sufficient evidence to go to the jury to support the claim of improper loading and icing, and that the same resulted in damages to appellee. It was essentially a jury question, and, finding sufficient evidence in the record to sustain the verdict, we cannot interfere.

Appeal—interference with verdict—jury question.

V. It is contended the appellee was guilty of contributory negligence, and, for that reason, cannot recover. This was a question for the determination of the jury, and was properly submitted by the court.

VI. Errors are urged in the admission of evidence. The first error urged on this ground that demands our attention is with respect to a transcript of testimony which was admitted under § 245a of the Supplement of 1913. From the record it appears that the appellee herein originally instituted suit in Wapello county against the appellant and the Chicago, Milwaukee, & St. Paul Railway Company, on February 13, 1914. Said action involved the identical shipment and cars under consideration in this action. The cause was submitted to the district court of Wapello county and tried without the intervention of a jury in October, 1915. Subsequently the court entered a finding that the Railway Company could not be held liable because of failure on the part of the appellee to comply with the requirements of the bill of lading in respect to the giving of notices, but that the Refrigerator Company was liable. Upon the motion of the appellant herein, under § 3502 of the Code, the action was dismissed, the

order reciting: "Such dismissal is without prejudice to the merits of the action as between plaintiff and said defendant."

Immediately thereafter the present suit was instituted, embracing the identical matters included in the previous suit. This action was aided by attachment. Upon the trial of this cause, the appellee read in evidence from the transcript of testimony of certain witnesses given upon the former trial before the district court. Was this evidence properly admissible under the provisions of § 245a of the Supplement to the Code of 1913? The section of the statute provides that any transcript of an official court reporter, "when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken."

We do not think that the legislature intended to use the word "case" in the statute in a narrow and strictly legal and technical sense. The evident purpose was to obviate the necessity of producing witnesses who had once been before the court and had testified respecting the matter in controversy between the parties. Under the provisions of the statute itself, if we should now reverse the case and send it back for a new trial, the transcript of the evidence on the last trial, which would include the transcript of the evidence of the first trial, would be admissible. Such an incongruous condition was never contemplated by the legislature. The proper course to pursue would have been to serve notice of intention to use the transcript, or obtain an order of court so to do, or secure a stipulation providing for its use. The situation here presented can and should be easily obviated.

In *Re Wiltsey*, 135 Iowa, 430, 109 N. W. 776, we held, under a somewhat similar situation, that where no new issues were involved and the evidence taken on the former trial was in respect to the very matters determined in the subsequent

trial, the transcript was properly admitted in evidence.

Nothing in *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058, is inconsistent with this holding. In that case it affirmatively appeared that the transcript was offered in a case which was not a retrial of a former case, but that the actions were entirely distinct, and involved two separate and distinct wills, and that the action in which the evidence contained in the transcript was received had gone to final judgment. It is to be observed that the original case herein did not go to final judgment. It was dismissed as to the appellant under the provisions of § 3502 of the Code. The order of court recited: "Such dismissal is without prejudice to the merits of the action as between plaintiff and said defendant. The court finds and adjudges that the failure of plaintiff to prevail herein as against the said defendant is not because of any negligence in its prosecution."

Under the record, we think this transcript was admissible under this section of the statute. The parties were the same; the issues were the same; it was, to all intents and purposes, a retrial of the identical "case" in which the evidence in the transcript had been taken.

Evidence—
transcript of
evidence taken
at former trial.

In this connection, error is also predicated upon the action of the lower court in permitting the appellee to offer in evidence the deposition of a witness which was taken at the former trial above referred to. No question is raised that the deposition was not properly taken and filed upon the previous trial. It also appears that the deposition was taken upon notice, and that the appellant herein appeared and cross-examined the witness. It is urged, however, that the deposition was not duly filed in the instant case, nor was leave obtained to use it before the trial was begun. We are cited to *Searle v. Richardson*, 67 Iowa, 170, 25 N. W. 113. Therein

we said: "But we are very clear that, under our practice, a party should not be permitted to use depositions on the trial of one cause which have been taken in another, without having filed them in the cause in which he proposes to use them, or obtaining leave before the commencement of the trial to so use them."

The rule so declared is undoubtedly correct, and a party should not be allowed to transport depositions from one cause to another without duly filing the same in the cause in which he proposes to use them, or obtaining leave of court to so use them, before the commencement of the trial. The reason for this rule is obvious. The evidence of a witness, taken in one cause, may be in a large measure material in some other cause between the same parties, but a portion of the evidence may be material in one case and wholly inadmissible in the other. But the rule can have no application where the deposition is used in a retrial of the same identical case, with the same parties and the same issues. Furthermore, it appears that the deposition now in question was offered in evidence in the former trial of the case, and the shorthand notes of the official court

reporter so show. Certainly no prejudice could result to the appellant by the reading of the original deposition, rather than ^{—deposition taken for former trial.} by having the shorthand reporter read the same from his shorthand notes to the jury. We think the court did not err upon this record in admitting the deposition in evidence.

VII. Error is predicated upon the giving of certain instructions to the jury and the refusal to give instructions that were requested. The matters complained of largely include the same subject-matter heretofore discussed in this opinion, and it is unnecessary to discuss the matter further. We find no error in the instructions that were given or in the refusal to give the instructions that were requested by the appellant. The case seems to have been fairly submitted to the jury, and the judgment appealed from must be affirmed.

In view of this conclusion, no further consideration need be given to the appellee's cross appeal.

Evans, Ch. J., and Stevens, Weaver, and Arthur, JJ., concur.

Petition for rehearing denied February 18, 1922.

ANNOTATION.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer.

I. Scope, 98.

II. Introductory:

- a. General rule, 99.
- b. Lane v. Cotton, 101.
- c. Judge Story's rule, 103.
- d. Attempted explanation of rule, 104.
- e. Breach of servant's duty to person injured, 107.

III. Malfeasance:

- a. In general, 108.
- b. Trespass, 109.
- c. Assault, 111.
- d. Fraud and extortion, 112.
- e. Libel, 116.

20 A.L.R.—7.

III.—continued.

- f. Obstruction of ancient lights, 116.
- g. Abuse of legal process, 116.
- h. Infringement of patent, 118.
- i. Meddling with decedents' estates, 119.
- j. Conversion:
 1. In general, 120.
 2. Property turned over to principal, 123.
 3. Sale and proceeds turned over, 127.
 4. Assisting conversion, 128.
 5. Mortgaged property, 128.
 6. Refusal to deliver property in agent's possession, 129.

III. j.—continued.

- 7. Form of action, 131.
- 8. Liability of broker or sales agent:
 - a. In general, 132.
 - b. Stolen property, 134.
- 9. Auctioneers:
 - a. In general, 135.
 - b. Stolen and mortgaged property, 137.
 - k. Forcible entry and detainer, 138.
- IV. Misfeasance:
 - a. In general, 139.
 - b. Driving car or team against traveler, 142.
 - c. Agents of carriers, 144.

I. Scope.

This annotation will be confined strictly to the question of liability of the agent or servant of an individual or private corporation for injuries which occur to a third person through the performance or nonperformance of duties which he owes to his principal. There are several classes of cases which may, on their face, seem analogous to this question, and which, to some extent, may rest upon the general rules which govern the cases included in this note, but in which in fact other elements enter, and which are therefore excluded from consideration here. There are many cases in which the question has been whether or not the master and servant could be sued jointly for an injury caused by the act of the agent. If the joint liability is upheld, of course the court must assume that the servant is liable; but unless there is some discussion of the question of his liability, cases of that kind are not included.

So, cases are omitted which involve the question of the liability of an attorney at law for injuries to third persons. While such persons are, in a sense, agents, they are also officers of the court, and there may be considerations of public policy which would make a different rule applicable to them from that applicable to ordinary servants and agents. So, the general question of the liability of public officers will be omitted. Their liability depends so much upon the question of public policy that any ruling with regard to them might throw little or no light on the general question of liability of private servants or agents.

IV.—continued.

- d. Negligent fires, 145.
- e. Injury to fellow servants:
 - 1. In general, 146.
 - 2. Acts of commission, 149.
 - 3. Acts of omission, 152.
- V. Nonfeasance:
 - a. Absence of duty to third person, 155.
 - b. Cases denying liability for nonfeasance, 158.
 - c. Cases recognizing liability for nonfeasance:
 - 1. In general, 165.
 - 2. Management of property, 171.

ity of private servants or agents. This will apply also to soldiers, although it may be suggested that a distinction has been made between officers and private soldiers, there being no liability on the latter for obeying orders, while there may be on the part of the former. Thus it has been held that a common soldier is not personally liable for committing a trespass under command of his officer. *Trammell v. Bassett* (1866) 24 Ark. 499.

But where an Army officer issued an order for seizure of property which was beyond his authority, the officer executing the order, by reason of which the property was lost to the owner, was held liable for the value thereof. The order given was an order to do an illegal act,—to commit a trespass upon the property of another,—and could afford no justification to the person by whom it was executed. "It can never be maintained that a military officer can justify himself for doing an unlawful act by producing an order of his superior." *Mitchell v. Harmony* (1851) 13 How. (U. S.) 115, 14 L. ed. 75.

Cases involving liability of the officers of corporations will also be omitted. Such officers representing, as they do, the corporation, and the corporation acting through them, a distinct ground of liability on their part may be found to exist which might not be the case with the mere agents and servants of such corporations or of individuals.

Cases involving the liability of contractors who have finished their contracts and turned the jobs over to the

owners, who have accepted them, are omitted. These cases include servants who are employed upon work which afterwards causes injury, of which the following is an illustration:

"A contractor or hired man employed by and acting under direction of another person in digging a tunnel through an embankment, with which he has nothing further to do, is not liable for mere consequential injuries to third persons, as to whom he committed no direct trespass, where the injury results more than a year afterwards from water flowing through such tunnel, because it was the maintenance, and not the digging, of the tunnel, that caused the injury." *Chapel v. Smith* (1890) 80 Mich. 100, 45 N. W. 69.

So, also, are omitted cases involving the question of liability of subcontractors to the property owner. The question of liability of servants and agents for contempt of court in disobeying orders addressed to their employers is not considered.

The liability of agencies for collecting negotiable paper depending in part on the law merchant, and in part on general custom, are omitted. Moreover, there is a very numerous class of cases in which the courts have, on the facts, held the servant or agent not liable because no trespass, assault, conversion, or other wrong which was the basis of the action was established. The mere fact that no wrong was found to exist throws little light on the further question whether or not there would be a liability in case it did exist. Of this class reference is made to *Crandall v. Loomis* (1884) 56 Vt. 664.

The cases to be included are those for which the master is answerable because the act done was within the terms of his contract with the servant; and therefore, cases which have held the servant liable because he was acting outside the scope of his employment are not included.

As illustrative of this class, attention may be called to *Wright v. Intermountain Motor Car Co.* (1918) 53 Utah, 176, 177 Pac. 237, where it was held that one employed to demon-

strate automobiles may be held personally liable if he takes a car after business hours, to accommodate a customer, and permits the customer to drive it, which results in the injury of a person on the highway.

So, a servant acts outside the scope of his employment where he takes his master's horse for his own purpose, and so insufficiently fastens it when leaving it that it breaks away, and causes the injury for which the suit is brought. *Way v. Powers* (1884) 57 Vt. 135.

The excessive or ultra vires acts of the agent for which he, and not the master, is liable, are discussed by Brown and Comstock, J.J., in *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455.

II. Introductory.

a. General rule.

An agent who violates a duty which he owes to a third person is answerable to such person for the consequences, whether it be an act of malfeasance, misfeasance, or nonfeasance. Stated in this form there is probably no case to be found to the contrary. But the doctrine laid down by some text-writers, founded on Lord Holt's dictum in *Lane v. Cotton* (1701) 12 Mod. 488, 88 Eng. Reprint, 1466, has caused much confusion in the decisions over a fictitious distinction between acts of malfeasance and misfeasance and those of nonfeasance. As shown by Labatt on Master & Servant, page 7973, this error and the absence of any valid distinction in the classes of negligence were distinctly pointed out more than twenty-five years ago; but there are courts which still solemnly discuss the distinction every time a case involving the question comes before them, and settle the rights of the parties according as they think the case comes within or falls without the distinction. Many of the later cases have, however, abandoned it, as have also most of the recent text-writers.

If a servant owes a duty to a third person because of a contract with his master, there is no reason why he should not be liable for injury caused by its nonperformance. Of course, the

circumstances in which the failure of the servant to perform a duty owing to his master will raise a liability in favor of a stranger must, of necessity, be few; but when they exist, the rule of liability should be applied the same as though it was an act of malfeasance or misfeasance. The error that such liability does not exist not only arose from a misreading of the case of *Lane v. Cotton*, but also is an example of disconnected reasoning of which Judge Story, with whom the error seems to have originated, would hardly be imagined to be guilty. As will be seen in subdivision II. c, he laid down the formula that the servant or agent is liable to the third person for his mal- or mis-feasance, but not for his non-feasance. A moment's consideration demonstrates that there are many mal- and mis-feasances of the servant towards his principal which give no right of action to third persons any more than do acts of nonfeasance. Thus, the servant may be guilty of malfeasance toward his principal by embezzling money intrusted to his care. He may be guilty of misfeasance by negligently wrecking an automobile which he is employed to operate. Neither of these will give a third person a right of action. Therefore, to give a third person a right of action the act must not be a malfeasance or misfeasance toward the master, but must, because of the act which he does, or attempts to do, be a malfeasance or misfeasance toward a stranger. The same rule applies with respect to nonfeasance. The servant's mere omission of duty towards his master will not give the person a right of action, but omitting to perform a duty which he and his master owe to a third person may give a right of action. When, therefore, the formula is read as stated by Judge Story, the delicts comprising mal- and mis-feasance are, of necessity, toward third persons, while those comprising nonfeasance are solely towards the master and the persons toward whom the duty is owing, and the liabilities said to exist or not to exist are not the same.

As thus analyzed, of course, the

formula becomes meaningless as an aid to the decision of concrete cases. It has been suggested that the only value which the formula has is to indicate that a liability to a third person cannot be predicated upon mere omission of duty owing to the master; but since the same is true with respect to mal- or mis-performance of duty owing the master, it would seem that the sooner the formula passes into oblivion, and the cases are judged solely upon the consideration whether or not the servant has breached any duty which he owed the complaining party, the better. Of course, in case of malfeasance or misfeasance, the relationship to the master may be entirely immaterial, because the liability may be predicated on the positive wrong done, while in case of nonfeasance, the duty to the complaining party must be worked out, if at all, through the duty which the servant had undertaken to perform for the master.

In volume 1, pp. 288, 289, of *Jagard on Torts*, it is said: "The thinness and uncertainty of the distinction between the misfeasance, malfeasance, and nonfeasance leaves an exceedingly unstable basis on which to rest an important principle of liability. It would, indeed, seem to be a fair criticism on the subsequent reasoning that the courts have, in applying the distinction, engaged in a solemn game of logomachy. Thus, in *Bell v. Josselyn* (1855) 3 Gray (Mass.) 309, 63 Am. Dec. 741, it was said that failure of defendant to examine the state of the pipes in a house before causing the water to be let on, would be a nonfeasance, but, if he had not caused water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts were, the nonfeasance caused the act done to be a misfeasance. The plaintiff suffered from the act done, which was no less a misfeasance by the reason of its being preceded by a nonfeasance. . . . "The futility of such

reasoning on the word "nonfeasance" appears fully from the lack of definitiveness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear "if the nature of the duty incumbent upon the servant be considered." If the servant owe a duty to third persons, derived from an instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission."

b. Lane v. Cotton.

The celebrated case of *Lane v. Cotton* (1701) 11 Mod. 17, 12 Mod. 472, 88 Eng. Reprint, 855, 1458, Comyns, 107, 92 Eng. Reprint, 984, Holt, 583, 90 Eng. Reprint, 1222, 1 Salk. 17, 1 Ld. Raym. 655, 91 Eng. Reprint, 17, 1337, which seems to have been the cause of the misunderstanding upon this subject, was one to hold the Postmaster General liable for loss of exchequer bills from a letter after it had been deposited in the receiving office. It was held that he was not liable, but Chief Justice Holt, dissenting, argued in a long opinion that he should be held liable, and one branch of the argument was as follows: "It was objected at the bar, that they have this remedy against Breese (who was apparently the clerk from whose possession the loss occurred). I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect

to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer." It will be noticed that the question of the liability of the clerk was not involved, and the only ground upon which it becomes material at all is that it was suggested by the prevailing judges as one reason for the non-liability of the Postmaster General, that the receiving clerk was personally liable.

There are several reports of the case of *Lane v. Cotton*, and they do not strictly agree as to what the majority judges hold, or as to what Lord Holt himself held. All of the reports give more prominence to Holt's dissenting opinion than they do to the prevailing opinions. The question before the court being the liability of the Postmaster General, the question of the liability of the clerk through whose negligence the letter was lost was in no way before the court. It was admitted in the case that he was not a party to the taking of the letter, but was simply negligent in caring for it, so that he was liable merely for nonfeasance, unless that term is limited to the sense in which it has been used by some of the later text-writers. See II. d.

Farresley's report, which goes under the name of Holt (Holt, 583, 90 Eng. Reprint, 1222), makes the other three judges hold the Postmaster General not liable because Breese was necessarily liable himself. And Salkeld's report makes all three judges agree that he is liable (1 Salk. 17, 91 Eng. Reprint, 17).

In the report in 1 Ld. Raym. 646, 91 Eng. Reprint, 1332, Powys, J., is made to say that an action would lie against Breese, and therefore plaintiff is not without remedy, and in this, Gould, J., seems to have concurred.

In the report in 11 Mod. 12, 88 Eng. Reprint, 853, however, Powys, J., is made to say in response to the objection that if the action does not lie against the Postmaster General there may be a wrong without any remedy,

—that it is often so when no person can be found against whom to have a remedy. And the same response appears in the report of Comyns, 103, 92 Eng. Reprint, 982.

Not only were the arguments of the prevailing judges thus inadequately reported by the various reporters, but there is not an agreement among them as to Lord Holt's position in the matter.

In the report in 1 Ld. Raym. 655, 91 Eng. Reprint, 1337, Holt is made to say that Breese cannot be charged as an officer for negligence. For misfeasance of a deputy an action will lie against him, but that is not *qua* officer, but *qua* tort-feasor.

In 11 Mod. 17, 88 Eng. Reprint, 855, the statement is, if the deputy be guilty of misfeasance an action will lie against him; but for the nonfeasance or negligence of a deputy, the superior is punishable; and if, in this case, any misfeasance could be proved upon any particular deputy, as the taking out of the bills by him, he would be punishable.

In Comyns, 107, 92 Eng. Reprint, 984, Holt's statement is reduced to the following: "Another objection is that an action may be brought against the subagent, but for negligence the principal must answer for his inferior officer."

In Salkeld's Report (1 Salk. 17, 91 Eng. Reprint, 17), Holt is made to say that though the master be liable, yet Breese is chargeable also, but he is not chargeable as an officer, but as a wrongdoer.

And in the report of the case by Thomas Farresley, which goes under the name of Holt (Holt, 583, 90 Eng. Reprint, 1222), Holt is made to say: "I am of opinion though the Postmaster General be liable, that Breese is chargeable also, not as an officer, but as a wrongdoer, for 'tis upon this reason that action of the case lies against the gaoler as well as against the sheriff upon a voluntary escape."

It will be noticed that the court was dealing with the question of the liability of a public official, and there has always been a distinction between the liability of their deputies and that of

servants or private individuals. In the excerpt quoted above from 12 Mod., Holt's illustration is of a sheriff and his bailiff.

In *Cameron v. Reynolds* (1776) 1 Cowp. 406, 98 Eng. Reprint, 1155, Lord Mansfield said that the judges were all of opinion that an action for breach of duty in the office of sheriff must be brought against the sheriff himself, as for an act done by him, although it was in fact done by the undersheriff.

For authority for the statement set out above, from 12 Mod., Lord Holt cites 1 Leon. 146; 3 Cro. 175, 143; 41 Edw. III. 12; 1 Rolle, 78; and Salkeld adds Noy, 90.

The case in (1589) 1 Leon. 146, 74 Eng. Reprint, 135, is *Marsh & Astrey's Case*, in which Marsh brought action against Astrey, an undersheriff, for failure to return a summons for lands. It was argued on one side that the action should have been against the sheriff, but Snag, contra, said if the return be insufficient, the sheriff shall be amerced, but in the case of failure to return it is clear that the action lieth against the undersheriff if the person will, and such was the opinion of the judges. And judgment was given for the plaintiff. The case in 3 Cro. (Cro. Eliz.) 175, 78 Eng. Reprint, 432, seems to be the same case as that in Leonard, although it is attributed to a different year and term; but it is expressly stated that Coke moved in arrest of judgment that, the action being for nonfeasance, that is, for not returning the writ, the action lieth not against the undersheriff, but ought to be brought against the sheriff himself. But the argument did not prevail. There is no case in point on page 143, and so it must be an error in citation, but Salkeld locates the reference at page 743 (1599) 78 Eng. Reprint, 976. That was the case of *Baldry v. Johnson*, an action against the jailer of a prison for that the bailiffs of a vill had directed a warrant to the undersheriff to take a person in such manner that they have his body at the next court. The undersheriff made the arrest, and committed the prisoner to the custody

of the jailer. After verdict for plaintiff, it was moved in arrest of judgment that the jailer was not liable because the undersheriffs had no authority to commit the prisoner to his custody, and that they alone were liable for the escape. And the conclusion seems to be that the judgment was arrested because the undersheriffs alone were liable.

The case of *Laycock v. Undersheriff, Noy*, 90, 74 Eng. Reprint, 1057, was an action against an undersheriff because of a false return non est inventus on a latitat. It was argued that for a falsity the action will lie against an undersheriff, but the report states that the court seemed to the contrary. For the undersheriff is not an officer to the court, but the sheriff himself shall be amerced for all defaults, negligence, and falsities of the undersheriff.

The case in (1614) 1 Rolle Rep. 78, 81 Eng. Reprint, 341, is *Bell v. Catesby*, in which Bell brought an action against Catesby, an undersheriff, for suppressing a warrant which had been put into his hands for service, the allegation being that he levied on the goods and afterwards concealed the writ and made no certificate of it. Exception was taken, after verdict, that the action will not lie against the undersheriff, but the judgment was given by the court for the plaintiff.

There is no case on page 12 of 41 Edw. III. having any bearing on the question under discussion. The case carried on to that page from the previous one was a writ of formedon to establish a remainder, and the case beginning on that page involved the right of infants against whom a right to real estate was sought to be established, to have the writ abated. It has been suggested that the reference was to pl. 12 of the Book of Assize of 41 Edw. III. But that was a prosecution for mayhem which involved a question of jurisdiction over persons not served. So that the citation seems to throw no light upon Lord Holt's meaning. Of the cases cited by Lord Holt, therefore, four seem to have

been contrary to his claim, one in his favor, and one a miscitation.

But Lord Holt seems to have acted upon the opinion contended for by him in the next case which came before him.

In *Savage v. Walthew* (1708) 11 Mod. 135, 88 Eng. Reprint, 947, a carrier brought an action against his servant for loss of goods delivered to him for carriage, and it was objected that if the action lies, defendant will be twice charged by the master and by the owner. Holt, Ch. J., said it is not so unless there is an actual conversion, for the owner of the goods has an action against the servant only in case of a conversion.

A singular fact is that in at least two subsequent English cases, Lord Holt's opinion is referred to as the rule of the case. *Jones v. Hart* (1698) 2 Salk. 441, 91 Eng. Reprint, 382; *Bennett v. Bayes* (1860) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156.

c. Judge Story's rule.

Judge Story, in his work on the Law of Agency, published in 1839, founded the following statement on what he terms Lord Holt's celebrated judgment in *Lane v. Cotton*: "The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, 'respondeat superior.'" § 308.

"The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong, and mere neglects by agents, as to their personal liability therefor, may seem nice and artificial, and partakes,

perhaps, not a little of the subtlety and overrefinement of the old doctrines of the common law. It seems, however, to be founded upon this ground: that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become directly bound or amenable for his conduct." Story, Agency, 9th ed. § 309.

In making this statement, Judge Story seems to have overlooked the obligations which are imposed upon all living in a civilized community, in favor of their neighbors. Because of this obligation the law and public policy impose certain duties upon persons who have contracted with a master to do a certain thing which makes them liable to third persons for its nonperformance. Most acts of negligence are, in final analysis, acts of nonfeasance, but the books are full of cases in which servants and agents have been held liable for negligence. While, therefore, many cases have attempted to maintain the formula laid down by Judge Story, they have, in practice, either distinguished it so that little is left of it, or departed from it altogether. As will appear in the next succeeding section, certain text-writers have attempted to preserve the formula by giving it an interpretation so narrow that there is really little left of it.

d. Attempted explanation of rule.

Clark & Skyles, in their work on the Law of Agency, make the following statement: "There is a distinction between nonfeasance and misfeasance or malfeasance; and this distinction is often of great importance in determining an agent's liability to third

persons. By reason of some of the cases failing to clearly notice this distinction there has been some confusion in the decisions on this point. In this connection, nonfeasance means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do; misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and malfeasance is a doing of an act which he ought not to do at all. . . . From these meanings, it will be seen that it is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons or to the public in general, as a member of society. Nonfeasance does not extend to the omission or failure to do some act whereby a third person is injured, after he has once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another, and he refuses or fails to enter upon such performance, it is a nonfeasance; but if he once begins the performance of such acts, and in doing so fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance." Clark & S. Agency, p. 1299.

Mr. Mechem (Agency, § 572) also states that "some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing; as where the agent,

while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed . . . upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation."

It will thus be seen that these authors narrow the meaning of nonfeasance down to a mere failure to enter upon the performance of a duty which the contract imposes upon the servant. This meaning of the term is much narrower than that which was in the mind of Lord Holt or Judge Story, or than that which has been in the minds of many of the judges who have attempted to apply the formula in deciding cases. It may be seriously questioned whether, even in this narrow form, the formula is accurate. Is it entirely safe to say that when the question is determined solely by the duty of the servant to the person injured, the courts will not say that, in case an agreement is made with a protective agency for a watchman on a particular occasion, and the servant employed by the agency, without notice of the fact that he did not intend to meet his engagement, leaves the property unguarded when the owner is relying on him for protection, so that no other is provided, and the property is burglarized or destroyed, the servant will not be liable? Or, in case an agreement is made with a nurses' association for a nurse for a critical occasion, and she does not undertake the job, so that, because of inability to procure other assistance on account of want of timely notice of the nurse's default, the patient dies, the nurse will not be liable? Other cases of similar import readily come to mind and one cannot dogmatize upon them before the questions have been considered by the courts in their true light. This does not in any way in-

terfere with the rule that a third person cannot maintain an action on a contract made for his benefit, because the contract between master and servant is not necessarily made for his benefit. It would not, however, be extending the doctrine that one having entered upon the performance of his duties who omits, to the injury of a third person, to perform some act which is part of his duties, is liable for the injury thereby caused to the third person, on the ground that it is misfeasance, to hold that it is also misfeasance to breach his agreement to perform an act, failure to perform which will injure a third person, after he has undertaken to do so, without giving any notice of his intended omission, on the ground that he will be deemed to have entered upon the performance of his agreement.

This narrowing of the definition of nonfeasance has, in some degree, presented a way out of the dilemma in which the old formula placed the courts, and some of the courts have followed it. Thus, in *Atkins v. Field* (1896) 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375, the court said: "If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

So, in *Hagerty v. Montana Ore Purchasing Co.* (*Hagerty v. Wilson*) 38 Mont. 69, 25 L.R.A. (N.S.) 356, 98 Pac. 643, the court said: "The courts and text-writers have not always been accurate in defining the terms 'nonfeasance' and 'misfeasance,' or in discriminating between them. As applied in cases of this character, we think the term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but,

whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible. We think this conclusion is based upon reason and authority."

In *Orcutt v. Century Bldg. Co.* (1907) 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062, the court said: "When it [the defendant] undertook the management of this building from its principal, it undertook to do for the principal a particular work; and after it entered upon the performance of that work, any act which it did, whether by omission or commission, was misfeasance. After making this contract, had it stood aloof and refused to take the management of the building, and, in so doing, thereby failed to do something, which resulted in injury to a third person, it would not have been liable, because we would thus have mere nonfeasance. But, after it assumed its management, and thereby commenced to do the thing it contracted and agreed to do, then, as said before, acts of omission or commission constitute misfeasance, or a failure to properly do the things which it had, in the line of its duty, commenced to do."

In *Brower v. Northern P. R. Co.* (1910) 109 Minn. 385, 25 L.R.A.(N.S.) 354, 124 N. W. 10, where an engineer, in repairing a water gauge, failed to replace the guard, the court said: "From the facts stated in the complaint it satisfactorily appears that appellant undertook the execution of the duty of replacing the gauge, and that he performed it negligently; hence his act was one of misfeasance, and not one of nonfeasance. . . . Strictly speaking, the act of the engineer in failing to put on the guard was nonfeasance,—that is, in not doing an act which he was required to perform; but the distinction between misfeasance and nonfeasance is sometimes fanciful."

So, in *Southern R. Co. v. Grizzle* (1906) 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244, where it was held

that the negligence of a railroad engineer in failing to blow his whistle where he was required by law to do so was a misfeasance, rendering him liable for injuries resulting therefrom, the court said: "Misfeasance may involve also, to some extent, the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution, or does not exercise that care, which a due regard to the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. . . . The engineer having once undertaken, in behalf of the principal, to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance."

In *Williams v. Dean* (1907) 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931, it is said, nonfeasance is nonperformance of some act which ought to be performed, and also is the performance of an act in an improper manner, whereby someone receives injury.

"Nonfeasance is the failure to do that which one, by reason of his undertaking, and not because imposed upon him as a legal duty, agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal. Misfeasance, on the contrary, may consist in failing to do that which is imposed as a duty, or in doing for another, in an improper manner, that which the principal ought to have done. As of the latter class would be where an agent actually undertakes and enters upon the performance of a certain work for the principal, in the execu-

tion of which it is his duty to use reasonable care in the manner of executing it, so as not to cause injury to others, and he cannot, by failing to exercise such care, either while performing the work or by abandoning it in an uncompleted condition and leaving it unguarded or unsafe, exempt himself from liability to those who may suffer injury by reason of such negligence." *Dean v. Brock* (1894) 11 Ind. App. 507, 38 N. E. 829.

It will be noticed that one of the reasons given by Judge Story (*supra*, II. c) for holding the servant not liable is the maxim "respondeat superior;" and that has also been suggested as a reason in some of the cases. But the mere fact that the master is required to respond for the consequences of acts done on his behalf does not mean that there shall be no remedy against the one primarily liable for the injury, if he is a responsible person. The maxim "respondeat superior" was adopted to prevent a responsible principal from avoiding liability for injuries caused by the transaction of his business by employing impecunious servants, and there seems to be no reason why it should operate to relieve the negligent servant from personal responsibility.

c. Breach of servant's duty to person injured.

The only rule which can be sustained on principle is that the servant or agent is liable for injury to third persons when, and only when, he breaches some duty which he owes to such third person. The cases are increasingly recognizing this test.

In *Morey v. Shenango Furnace Co.* (1910) 112 Minn. 528, 127 N. W. 1134, it is said that if a servant owes a duty to a third person, and violates that duty, he is responsible because of his wrongdoing, and not because of the positive or negative character of his conduct.

In an action to hold one employed to operate a ferry for a county, liable for loss of property off the boat, the court said: "A servant or agent may be personally liable for the damnifying consequences of a tort committed by him in the master's service, and so

whether the servant's or agent's dereliction, proximately causing the damage, is assignable to the categories of nonfeasance or of misfeasance. . . . Personal liability attaches to the servant or agent when the servant or agent would be liable if there had been no relation of master and servant or principal and agent. Such liability is therefore dependent upon an act or omission, misfeasance, or nonfeasance, on the part of the servant or agent himself; and any dereliction of the master or principal, not effectively participated in by the servant or agent, will not, of course, afford the basis for the personal culpability of the servant or agent." *Hilburn v. McKinney* (1920) 204 Ala. 158, 85 So. 496.

An agent of a corporation is not to be held personally liable merely because he is such agent, but he must be so connected with the tortious act that he would be personally liable for his wilful act or negligent conduct without regard to the liability of the corporation. *Frorer v. Baker* (1907) 137 Ill. App. 588.

Where a certificate of title, prepared by an attorney for a property owner, was acted upon by a bank in lending money to the property owner, the court, without direct discussion of the question of liability of an agent for injury to third persons, in deciding against the liability, makes some observations which have a very material bearing upon the question. It says, the person occasioning the loss must owe a duty arising from contract or otherwise, to the person sustaining the loss. Also that building contractors are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employer. Where there is no fraud or collusion or privity of contract, the agent will not be held liable to a stranger unless the act is one immediately dangerous to the lives of others, or is an act performed in pursuance of some legal duty. *National Sav. Bank v. Ward* (1880) 100 U. S. 195, 25 L. ed. 621.

One employed in a mill may be liable to a coemployee for negligence in directing the removal of a structure which had operated as a stop for a traveling crane, so that the pulley runs off the end of the rail, to the injury of the employee. The court says, a servant in charge of his master's property is liable to strangers in the management of it, not because he owes a duty in respect of it to the master, but because the possession and charge of property put him under an obligation of care in the use and management of it. The negligence must be negligence to strangers, and not to the master only. The violation of the master's orders, or the neglect or improper use of his property, not violating the duty which the servant owes to strangers, would not make him liable to them. *Osborne v. Morgan* (1884) 137 Mass. 1.

In *Haynes v. Cincinnati, N. O. & T. P. R. Co.* (1911) 145 Ky. 209, 140 S. W. 176, Ann. Cas. 1913B, 719, the court said: "There is no reason for making a distinction between acts of commission and omission when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer without respect to the position in which he acts or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or wilful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform."

III. Malfesance.

a. In general.

The term "malfesance" is employed to indicate acts which are forbidden or illegal, so that they are not justified under any circumstances.

In *Travis v. Claiborne* (1817) 5 Munf. (Va.) 439, Roane, J., says if an agent does an act which the principal ought not to require nor he to obey him in, his character as agent ceases, and he himself becomes responsible for his acts.

Since authority from one who has no right to confer it is void, it is no legal excuse for an act which causes an injury to another that the person committing it acted under the direction or by the consent of a third person who himself had no right to grant such authority or permission, and hence the well-settled rule that if a principal is a wrongdoer the agent, however innocent his intention, who participates in his acts, is also a wrongdoer. It must, therefore, be true, as a general proposition, that if an injurious act be done without sufficient authority, it is no answer to the claim of the owner for redress that the immediate author of the mischief acted in good faith, by direction of one whom he supposed to be the owner. *Jones v. Fort* (1860) 36 Ala. 462.

An agent who commits an act prohibited by law is liable as a principal. *Swaggard v. Hancock* (1887) 25 Mo. App. 596.

One doing an illegal act under contract with another is personally liable for any damage that may proximately flow from it. *Moore v. Koppin* (1911) — Tex. Civ. App. —, 135 S. W. 1033.

Servants of a railroad company who knowingly back a train in a manner prohibited by statute are personally liable for injury thereby caused to a fellow servant. *Illinois C. R. Co. v. Archer* (1916) 113 Miss. 158, 74 So. 135.

Where the statute requires railroad rights of way to be kept clear from inflammable material, a section foreman will be liable in damages for injuries to adjoining lands by fire started on the right of way by his negligence in failing to keep it clear of such material. *Patry v. Northern P. R. Co.* (1911) 114 Minn. 375, 34 L.R.A. (N.S.) 568, 131 N. W. 462.

Where, by statute, railroad com-

panies are required to maintain efficient spark arresters, engineers in charge of locomotives are liable for failure to see that the spark arresters on their engines are in good condition. *Ibid.*

An agent who receives usurious interest for his principal with notice that it is usurious, and that he will be held personally liable for it, cannot defeat an action on the ground that he acted merely as agent. *O'Connor v. Clopton* (1882) 60 Miss. 349.

In *Jenne v. Sutton* (1881) 43 N. J. L. 257, 39 Am. Rep. 578, which involved the question of liability of the president of a political club for injury done by fireworks exploded in a public street by direction of the club, the court said that the act of exploding them in the public street being unlawful, there can be no question with respect to the legal liability of all persons concerned in the doing of such act.

b. Trespass.

A servant who, in carrying out the terms of his employment, or who, by obeying the command of his master, commits a trespass, is personally liable therefor, and cannot plead in defense the fact that his act was that of his master.

United States.—*Mitchell v. Harmony* (1851) 13 How. 115. 14 L. ed. 75; *Lightner v. Brooks* (1864) 2 Cliff. 287, Fed. Cas. No. 8,344.

California. — *Brownell v. Fisher* (1880) 57 Cal. 150.

Colorado. — *Humphreys Tunnel & Min. Co. v. Frank* (1909) 46 Colo. 524, 105 Pac. 1093.

Georgia. — *Baker v. Davis* (1906) 127 Ga. 649, 57 S. E. 62.

Illinois. — *Gravett v. Mugge* (1878) 89 Ill. 218; *Sundmacher v. Block* (1891) 89 Ill. App. 553.

Kentucky. — *Waller v. Martin* (1856) 17 B. Mon. 181.

Maine. — *Hazen v. Wight* (1895) 87 Me. 233, 32 Atl. 887.

Maryland. — *Blaen Avon Coal Co. v. McCulloh* (1883) 59 Md. 403, 43 Am. Rep. 560.

Massachusetts. — *Hewett v. Swift*

(1862) 3 Allen, 420; *Gilmore v. Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37.

Missouri. — *Peckham v. Lindell Glass Co.* (1881) 9 Mo. App. 459; *Martin v. Benoist* (1886) 20 Mo. App. 262; *Welsh v. Stewart* (1888) 31 Mo. App. 376; *McNichols v. Nelson* (1891) 45 Mo. App. 446; *Walters v. Hamilton* (1898) 75 Mo. App. 237; *Robinson v. Moark-Nemo Consol. Min. Co.* (1914) 178 Mo. App. 531, 163 S. W. 885, affirmed in (1917) — Mo. —, 196 S. W. 1131; *Reber v. Bell Teleph. Co.* (1916) 196 Mo. App. 69, 190 S. W. 612.

New York. — *Livingston v. Bishop* (1806) 1 Johns. 290, 3 Am. Dec. 330; *Hardrop v. Gallagher* (1854) 2 E. D. Smith, 523; *Page v. Dempsey* (1906) 184 N. Y. 245, 77 N. E. 9, 22 Am. Neg. Rep. 185.

Pennsylvania. — *Hindson v. Markle* (1895) 171 Pa. 138, 33 Atl. 74.

Rhode Island. — *SEMONIAN v. PANORAS* (reported herewith) ante, 83.

Tennessee. — *Nunnally v. Southern Iron Co.* (1895) 94 Tenn. 397, 23 L.R.A. 421, 29 S. W. 361.

Texas. — *Diamond & O. C. Sewerage Co. v. Smith* (1901) 27 Tex. Civ. App. 558, 66 S. W. 141.

Vermont. — *Brown v. Lent* (1848) 20 Vt. 529.

Wyoming. — *Badger v. Mills & B. Co.* (1921) — Wyo. —, 201 Pac. 1012.

England. — 1 Bl. Com. 480; *Gauntlett v. King* (1857) 3 C. B. N. S. 59, 140 Eng. Reprint, 660; *Bennett v. Bayes* (1860) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 2 L. T. N. S. 156, 8 Week. Rep. 320; *Heugh v. Abergavenny* (1874) 23 Week. Rep. 40; *McManus v. Crickett* (1800) 1 East, 106, 102 Eng. Reprint, 43, 5 Revised Rep. 518.

That a servant committed a trespass by the command or encouragement of his master, the master is liable, but the servant is not thereby excused, for he is only to obey his master in matters that are entirely lawful. 1 Bl. Com. 430.

An agent who commits a positive wrong, such as a trespass, cannot shield himself simply because he acts as agent for another. *Bader v. Mills*

& B. Co. (1921) — Wyo. —, 201 Pac. 1012.

Waller v. Martin (1856) 17 B. Mon. (Ky.) 181, was an action against the officers, engineers, and laborers of a railroad company for trespassing on plaintiff's land. Only the officers were served with process, but the court held that if the company had no authority to commit the act, they were individually liable.

In *Gilmore v. Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37, which involved the right to lateral support, there is a dictum to the effect that even an agent of the owner of adjoining land will be liable for his own negligence or positive wrongs, for his principal could not confer upon him any authority to commit a tort upon the property or rights of another.

A servant who participates in the digging of a trench which casts water into another's cellar is liable for the resulting damage. The court says that for a misfeasance done by an agent in the line of his duty, he is liable. *Martin v. Benoist* (1886) 20 Mo. App. 262.

Agents of a corporation who enter upon private land and cut trees cannot defeat liability for the trespass on the theory that they were agents, if the corporation had no authority to do the act. *Brownell v. Fisher* (1880) 57 Cal. 150.

An agent who, under direction of his principal, unlawfully cuts timber of another, is liable for trespass. *Baker v. Davis* (1906) 127 Ga. 649, 57 S. E. 62.

An agent is liable in trespass for appropriating for his principal lumber belonging to another. *Gravett v. Mugge* (1878) 89 Ill. 218.

One cannot avoid liability for trespass in cutting and carrying away timber from another's land by the fact that he was acting merely as agent. *Hazen v. Wight* (1895) 87 Me. 233, 32 Atl. 887. The court says if the employer was a trespasser in ordering the removal of the timber, the servant was also a trespasser in carrying out the order, because a servant can never have greater authority than his employer.

In an action against a general contractor for injuries by a blast fired by one in charge of the blasting work, the court held that defendant could not be held liable for the act, but stated that the one responsible for the blast, and those under his control, by reason of their direct participation in the injurious act, might be liable. *Brown v. Lent* (1848) 20 Vt. 529.

Employees causing injury by blasting are personally liable therefor. *Hardrop v. Gallagher* (1854) 2 E. D. Smith (N. Y.) 523.

An employee responsible for the setting off of a blast which throws debris onto neighboring property is personally liable for the trespass. *Page v. Dempsey* (1906) 184 N. Y. 245, 77 N. E. 9, 22 Am. Neg. Rep. 135.

The active manager of a coal mine is personally liable for directing the deposit of culm where it is washed into a stream to the injury of lower riparian property. *Hindson v. Markle* (1895) 171 Pa. 138, 33 Atl. 74. The court says if the acts were wrongful and occasioned injury to plaintiff, they were acts of misfeasance for which, under all the authorities, he was liable. They were his own voluntary acts, not enjoined upon him by his employers.

An agent in charge of an ore mill cannot escape liability for injury done to lower riparian property by the casting of tailings into the stream so as to pollute the water, by the fact that he was a mere agent. *Humphreys Tunnel & Min. Co. v. Frank* (1909) 46 Colo. 524, 105 Pac. 1093.

In *Nunnally v. Southern Iron Co.* (1895) 94 Tenn. 397, 28 L.R.A. 421, 29 S. W. 361, where a general manager of a mining corporation injured lower riparian property by casting debris into the stream, the court said: If the agent of a corporation or an individual commits a tort, the agent is clearly liable for the same, and it matters not what liability may attach to the principal, the agent must respond in damages if called upon to do so. "To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability

behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent corporations in their efforts to repair the shattered fortunes of their failing principals upon the ruins of the rights of others."

An agent who, by direction of his employer, breaks the connection of a property owner with a sewer as a method of enforcing payment of charges for the right to use it, cannot defeat liability if the act was a wrongful trespass, on the ground that he acted merely as agent. *Diamond & O. C. Sewerage Co. v. Smith* (1901) 27 Tex. Civ. App. 558, 66 S. W. 141.

Where defendant demurred to a bill to enjoin him from entering upon plaintiff's land and destroying a weir, on the ground that he was a mere agent, the court said there was no agency between wrongdoers, and that want of interest was no defense because the tort was committed under direction of another. *Heugh v. Abergavenny* (1874) 23 Week. Rep. (Eng.) 40.

In *McManus v. Crickett* (1800) 1 East, 106, 102 Eng. Reprint, 43, 5 Revised Rep. 518, where the question was as to the liability of the master for a wilful trespass of the servant, Lord Kenyon referred to cases in which the servant, through negligence, ran over a boy in the street, and another ran against and overturned a vehicle, by which its load was injured, and stated that there could be no doubt of the servants in these cases being liable as trespassers.

Servants of a telephone company, who enter upon private property and cut the branches off trees to facilitate the stringing of wires, are personally liable for the trespass. *Reber v. Bell Teleph. Co.* (1916) 196 Mo. App. 69, 190 S. W. 612.

A broker who, as the agent of a landlord, attempts to distrain for rent, will be liable jointly with the latter in case he seizes exempt prop-

erty. *Gauntlett v. King* (1857) 3 C. B. N. S. 59, 140 Eng. Reprint, 660.

A servant who commits a trespass in running a mine over onto adjoining property will be individually liable therefor. *Blaen Avon Coal Co. v. McCulloh* (1883) 59 Md. 403, 43 Am. Rep. 560.

But if the agent acts under direction of his principal, an action of trespass will not lie against him unless it would lie against the principal. *Strong v. Colter* (1868) 13 Minn. 82, Gil. 77.

In *Paton v. Lancaster* (1874) 38 Iowa, 494, which was an action to enjoin interference with plaintiff's possession of real estate, it appeared that defendant and his attorneys had committed actual trespasses on the property, and, although defendant was held liable, it was held that the attorneys, to the knowledge of plaintiff, were acting only as defendant's agents, and that, no fraud being charged, the action would not lie against them.

In *Buron v. Denman* (1848) 2 Exch. 167, 154 Eng. Reprint, 450, which involved the question of liability for acts done by an officer in suppression of the slave trade, it was held that the act being approved by the government, there was no personal liability; but Parke, Baron, said if an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured may sue either principal or agent.

c. Assault.

An agent or servant cannot escape liability for an assault by showing that it was committed by command of the principal or master.

United States. — *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575.

District of Columbia. — *Lisner v. Hughes* (1919) 49 App. D. C. 40, 258 Fed. 512.

Illinois. — *St. Louis, A. & C. R. Co. v. Dalby* (1857) 19 Ill. 353.

Indiana. — *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70, 8 Am. Neg. Cas. 201; *Wright v. Compton* (1876) 53 Ind. 337, 2 Mor. Min. Rep. 189.

Massachusetts. — *Com. v. Rigney* (1862) 4 Allen, 316.

Missouri. — *Canfield v. Chicago, R. I. & P. R. Co.* (1894) 59 Mo. App. 354.

New Jersey. — *Brokaw v. New Jersey R. & Transp. Co.* (1867) 2 N. J. L. 333, 90 Am. Dec. 659.

New York. — *Brown v. Howard* (1817) 14 Johns. 119; *Phelps v. Wait* (1864) 30 N. Y. 78; *Montfort v. Hughes* (1854) 3 E. D. Smith, 591; *Priest v. Hudson River R. Co.* (1870) 40 How. Pr. 456.

Ohio. — *Bell v. Miller* (1831) 5 Ohio, 250; *Blakely v. Greer* (1905) 7 Ohio C. C. N. S. 169.

If one person employs another to commit an assault and battery and the act is perpetrated, both are responsible in damages. *Bell v. Miller* (Ohio) *supra*.

The agent is personally liable for assault committed in discharging the duties imposed upon him by the master. *Brokaw v. New Jersey R. & Transp. Co.* (N. J.) *supra*.

The mate of a vessel cannot justify the commission of a wrongful assault upon a seaman by the fact that it was ordered to be done by the master. *Brown v. Howard* (N. Y.) *supra*.

Those in charge of a railroad train are personally liable for injuries caused by the use of excessive force in removing a person from the train. *St. Louis, A. & C. R. Co. v. Dalby* (Ill.) *supra*.

In *Chamberlain v. Chandler* (Fed.) *supra*, which was an action to hold the master of a vessel liable in damages for illegal treatment of passengers upon his vessel, the court does not separately consider the question of his liability as agent of the owners, but says that, in exercising the rights of sovereign control while the ship is at sea, if he chooses to perform his duties or exert his office in a harsh, intemperate, or oppressive manner, he is responsible to the law; and the court states that it appears that if he is guilty of gross abuse and oppression, the courts will never be found slow in visiting him, in the shape of damages, with an appropriate punishment.

An employee of a railroad company

is personally liable for assault and battery committed by him upon an intending passenger. *Priest v. Hudson River R. Co.* (N. Y.) *supra*.

In *Evansville & C. R. Co. v. Baum* (Ind.) *supra*, which was an action against the master, the court says the servant himself is liable if he makes an assault upon another to gratify his private hate or malignity, under color of discharging the duty he has undertaken for his master, though he is, in general, not so liable to strangers for the consequences of mere negligence in the course of his employment.

In *Lisner v. Hughes* (D. C.) *supra*, which was an action against a master and servant jointly for an assault committed by the servant, the question discussed was as to the form of action and sufficiency of proof; but it seems to have been assumed that the action would lie against the servant.

An agent in charge of an office who is furnished with a weapon for protection against robbers is personally liable in case, by mistake of judgment, he shoots one entering the office on lawful business. *Blakely v. Greer* (Ohio) *supra*.

Where a blast in a quarry injured a person passing on the highway, an action was brought against the servant performing the work, it was said to be well settled that the servant is liable for his own carelessness. *Wright v. Compton* (Ind.) *supra*.

In *Com. v. Rigney* (Mass.) *supra*, a servant, at the command of his master, ejected a third person from premises in possession of the master, and he was held liable for assault; but the question of the effect of the command of the master is not discussed, the case turning upon the question of the right to effect the ejection.

d. Fraud and extortion.

An agent or servant is personally liable for injury inflicted upon third persons by his false representations, fraud, or extortion committed on behalf of his employer.

Florida. — *Wheeler v. Baars* (1894) 33 Fla. 696, 15 So. 584.

Illinois. — *Reed v. Peterson* (1878) 91 Ill. 238.

Indiana. — *Moore v. Shields* (1889) 121 Ind. 267, 23 N. E. 89.

Kentucky. — *Campbell v. Hillman* (1854) 15 B. Mon. 508, 61 Am. Dec. 195.

Maryland. — *Lamm v. Port Deposit Homestead Asso.* (1878) 49 Md. 233, 33 Am. Rep. 246.

Massachusetts. — *Hedden v. Griffin* (1884) 136 Mass. 229, 49 Am. Rep. 25.

Michigan. — *Starkweather v. Benjamin* (1875) 32 Mich. 306; *Weber v. Weber* (1882) 47 Mich. 569, 11 N. W. 389; *Hempfling v. Burr* (1886) 59 Mich. 294, 26 N. W. 496; *McDonald v. McKinnon* (1892) 92 Mich. 254, 52 N. W. 303; *Bartholomew v. Walsh* (1916) 191 Mich. 252, 157 N. W. 575.

Minnesota. — *Clark v. Lovering* (1887) 37 Minn. 120, 33 N. W. 776.

Missouri. — *Hamlin v. Abell* (1893) 120 Mo. 188, 25 S. W. 516.

New Jersey. — *Bocchino v. Cook* (1902) 67 N. J. L. 467, 51 Atl. 487.

New York. — *Hecker v. De Groot* (1857) 15 How. Pr. 314; *Gutchess v. Whiting* (1866) 46 Barb. 139; *Bruff v. Mali* (1867) 36 N. Y. 200, 6 Mor. Min. Rep. 574; *Sprights v. Hawley* (1868) 39 N. Y. 441, 7 N. Y. Trans. App. 14, 100 Am. Dec. 452; *Re Cushman* (1916) 95 Misc. 9, 160 N. Y. Supp. 661.

Tennessee. — *Carpenter v. Lee* (1833) 5 Yerg. 265; *Caulkins v. Memphis Gaslight Co.* (1887) 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287; *Brumley v. Chattanooga Speedway & Motordrome Co.* (1917) 138 Tenn. 534, 198 S. W. 775.

Texas. — *Baker v. Wasson* (1880) 53 Tex. 150; *Cameron v. First Nat. Bank* (1917) — Tex. Civ. App. —, 194 S. W. 469.

West Virginia. — *Mann v. McVey* (1869) 3 W. Va. 232.

Wisconsin. — *Wright v. Eaton* (1858) 7 Wis. 595.

England. — *Southerne v. Howe* (1619) 2 Rolle, Rep. 28, 81 Eng. Reprint, 637, citing (1606) 3 Jac. B. R. Lopez's Case; *Arnot v. Biscoe* (1743) 1 Ves. Sr. 95, 27 Eng. Reprint, 914, 18 Eng. Rul. Cas. 156; *Cox v. Prentice* (1815) 3 Maule & S. 345, 105 Eng. 20 A.L.R.—8.

Reprint, 641, 16 Revised Rep. 288; *Swift v. Jewsbury* (1846) L. R. 9 Q. B. 301, 43 L. J. Q. B. N. S. 56, 30 L. T. N. S. 31, 22 Week. Rep. 319; *Cullen v. Thomson* (1863) 4 Macq. H. L. Cas. 441, 9 Jur. N. S. 85, 6 L. T. N. S. 870.

One who extorts money from another cannot avoid liability on the ground that he was acting for another person, to whom he has paid the money. *Bacchino v. Cook* (N. J.) *supra*.

An agent is personally liable for securing the surrender of bonds by their holder upon payments in Confederate currency by representing that such currency was legal tender, and that the creditor was compelled to receive it, whether the statement was fraudulently untrue, or constituted duress, by forcing the currency on the unwilling creditor. *Mann v. McVey* (W. Va.) *supra*.

For deceit and false representations made by an agent in the course of his employment, both the agent and his principal are civilly liable. *Wheeler v. Baars* (Fla.) *supra*.

In *Cameron v. First Nat. Bank* (Tex.) *supra*, which involved the question of liability of directors of a corporation, the court says an agent is as much responsible as his principal for fraud perpetrated by another, in which he participated.

In *Reed v. Peterson* (Ill.) *supra*, in which relief was sought from a fraudulent deprivation of a person of his property against a corporation and its cashier and agent, the court states the rule that, in an action at law for damages, the fact that defendant acted throughout in the capacity of agent, in a fraud perpetrated by him, will afford him no excuse.

An insurance agent is personally liable for false representations which induced the taking of a policy which would not otherwise have been taken. *Hedden v. Griffin* (Mass.) *supra*.

An agent is liable for false representations made in his master's business. *Weber v. Weber* (1882) 47 Mich. 569, 11 N. W. 389. The court says a person cannot avoid responsibility merely because he gets no per-

sonal advantage from the fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another.

The treasurer of a corporation, who has received, as custodian, stock to which another person will be entitled when he has performed certain services for the corporation, cannot avoid personal responsibility for his fraud in representing that it had been destroyed, and refusing to deliver it up when the condition was fulfilled, on the ground that the action should have been against the corporation. The court says that it is true that he, as agent of the corporation, could not be held liable for its acts, but he is charged with fraud and deceit, and for those acts he, and not the corporation, is the responsible party. *McDonald v. McKinnon* (1892) 92 Mich. 254, 52 N. W. 363.

A servant of a corporation is personally liable for fraudulently over-issuing its stock. *Bruff v. Mali* (1867) 36 N. Y. 200.

An agent who assists a trustee of corporate stock in selling it and securing a transfer of it on the books of the corporation is liable for its value to a cestui que trust. *Caulkins v. Memphis Gaslight Co.* (1887) 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287.

One who aids in procuring corporate stock to be illegally issued to him under circumstances which would make him, if acting in his own right, responsible to the true owner, cannot avoid liability because he was acting as agent for another. *Baker v. Wasson* (1880) 53 Tex. 150.

An agent of a bank, who makes a false statement upon inquiry by a third person as to the credit of a person named, is personally liable for the loss caused thereby to the one making the inquiry. That ruling, however, is put upon the ground that the inquiry was made of the manager individually, and that, therefore, the bank would not be liable for his act. *Swift v. Jewsbury* (1846) L. R. 9 Q. B. (Eng.) 301, 43 L. J. Q. B. N. S. 56, 30 L. T. N. S. 31, 22 Week. Rep. 319.

In *Hempfling v. Burr* (1886) 59 Mich. 294, 26 N. W. 496, the court, in speaking of a claim that a cashier of a bank was not liable for a fraud committed by him in behalf of the bank, says this is a very singular result, and one which is too unreasonable to bear consideration.

Sales.

An agent is personally liable for false representations made in the sale of his principal's property. *Lamm v. Port Deposit Homestead Asso.* (1878) 49 Md. 233, 33 Am. Rep. 246; *Campbell v. Hillman* (1854) 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Gutchess v. Whiting* (1866) 46 Barb. (N. Y.) 139.

Agents who, by false representations, induce others to purchase invalid warrants, are personally liable in an action for money had and received, although they have turned the proceeds of the sale over to their principals. *Moore v. Shields* (1889) 121 Ind. 267, 23 N. E. 89.

In *Re Cushman* (1916) 95 Misc. 9, 160 N. Y. Supp. 661, which was an action to hold the estate of a guardian liable for false representations as to title in the sale of the ward's real estate, the court recognizes the rule that a known agent is not responsible to a third person for acts done by him in performance of an authority rightfully conferred. He is not liable to third persons for omission or neglect of duty, though he may be liable for his own torts.

An agent fraudulently selling an unsound horse as sound is liable for the fraud. *Carpenter v. Lee* (1833) 5 Yerg. (Tenn.) 265.

An agent assisting in defrauding a customer into the purchase of worthless stock is personally liable. *Brumley v. Chattanooga Speedway & Motor-drome Co.* (1917) 138 Tenn. 534, 198 S. W. 775. The court says: "If one acting as the agent or employee of another is guilty of fraud under circumstances which would make him responsible if acting for himself, he may not be relieved from liability by showing that he acted as agent for such another, even though no personal benefit accrues to him." In-

deed, liability rests primarily upon the agent as the immediate actor at fault, and even his principal's liability is derivative from that primary source, and dependent on whether or not the agent acted for the principal.

... There can be no sound distinction between torts of negligence and torts growing out of fraud and deceit in this regard. The case for liability on the part of the agent rather would seem to be stronger in the latter case, since ordinarily he consciously and wittingly does the wrongful act that deceives and defrauds."

If one send his servant to sell a counterfeit Bezoar stone as genuine, and the servant, with knowledge of the deceit, follows his instructions, an action on the case lies against him. *Southerne v. Howe* (1619) Rolle, Rep. 28, 81 Eng. Reprint, 637, citing (1606) 3 Jac. B. R. Lopez's Case.

An agent who effects the sale of an encumbered leasehold without disclosing the fact of the encumbrance is personally liable for the down payment which has been made to him. *Arnot v. Biscoe* (1743) 1 Ves. Sr. 95, 27 Eng. Reprint, 914, 18 Eng. Rul. Cas. 156.

Where an agent having silver to sell for his principal sold it on a false assay for more than it was worth, and credited his principal's account with what he received, he was held to be personally liable to the purchaser for the deficiency, on the ground that he had not, by merely crediting his principal's account, changed his position. The agent was guilty of no wrong in the matter, however, because he employed a professional assay master to compute the amount. The decision was put upon the ground of mutual error. *Cox v. Prentice* (1815) 3 Maule & S. 345, 105 Eng. Reprint, 641, 16 Revised Rep. 288.

In *Cullen v. Thomson* (1863) 4 Macq. H. L. Cas. (Eng.) 441, 9 Jur. N. S. 85, 6 L. T. N. S. 870, which was an action to hold managers of a corporation liable for fraudulent sales of stock, the Lord Chancellor says all persons directly concerned in the commission of a fraud are to be treated as principals. No person can be per-

mitted to excuse himself on the ground that he acted as the agent or as the servant of another, and the reason is plain; for the contract of agency cannot impose an obligation on the agent or servant to commit, or assist in the committing of, a fraud.

Agents who aid in concealing property obtained by fraud will be equally liable therefor with the one guilty of the fraud. *Allen v. Hartfield* (1875) 76 Ill. 358.

The same principle applies to an agent who aids in a breach of trust.

The agent of a trustee, who, with knowledge that a breach of trust is being committed, assists in that breach of trust, is personally answerable, although he may be employed as the agent of the person who directs him to commit the breach of trust. *Atty. Gen. v. Leicester* (1844) 7 Beav. 176, 49 Eng. Reprint, 1031.

There is one early case which, as reported, seems to be out of harmony with the law as afterwards established.

In *Anonymous* (1472) Y. B. (Eng.) Edw. IV. 6, pl. 10, an action of deceit was brought against a person for selling cloth warranted to be of a certain length, which was not so long as warranted. The defendant pleaded that he sold as servant for the owner, and the court said that plaintiff could look to the master, for the servant sold merely as servant.

As will be seen in the discussion of the question of conversion, III. j, there is a theory that if the servant or agent acts merely as a conduit through whose possession the goods pass, without any act on his part to affect the title, he is not liable. This rule has been applied in a few cases which appear to have involved liability for fraud.

Thus, a clerk is not personally liable for failure to credit a payment on the books which he has turned over to his master. *Cary v. Webster* (1721) 1 Strange, 480, 93 Eng. Reprint, 647. The court, however, says that if he had not paid it over, the plaintiff would have had his option to charge either servant or master.

In *Snowdon v. Davis* (1808) 1,

Taunt. 359, 127 Eng. Reprint, 872, which was an action for money had and received against the bailiff of a sheriff, who had extorted more money than his warrant called for by threat of distress, and paid the money over to the sheriff, the question of liability was compared to that of an agent, and the distinction was made that if the money were paid to the agent to be paid to the principal, the agent would not be liable, though he would be if it were not paid expressly for the benefit of the principal.

In 1 Rolle, Abr. 95, it is said that if a servant of a taverner sell wine which is bad, yet an action of deceit will not lie against the servant, for he did this as servant. But no authority is cited for the proposition, and the author concludes his sentence, "Contra, 9 Hen. VI. 533." The latter authority was a case against B and C for the sale of bad wine, and C defended on the ground that he sold as the servant of B, and Martin held that the defense was not good; so that Rolle's statement does not seem to be correct.

And in one case it was held that there was no liability for false representations in the sale of stock, if they were honestly made, the agent himself being deceived by the principal. *Eblin v. Sellars* (1894) 15 Ky. L. Rep. 539.

That makes the question of knowledge or notice on the part of the agent an element in the liability of the agent, but it would seem that the same rule should apply to the agent as to the principal; that is, he should be liable not only for statements which he knows to be false, but also for those which he ought to have known to be so.

e. Libel.

A servant or agent cannot avoid liability for libel published by him by the fact that he acted merely in the capacity of servant or agent. *Pollasky v. Minchener* (1890) 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5; *Morse v. Modern Woodmen* (1917) 166 Wis. 194, 164 N. W. 829, Ann. Cas. 1918D, 480.

In *Breay v. Royal British Nurses Asso.* [1897] 2 Ch. (Eng.) 272, 66 L. J. Ch. N. S. 587, 76 L. T. N. S. 735, 46 Week. Rep. 86, which involved the question of the liability of a benefit association for a libel published in a paper which it maintained, the court said that if the article was a libel, the secretary of the association, who ordered the publication to be made, would be personally liable for it.

In *Maloney v. Bartley* (1812) 3 Campb. (Eng.) 210, which involved a question of admissibility of evidence, the court says that a person who has written a copy of a libel and delivered it to a third person is liable, and the fact that his master ordered him to do so is no justification.

Civil actions for libel seem to be rare; and therefore attention is called to the following cases in which prosecutions were upheld against servants as such: *Rex v. Clerk* (1728) 1 Barnard. K. B. 304, 94 Eng. Reprint, 207; *Rex v. Knell* (1729) 1 Barnard. K. B. 305, 94 Eng. Reprint, 207.

There is a tendency running through the decisions, however, to hold that if the agent or servant is a mere innocent conduit through which the wrong is committed, he will not be personally liable. Thus, a porter, who, in the course of his business, delivers parcels containing libelous handbills, is not liable in an action of libel if he can show that he was ignorant of the contents of the parcels. *Day v. Bream* (1837) 2 Moody & R. (Eng.) 54.

f. Obstruction of ancient lights.

A servant of a corporation is liable for obstructing ancient lights. *Thompson v. Gibson* (1841) 7 Mees. & W. 456, 151 Eng. Reprint, 845, 9 Dowl. P. C. 717, 10 L. J. Exch. N. S. 330.

The managing clerk of a property owner under whose direction buildings are constructed which darken the ancient lights of a neighboring property owner is personally liable for the injury. *Wilson v. Peto* (1821) 6 J. B. Moore (Eng.) 47.

g. Abuse of legal process.

An agent or servant who uses legal

process in an illegal manner incurs the same liability as he would had he employed it in his own behalf.

Alabama. — *Warfield v. Campbell* (1859) 35 Ala. 349.

Illinois. — *Sundmacher v. Block* (1890) 39 Ill. App. 553.

Kentucky. — *Wood v. Weir* (1845) 5 B. Mon. 546.

Maine. — *Richardson v. Kimball* (1848) 28 Me. 463.

Michigan. — *Josselyn v. McAllister* (1871) 22 Mich. 300.

New York. — *Gearity v. Strasbourger* (1909) 133 App. Div. 701, 118 N. Y. Supp. 257.

Rhode Island. — *McGarrahan v. Lavers* (1866) 15 R. I. 302, 3 Atl. 592.

Texas. — *Wallace v. Finberg* (1876) 46 Tex. 35.

Wisconsin. — *Wright v. Eaton* (1859) 7 Wis. 595.

England.—*Sands v. Child* (1693) 3 Lev. 351, 83 Eng. Reprint, 725; *Barker v. Braham* (1773) 3 Wils. 377, 95 Eng. Reprint, 1109, 2 W. Bl. 866, 96 Eng. Reprint, 510; *Stevens v. Midland Counties R. Co.* (1854) 10 Exch. 352, 156 Eng. Reprint, 480, 2 C. L. R. 1300, 23 L. J. Exch. N. S. 328, 18 Jur. 932; *Gauntlett v. King* (1857) 3 C. B. N. S. 59, 140 Eng. Reprint, 660; *Bennett v. Bayes* (1860) 5 Hurlst. & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156.

In *McGarrahan v. Lavers* (R. I.) supra, a clerk in a restaurant was held liable for directing the arrest of a customer, without any discussion as to whether or not the action should have been brought against his employer.

A manager of a store is personally liable for arresting, without warrant, a customer who is alleged to have been guilty of shoplifting, which did not occur in his presence. *Gearity v. Stresbourger* (N. Y.) supra.

And the general rule is that the servant or agent is liable in all cases for false arrest. *Josselyn v. McAllister* (Mich.) supra.

A clerk and watchman of a hotel who took part in a wrongful arrest of a guest for alleged refusal to pay a bill are personally liable in damages

therefor. *Sundmacher v. Block* (Ill.) supra.

An agent or servant is liable in damages for causing the arrest of a person maliciously and illegally, although he is acting for his principal. *Warfield v. Campbell* (Ala.) supra.

If A orders B to conduct a prosecution, and both know that the person charged is innocent, they are equally to blame. The fact of B obeying A's command is not enough to exonerate him. *Stevens v. Midland Counties R. Co.* (1854) 10 Exch. 352, 156 Eng. Reprint, 480, 2 C. L. R. 1300, 23 L. J. Exch. N. S. 328, 18 Jur. 932.

One who, as agent of another, collects money by execution, and, instead of applying it on the judgment and costs in the action, applies it to other claims of his principals, cannot avoid liability to the judgment debtor on the ground that he acted as agent. *Wright v. Eaton* (Wis.) supra. The court says the fact that the client obtained the money as agent, if wrongfully obtained, cannot absolve him from liability to the person from whom it was obtained, although he had paid it over to his principal.

In an action against agents for illegally bringing suit in the admiralty for a matter arising within the body of a county, it was held that the express command of the master would not avail because the warrant of no man, not even the King himself, can excuse the doing of an illegal act, for, although the commanders are trespassers, so are also the persons who do the act. *Sands v. Child* (1693) 3 Lev. 351, 83 Eng. Reprint, 725.

In *Wood v. Weir* (Ky.) supra, an attorney who maliciously procured a restraining order to deprive plaintiff of his property was held liable in damages; but there is no discussion of his position as agent of his client.

In *Barker v. Braham* (1773) 3 Wils. 377, 95 Eng. Reprint, 1109, 2 W. Bl. 866, 96 Eng. Reprint, 510, which involved the question of liability of an attorney for illegally suing out a *capias ad satisfaciendum*, he attempted to defend on the ground that he merely acted as agent for his princi-

pal; but the court said all the books say that all are principals in trespass.

An agent having the renting of property for the owner cannot defeat liability to an action for trespass in directing the leaving of a distress for rent after the rent had been tendered, on the ground that he was merely acting as agent. *Bennett v. Bayes* (1860) 5 Hurlst & N. 391, 157 Eng. Reprint, 1233, 29 L. J. Exch. N. S. 224, 8 Week. Rep. 320, 2 L. T. N. S. 156.

Agents of an officer who, after attaching a vessel, permit it to continue its accustomed course of business, and who receive the profits thereof, are liable to the attaching creditor, who establishes his title to the vessel, for the amounts so received, the court saying that an agent is liable for misfeasance to the owner of the property, whether he acted by direction of his principal or not. *Richardson v. Kimball* (Me.) *supra*.

A real estate broker employed by a property owner to make a distress for rent is personally liable for distraining goods not subject to distress. *Gauntlett v. King* (1857) 3 C. B. N. S. 59, 140 Eng. Reprint, 660.

An agent who acts maliciously in making the affidavit and bond necessary to secure an attachment is personally responsible for the injury done. *Wallace v. Finberg* (Tex.) *supra*.

h. Infringement of patent.

Agents who participate in the infringement of a patent may be held personally liable for their acts.

And an injunction will lie against them to prevent infringement. *Good-year v. Phelps* (1853) 3 Blatchf. 91, Fed. Cas. No. 5,581; *Poppenhausen v. Falke* (1861) 4 Blatchf. 493, Fed. Cas. No. 11,279; *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.* (1887) 30 Fed. 123; *Cahoone Barnet Mfg. Co. v. Rubber & C. Harness Co.* (1891) 45 Fed. 582.

An agent who actively participates in the infringement of a patent is liable in damages. *National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co.* (1884) 19 Fed. 514.

In an action against the chairman

of the directors of a railroad company for contracting for certain work which involved the infringement of a patent, the court says undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured person. Both the master who commands the doing and the servant who does the acts of trespass may be made responsible as principals. *Lightner v. Brooks* (1864) 2 Cliff. 287, Fed. Cas. No. 8,344.

Sickels v. Borden (1857) 4 Blatchf. 14, Fed. Cas. No. 12,833, was a proceeding in attachment for violation of an injunction against infringement of a patent by the use of an engine to which the mechanism had been attached. But with respect to the liability of the engineer having no interest in, or control over, the engine, it was argued that it would not do to punish by attachment the mere servants of the owner of the boat, who were subject to the orders of the master and to punishment for disobedience if they refused to aid in the navigation of the boat. But the court held that both the master and engineer, as agents of the foreign corporation which owned the boat on which the infringing mechanism was placed, were proper parties to the suit, at least for the purpose of enjoining the engineer as the acting infringer. And neither his agency nor his relationship to the master or to the vessel affords an excuse for violation of the injunction.

But an action at law for damages cannot be maintained against servants who merely make or sell an article which infringes a patent. *United Nickel Co. v. Worthington* (1882) 13 Fed. 392.

So, customhouse agents of foreign manufacturers, who aid in passing through the customhouse articles manufactured abroad which infringe a domestic patent, cannot be held liable for the infringement. This was placed upon the ground that the act was neither making, using, exercising, nor vending the invention. *Nobel's*

Explosives Co. v. Jones (1883) L. R. 8 App. Cas. (Eng.) 5, 52 L. J. Ch. N. S. 339, 48 L. T. N. S. 490, 31 Week. Rep. 388, affirming (1880) L. R. 17 Ch. Div. 722, 50 L. J. Ch. N. S. 582, 44 L. T. N. S. 593, 30 Week. Rep. 494.

The directors of a corporation which has been guilty of an infringement of a patent may be held personally liable so far as they co-operated in the infringement, and it is no justification for them to say that the corporation ordered them to do so. *Betts v. De Vitre* (1864) 11 L. T. N. S. (Eng.) 535, 5 New. Rep. 165.

1. *Meddling with decedents' estates.*

An agent who assists his principal in meddling with the estate of a deceased person, with which the principal is not authorized to interfere, is personally liable therefor.

In *Lysley v. Clarke* (1851) 14 Eng. L. & Eq. Rep. 510, there is a dictum to the effect that one interfering with the estate of a deceased person, as agent for another, is a wrongdoer and liable as executor de son tort.

An agent of an executrix, who mismanages the estate and converts income to his own use, is liable to the executrix, but not to heirs and distributees. *Phinney v. Phinney* (1859) 17 How. Pr. (N. Y.) 197.

In *Pond v. Underwood* (1766) 2 Ld. Raym. 1210, 92 Eng. Reprint, 299, it was held that one who, as agent for an administrator appointed before finding the will, collects money due the intestate and turns it over to the administrator, is not liable in trover to the executor when appointed. The court held that though the administrator might be liable, yet it would be hard to make defendant liable, he having paid the money over before he knew of the will.

But in *Jacob v. Allen* (1703) 1 Salk. 27, 91 Eng. Reprint, 26, it was held that an agent of an administrator who collects money for the estate, and pays it over to the administrator before the will is found, is liable to the executor in indebitatus assumpsit, because the administration was void and could give him no authority to act.

The earlier case was decided by Trevor, Ch. J., and was indebitatus assumpsit for money had and received, and it was objected that defendant acting only as agent, it was a receipt by the administrator, and not by defendant, and that the action ought to be special assumpsit, and not general indebitatus, because, the money having been received by special authority, to the use of another, this express intent prevents the raising of an implied contract to a third person. Sed non allocatur for the administration was merely void and the administrator could give no authority, and then there is nothing to hinder the raising of an implied contract. The later case was the same form of action for money which was due the testator and collected by defendant before the will was found. The case came before Lord Holt, who, as has been seen, was inclined to favor a rule of nonliability in case of agents acting for their principals, and he directed a nonsuit. In *Sadler v. Evans* (1766) 4 Burr. 1984, 98 Eng. Reprint, 34, decided about the time of *Pond v. Underwood*, Lord Mansfield said that he favored the later case.

One who, at the instance of a widow, collects and pays over to her money due the estate when she has not taken letters of administration, is personally liable to the executor for the amount so collected. *Sharland v. Mildon* (1846) 5 Hare, 469, 67 Eng. Reprint, 997, 15 L. J. Ch. N. S. 434, 10 Jur. 771. The court says the authorities clearly show that the doctrine that the possession of the agent is the possession of the principal has no application to the case of a wrongdoer.

The husband of an administratrix, acting as her agent, may be directly liable to the cestuis que trust for any fraud or collusion in the management of the estate. *Lehmann v. Rothbarth* (1884) 111 Ill. 185.

Executors and trustees in charge of the property of a deceased are personally liable for permitting the property to become so out of order that a window falls from the building, to the injury of a passer-by. *Ferrier v. Trépannier* (1895) 24 Can. C. S. 86,

Where the treasurer of a savings bank paid out money of a deceased depositor in settlement of claims against him, and it was sought to make him liable for other debts as executor de son tort, he claims exemption as having acted merely as agent of the bank; but the court says the actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another, or even by his superior command. *Bennett v. Ives* (1862) 30 Conn. 329.

In *Stephens v. Bacon* (1822) 7 N. J. L. 1, it was held that an agent of an executrix who receives money held by testator in trust for a third person is not liable in assumpsit to the third person. The court says a mere agent, without suggestion of fraud, is answerable only to his principal.

If a person acting as agent for another takes possession of the personal property of a decedent and converts it into money, without administration, he will be liable to the lawful administrator for the value of the property so converted. *Stevenson v. Valentine* (1889) 27 Neb. 338, 43 N. W. 107. One employed to collect some debts belonging to a decedent's estate was sought to be held liable for paying them over to decedent's widow, and it was held that he will not be relieved from liability on the ground that he was acting as agent for the widow, since the law does not recognize the relation of principal and agent as existing amongst wrongdoers. *Sharland v. Mildon* (Eng.) *supra*.

j. Conversion.

1. In general.

An agent or servant who assists his principal or master in converting property of a third person to the use of the principal or master is personally liable to the true owner for the loss thereby inflicted upon him.

United States. — *Hills v. Ross* (1796) 3 Dall. 184, 1 L. ed. 562.

Alabama. — *Lee v. Mathews* (1846) 10 Ala. 682, 44 Am. Dec. 177; *Prince v. Puckett* (1848) 12 Ala. 832; *Per-*

minter v. Kelly (1851) 18 Ala. 716, 54 Am. Dec. 177; *Hudmon v. Du Bose* (1888) 85 Ala. 446, 2 L.R.A. 475, 5 So. 162.

Arkansas. — *Gaines v. Briggs* (1849) 9 Ark. 46.

California. — *Webb v. Winter* (1851) 1 Cal. 417.

Dakota. — *Nichols, S. & Co. v. Barnes* (1882) 3 Dak. 148, 14 N. W. 110; *Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co.* (1888) 5 Dak. 62, 37 N. W. 763.

Georgia. — *Porter v. Thomas* (1857) 23 Ga. 467; *Miller v. Wilson* (1896) 98 Ga. 567, 58 Am. St. Rep. 319, 25 S. E. 578; *Flannery v. Harley* (1903) 117 Ga. 483, 43 S. E. 765; *McConnell v. Prince* (1912) 12 Ga. App. 54, 76 S. E. 754.

Illinois. — *Allen v. Hartfield* (1875) 76 Ill. 358.

Indiana. — *Berghoff v. McDonald* (1882) 87 Ind. 549; *Shearer v. Evans* (1883) 89 Ind. 400.

Iowa. — *Warder-Bushnell & G. Co. v. Harris* (1890) 81 Iowa, 153, 46 N. W. 859.

Kansas. — *Huffman v. Parsons* (1879) 21 Kan. 467; *Barnhart v. Ford* (1887) 37 Kan. 520, 15 Pac. 542.

Kentucky. — *Poole v. Adkisson* (1833) 1 Dana, 110.

Maine. — *Eveleth v. Blossom* (1867) 54 Me. 447, 92 Am. Dec. 555; *McPheters v. Page* (1891) 83 Me. 234, 23 Am. St. Rep. 772, 22 Atl. 101; *Wing v. Milliken* (1898) 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138.

Massachusetts. — *Higginson v. York* (1809) 5 Mass. 341; *McPartland v. Read* (1865) 11 Allen, 231; *Edgerly v. Whalan* (1871) 106 Mass. 307.

Michigan. — *Knowles v. Smith* (1916) 190 Mich. 409, 157 N. W. 276.

Missouri. — *Williams v. Wall* (1875) 60 Mo. 318; *Ess v. Griffith* (1894) 128 Mo. 50, 30 S. W. 343.

Nebraska. — *Peckinbaugh v. Quillin* (1882) 12 Neb. 586, 12 N. W. 104; *McCormick v. Stevenson* (1882) 13 Neb. 70, 12 N. W. 828; *Stevenson v. Valentine* (1889) 27 Neb. 338, 43 N. W. 107; *Cook v. Monroe* (1895) 45 Neb. 349, 63 N. W. 800; *D. M. Osborne Co. v. Plano Mfg. Co.* (1897) 51 Neb. 502, 70 N. W. 1124; *Hill v. Campbell*

Commission Co. (1898) 54 Neb. 59, 74 N. W. 388.

New Hampshire.—*Doty v. Hawkins* (1833) 6 N. H. 247, 25 Am. Dec. 459; *Gage v. Whittier* (1845) 17 N. H. 320; *Arthur v. Balch* (1851) 23 N. H. 157; *Flanders v. Colby* (1853) 28 N. H. 34.

New York.—*Sprights v. Hawley* (1868) 39 N. Y. 441, 7 N. Y. Trans. App. 14, 100 Am. Dec. 452, affirming (1863) 40 Barb. 397; *Thompson v. McLean* (1890) 32 N. Y. S. R. 736, 10 N. Y. Supp. 411; *Mayer v. Kilpatrick* (1894) 7 Misc. 689, 28 N. Y. Supp. 145; *Crane v. Onderdonk* (1873) 67 Barb. 47; *Mead v. Jack* (1883) 12 Daly, 65; *Farrar v. Chauffetete* (1848) 5 Denio, 527; *Hearsey v. Pruyn* (1810) 7 Johns. 182; *Thorp v. Burling* (1814) 11 Johns. 285.

Pennsylvania.—*Rice v. Yocum* (1893) 155 Pa. 538, 26 Atl. 698; *Barton v. Willey* (1875) 2 W. N. C. 157; *Thum v. Fish* (1882) 12 W. N. C. 94; *Berry v. Vantries* (1824) 12 Serg. & R. 89.

Rhode Island.—*Singer Mfg. Co. v. King* (1884) 14 R. I. 511.

South Carolina.—*Hall v. Garvin* (1920) 113 S. C. 182, 102 S. E. 1.

Tennessee.—*Elmore v. Brooks* (1871) 6 Heisk. 45.

Texas.—*Shilling v. Shilling* (1896) — Tex. Civ. App. —, 35 S. W. 420; *Ellis v. Stine* (1900) — Tex. Civ. App. —, 55 S. W. 758; *Kauffman v. Beasley* (1881) 54 Tex. 563.

Virginia.—*Newsom v. Newsom* (1829) 1 Leigh, 94, 19 Am. Dec. 739.

Wisconsin.—*Wright v. Eaton* (1859) 7 Wis. 595; *Blizzard v. Brown* (1913) 152 Wis. 160, 189 N. W. 737; *Jensen v. Miller* (1916) 162 Wis. 546, 156 N. W. 1010.

England.—(1676) 2 Rolle, Abr. 431; *Parker v. Godin* (1728) 2 Strange, 814, 93 Eng. Reprint, 866; *Perkins v. Smith* (1752) 1 Wils. 328, 95 Eng. Reprint, 644; *Sadler v. Evans* (1766) 4 Burr. 1984, 98 Eng. Reprint, 34; *Buller v. Harrison* (1777) Cowp. pt. 2, p. 566, 98 Eng. Reprint, 1243; *Stephens v. Elwall* (1815) 4 Maule & S. 259, 105 Eng. Reprint, 830; *Featherstonhaugh v. Johnston* (1818) 8 Taunt. 237, 129 Eng. Reprint, 374, 2 J. B. Moore, 181; *Wilson v. Anderton* (1830) 1 Barn &

Ad. 450, 109 Eng. Reprint, 855, 9 L. J. K. B. 48; *Howell v. Batt* (1833) 2 Nev. & M. 381, 5 Barn & Ad. 504, 110 Eng. Reprint, 877, 3 L. J. K. B. N. S. 49; *Cranch v. White* (1835) 1 Bing. N. C. 414, 181 Eng. Reprint, 1176, 6 Car. & P. 767, 1 Scott, 314, 4 L. J. C. P. N. S. 113; *Pearson v. Graham* (1837) 6 Ad. & El. 899, 112 Eng. Reprint, 344, 2 Nev. & P. 686, W. W. & D. 691, 7 L. J. Q. B. N. S. 247; *Catterall v. Kenyon* (1842) 3 Q. B. 310, 114 Eng. Reprint, 525, 6 Jur. 507, 2 Gale & D. 545, 11 L. J. Q. B. N. S. 260; *Davies v. Vernon* (1844) 6 Q. B. 443, 115 Eng. Reprint, 169, 14 L. J. Q. B. N. S. 30; *Ewbank v. Nutting* (1849) 7 C. B. 797, 137 Eng. Reprint, 316; *Powell v. Hoyland* (1851) 6 Exch. 67, 155 Eng. Reprint, 456, 20 L. J. Exch. N. S. 82; *Lee v. Bayes* (1856) 18 C. B. 609, 139 Eng. Reprint, 1508, 25 L. J. C. P. N. S. 249, 2 Jur. N. S. 1093; *Schuster v. McKellar* (1857) 7 El. & Bl. 704, 119 Eng. Reprint, 1407, 26 L. J. Q. B. N. S. 281, 3 Jur. N. S. 1820, 5 Week. Rep. 656; *Sharland v. Mildon* (1846) 5 Hare, 469, 67 Eng. Reprint, 997, 15 L. J. Ch. N. S. 434, 10 Jur. 771; *Fine Art. Soc. v. Union Bank* (1886) L. R. 17 Q. B. Div. 705, 56 L. J. Q. B. N. S. 70, 55 L. T. N. S. 536, 35 Week. Rep. 114, 51 J. P. 69.

If A takes property by command of B, replevin may be brought against both. (1676) 2 Rolle, Abr. (Eng.) 431.

A person wrongfully taking property is liable in replevin although he acts as agent for another. *Thompson v. McLean* (1890) 32 N. Y. S. R. 736, 10 N. Y. Supp. 411.

In *Arthur v. Balch* (1851) 23 N. H. 157, which was an action to hold the master liable for conversion by his servant, the court said that it was formerly held that where goods were converted by a servant at the command or by direction of the master, no action would lie against the servant, but that this doctrine is no longer held to be the law.

One who takes and converts property of another cannot escape liability to the owner by showing that he acted as agent. *Warder-Bushnell & G. Co. v. Harris* (Iowa) *supra*. The court says the capacity in which a

tort-feasor acts does not protect him from liability for his acts.

Where one to whom stock has been sent for delivery upon payment of the amount for which it was held as collateral converted it to his own use, an action was brought against him by the true owner, and the court, after stating that he had transcended the power conferred upon him, and was guilty of misfeasance toward the one entitled to possession of the stock, says: "Although an agent, for non-feasance and omissions of duty, is not liable, except to his principals, the rule is otherwise when the act complained of is misfeasance. In all such cases he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another." *Crane v. Onderdonk* (1873) 67 Barb. (N. Y.) 47.

One aiding in the conversion of property cannot escape liability in trover on the ground of his agency. *Shearer v. Evans* (Ind.) *supra*.

In *Davies v. Vernon* (1844) 6 Q. B. 443, 115 Eng. Reprint, 169, 14 L. J. Q. B. N. S. 30, which was an action against an attorney, the court says the general rule is that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal.

• Replevin lies against an agent who aids in detaining property of another. *Berghoff v. McDonald* (Ind.) *supra*. The court says, in torts the rule of principal and agent does not exist. They are all wrongdoers.

An agent who, for and in behalf of his principal, takes the property of another without the latter's consent, is guilty of conversion. *McConnell v. Prince* (Ga.) *supra*.

It is no defense in trover that defendant acted under authority of another, who had no authority over the property. *Gaines v. Briggs* (1849) 9 Ark. 46.

An agent who takes for a principal plank to which the principal has no claim is personally liable in trover

for the conversion. *Barton v. Willey* (1875) 2 W. N. C. (Pa.) 157.

One taking possession of another's animals, and carrying them off, cannot defeat liability on the ground that he was acting as agent. *Shilling v. Shilling* (1896) — Tex. Civ. App. —, 35 S. W. 420.

Persons who wrongfully drive a cropper off his land and appropriate his crop cannot defeat liability because they acted as agents. *Ellis v. Stine* (1900) — Tex. Civ. App. —, 55 S. W. 758.

In *Huffman v. Parsons* (1879) 21 Kan. 467, there is a dictum to the effect that if an agent, sued for the value of a wagon which he had taken from possession of plaintiff, committed a wrong in taking the wagon, he would be liable even though he acted as agent of another.

A cartman who assists in moving goods of a third person at the instance of his employer is liable in trover. *Thorp v. Burling* (1814) 11 Johns. (N. Y.) 285.

So, where cartmen assist the wrongdoer in reducing property to his possession by taking it from the place where the owner had deposited it, and carting it away, they will be liable for the conversion, although they did not know of the adverse title. The only ground on which the carrier cannot be held liable is that he has received and transported the goods after the trespasser has reduced them to his possession. *Mead v. Jack* (1883) 12 Daly (N. Y.) 65.

Agents sued in replevin for property taken by them for their principal cannot defeat the action by showing that they acted as agents. *Barnhart v. Ford* (1887) 37 Kan. 520, 15 Pac. 542.

Agents who aid their principal in concealing and retaining title to property fraudulently obtained are liable in trover. *Allen v. Hartfield* (1875) 76 Ill. 358.

An agent assisting in preventing the removal of trade fixtures from a building is personally liable in trover. *Farrar v. Chauffetete* (1848) 5 Denio, (N. Y.) 527.

The servant of a bankrupt, who,

under his general authority, after his master has committed an act of bankruptcy and absconded, sells goods belonging to the bankrupt, is guilty of conversion. *Pearson v. Graham* (1837) 6 Ad. & El. 899, 112 Eng. Reprint, 344, 2 Nev. & P. 636, W. W. & D. 691, 7 L. J. Q. B. N. S. 247.

The master of a ship who negligently signs a bill of lading in favor of a third person, and then delivers according to the bill of lading, notwithstanding notice not to do so, is liable for conversion. *Schuster v. McKellar* (1857) 7 El. & Bl. 704, 119 Eng. Reprint, 1407, 26 L. J. Q. B. N. S. 281, 3 Jur. N. S. 1320, 5 Week. Rep. 656.

Where the master of a ship unnecessarily sells the cargo before reaching destination, he is guilty of conversion. *Ewbank v. Nutting* (1849) 7 C. B. 797, 137 Eng. Reprint, 316.

But an agent acting in the presence and under the direction of his master in taking possession of property claimed by another was held, in *Strong v. Colter* (1868) 13 Minn. 82, Gil. 77, not to be liable for the conversion unless his principal would also be liable.

And there is no liability for conversion for acts in which the agent does not participate. *McLennan v. Minneapolis & N. Elevator Co.* (1894) 57 Minn. 317, 59 N. W. 628.

And that doctrine was, in *Leuthold v. Fairchild* (1885) 35 Minn. 100, 27 N. W. 503, 28 N. W. 218, where an employee of a warehouse was sued for assisting in wrongfully disposing of property of a patron, carried to such an extent that the court said that the rule was that "an agent or servant who, acting solely for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property."

There is a rule acted upon by the courts more or less generally that an agent is not personally liable if he is a mere conduit through whose possession the property passes without any

effect upon the title. Thus, a bailee or carrier may receive the property and return it to the principal or to his consignee without personal liability. This class of cases is not within the scope of this annotation because the cases turn upon the principle that there is no conversion in fact, without throwing any light upon the question now under consideration; namely, What is the liability of an agent who aids in a conversion?

Where a packer received, packed, and shipped goods to a third person which had been intrusted to his employers for sale, and by him pledged to such third persons for money lent, the court held that the packer was not liable for conversion, because he was exercising a public employment, and that he was a mere conduit in the ordinary course of trade, and could not be charged with a conversion. *Greenway v. Fisher* (1824) 1 Car. & P. (Eng.) 190.

But in *Fowler v. Hollins* (1872) L. R. 7 Q. B. 628, 2 Eng. Rul. Cas. 410, that case was doubted on the ground that a packer is not engaged in a public employment.

One Arkansas case failed to recognize this exception to the rule, and held broadly that in trover it is no defense that defendant acted under authority of another, who was himself a trespasser. *Gaines v. Briggs* (1848) 9 Ark. 46. In that case an instruction was disapproved which was to the effect that if defendant, in removing the property, acted as a mere carrier, at the instance and request of a third person, and with no intention of converting the property to his own use, or with the intent to exercise any right of ownership over said property, but in good faith, and at the time of the removal, the third person was in peaceable and quiet possession of the property, and defendant in no wise consented to, aided, or counseled the removal of the property, he would not be responsible.

2. Property turned over to principal.

The fact that the property has been turned over to the principal is immaterial. The liability of the agent con-

tinues as though he still had the property in his possession. In fact, the act of turning it over may be the very act which completes the conversion.

An agent who, having become possessed of negotiable bills which had been taken from a bankrupt under circumstances such that they belonged to the one from whom he obtained them, may be personally liable in trover for turning them over to his principal after notice of the owner's claim. *Powell v. Hoyland* (1851) 6 Exch. 67, 155 Eng. Reprint, 456, 20 L. J. Exch. N. S. 82.

Where a clerk of a foreign merchant bought goods belonging to a bankrupt's estate and sent them to his employer, he was held personally liable for the conversion, although he was ignorant of the fact that the goods belonged to the estate. *Stephens v. Elwall* (1815) 4 Maule & S. 259, 105 Eng. Reprint, 830. Lord Ellenborough said the clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion, "for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it." And he says in answer to the plea of hard case, "What can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but, if the master cannot satisfy it, for every penny of the whole damage?"

An agent who trades a new machine in his hands for sale for an old one belonging to a third person is personally liable to the true owner, although he turns the old one and the money received in the trade over to his employer. *Rice v. Yocum* (1893) 155 Pa. 538, 26 Atl. 698.

An agent who has money to which his principal has no right is personally liable to one from whom it is wrongfully withheld. *Jensen v. Miller* (1916) 162 Wis. 546, 156 N. W. 1010.

In an action against an attorney for wrongfully collecting money and turning it over to his principal, the court says that the rule is that if an agent collects for his principal money which does not belong to him, and turns it over to the principal, he is personally liable therefor. *Blizzard v. Brown* (1913) 152 Wis. 160, 139 N. W. 737.

That one wrongfully obtaining money from another acts as agent for a third person does not absolve him from liability to the person from whom he secured it, although he has paid it over to his principal. *Wright v. Eaton* (1859) 7 Wis. 595.

Agents who assist their principal in appropriating the proceeds of a check which was alleged to be lost, after a duplicate had been issued in its place, with the understanding that the first one, if found, would be returned or destroyed, cannot avoid liability on the ground of their agency. *Mayer v. Kilpatrick* (1894) 7 Misc. 689, 28 N. Y. Supp. 145. The court says the principal cannot authorize or be deemed to have authorized the commission of any unlawful act by his agent, and defendants will not be permitted, therefore, to escape liability because, in the conversion of the check, they pretended to act for another.

In *Hearsey v. Pruyn* (1810) 7 Johns. (N. Y.) 182, it is said the law is well settled that an action may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over.

One who bids in, as agent for another, at execution sale, property upon which he knows a third person has a lien, is guilty of conversion. *McCormick v. Stevenson* (1882) 13 Neb. 70, 12 N. W. 828; *Stevenson v. Valentine* (1889) 27 Neb. 338, 43 N. W. 107; *Cook v. Monroe* (1895) 45 Neb. 349, 63 N. W. 800; *D. M. Osborne Co. v. Plano Mfg. Co.* (1897) 51 Neb. 502, 70 N. W. 1124.

One who collects for another a draft received by indorsement in a gambling transaction, and turns the proceeds over to him, less his own com-

mission for the service, is liable for the conversion. *Williams v. Wall* (1875) 60 Mo. 318.

Where an agent to collect a bill receives property from the debtor which belongs to a third person, and transmits it to his principal, he is liable in trover. The court said he was not relieved from liability by the fact that, in receiving the property from the debtor, he acted as the agent of the creditor, and without notice of the title of the true owner. Whoever meddles with another's property, whether as principal or agent, does so at his peril, and it makes no difference that, in doing so, he acted in good faith; nor, in case of an agent, that he delivers the property to his principal before receiving notice of the claim of the owner. If an agent takes the property of another without his consent and delivers it to the principal, it is a conversion, and trover will lie for recovery of the property, or for damages. *Miller v. Wilson* (1896) 98 Ga. 567, 58 Am. St. Rep. 319, 25 S. E. 578; *Flannery v. Harley* (1903) 117 Ga. 483, 43 S. E. 765.

Where an agent purchased slaves unlawfully sold at an auction, and immediately turned them over to his principal, but was sued for the conversion, the court says: "Our first impression was that the defendant, having acted merely as the agent of another person, and having parted with the possession before he received notice of the title of the plaintiff, was not responsible in this action, but that the suit must be brought against the principal. Subsequent reflection has satisfied us that we were mistaken, and that the principal upon which we relied does not govern such cases as this. The general rule of law, that agents properly authorized, acting for a known principal, without any personal undertaking, are not individually responsible, does not apply to torts, because no one can lawfully command another to commit a wrong. It is also clear that every unlawful intermeddling with the goods of another is a conversion; and it is no answer to the true owner, that the person so receiving the goods was ignorant of his

title, or that he received them for the use or benefit of another. The taking or receiving of them, being a conversion, his subsequent disposition of them will not exonerate him from liability. . . . Although, therefore, this may appear to be a hard case, it is perfectly clear the defendant, in receiving the slaves, was guilty of a conversion, although he was ignorant of the title of the plaintiff, and was acting merely as the agent of another, and consequently liable to be sued in this form of action." *Lee v. Mathews* (1846) 10 Ala. 682, 44 Am. Dec. 498.

But where one, as agent, purchases the share of the cotenant in a horse at execution sale, and delivers him to his principal, he is not liable for conversion of the share of the other cotenant unless his acts deprived such cotenant of the means of locating the animal. *Sheffler v. Mudd* (1897) 71 Mo. App. 78.

So, an agent of a surety company is not liable for conversion in placing money deposited with him by a customer as collateral for a bond executed in his favor in a bank account upon which checks for various purposes are drawn, after the agency has terminated and the fund has passed under control of the surety company. *Sagone v. Mackey* (1919) 225 N. Y. 594, 122 N. E. 621, reversing (1916) 172 App. Div. 192, 158 N. Y. Supp. 579, where the court says that the law is well settled that where an agent misapplies and misappropriates trust moneys, he, as well as the principal, is liable to the cestuis que trust therefor. When this defendant received these trust funds, it was not only the duty of his principal, but his own duty, to keep them separate and distinct, not only from the funds of the company, but also from his individual funds. When he employed them in an account which contained a general fund of the company, and also an individual fund from which he drew for his personal use, he, as well as the principal, was liable for misfeasance and misappropriation. His wrongful act was a breach of duty owing to the cestuis que trust, for which he is personally liable.

Where a servant was sued in trover for conversion of a flute which he had obtained from plaintiff for his master's inspection, and which was not returned, it was held that the master was a competent witness to show that he authorized the obtaining of the flute, the chief justice saying that if he authorized the delivery of the message which was in fact delivered, the plaintiff could not recover from the servant. *Grylls v. Davies* (1831) 2 Barn. & Ad. 514, 109 Eng. Reprint, 1234. In that case trover had been brought against the servant, and after verdict in his favor, the only question was as to the competency of the principal as a witness, and that depended upon whether or not he was an interested party. The ground of the ruling of the chief justice is not stated. If the intent to convert the flute was not formed until after it had been delivered to the master, the servant may possibly not be liable because he did not participate in the conversion; but if the message was part of the scheme to get possession of and convert the instrument, it is not apparent why the servant should not be personally liable for aiding such a scheme.

Some New York cases, by an application of the principal of nonfeasance which obtained in that state, have reached the conclusion that an agent who purchases for a principal property claimed by another is not liable for the conversion. *Jackson v. Klingner* (1900) 33 Misc. 758, 67 N. Y. Supp. 850.

So, replevin will not lie against an agent who takes for his principal an article sold by the principal on conditional sale, and turns it over to the principal to hold for defaulted payments. *Iserman v. Conklin* (1897) 21 Misc. 194, 47 N. Y. Supp. 107. The court says the agent acted, with knowledge of the plaintiff, as the agent of the sellers, and not for himself.

In conflict with the above doctrine is the early English case of *Mires v. Solebay* (1677) 2 Mod. 242, 86 Eng. Reprint, 1050. In that case it appeared that, in consequence of a controversy over the title to some sheep, replevin

was brought to recover their possession, and defendant, by command of the replevin suit, assisted the officers in driving the sheep to the plaintiff's pasture. Defendant was held not liable in trover, partly upon the ground that the sheep were in the custody of the law; but the court said the action will not lie against the servant, for apparent wrong; for if the master's command, though he had no title, yet he shall be excused. And this ruling would extend to all cases where the master's command was not to do an apparent wrong; for if the master's cause depend upon a title, be it true or false, it is enough to excuse the servant; for otherwise it would be a mischievous thing if a servant upon all occasions must be satisfied with his master's title and right before he will obey his commands. But the servant cannot plead the command of the master in bar of a trespass. The jury having failed to find a conversion, the court said it would not intend one, because, if the conversion was to the use of the master, there is no call for this action to be brought against defendant, but it ought to be brought against the master. It will be noted that in that case the jury refused to find a conversion, and that, together with the other elements in the case, makes the argument of the court of little weight. In the light of later decisions it would seem that had nothing appeared further than that, at his master's command, defendant assisted in taking sheep from their owner's pasture to his master's without authority of the owner, defendant could not shield himself from liability to suit.

In *Berry v. Vantries* (1824) 12 Serg. & R. (Pa.) 89, it is said the law is well laid down in *Mires v. Solebay* (Eng.) supra, that trover cannot be maintained against a servant who has acted by his master's command, unless it were to do an apparent wrong. And that where the master's cause depends on a title, as where the command is given under the color of a writ, whether valid or not, a servant will be excused, for it would be unreasonable to require him to scruti-

nize the master's title, and thus make him act in all cases at his peril.

3. Sale and proceeds turned over.

An agent who makes a sale of property to a third person at the command of his employer is liable in detinue, notwithstanding he acted merely as agent. *Poole v. Adkisson* (1833) 1 Dana (Ky.) 110. The court says the principal cannot delegate authority to another to do an act which he himself has no legal authority to do. An agent or servant is responsible for his own tortious act even though it was done in submission to the command or authority of his employer or master. The general rule is that he whose voluntary act, whether for himself or another, operates injuriously to the rights of a third person, shall be responsible to the person who may be injured by the wrongful act.

A sale of property by an agent which deprives the true owner of it subjects the agent to liability for trover, although he has turned the proceeds over to his principal. *Gage v. Whittier* (1845) 17 N. H. 320.

A servant who, in attempting to collect for his master a debt from a bankrupt, receives goods from the latter which he sells, and turns the money over to his principal, is personally liable in trover to the bankrupt's assignee. The court says that if the agent is a tort-feasor, no authority that he can derive from his master can excuse him from being liable in this action. *Perkins v. Smith* (1752) 1 Wils. 328, 95 Eng. Reprint, 644.

In *Featherstonhaugh v. Johnston* (1818) 8 Taunt. 237, 129 Eng. Reprint, 374, 2 J. B. Moore, 181, a consignee of goods, who sold them without notice of the claim of a third person, was held liable to him for the full value.

A bank which receives from a depositor money orders which he has embezzled, and cashes them, and places the proceeds to his credit, is liable for a conversion. *Fine Art Soc. v. Union Bank* (1886) L. R. 17 Q. B. Div. (Eng.) 705, 56 L. J. Q. B. N. S.

70, 55 L. T. N. S. 536, 35 Week. Rep. 114, 51 J. P. 69.

One who merely aids the wife of a bankrupt in pawning some plate, and immediately delivers the proceeds to her, is personally liable in trover for the conversion. *Parker v. Godin* (1728) 2 Strange, 814, 93 Eng. Reprint, 866.

An administrator who sells a chattel not owned by his intestate, and applies the proceeds to the payment of the debts of his intestate, is liable in trover to the true owner for its value. *Newsom v. Newsom* (1829) 1 Leigh (Va.) 94, 19 Am. Dec. 739.

That one is acting as agent when he takes possession of property of one person to secure the debt of another, and has it sold, is no defense in an action of trover against him. *Kauffman v. Beasley* (1881) 54 Tex. 563.

An agent who sells stolen property is liable to the true owner in trover if he refuses to disclose his principal. *Thum v. Fish* (1882) 12 W. N. C. (Pa.) 94.

One who enters another's close at the instance of a third person, and takes away and sells wood, accounting to such third person for the proceeds, is liable in trespass to the true owner, although he was ignorant of the fact that his employer did not own the wood. *Higginson v. York* (1809) 5 Mass. 341.

Where an agent of one cotenant sold the common property, the court said: "He must stand on the same ground with his principal. The sale was equally a wrong by both. . . . That the sale by the defendant below was such an assumption of authority over another's property as to amount to a conversion, there can be no doubt. If a party claim the property in the chattels as his own, or even assert the right of another over them, it is evidence of a conversion; and where a person's property is sold by one, whether for his own use or the use of another, it is a conversion, for it is a tortious act, and the gist of the action." *Perminter v. Kelly* (1851) 18 Ala. 716, 54 Am. Dec. 177.

Commercial agents of privateers were, in *Hills v. Ross* (1796) 3 Dall.

(U. S.) 331, 1 L. ed. 623, held liable to the owners of a prize which had been captured for the proceeds of sales which they, under direction of the privateers, had received and paid over to the privateers, with notice of the claim of the true owners.

4. *Assisting conversion.*

Where consignees of a ship indorsed a bill of lading so as to permit goods to be taken by one not their true owner they were held liable in damages, the court saying that the fact that they were the agents of the owners of the ship would not relieve them from such liability. *Webb v. Winter* (1851) 1 Cal. 417.

A butcher who cuts up game for officers who have wrongfully seized it, and distributes it for consumption under their direction, is liable in trover. *McPheters v. Page* (1891) 83 Me. 234, 23 Am. St. Rep. 772, 22 Atl. 101.

An attorney at law who assists in the conversion of property by being present at an unlawful sale and bidding thereon cannot escape responsibility on the ground that he acted merely as agent. *Peckinbaugh v. Quillin* (1882) 12 Neb. 586, 12 N. W. 104.

But where the manager of a business, under direction of his employer, utilizes funds of the employer, under the latter's direction, to pay general debts of the business instead of a note, the holder of which claimed a special interest in the property, it was held that the agent was not personally liable. *Hodgson v. St. Paul Plow Co.* (1899) 78 Minn. 172, 50 L.R.A. 644, 80 N. W. 956. The court says, in contemplation of law such a servant has no possession of or title to his master's property. A servant may be a joint trespasser or joint tort-feasor in assisting the master in taking the goods wrongfully, but the servant is not liable for merely holding and refusing to deliver up goods received by him from his master, and held by him under the master's orders. The decision in that case, however, would seem to have been put upon a ground not applicable to the facts involved.

The court says: "If, while the \$2,000 was still on deposit, and Power, as such servant, had the custody of the certificate of deposit, plaintiff had brought its action against him alone to have a trust declared in its favor upon such certificate, we are clearly of the opinion that the action could not be maintained. It would be useless to bring such an action. The plow company might discharge Power the next day after the action was commenced. Thereafter his relations to the certificate of deposit would be the same as those of any other stranger, and the action must necessarily be abortive. If plaintiff could not maintain such an action against Power while the alleged trust fund was so on deposit, it cannot maintain this action now, after the trust fund has been distributed in payment of the debts of the plow company." But the agent was not in mere passive possession. Conceding that no action would lie against him, if such was the fact, it by no means follows that he would not be liable where he had assisted in actually disbursing the funds.

The Minnesota decisions hold that an agent or servant, who, acting for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross neglect in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property. *Leuthold v. Fairchild* (1886) 35 Minn. 100, 27 N. W. 503, 28 N. W. 218; *McLennan v. Minneapolis & N. Elevator Co.* (1894) 57 Minn. 317, 59 N. W. 628.

5. *Mortgaged property.*

That one assisting in wrongfully taking mortgaged property out of the possession of the mortgagor acted merely as agent for the mortgagee does not absolve him from liability in trover for the injury. *Hall v. Garvin* (1920) 113 S. C. 182, 102 S. E. 1.

An agent who sells mortgaged property for the mortgagor is liable to the mortgagee for the conversion. *Sprights v. Hawley* (1868) 39 N. Y.

441, 7 N. Y. Trans. App. 14, 100 Am. Dec. 452, affirming *Dudley v. Hawley* (1863) 40 Barb. 397, where the court said that the aiding in disposing of the property was an act of conversion in which defendant was a volunteer actor without excuse, and that the law holds him liable in such case, although he did not participate in the proceeds.

One aiding a mortgagor to secrete the mortgaged property so that the mortgage lien cannot be enforced is liable in trover. *Flanders v. Colby* (1853) 28 N. H. 34.

The owner of a grain elevator who receives mortgaged wheat from the mortgagor, mingles it with other wheat in its elevator, and ships it out of the country by orders of the mortgagor, is liable for conversion. *Philip Best Brewing Co. v. Pillsbury & H. Elevator Co.* (1888) 5 Dak. 62, 37 N. W. 763; *Nichols S. & Co. v. Barnes* (1882) 3 Dak. 148, 14 N. W. 110.

The shipping by a warehouseman with whom mortgaged cotton is stored, of the property at the instance of the mortgagor, renders the warehouseman liable in trover. *Hudmon v. DuBose* (1888) 85 Ala. 446, 2 L.R.A. 475, 5 So. 162. The exception with respect to restoration of the property to the bailor does not include a restoration of the bailor's dominion by an act the essential nature of which is in defiance of the true owner's title, or the probable consequences of which will be to put the property beyond his reach.

But in *Travis v. Claiborne* (1817) 5 Munf. (Va.) 435, it was held that an agent who assists in disposing of a mortgaged slave without notice of the mortgage is not personally liable for the conversion after he has turned the proceeds over to his principal. The ruling was put upon the ground that the recording of the mortgage did not charge the agent with notice, but only made it good against creditors and purchasers. Cabell, J., says: "The command of the principal will not justify the agent in committing a trespass, nor even an apparent wrong; in such a case, both the principal and agent are liable to the party injured. But where the conduct of the agent is

20 A.L.R.—9.

within the limits of the authority confided to him, is fair, and unattended by circumstances sufficient to apprise him that he is acting wrongfully in relation to others,—or, in other words, where he does not commit an apparent wrong,—the principal, and not the agent, is responsible for the act." And Roane, J., after stating that a verdict against the agent would not bind the principal, said it would be an enormity if the agent should be condemned and imprisoned on the ground of invading the property right of a third person in a subject which, in a future action between the proper parties, may be found to have been the property of his principal, and not of the stranger. A construction of this sort would destroy and put an end to agencies of every kind. No man would become an agent without, at the same time, becoming an insurer.

6. Refusal to deliver property in agent's possession.

A mere bailee may be liable for conversion if he refuses to surrender the property to the true owner. *Wilson v. Anderton* (1830) 1 Barn. & Ad. 450, 109 Eng. Reprint, 855, 9 L. J. K. B. 48.

The general question of the liability of bailees in such cases is not within the scope of this annotation, and only two cases will be included in which the servant was treated as a bailee, and the general principles applicable in case of servants applied.

Where one in whose custody property wrongfully seized under execution is placed, with an offer of indemnity, by the execution creditor, refuses to give it up, he is liable for conversion. *Catterall v. Kenyon* (1842) 3 Q. B. 310, 114 Eng. Reprint, 525, 6 Jur. 507, 2 Gale & D. 545.

A clerk in a business, who takes on an account due his master a bill which was left with the debtor merely for discount, and refuses to surrender it on demand, may be liable for conversion. *Cranch v. White* (1835) 1 Bing. N. C. 414, 131 Eng. Reprint, 1176, 6 Car. & P. 767, 1 Scott, 314, 4 L. J. C. P. N. S. 113, 1 Hodges, 61.

In *Lee v. Bayes* (1856) 18 C. B. 609, 139 Eng. Reprint, 1508, 25 L. J. C. P.

N. S. 249, 2 Jur. N. S. 1093, where one in whose possession a stolen horse, purchased at public auction, had been placed for keeping, refused to deliver it to the owner upon demand, he was held to be guilty of conversion. The court says if the one who holds the goods chooses to set up the title of his bailor, and to rely on it, he is doing an act which is foreign to his employment or his duty. He asserts a title adverse to the real owner of the goods, and he is guilty of conversion.

A carrier's agent, who, by direction of his employer, refuses to deliver property to a consignee, is personally liable in trover. *Elmore v. Brooks* (1871) 6 Heisk. (Tenn.) 45. The court says if the agent elects to obey an order which was illegal, he cannot escape from the consequences by shifting the liability upon his principal.

An agent, who, having possession of a chattel belonging to a third person, by direction of his employer refuses to deliver it to the true owner, is liable in trover. *Singer Mfg. Co. v. King* (1884) 14 R. I. 511.

A manager of a factory who refuses to deliver a patented machine which had been set up in the factory, to the owner, was held personally liable in trover, the court saying that his possession, being an executive one, was different from that of an ordinary servant; that he is to judge of the propriety of every measure taken for the benefit of his employer, and that, as respects third persons, he acts at his peril. *Berry v. Vantries* (1824) 12 Serg. & R. (Pa.) 89.

An agent of one having no title to property cannot defeat an action for trover brought by the true owner, by setting up the claim of his principal. *Doty v. Hawkins* (1833) 6 N. H. 247, 25 Am. Dec. 459.

The agent of an express company, who has been instructed to hold goods transported by it until payment of certain charges thereon, cannot defeat an action of replevin on the ground of his agency, where the demand is too large and the proper charge is tendered, although he may be liable to the company in case he surrenders

the property for less than the sum demanded by it. *Eveleth v. Blossom* (1867) 54 Me. 447, 92 Am. Dec. 555.

In *Prince v. Puckett* (1848) 12 Ala. 832, which was trespass against a warehouseman with whom a sheriff had stored goods seized under a writ against a nonowner, and who refused to deliver them to the true owner on request, the court said the remedy was trover or detinue.

An overseer may be liable in trover for slaves in his possession. *Porter v. Thomas* (1857) 23 Ga. 467. The court says a servant may be charged in trover though the conversion be done by him, however innocently, for the benefit of his master; and it is immaterial whether he had his master's authority or not.

To raise the question discussed in this annotation there must be an actual conversion or wrongful act on the part of the servant; and therefore, a distinction must be kept in mind between cases of conversion and cases like *Alexander v. Southey* (1821) 5 Barn. & Ald. 247, 106 Eng. Reprint, 1183, 24 Revised Rep. 348, where the agent of an insurance company, who had salvaged goods in the company's warehouse, refused to deliver them without an order from the insurers, and it was held not to be a conversion.

The manager of a storage warehouse who merely refuses to select goods of a patron which are not covered by a chattel mortgage when the mortgagee directs those covered to be retained does not become liable for conversion, the court designating the act as being mere nonfeasance. *Economy Furniture Co. v. Chapman* (1894) 54 Ill. App. 122.

There are cases at variance with the rule laid down in this subdivision which cannot, on their facts, be harmonized with it.

Thus, where plaintiff bought goods in England through an agent of the seller in this country, and, upon the goods arriving here, the agent refused to deliver them, the court held that the remedy was solely against the principal, the merchant in England. *Bradford v. Eastburn* (1808) 2 Wash. C. C. 219, Fed. Cas. No. 1,767. It

was difficult to support that ruling in principle. If the title had passed to the plaintiff, so that the property was in him, why could he not have had a remedy against the one who withheld the property from him, even though that person was acting as agent for another?

A servant is not liable in replevin merely because he refuses to deliver property which his master had placed in his custody, to a third person, without direction from the master. *Mount v. Derick* (1843) 5 Hill (N. Y.) 456; *Goodwin v. Wertheimer* (1885) 99 N. Y. 153, 1 N. E. 404.

Where personal property is left with an employer to assist in performance of a contract with the owner, the servant of the employer is not liable in replevin for refusal, at the employer's command, to surrender the property to the owner. *Hensley v. Howland* (1895) 10 Misc. 756, 31 N. Y. Supp. 823. The court says it is true that a wrongdoer may not plead agency for another in extenuation of his wrongdoing; yet, on the other hand, a servant is not to be made liable as for a conversion of chattels of which he has the custody at the hands of his employer, and which he refuses to surrender at the demand of a stranger, even though he may have good reason to believe that the stranger has good title to the property.

Replevin will not lie against a freight agent for refusal to deliver property until a claim for freight is paid. *McDougall v. Travis* (1881) 24 Hun (N. Y.) 590. The court says: "As it was not in the defendant's possession, it could not be rightfully taken by replevin against him. For instance, if one were in possession of furniture in one's own house, a person claiming it could not maintain replevin against the servant who should refuse to deliver it on demand. Replevin is to be brought against the person in possession, not against one who is the mere servant of the possessor. None of the cases cited by the plaintiff are in conflict with this rule. The plaintiff argues that whoever does the wrong is liable. He does the wrong who, being in possession

wrongfully, refuses to surrender. He does not do the wrong who is not in possession. And it is not every exercise of physical power over the thing in question which constitutes possession."

Colvin v. Holbrook (1848) 2 N. Y. 126, was an action against a deputy sheriff for refusal to pay money over to plaintiff. Plaintiff insisted that he was a mere agent of the sheriff, and that his liability was to be considered from that point of view. The court said that this was less favorable to defendant, but proceeded to consider the case according to plaintiff's contention. It said: "The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself; and the individuality of the agent so far is merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible." The court, however, said that the plaintiff makes title, if he has any, through the official acts of the deputy, and is thus compelled to recognize the right of the sheriff to receive the deposit, and also the duty of the deputy to pay it over to him. It thus appears that the deputy was acting in the strict line of his duty, and was under no obligation to plaintiff, and therefore there was no wrong for which an action would lie against him.

7. Form of action.

In most of the cases cited in the preceding subdivisions, the action in which relief was sought was trover or replevin. In some cases in which money alone was involved in the transaction, the form of the action was for money had and received. The liability of the agent for a conversion is, of course, founded on a wrongful act

for which trover is the proper form of remedy. Cyc. (vol. 27, p. 849) says that an action for money had and received is an equitable one in which plaintiff waives all torts, trespasses, and damage. Under these circumstances, it is quite probable that if the money has been turned over to the principal, money had and received is not a proper form of action. But it has been held that an action for money had and received lies against an agent who has collected insurance money for his principal upon a loss for which the insurer was not liable, if he has merely credited it to the principal in his accounts, without having actually paid it over. The case was treated, however, as merely one of mistake, not of wrongdoing on the part of the agent. But the court asks, Is it conscionable that the agent should keep money which he has got by the misrepresentations of his principal? *Buller v. Harrison* (1777) Cowp. pt. 2, p. 566, 98 Eng. Reprint, 1243.

But an agent who collects for his principal rents, the liability for which is disputed, is not personally liable to the tenant for money had and received after he has turned it over to his principal. *Sadler v. Evans* (1766) 4 Burr. 1984, 98 Eng. Reprint, 34. The court thought that the principles upon which the action for money had and received was founded did not apply to the case. The defense in such action is an equity, which will rebut the action. The money was paid to a known agent. He was liable to his principal for it, and in such cases the action ought to be brought against the principal except in special cases, as under notice or mala fides.

So, the mere fact that an agent of one partner in a stagecoach sends to another partner less than his share of the profits does not render him liable to such partner in an action for money had and received, although the agent acknowledges that his employer had placed the full amount in his hands to be forwarded, where there is nothing to show that the employer may not have countermanded the payment before it was sent. *Howell v. Batt* (1833) 2 Nev. & M. 381, 5 Barn.

& Ad. 504, 110 Eng. Reprint, 877, 3 L. J. K. B. N. S. 49.

8. *Liability of broker or sales agent.*

a. In general.

A broker or sales agent who sells property for one who is not the owner is liable to the true owner as for a conversion.

Alabama. — *Marks v. Robinson* (1886) 82 Ala. 69, 2 So. 292.

Arkansas. — *Merchants & P. Bank v. Meyer* (1892) 56 Ark. 499, 20 S. W. 406.

California. — *Cerkel v. Waterman* (1883) 63 Cal. 34; *Swim v. Wilson* (1891) 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33.

Georgia. — *National Bank v. Piland* (1918) 22 Ga. App. 471, 96 S. E. 341.

Illinois. — *Cassidy Bros. & Co. v. Elk Grove Land & Cattle Co.* (1894) 58 Ill. App. 39.

Indiana. — *Alexander v. Swackhamer* (1885) 105 Ind. 81, 55 Am. Rep. 180, 5 N. E. 908, 4 N. E. 433; *Fort v. Wells* (1895) 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N. E. 155.

Kansas. — *Brown v. James H. Campbell Co.* (1890) 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492.

Louisiana. — *Ledoux v. Cooper* (1847) 2 La. Ann. 586; *Ledoux v. Anderson* (1847) 2 La. Ann. 558.

Massachusetts. — *Spooner v. Holmes* (1869) 102 Mass. 503, 3 Am. Rep. 491.

Maine. — *Kimball v. Billings* (1867) 55 Me. 147, 92 Am. Dec. 581.

Missouri. — *Koch v. Branch* (1869) 44 Mo. 542, 100 Am. Dec. 324; *LaFayette County Bank v. Metcalf* (1890) 40 Mo. App. 494; *Arkansas City Bank v. Cassidy* (1896) 71 Mo. App. 186; *Laughlin v. Barnes* (1898) 76 Mo. App. 258; *Thompson v. Irwin* (1891) 76 Mo. App. 418.

Nevada. — *Bercich v. Marye* (1874) 9 Nev. 312, 13 Mor. Min. Rep. 544.

New York. — *Everett v. Coffin* (1831) 6 Wend. 603, 22 Am. Dec. 551; *Williams v. Merle* (1833) 11 Wend. 80, 25 Am. Dec. 604; *Anderson v. Nicholas* (1859) 5 Bosw. 121.

Tennessee. — *Taylor v. Pope* (1867) 5 Coldw. 413.

England. — *Fowler v. Hollins* (1872) L. R. 7 Q. B. 616, 41 L. J. Q. B. N. S.

277, 27 L. T. N. S. 168, 20 Week. Rep. 868; *Hollins v. Fowler* (1875) L. R. 7 H. L. 757, 44 L. J. Q. B. N. S. 169, 33 L. T. N. S. 73; *Turner v. Hockey* (1887) 56 L. J. Q. B. N. S. 301.

One selling stock for another, who has no title, is liable to the true owner for the conversion. *Anderson v. Nicholas* (N. Y.) *supra*.

Agents who dispose of the cargo of a ship at the instance of the master, and turn the proceeds over to him without notice of the rights of third persons, are nevertheless liable to the true owner in trover. *Everett v. Coffin* (N. Y.) *supra*.

A factor who sells property of one person under authority from another cannot avoid liability in trover on the ground of his agency. *Arkansas City Bank v. Cassidy* (1896) 71 Mo. App. 186.

Brokers who sell cattle on the market for slaughter and consumption, and turn the proceeds over to their employer, are liable in trover to the true owner for their value. *LaFayette County Bank v. Metcalf* (1890) 40 Mo. App. 494.

Brokers to whom cotton is shipped for sale are liable to the true owner after receiving notice of his claim and demand for the proceeds of the sale, if they subsequently turn the proceeds over to their correspondent. *Ledoux v. Anderson* and *Ledoux v. Cooper* (La.) *supra*.

A bank which, as agent of a cotton buyer, sells cotton which the latter has not paid for, and turns the proceeds over to him, whereby the true owner loses the price, is liable for the conversion. *National Bank v. Piland* (1918) 22 Ga. App. 471, 96 S. E. 341.

In *Cerkel v. Waterman* (1883) 63 Cal. 34, the court, without discussion, held commission merchants liable for selling wheat as that of their principal, and turning the proceeds over to him, when the wheat in fact belonged to another.

But where a dairyman sent a cow to a cattle market, and directed the cattle salesman into whose pen it was put, to sell it, the mere fact that the salesman received an offer for it which, when communicated to the

dairyman, was accepted by him, and paid the proceeds through his bank account to the dairyman, does not render the salesman liable for a conversion. *Turner v. Hockey* (Eng.) *supra*. The court applied the rule of the conduit pipe, saying that where the salesman merely acts as a conduit by which title is passed from seller to buyer without himself interfering with it, he is not personally liable.

The assumption and exercise of dominion over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and it is immaterial whether the act done be for the use of defendant himself, or of a third person. And therefore it was held, by a divided court, in *Fowler v. Hollins* (1872) L. R. 7 Q. B. (Eng.) 628, 41 L. J. Q. B. N. S. 277, 27 L. T. N. S. 168, 20 Week. Rep. 868, affirming a judgment of the Queen's bench, that a broker who sells cotton the title to which was fraudulently obtained by his employer is personally liable for the conversion in case he sells it to a stranger. The case was, however, affirmed by the House of Lords in (1876) L. R. 7 H. L. 757, 44 L. J. Q. B. N. S. 169, 33 L. T. N. S. 73, but it seemed to be the opinion of some of the judges, at least, that since brokers act merely as conduits to pass the title from seller to buyer without themselves interfering with the goods, there would be no liability.

So, commission merchants selling mortgaged property are liable in trover to the mortgagee. *Brown v. James H. Campbell Co.* (1890) 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492.

A commission merchant who sells mortgaged property for the mortgagor when the mortgage is on record is liable in trover, although he immediately turns over the proceeds to his employer. *Marks v. Robinson* (1886) 82 Ala. 69, 2 So. 292.

A factor who sells cotton with notice of a lien upon it, thereby aiding in the destruction of the lien, is liable for conversion. *Merchants & P. Bank v. Meyer* (1892) 56 Ark. 499, 20 S. W. 406.

In an early Tennessee case it was

held that factors who sell property for an agent in possession, and turn the money over to him, are liable in trover to the true owner. *Taylor v. Pope* (1867) 5 Coldw. (Tenn.) 413.

But that case was overruled in *Roach v. Turk* (1872) 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360, where it was held that commission merchants are not liable to the true owner for selling property for one wrongfully claiming it, and turning the proceeds over to him, without notice of the rights of the owner. The court says: "If the plaintiffs recover in this case, it must be for a conversion of the cotton by parties who had no knowledge of their title or claim, and who never for a moment claimed adversely to their rights. It is equally clear that we must force upon the defendants the position of antagonism to the rights of the plaintiffs, contrary to the facts of the case, and assume that they are guilty of a tortious conversion when it is evident that, had they known of the plaintiffs' title, they would most readily have yielded to it. Can such a liability be based on sound principle? We think not. . . . It is clear, beyond question, that there can be no conversion in a case like this without an adverse holding or claim as against the title of the true owner (which necessarily involves a knowledge of such title); and until such knowledge is fixed on the party in possession, or who has been in the possession, of the property, he cannot, in the language of Mr. Greenleaf, be said to 'exercise dominion over it in exclusion or in defiance of the plaintiff's right, or to withhold the possession from the plaintiff under a claim of title inconsistent with the title of the true owner.' . . . In order to make the factor liable, a demand must be made while the property or its proceeds are in his hands; or notice of the owner's title, or the want of title on the part of the party placing it in his hands, must be brought home to him, and thus fix upon him a wrongful assertion of dominion and control over another's property, and in defiance of his right."

b. Stolen property.

A broker selling stolen property is

liable in trover to the true owner. *Bercich v. Marye* (1874) 9 Nev. 312, 13 Mor. Min. Rep. 544; *Thompson v. Allen* (1898) 76 Mo. App. 418; *Laughlin v. Barnes* (1898) 76 Mo. App. 258; *Fort v. Wells* (1895) 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N. E. 155.

An agent who sells stolen bonds for his principal, and delivers to him the proceeds, is liable in trover for their conversion. *Kimball v. Billings* (1867) 55 Me. 147, 92 Am. Dec. 581. The court says the principal could not secure to the agent immunity for an act which the principal could not do himself.

A factor who sells stolen property for the thief, and refuses information to enable the true owner to trace the property, is liable in trover. *Cassidy Bros. & Co. v. Elk Grove Land & Cattle Co.* (1894) 58 Ill. App. 39. The court says that, as against the view of liability, it is argued: "That such a rule imperils great commercial interests, and that those great agencies by which property is necessarily transferred from seller to buyer should not be required to investigate title to the property handled at the peril of liability for its value. There is much force in this contention, which has been exhaustively discussed in the cases referred to, and yet, in principle, it is difficult to see why, if the innocent purchaser of stolen property is liable, the agent, who should know better than he the title, and who induced the purchase, should not also be equally liable. If the purchaser is guilty of a tort, the one who suggests it and aids in its commission, according to the fundamental rules of law, is equally guilty. There are no agencies in torts."

A broker who sells stolen securities and turns the proceeds over to the thief is liable to the true owner for their value. *Swim v. Wilson* (1891) 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33. The court says it is clear that the thief did not acquire a right to the stock, and it is equally clear that defendant, acting for him as his agent, did not have a greater right, and his act was, therefore, wholly unauthorized, and, in law, a conversion of the property. "To hold

the defendant liable, under the circumstances disclosed here, may seem, upon first impression, to be a hardship upon him. But it is a matter of everyday experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief; and, relying on his representations, aided his principal to convert the plaintiff's property into money; and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it."

If one with whom a horse has been placed for sale refuses to deliver it to another, claiming that it had been stolen from him, he may be held liable for conversion. *Lee v. Robinson* (1856) 18 C. B. 599, 139 Eng. Reprint, 1504, 2 Jur. N. S. 1093, 25 L. J. C. P. N. S. 249.

In *Alexander v. Swackhamer* (1885) 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908, which involved the liability of the ultimate purchaser of stolen property to the true owner, the court, in the course of the opinion, says that when the brokerage firm sold the property, received the money, and turned it over to the thief, this amounted to a conversion of the property for which the brokers were liable.

One who merely collects for a thief a government voucher, and turns the proceeds over to him, is liable for conversion to the true owner. *Koch v. Branch* (1869) 44 Mo. 542, 100 Am. Dec. 324. The court says public policy as well as private rights demand that the settled rule that no title shall pass through a thief shall not be relaxed, and those who buy it of him shall be compelled to give up the property unless they have converted it, when they shall be held for its value. Factors and agents also should be held to the same accountability. It is their duty to know for whom they act, and whether they can be saved harmless

if their actions shall amount to a conversion of another's property.

But one who, as agent, sells coupons from stolen bonds and turns the proceeds over to his employer, is not liable in trover for conversion of the coupons. *Spooner v. Holmes* (1869) 102 Mass. 503, 3 Am. Rep. 491. The court held that the coupons were negotiable and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. The court concluded that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to the employer, constitutes a conversion for which the broker could be held liable in an action of tort in the nature of trover.

The agent must, however, have received the coupons, and sold them without notice of the infirmity of his employer's title, and have acted in good faith, without gross negligence, as agent only, without receiving any benefit from the transaction.

B. Auctioneers.

a. In general.

An auctioneer who makes sale of property which does not belong to the one employing him, and passes the title to the purchaser, is personally liable to the true owner for the conversion.

California.—*Rogers v. Huie* (1851) 1 Cal. 429, 54 Am. Dec. 300; *Rogers v. Huie* (1852) 2 Cal. 571, 56 Am. Dec. 363.

Massachusetts. — *Hills v. Snell* (1870) 104 Mass. 173, 6 Am. Rep. 216; *Milliken v. Hathaway* (1888) 143 Mass. 69, 1 L.R.A. 510, 19 N. E. 16; *Robinson v. Bird* (1893) 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391; *Coles v. Clark* (1849) 3 Cush. 399.

Michigan. — *Kearney v. Clutton* (1894) 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419.

New York. — *Hoffman v. Carow* (1838) 20 Wend. 21, affirmed in (1839) 22 Wend. 285; *Moloughney v. Hege-man* (1880) 9 Abb. N. C. 403.

Canada. — *Johnston v. Henderson* (1896) 28 Ont. Rep. 25.

England. — *Hardacre v. Stewart* (1804) 5 Esp. 103; *Farebrother v.*

Ansley (1808) 1 Campb. 343; Adamson v. Jarvis (1827) 4 Bing. 66, 130 Eng. Reprint, 693, 5 L. J. C. P. 68; Iredale v. Kendall (1878) 40 L. T. N. S. 362; Cochran v. Rymill (1879) 40 L. T. N. S. 744, 27 Week. Rep. 776; Barker v. Furlong [1891] 2 Ch. 172, 60 L. J. Ch. N. S. 368, 64 L. T. N. S. 411, 39 Week. Rep. 621; Consolidated Co. v. Curtis [1892] 1 Q. B. 495, 61 L. J. Q. B. N. S. 325, 40 Week. Rep. 426, 56 J. P. 565, 25 Eng. Rul. Cas. 162.

Ireland.—Ganly v. Ledwidge (1876) Ir. Rep. 10 C. L. 33.

In *Hills v. Snell* (Mass.) supra, there is a dictum to the effect that an auctioneer or a broker who sells property for one who has no title, and pays over to him the proceeds with no knowledge of the defect of title or want of authority, is liable to the true owner for its conversion.

An auctioneer who, with notice, sells property of a third person at the instance of his client, is personally liable to the true owner. *Hardacre v. Stewart* (Eng.) supra. The court said that by his manner of conducting himself he made himself quasi principal. If a man sells property of others with full notice that he is doing wrong, and that he is disposing of that to which he has no title, he is liable to an action for money had and received.

In *Adamson v. Jarvis* (1827) 4 Bing. 66, 130 Eng. Reprint, 693, 5 L. J. C. P. 68, which was an action by an auctioneer for contribution from the one who delivered property to him for sale, it appeared that the auctioneer, relying on defendant's claim to title, had sold the property to a third person, and had been compelled to make restitution to the true owner.

In *Farebrother v. Ansley* (1808) 1 Campb. (Eng.) 343, where a judgment had been rendered against an auctioneer for selling property wrongfully seized by a sheriff, a recovery of indemnity which he sought from the sheriff was denied on the ground that there is no contribution between wrongdoers.

An auctioneer who has actual possession and makes delivery of goods sold for one person which are the property of another is liable to the

latter for conversion. *Consolidated Co. v. Curtis* (Eng.) supra.

Where a mortgagee of some cabs procured a loan on them from an auctioneer, and then had the auctioneer sell them, after which the auctioneer delivered the proceeds to him over and above the loan, the auctioneer was held liable to the mortgagor. *Cochran v. Rymill* (1879) 40 L. T. N. S. (Eng.) 744, 27 Week. Rep. 776. The court said that the case showed a clear dealing with the property, and an exercising of dominion over the chattels, and a delivery of them to the purchaser. In that case it is said that if a man goes into an auctioneer's yard, holding a horse by the bridle, and says: "I want to sell my horse; if you will find a purchaser I will pay a commission." And the auctioneer says: "Here is a man who wants to sell a horse; will anyone buy him?"—if he then and there finds him a purchaser and the seller himself hands over the horse, there will be no act on the part of the auctioneer which could render him liable for conversion. But in the case before the court there was a clear dealing with the property, and exercising dominion over the chattel, and a delivery of it by the defendant to another person, to do what he liked with it. The owner has a right to say: "You have undertaken to deal with my goods as though you had a right to sell them or deal with them; I am not going to take the trouble to trace each one of them, but I look to you for the value of them."

Where an auctioneer proceeds to sell goods as the property of a tenant after the landlord has levied a distress upon them, he is liable for a rescue. *Iredale v. Kendall* (1878) 40 L. T. N. S. (Eng.) 362. The defense was that the defendant did not attach the goods, but merely received the bids on them, and the tenant delivered them to the purchaser; but the court said that the defendant enabled the tenant to dispose of the goods and assisted him in so doing. He knowingly and intentionally assisted in transferring the dominion to property in the goods to the purchaser, and was therefore liable.

But where horses were sold in the yard of an auctioneer by one who had already granted a bill of sale of them to a third person, the auctioneer merely taking a commission on the sale, it was held that he did not interfere with them in such a way as to be personally liable for the conversion. *National Mercantile Bank v. Rymill* (1881) 44 L. T. N. S. (Eng.) 767.

In one English case it was held that where a person who has given a bill of sale of a cow takes it to an auctioneer for sale, the latter will not be liable for making the sale, where he is ignorant of the fact of the prior bill of sale. The court places this ruling upon the ground that he is a mere conduit pipe for the purpose of conveying the interest. *Turner v. Hockey* (1887) 56 L. J. Q. B. N. S. (Eng.) 301. But in *Consolidated Co. v. Curtis* [1892] 1 Q. B. (Eng.) 502, 61 L. J. Q. B. N. S. 325, 40 Week. Rep. 426, 56 J. P. 565, 25 Eng. Rul. Cas. 162, it is said that if delivery under the contract be assumed, that proposition is not law. It is in direct conflict with principle and with authority. The decision is, however, justified on the ground that in that case the auctioneer merely obtained an offer which he communicated to the seller, who accepted it, so that the auctioneer did no more than act as a mere intermediary in the transaction.

b. Stolen and mortgaged property.

The rule of liability on the part of the auctioneer applies even though the property has been stolen or is subject to mortgage, of which facts he is ignorant.

A salesmaster in a public market who sells a stolen cow and turns the proceeds over to the one offering it for sale is personally liable in trover to the true owner, although he did not know that it was stolen. *Ganly v. Ledwidge* (1876) Ir. L. Rep. 10 C. L. 33.

Where an auctioneer receives misappropriated goods into his custody, and, on selling them, hands them over to the purchasers with a view to passing the property to them, he is guilty of conversion. *Barker v. Furlong* [1891] 2 Ch. (Eng.) 172, 60 L. J. Ch.

N. S. 368, 64 L. T. N. S. 411, 39 Week. Rep. 621. The court says the general rule is that, where an agent takes part in transferring the property in a chattel, and it turns out that his principal has no title, his ignorance of this fact affords him no protection. And *Turner v. Hockey* (1887) 56 L. J. Q. B. N. S. (Eng.) 301, where, under the circumstances, the auctioneer was held not liable, was questioned.

The case of *Hoffman v. Carow* (1838) 20 Wend. (N. Y.) 21, where an auctioneer was held liable for selling stolen goods, was not decided strictly upon the question of the liability of an agent, but merely on the general question of the public policy with respect to dealing with stolen property. Senator Verplanck, in writing for affirmance on appeal in (1839) 22 Wend. 285, said: "The policy of our law is to make every man look to the character of those with whom he deals, and who are responsible for the title of property in the articles bought and sold. If he does not do this, he must take the consequent risk. The same considerations of public policy apply to him who sells as the agent of another, as to him who buys; both of them are to look to the character of the person with whom they deal. If in this they are negligent, or have been deceived, they must take the consequences whenever their rights come into conflict with those of any innocent sufferer by the act of the same guilty third party. Accordingly, the doctrine of our decisions is, that the original and true owner of movable property, who has not by his own act or assent given a color of title or an apparent right of sale to another, may recover the value of those goods from anyone having them in possession and refusing to deliver them up, or who has applied them to his own use, or has in any other way converted them; i. e., has changed the substance of the things in question, their character, use, or ownership, to the injury of the real owner." But he further said: "In the argument before us, it was very strongly urged that a rule of law thus charging mere agents would work great public injury as well as

private injustice, as it would extend to common carriers, shipmasters, and others, through whose hands goods feloniously or wrongfully obtained might pass. There may be some cases going to that length, but they are not, in my judgment, within the principle or the policy of the rule, nor are they included in the older decisions. . . .

I cannot think the law charges one who had accidentally a temporary possession of goods without claim of property, and with which he has parted before demand. It requires a wrongful taking or conversion of the thing itself to make the transaction tortious. The auctioneers who had sold the goods now in question have made such an unauthorized conversion, and must be answerable for the value. In this instance the rule falls hardly upon innocent and honorable men; but, looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and, in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer."

In an early California case it was held that an auctioneer who sells stolen goods and turns the proceeds over to the thief is liable in trover for the conversion. *Rogers v. Huie* (1851) 1 Cal. 429, 54 Am. Dec. 300. But a different conclusion was reached in that case, apparently, on a rehearing. *Rogers v. Huie* (1852) 2 Cal. 571, 56 Am. Dec. 363. The court holds that there was no conversion by the auctioneer, there being no appropriation of the goods to his own use, or wrongful intent, which was held to be necessary to a conversion. It says he was a mere agent for the transmission of the property from one hand to another. Each act committed in connection with the goods was not his act, but that of his employer. A case relied on for authority held that one acting in the usual course of trade is an exception to the general rule. The distinction between that case and that of a servant is that here is a public employment. In *Swim v. Wilson*

(1891) 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33, however, the later opinion is cited as overruled.

So, an auctioneer is liable for selling mortgaged goods at the instance of the mortgagor. *Moloughney v. Hegeman* (1880) 9 Abb. N. C. (N. Y.) 403.

Although he had no personal knowledge of the mortgage. *Coles v. Clark* (1849) 3 Cush. (Mass.) 399.

An auctioneer who persists in selling under a mortgage given to delay creditors notwithstanding demand by a representative of the insolvent mortgagor is liable for the conversion. *Milliken v. Hathaway* (1888) 148 Mass. 69, 1 L.R.A. 510, 19 N. E. 16.

But in *Frizzell v. Rundle* (1890) 88 Tenn. 396, 17 Am. St. Rep. 908, 12 S. W. 918, it was held that an auctioneer is not liable for selling for a mortgagor the mortgaged property, and turning over the proceeds to him, so as to deprive the mortgagee of his lien. This ruling is put upon the ground that the constructive notice of the record did not bind the auctioneer, who himself asserted no title to the property.

And somewhat in accord with that doctrine is the unreported case of *Jacobs*, cited in *Ashe v. Livingston* (1797) 2 S. C. L. (2 Bay) 84, where it was held that an auctioneer is not liable to an action for money had and received in case he turns over to his employer the money received from the sale, although the property sold belonged to a third person. There is, however, some ground for distinction between liability in the two forms of action. If the agent is regarded as merely having received the money, he must have received it as a mere conduit for its transmission; whereas if the effort is made to hold the agent liable for dealing with the property, he may be regarded as assisting in the conversion, and so be liable in trover, as the cases usually regard him.

k. Forcible entry and detainer.

One cannot defeat an action for forcible entry and detainer on the ground that he was acting as agent. *Luling v. Sheppard* (1896) 112 Ala.

538, 21 So. 352. The court says the act is a tort, and no principle of law is more general and better settled than that one guilty of a tort cannot justify on the ground that he was acting in the capacity of an agent, and not on his personal responsibility. It has never been questioned that an agent is liable for his actual torts.

IV. *Misfeasance.*

a. *In general.*

As has been seen from the foregoing subdivisions of this annotation, there is very little difficulty in determining what is an act of malfeasance, and the liability of the servant or agent for committing it; but when it comes to distinguishing between misfeasance and nonfeasance, and laying down any rule which will be of practical value, very great difficulty is encountered. As a general proposition for classification purposes, the acts of misfeasance are merely acts of negligence, i. e., the misperformance of acts which there is a perfect right to perform in a proper way. Very slight consideration will show that the true distinction between misfeasance and nonfeasance is not merely between performance and omission to perform. For example, a motorman in charge of a street car injures a pedestrian at a highway crossing. It cannot be true that he would be liable if the injury were caused by driving the car too fast, but would not be liable if it were caused by his failure to stop the car in time to avoid the injury. Application of the formula that the servant was liable for misfeasance, but not for nonfeasance, would render the conductor of a train liable in case he injured a drunken passenger by negligently removing him from the car, but not liable for injury by the drunken person to a fellow passenger, resulting from the conductor's failure to remove or restrain him. In many of the cases where the courts have attempted to apply the formula they have held acts of omission to be misfeasance. These cases will be considered in subdivision V. of this annotation. It may be stated as a general rule, however, that the servant or agent is liable for

any injuries caused to third persons by active, as distinguished from passive, negligence on his part. This does not mean that there may not be liability for passive negligence, but that question will be considered in later subdivisions.

United States.—*Standard Oil Co. v. Anderson* (1909) 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252.

California.—*Zibbell v. Southern P. Co.* (1911) 160 Cal. 237, 116 Pac. 513.

Colorado.—*Miller v. Staples* (1893) 3 Colo. App. 93, 32 Pac. 81.

Georgia.—*Southern R. Co. v. Grizzle* (1906) 124 Ga. 734, 110 Am. St. Rep. 191, 53 S. E. 244; *Southern R. Co. v. Reynolds* (1906) 126 Ga. 657, 55 S. E. 1039; *Louisville & N. R. Co. v. Peoples* (1911) 136 Ga. 448, 71 S. E. 805; *Wadley v. Dooly* (1912) 138 Ga. 275, 75 S. E. 153.

Illinois.—*Johnson v. Barber* (1849) 10 Ill. 425, 50 Am. Dec. 416; *Tuller v. Voght* (1851) 13 Ill. 277; *Illinois C. R. Co. v. Foulks* (1901) 191 Ill. 57, 60 N. E. 890; *Chicago & E. R. Co. v. Neilson* (1905) 118 Ill. App. 343.

Indiana.—*Block v. Haseltine* (1891) 3 Ind. App. 491, 29 N. E. 937; *Blue v. Briggs* (1894) 12 Ind. App. 105, 39 N. E. 885; *Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co.* (1904) — Ind. App. —, 72 N. E. 183.

Iowa.—*Hough v. Illinois C. R. Co.* (1914) 169 Iowa, 224, 149 N. W. 885; *E. H. EMERY & Co. v. AMERICAN REFRIGERATOR TRANSIT CO.* (reported herewith) ante, 86.

Kentucky. — *Chesapeake & O. R. Co. v. Dixon* (1898) 104 Ky. 608, 47 S. W. 615; *Illinois C. R. Co. v. Coley* (1905) 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; *Chesapeake & O. R. Co. v. Banks* (1911) 144 Ky. 137, 137 S. W. 1066, affirmed in (1914) 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278.

Louisiana. — *Le Blanc v. Sweet* (1902) 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766; *Englert v. New Orleans R. & Light Co.* (1911) 128 La. 473, 54 So. 963; *Burke v. Werlein* (1918) 143 La. 788, 79 So. 405.

Massachusetts. — *Bell v. Josselyn* (1855) 3 Gray, 309, 63 Am. Dec. 741; *Hawkesworth v. Thompson* (1867) 98 Mass. 77, 93 Am. Dec. 137; *Mulchey v.*

Methodist Religious Soc. (1878) 125 Mass. 487; *Bickford v. Richards* (1891) 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014; *Corliss v. Keown* (1910) 207 Mass. 149, 93 N. E. 143; *Banfield v. Whipple* (1865) 10 Allen, 30, 87 Am. Dec. 618; *Parsons v. Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745.

Missouri. — *Harriman v. Stowe* (1874) 57 Mo. 93; *Buis v. Cook* (1875) 60 Mo. 391.

New Jersey. — *Whalen v. Pennsylvania R. Co.* (1906) 73 N. J. L. 192, 63 Atl. 993.

New York. — *Suydam v. Moore* (1850) 8 Barb. 358; *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507.

North Dakota. — *Schlosser v. Great Northern R. Co.* (1910) 20 N. D. 406, 127 N. W. 502; *Edwards v. Great Northern R. Co.* (1919) 42 N. D. 154, 171 N. W. 873.

South Carolina. — *Ellis v. Southern R. Co.* (1905) 72 S. C. 465, 2 L.R.A. (N.S.) 378, 52 S. E. 228, 19 Am. Neg. Rep. 541; *Able v. Southern R. Co.* (1906) 73 S. C. 173, 52 S. E. 962, 19 Am. Neg. Rep. 549; *Carter v. Atlantic Coast Line R. Co.* (1910) 84 S. C. 546, 66 S. E. 997.

Tennessee. — *Nashville, C. & St. L. R. Co. v. Price* (1911) 125 Tenn. 646, 148 S. W. 219.

Texas. — *Eastin v. Texas & P. R. Co.* (1906) 99 Tex. 654, 92 S. W. 838.

Washington. — *Cronkhite v. Whalen* (1920) 111 Wash. 31, 189 Pac. 94.

England. — *Morse v. Slue* (1673) 1 Ventr. 238, 1 Mod. 85, 86 Eng. Reprint, 159, 752, T. Raym. 220, 83 Eng. Reprint, 453, 5 Eng. Rul. Cas. 244; *Michael v. Alestree* (1676) 2 Lev. 172, 83 Eng. Reprint, 504, 3 Keble, 650, 84 Eng. Reprint, 932; *Stone v. Cartwright* (1795) 6 T. R. 411, 101 Eng. Reprint, 622, 9 Mor. Min. Rep. 672; *Williams v. Cranston* (1816) 2 Starkie, 82; *Whitmore v. Waterhouse* (1830) 4 Car. & P. 382; *Quarman v. Burnett* (1840) 6 Mees. & W. 499, per Parke, B., p. 509, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969; *Woodman v. Joiner* (1864) 10 Jur. N. S. 852.

One employed to make excavations for the foundation of a building may be personally liable for so negligently

performing the work that an adjoining building is undermined and caused to fall. *Block v. Haseltine* (1891) 3 Ind. App. 491, 29 N. E. 937.

Where one employed to build a trapdoor does so so negligently that another falls into it and is injured, the servant will be personally liable therefor. *Harriman v. Stowe* (1874) 57 Mo. 93. The court, after setting out, with apparent approval, Judge Story's theory of nonliability for nonfeasance, says the agent undertook and proceeded to build the trapdoor, but did it so negligently as to cause the injury. Under such circumstances, the action would be maintained against the agent.

Where the employee of a corporation which had undertaken to shoot an oil well for plaintiff so negligently performed the work that the well was destroyed, the court said the fault charged upon the employee was not an omission to perform a duty of his master toward the injured third person, or mere negligence, but was negligent conduct in the doing of his own duty as an employee, for the negligent and unskilful doing of which both the employer and employee are liable. *Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co.* (1904) — Ind. App. —, 72 N. E. 183.

An agent who constructs an improperly covered excavation in a public street is personally liable for injury to a pedestrian who falls into it. *Burke v. Werlein* (1918) 143 La. 788, 79 So. 405.

An agent of a railroad, who, in changing the course of a highway, constructs a wire fence across the abandoned road, without marks, is personally liable for injury to one colliding with it in the dark, in attempting to use the highway. *Blue v. Briggs* (1894) 12 Ind. App. 105, 39 N. E. 885. The court says he who commits an unlawful act or act of misfeasance and positive and aggressive wrong to another cannot escape liability therefor, upon the ground of his being an agent for another.

One who superintends the making of a connection with a sewer which is done so carelessly as to cause the

water from the sewer to flow into and injure the property of a stranger is personally liable for the injury. *Hawkesworth v. Thompson* (1867) 98 Mass. 77, 93 Am. Dec. 137.

Where the managing agent of a block of tenements ordered the water turned on when a faucet in one of the rooms was open and the waste pipe clogged, so that the water overflowed, to the injury of occupants of a lower room, he was held to be personally liable. *Bell v. Josselyn* (1855) 3 Gray (Mass.) 309, 63 Am. Dec. 741. The court says the injury was caused not by his nonfeasance but by his misfeasance. His omission to examine the pipes in the house before the water was turned on was nonfeasance; but if he had not caused the water to be turned on, that nonfeasance would have caused no injury. As the facts are, the nonfeasance caused the acts done to be a misfeasance. There was no less a misfeasance by reason of it being preceded by a nonfeasance.

A committee of a religious society, authorized to secure the painting of the interior of the church, will be personally liable in case they furnish to the painters a staging which is insufficient, and causes their injury. *Mulchey v. Methodist Religious Soc.* (1878) 125 Mass. 487.

Employees of one who has contracted to move a building are liable to the owner for their negligence, which injures the building. *Bickford v. Richards* (1891) 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014. The right of action depends upon the fact that they have wrongfully or negligently done something to the property which has injured it. The gist of the action is the breach by defendants of the duty which they owed to the owner not to injure his property by any wrongful or negligent act of theirs.

A servant of the lessee of a horse, who drives it so immoderately that it dies, is personally liable to the owner for its value. *Banfield v. Whipple* (1865) 10 Allen (Mass.) 30, 87 Am. Dec. 618.

The abuse and injury of a team by overdriving and heating by the agent to whom it was committed by one who

had hired it is a positive damage, and not a mere omission of duty, and the agent is therefore liable for the injury done. *Buis v. Cook* (1875) 60 Mo. 391.

An agent who kills a mare in negligently roping her for the purpose of breaking her, which his employer has been engaged to do, cannot escape liability on the ground that he was merely an agent. *Miller v. Staples* (1893) 3 Colo. App. 93, 32 Pac. 81. The court says: "The frequent attempts of agents to escape responsibility for their negligent acts by shielding themselves behind the principal whose business they may be transacting when the injury is done has led to many discussions as to the proper limits of the defenses based on the employment. The rule is pretty well settled that while both principal and agent are liable for the injuries which may come to a third person from the agent's misfeasance or malfeasance, the injured party may elect to sue one or the other, or both, at his pleasure. Doubtless the primary responsibility rests on the principal as to the agent's misfeasance, and he should be called upon to answer for the damages resulting from the negligent performance of his agent; yet the servant or agent may likewise be sued, and he cannot escape by asserting that what he did was done while working for his master."

An agent for the sale of threshing machines, who takes control of the testing of a new machine which has been sold and has undertaken a job, is personally liable for negligent operation of the engine, so that it sets fire to the grain stacks. *Cronkhite v. Whalen* (1920) 111 Wash. 31, 189 Pac. 94.

A servant in charge of his master's team is liable for wilfulness or negligence in causing injury to a person who attempts to board the wagon for a ride. *Wright v. Wilcox* (1838) 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

A section boss of a railroad is personally liable for injuries to a horse which he negligently drives over a stock gap. *Louisville & N. R. Co. v.*

Peeples (1911) 136 Ga. 448, 71 S. E. 805.

In *Parsons v. Winchell* (1850) 5 Cush. (Mass.) 592, 52 Am. Dec. 745, where the question was whether or not a joint action would lie against master and servant for injuries done by the negligent driving of the master's horses, the court says that the servant is answerable to the person injured by his acts done as servant.

In holding that no action lay against an intermediate servant for the negligence of those under him, the court said the action must either be brought against the servant committing the injury, or against the master. *Stone v. Cartwright* (1795) 6 T. R. 411, 101 Eng. Reprint, 622, 9 Mor. Min. Rep. 672.

In *Standard Oil Co. v. Anderson* (1909) 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252, which was an action to recover for personal injuries caused by the negligent operation of a winch by a servant in charge of it, and the question in the case was who was the master at the time of the injury, within the rule that the master was liable for the negligent act of his servant, the court observed, by way of dictum, that the servant himself is, of course, liable for the consequences of his own carelessness.

In 1 Bl. Com. 431, where the author is considering the liability of the master for negligence of his servant, he states that if a smith's servant lames a horse while shoeing him, an action lies against the master, and not against the servant. No authority is cited for this proposition, and it is questioned in the notes in Lewis's edition of that work.

b. *Driving car or team against traveler.*

A railroad engineer is personally liable for injury to one at a highway crossing by his failure to give the required signals when approaching it with his engine. *Southern R. Co. v. Grizzle* (1906) 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244. The court says: "An agent is not ordinarily liable to third persons for mere nonfeasance. . . . An agent is, however, liable to third persons for mis-

feasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and, in doing so, omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. . . . Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. . . . In the present case the failure of the engineer to comply with the requirements of the Blow-post Law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad

company owed to travelers upon the highway. The engineer having once undertaken, in behalf of the principal, to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance."

Those in charge of a locomotive are personally liable for their own negligence in injuring a traveler at a highway crossing. *Illinois C. R. Co. v. Coley* (1905) 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; *Zibbell v. Southern P. Co.* (1911) 160 Cal. 237, 116 Pac. 513; *Edwards v. Great Northern R. Co.* (1919) 42 N. D. 154, 171 N. W. 873; *Able v. Southern R. Co.* (1906) 73 S. C. 173, 52 S. E. 962, 19 Am. Neg. Rep. 549.

Or for killing him. *Chesapeake & O. R. Co. v. Dixon* (1898) 104 Ky. 608, 47 S. W. 615.

The engineer of a train which kills a person at a highway crossing cannot defeat an action for damages on the theory that he was merely agent for the railroad company. *Hough v. Illinois C. R. Co.* (1914) 169 Iowa, 224, 149 N. W. 885.

Where plaintiff was injured by the negligence of a railroad engineer in running his engine over a highway crossing, the court said his liability is made to appear when the evidence shows that he failed to use reasonable care and diligence in the performance of his duty, and such misfeasance resulted in injury to a third person. When an agent once enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby third persons are injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. *Southern R. Co. v. Reynolds* (1906) 126 Ga. 657, 55 S. E. 1039.

In *Ellis v. Southern R. Co.* (1905) 72 S. C. 465, 2 L.R.A. (N.S.) 378, 52 S. E. 228, 19 Am. Neg. Rep. 541, one attempting to flag a train at night

was killed by the negligence of the engineer in running the train at high speed past the stopping place after signaling that the train would stop. The court says the question is whether or not an agent is personally liable to a third person for nonfeasance causing injury. And after reviewing authorities, the court concludes that the true rule is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance.

A fireman on a locomotive is personally liable for the death of a pedestrian attempting to cross the track at a much-used crossing near the railroad station, where he failed to keep a lookout as the train started up to leave the station after discharging passengers. *Chesapeake & O. R. Co. v. Banks* (1911) 144 Ky. 137, 137 S. W. 1066, affirmed in (1914) 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278.

Where a cow was killed by a train, and the action was against the engineer and fireman, the court held that if the railroad company would be liable, defendants were liable. *Suydam v. Moore* (1850) 8 Barb. (N. Y.) 358. The inclination of the court seems to be to hold the defendants liable for the negligence of their employer because the cow was upon the track on account of absence of fences and cattle guards which the company was under obligation to erect. The court says defendants were not bound to remain in the employ of the company after it had neglected to erect the fences. Such act greatly increased their responsibility. If they continued to remain at their respective posts they had no just cause for complaining if the public held them accountable for the consequences resulting from this omission of their employers.

Under the Georgia Code, an agent is personally liable for his own torts; and therefore an agent in charge of an automobile, who negligently runs down a pedestrian on the highway, cannot avoid liability merely on the theory that he is an agent. *Wadley*

v. Dooly (1912) 138 Ga. 275, 75 S. E. 153.

Where a servant, by command of his master, takes ungovernable horses to a place much frequented by people, to break them, he will be personally liable for injury done by their running down a stranger. *Michael v. Alestree* (1676) 2 Lev. 172, 83 Eng. Reprint, 504, 3 Keble, 650, 84 Eng. Reprint, 932.

In *Quarman v. Burnett* (1840) 6 Mees & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969, where the question was whether the owner of a team, a driver, or a hirer was liable for the driver's negligence in leaving the team unattended, so that it ran away, to the injury of plaintiff, the court said the question is whether anyone but the coachman is liable to the person injured; for the coachman certainly is.

In an action for injury caused by the driving of a team along a highway against the horse on which plaintiff was riding, the question involved was whether trespass was the proper form of action. The court said that unless the master expressly commanded the servant to commit the trespass, the servant alone is liable in this form of action. *Tuller v. Voght* (1851) 13 Ill. 277.

An agent of the owner of a horse which is dangerous to be used on the public streets is liable for injuries to a traveler by the running away of the horse while it is being used in such place under his direction. *Corliss v. Keown* (1910) 207 Mass. 149, 93 N. E. 143.

In *Phelps v. Wait* (1864) 30 N. Y. 78, where the agent in charge of a team drove over plaintiff, to his injury, the question was whether a joint action would lie against him and the owner of the team; and there seems to be no question that the driver was liable to the person injured.

And the principle of that case was followed in *Montfort v. Hughes* (1854) 8 E. D. Smith (N. Y.) 591.

c. Agents of carriers.

A servant in charge of a steamboat is personally liable for injury to a

passenger through negligent operation of the boat. *Whalen v. Pennsylvania R. Co.* (1906) 73 N. J. L. 192, 63 Atl. 993.

In *Le Blanc v. Sweet* (1902) 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766, where a passenger on a boat was drowned through the negligence of the captain in handling the boat, while she was attempting to disembark, the headnote says that since the master was acting in a representative capacity, the owner alone was liable, and the opinion simply states that, under the circumstances, no reason was found for holding the captain liable.

In *Whitmore v. Waterhouse* (1830) 4 Car. & P. (Eng.) 382, which was an action against the proprietors of a coach and the servant in charge of it, for injury to a passenger by the latter's negligence, a verdict went for defendants for lack of proof; but the court was of opinion that the servant would be personally liable to the passenger for the injury.

In *Williams v. Cranston* (1816) 2 Starkie (Eng.) 82, a watch which had been given to the driver of a stage-coach for delivery to the owner was lost and suit was brought against the driver. The court said there was nothing to indicate that he received the parcel otherwise than in the character of servant, and that the loss appears to have resulted from the negligence of the master through the medium of his servants, so that there could be no recovery against the servant.

A railroad company which, as agent for a sleeping car company, sells an intending passenger a sleeping car ticket for a car which does not follow the route called for by the transportation ticket, cannot avoid liability for expulsion of the passenger from the car on the theory that it is a mere agent. *Nashville, C. & St. L. R. Co. v. Price* (1911) 125 Tenn. 646, 148 S. W. 219. The court says the acts were those of misfeasance and negligence for which the agent is liable.

So *E. H. EMERY & Co. v. AMERICAN REFRIGERATOR TRANSIT CO.* (reported herewith) ante, 86, holds that a refrigerating company which contracts

with a railroad company to ice fruit cars is liable to a shipper for injury to his fruit by the negligent manner in which it performs its agreement.

The negligence of a railroad company in misbilling freight so that it is delayed on the road is an act of misfeasance, and not of nonfeasance, and therefore, it is liable notwithstanding it was acting merely as agent for another road. *Illinois C. R. Co. v. Foulks* (1901) 191 Ill. 57, 60 N. E. 890.

A station agent of a railroad company who refuses to route cattle over the shorter route to destination, and sends them over a longer route, is personally liable for an injury thereby caused to them. *Eastin v. Texas & P. R. Co.* (1906) 99 Tex. 654, 92 S. W. 838. The court says that where an agent is empowered to perform a duty for his principal and neglects to perform it, and damage accrues from the failure, the agent is not responsible. But where the agent, acting for his principal, does a wrongful act and damage results to a third person, he is responsible. The same ruling was made on second appeal (1907) 100 Tex. 556, 102 S. W. 105, which was affirmed by the Supreme Court of the United States in (1909) 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564.

Where goods were delivered to a ship for transportation, and lost before the ship left port, an action was brought against the master, and it was objected that he was but a servant to the owners, but Lord Hale held that the law takes notice of him that he is more than a servant. He is rather an officer than a servant, and is chargeable for the loss. *Morse v. Slue* (1673) 1 Vent. 238, 1 Mod. 85, 86 Eng. Reprint, 159, 752, 5 Eng. Rul. Cas. 244, T. Raym. 220, 83 Eng. Reprint, 453.

In *Schlosser v. Great Northern R. Co.* (1910) 20 N. D. 406, 127 N. W. 502, which involved the question of liability of a carrier to the owner for injuries to horses which had been shipped to him by a bailee, the court says that the rule is that an agent is liable to third persons for negligence resulting in injury to them in the discharge of his agency. An

20 A.L.R.—10.

agent, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not by his own act unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is liable in damages to the person injured. The fact that he was acting as agent at the time will not relieve him from liability. Everyone, whether he is principal or agent, is responsible directly to persons injured by his negligence in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him independently of contract. Where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance. An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and as such is responsible for any injury he may cause.

One employed to unload shells from a boat for use of a railroad company may be liable for injury to a passenger caused by his piling them so close to the track that they slid onto it and derailed a car. *Englert v. New Orleans R. & Light Co.* (1911) 128 La. 473, 54 So. 963.

d. Negligent fires.

A section foreman is personally liable for permitting the right of way to become covered with inflammable material, so that it ignites and causes injury to neighboring property. *Carter v. Atlantic Coast Line R. Co.* (1910) 84 S. C. 546, 66 S. E. 997.

A servant employed to construct a sign in a shed let to the employer for the purpose is personally liable for destruction of the shed by fire caused by his negligence in lighting his pipe.

Woodman v. Joiner (1864) 10 Jur. N. S. (Eng.) 852.

Those in charge of a locomotive, the sparks from which set fire to private property, are personally liable for the injury thereby caused. Chicago & E. R. Co. v. Neilson (1905) 118 Ill. App. 343.

In an action for damages for wrongfully setting fire to a prairie, to the injury of plaintiff's property, it appeared that the fire was set by one defendant as agent of the other, and defendant requested an instruction that plaintiff could not recover against both defendants, for if one acted under the instructions and directions of the other, then the latter alone would be liable. The court said, the instruction is clearly wrong; if the act complained of was illegal, the fact that one of the defendants committed it under direction of the other did not relieve him from responsibility. All concerned in the commission of a wrongful act are responsible for the consequences. Admit the principle asserted in this instruction, and every person charged with the commission of an act prohibited by law would excuse himself by showing that he acted in obedience to the command or under the direction of another. And such a doctrine would be subversive of private rights and detrimental to the public interests. Johnson v. Barber (1849) 10 Ill. 425, 50 Am. Dec. 416.

c. Injury to fellow servants.

1. In general.

Except in cases where the courts have become confused by the suggested distinction between cases of misfeasance and nonfeasance, the general rule is that the servant is liable for injuries which he inflicts upon a fellow servant, either through his negligence or unskilful management of the business intrusted to him, or through omissions to perform duties committed to him.

United States. — Warax v. Cincinnati, N. O. & T. P. R. Co. (1896) 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. (1896) 72 Fed. 745; Charman v. Lake Erie & W. R. Co. (1900) 105

Fed. 449; Chiarello Bros. Co. v. Pedersen (1917) 155 C. C. A. 258, 242 Fed. 482.

Alabama. — Wright v. McCord (1920) 205 Ala. 122, 88 So. 150.

California. — Daves v. Southern P. Co. (1893) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367.

Georgia. — Southern R. Co. v. Miller (1907) 1 Ga. App. 616, 57 S. E. 1090, approved in (1907) 3 Ga. App. 410, 59 S. E. 1115, which is affirmed in (1910) 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450.

Illinois. — Republic Iron & Steel Co. v. Lee (1907) 227 Ill. 246, 81 N. E. 411.

Indiana. — Hinds v. Harbon (1877) 58 Ind. 121; Hinds v. Overacker (1879) 66 Ind. 547, 32 Am. Rep. 114; Rogers v. Overton (1882) 87 Ind. 410; Lake Erie & W. R. Co. v. Charman (1903) 161 Ind. 95, 67 N. E. 923; Louisville & N. R. Co. v. Gollihur (1907) 40 Ind. App. 480, 82 N. E. 492.

Kentucky. — Martin v. Louisville & N. R. Co. (1894) 95 Ky. 612, 26 S. W. 801; Illinois C. R. Co. v. Houchins (1905) 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530; Ward v. Pullman Car Corp. (1908) 131 Ky. 142, 25 L.R.A.(N.S.) 343, 114 S. W. 754; Standard Oil Co. v. Marlow (1912) 150 Ky. 647, 150 S. W. 832; Evans Chemical Works v. Ball (1914) 159 Ky. 399, 167 S. W. 390.

Louisiana. — Camp v. Church of St. Louis (1852) 7 La. Ann. 321.

Maine. — Hare v. McIntire (1890) 82 Me. 240, 8 L.R.A. 450, 17 Am. St. Rep. 476, 19 Atl. 453; Atkins v. Field (1896) 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375.

Massachusetts. — Osborne v. Morgan (1881) 130 Mass. 102, 39 Am. Rep. 437, overruling Albrow v. Jaquith (1855) 4 Gray, 99, 64 Am. Dec. 56; Osborne v. Morgan (1884) 137 Mass. 1; Kalleck v. Deering (1897) 169 Mass. 200, 47 N. E. 698, 3 Am. Neg. Rep. 671.

Minnesota. — Griffiths v. Wolfram (1875) 22 Minn. 185; Mayberry v. Northern P. R. Co. (1907) 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Brower v. Northern P. R. Co. (1910) 109 Minn. 385, 25 L.R.A.(N.S.) 354, 124 N. W. 10; Jack-

son v. Orth Lumber Co. (1913) 121 Minn. 461, 141 N. W. 519.

Missouri.—Malone v. Morton (1884) 84 Mo. 436; Steinhauser v. Spraul (1893) 114 Mo. 551, 21 S. W. 515, 859; Steinhauser v. Spraul (1895) 127 Mo. 541, 27 L.R.A. 441, '28 S. W. 620, 30 S. W. 102; McGinnis v. Chicago, R. I. & P. R. Co. (1906) 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Jewell v. Kansas City Bolt & Nut Co. (1910) 231 Mo. 176, 140 Am. St. Rep. 515, 132 S. W. 703; Morin v. Rainey (1919) — Mo. App. —, 207 S. W. 858.

Montana.—Hagerty v. Montana Ore Purchasing Co. (Hagerty v. Wilson) (1908) 38 Mont. 69, 25 L.R.A.(N.S.) 356, 98 Pac. 643; Moyse v. Northern P. R. Co. (1910) 41 Mont. 272, 108 Pac. 1062.

New Jersey. — O'Brien v. Traynor (1903) 69 N. J. L. 239, 55 Atl. 307, 14 Am. Neg. Rep. 418; Churchill v. Stephens (1917) 91 N. J. L. 195, 102 Atl. 657; Duffy v. Bates (1918) 91 N. J. L. 243, 103 Atl. 243.

New York.—Murray v. Usher (1889) 117 N. Y. 542, 23 N. E. 564; Fort v. Whipple (1877) 11 Hun, 586.

North Carolina.—Wooten v. Holleman (1916) 171 N. C. 461, 88 S. E. 480.

Oklahoma. — Coalgate Co. v. Bross (1909) 25 Okla. 244, 138 Am. St. Rep. 915, 107 Pac. 425.

Oregon.—Hoag v. Washington-Oregon Corp. (1914) 75 Or. 588, 144 Pac. 574, rehearing in (1915) 75 Or. 597, 147 Pac. 756.

Pennsylvania.—Durkin v. Kingston Coal Co. (1895) 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237.

Rhode Island. — Hanna v. Granger (1894) 18 R. I. 507, 28 Atl. 659.

South Carolina. — Schumpert v. Southern R. Co. (1903) 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813, 13 Am. Neg. Rep. 676.

Tennessee.—Fox v. Sandford (1856) 4 Sneed, 36, 67 Am. Dec. 587.

Texas. — Kenney v. Lane (1894) 9 Tex. Civ. App. 150, 36 S. W. 1063.

Washington.—Morrison v. Northern P. R. Co. (1904) 34 Wash. 70, 74 Pac. 1064; Gennaux v. Northwestern Im-

prov. Co. (1913) 72 Wash. 268, 130 Pac. 495.

Wisconsin.—Greenberg v. Whitcomb Lumber Co. (1895) 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Lawton v. Waite (Lawton v. Chilton) (1899) 103 Wis. 244, 45 L.R.A. 616, 79 N. W. 321, 6 Am. Neg. Rep. 403.

Scotland. — Wright v. Roxburgh (1864) 2 Ct. Sess. Cas. 3d series, 748.

If one by his negligence injures another, it is no defense in a suit against him to assert that they were both employed under one master. Lawton v. Waite (Wis.) supra.

In Hanna v. Granger (1894) 18 R. I. 507, 28 Atl. 659, which involved the question of the liability of the master for the negligent injury of a servant by his fellow servant, the court says that the injured servant may sue his fellow servant for his negligence, but not the master.

In Schumpert v. Southern R. Co. (1903) 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813, 13 Am. Neg. Rep. 676, where the question was as to whether or not master and servant could be sued jointly for negligent injury to a fellow servant, the court says counsel do not dispute the proposition that the servant is liable for his own tort.

In Coalgate Co. v. Bross (1909) 25 Okla. 244, 138 Am. St. Rep. 915, 107 Pac. 425, which involved the question of the right to join the negligent servant with the principal in an action by an injured fellow servant for damages, it seems to be assumed that the servant was liable, the court saying that it is argued that the cause of action of one servant against another grows out of the legal duty that each owes to the other to use care for the other's safety in the conduct of the common undertaking, and that the liability of the master being founded on a different principle, the parties could not be joined.

When a yard foreman, after ordering brakemen to couple two broken cars together with chains, permitted the engine to come against the standing cars so as to drive together the cars upon which the employees were

working, to their injury, the foreman was held personally liable for the injury. *Lake Erie & W. R. Co. v. Charman* (1903) 161 Ind. 95, 67 N. E. 923.

And the same ruling was made in the Federal court between the same parties, the court holding that where a brakeman ordered to couple broken cars together with a chain was killed by the negligence of the yardmaster in permitting the engine to back against the train in which he was working, the duty of the person in charge of the switch yard growing out of the exigency of the social order was so to conduct himself about his master's business as not to injure a fellow servant by his negligence or want of due care. The negligence of the person in charge of the switch yard gave rise to a twofold breach of duty; namely, that of the person in charge of the switch yard and that of the railroad company. *Charman v. Lake Erie & W. R. Co.* (1900) 105 Fed. 449.

The engineer of a train is liable for the death of a railroad employee through the negligence of the engineer and cannot escape responsibility on the contention that he acted merely as agent for another. *Martin v. Louisville & N. R. Co.* (1894) 95 Ky. 612, 26 S. W. 801.

In an action to hold one in charge of construction work liable for injury to an employee through his negligence, the court says: "An agent of the owner of property who has the complete control and management of the property or premises is bound to keep and maintain or control it as not to injure others, and for this breach of duty is liable to third persons for injury proximately resulting to the latter while using the premises in an ordinary and appropriate manner. The agent cannot excuse himself on the plea that his principal is liable. It is not his contract with the master that exposes the agent to liability to such third persons; it is the liability of the servant, independent of that of the master, by reason of the servant's common-law obligation to so use that which he controls as not to injure another. The mere relation of agency

does not exempt a person from liability for an injury to a third person proximately resulting from the neglect of duty of such agent for which he would otherwise be liable. . . .

The agent, having entered upon the construction of the cottonseed bins in question, was in duty bound to use reasonable care in the manner of executing that work as not to cause any injury to third persons (working thereon under him or going thereby) which may be the natural consequence of his actionable negligence in construction of the bins and their insecurity and dangerous condition. He may not exempt himself from liability to any person who suffers injury by reason of his having it so negligently constructed and left without the proper safeguard of a sufficient and adequate support." *Wright v. McCord* (1920) 205 Ala. 122, 88 So. 150.

But to render the employee liable to a coemployee he must, of course, owe him some duty the breach of which causes the injury.

For a servant of a miner can be held liable for injury to another miner by the fall of a rock in the mine only so far as the individual acts or omissions within the scope of his employment contribute to the injury. *Allen v. Bear Creek Coal Co.* (1911) 43 Mont. 269, 115 Pac. 673.

An employee acting under immediate direction of superior officers, without knowledge of the perilous position of a servant injured, is not liable for the injury. *Chandler v. Chicago & A. R. Co.* (1913) 251 Mo. 592, 158 S. W. 35.

The foreman of a packing plant does not owe any duty to employees to have the working place safe, so as to become liable for injury in case of defect in such place. *Macutis v. Cudahy Packing Co.* (1913) 203 Fed. 291. The court says the act of the foreman was a mere nonfeasance,—mere omission on his part to perform the master's duty as to inspection and repairs. For this the foreman is not liable to the injured employee. The consensus of judicial opinion is such that there cannot be said to be a fair, debatable question as to the joint lia-

bility of master and servant for the servant's misfeasance.

An agent employed to operate a mine is not liable merely because of his agency to an employee injured by an explosion of gas in the mine. *Stiewel v. Borman* (1896) 63 Ark. 30, 37 S. W. 404. The court says if he owed the employee no duty he was not liable. A legal duty is an essential element of negligence without which there can be no negligence, and there can be no duty to do an act when there is no legal right to do it. An agent stands in the relation of confidence and privity to no one except his principal. To him alone he is under obligations to perform those duties which he expressly or impliedly assumed when he entered into that relation, and hence to him alone is liable for their nonperformance. Consequently, no third person is entitled to recover against him for damages sustained by reason of the nonperformance or neglect of duty which he owed to his principal. He, however, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not by his own act unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is liable for damages to the person injured. The fact that he is acting as agent at the time will not relieve him of the liability. The court, after citing cases holding that an agent in charge of real estate, or of the construction of a building, might be liable for negligence, says: The same rule applies to agents having full and complete control and management of any business enterprise or undertaking, and the power and authority to do whatever, in the exercise of ordinary prudence, he finds reasonably necessary to prevent injury to others. But whether the failure to use such precautions be misfeasance there is a conflict of opinion, but the question is of no particular importance. The liability of the servant rests upon his failure to discharge a duty, as in misfeasance. He is under

obligation so to use what is under his control as not to injure another. For a failure to discharge this duty he is liable in damages to a person injured.

2. Acts of commission.

There is no doubt that if the servant commits an act of positive negligence by which his fellow servant is injured, he will be liable for the consequences.

A servant is liable to his coservant for misfeasance in pushing upon him a hand car which they are engaged in loading onto another car. *McGinnis v. Chicago, R. I. & P. R. Co.* (1906) 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656.

The general managers of an electric power company are liable to a lineman where they turn the power on a line on which he is at work without giving him any warning of the danger. *Hoag v. Washington-Oregon Corp.* (1914) 75 Or. 588, 144 Pac. 574, rehearing in (1915) 75 Or. 597, 147 Pac. 756.

An engineer is liable for injuries inflicted upon a postal clerk by his negligent handling of his engine. *Illinois C. R. Co. v. Houchins* (1905) 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530.

A train despatcher who, through the negligent transmission of orders, causes a collision and death of a brakeman, is personally liable for the injury. *Louisville & N. R. Co. v. Gollihur* (1907) 40 Ind. App. 480, 82 N. E. 492.

An agent in charge of a station may be held liable for injury to a boy who is painting barrels, and whom he instructs to wash in gasoline and burn the gasoline when he is through, if he is found to have been negligent in giving such instructions, and the boy is injured in carrying them out. *Standard Oil Co. v. Marlow* (1912) 150 Ky. 647, 150 S. W. 832.

In *Hare v. McIntire* (1890) 82 Me. 240, 8 L.R.A. 450, 17 Am. St. Rep. 476, 19 Atl. 453, which was an action by an employee in a quarry against another employee for injuries caused by the negligent firing of a blast, the court said the right of action, if it

exists, must be founded "on the defendant's misfeasance, which, even if it could be deemed a breach of his contract with his master, would not, for that reason, exempt him from liability to others injured thereby, provided such misfeasance was a violation of a duty springing from the relation between them. And we are of opinion that where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty resulting from their relation of fellow servants, to exercise such care in the prosecution of their work as men of ordinary prudence usually use in like circumstances; and he who fails in that respect is responsible for a resulting personal injury to his fellow servant."

Employees of a mill who attach a block and tackle to the ceiling and leave it in such a manner as to be dangerous to other employees at work in the mill will be liable for an injury caused by its fall on such employees. *Osborne v. Morgan* (1881) 130 Mass. 102, 39 Am. Rep. 437. The court says: "In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath was a misfeasance or improper dealing with instruments in the defendant's actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. . . . The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby."

In that case, the court in effect overrules *Albro v. Jaquith* (1855) 4

Gray (Mass.) 99, 64 Am. Dec. 56, which was an action to hold the superintendent of a mill liable for injuries to an employee through his negligence with respect to the handling of the gas by which the mill was lighted. In the latter case the court said: "An agent or servant is always responsible to his principal or employer for the negligent or unfaithful performance of his duty, where loss or damage results from it. But, in reference to third persons, there is a qualification of his liability. There is a well-established distinction between nonfeasance and misfeasance. As to the former, which is merely negligence or carelessness in the performance of duty, the responsibility to the principal arises from some express or implied obligation between particular parties standing in privity of law or contract with each other. In such case the responsibility is commensurate with the obligation assumed. But this is the extent and limitation of his liability. He is not bound to answer for such violation of duty or obligation, except to those to whom he has become directly bound or answerable for his conduct. . . . This principle, applied to the facts stated in the declaration, is decisive against the right of the plaintiff to maintain her present action. No fea-
sance or positive act of wrong is charged or imputed to the defendant. The whole ground of complaint against him is that, having the care and superintendence of the apparatus and fixtures used in the mill of the Agawam Canal Company, for the purpose of generating, containing, and burning inflammable gas, he was negligent, careless, and unskilful in the management of them. His obligation to be faithful and diligent in this particular resulted either from an express contract with his principal, or is to be implied from the nature and character of the service in which he was engaged. And because this is the sole origin and foundation of his duty, he is responsible only to the party to whom it was due for the injurious consequences of neglecting it. It is not pretended that he had entered into any stipulation, or

made any positive engagement, with the plaintiff, in relation to the service which he had agreed to render to their common employer. She, therefore, can have no legal right to complain of his carelessness or unfaithfulness; for he had made himself, by no act or contract, accountable to her."

An agent intrusted with the management of a construction job is personally liable for injury to a servant through the fall of a scaffold, due to the negligence of the agent. *Fort v. Whipple* (1877) 11 Hun (N. Y.) 586.

Where a railroad hand was injured by the movement of the train by the engineer while the hand was between the cars, the court said: "It is contended that the failure of the engineer to give notice to the plaintiff of his intention to move the train while the plaintiff was between the cars was a mere act of nonfeasance, for which the plaintiff must look to the master, and not to the servant. This contention cannot be supported. Conceding, without deciding, the rule to be that, for mere nonfeasance, the servant of the master cannot be made responsible to third persons injured thereby, we are clearly of opinion that the act of the engineer in backing the engine voluntarily, without giving notice, was misfeasance, instead of nonfeasance; that the knowledge he had, or ought to have had, of the presence of the plaintiff between the cars, made his movement of the train without giving notice a direct trespass or wrong committed by him against plaintiff, without regard to the relation existing between each of them and the railway company. No case has been cited to us in which such an act of a servant in the business of his master has been held to be nonfeasance." *Warax v. Cincinnati, N. O. & T. P. R. Co.* (1896) 72 Fed. 637.

Car inspectors are liable for placing a car with a board projecting from its roof in a yard in such a position that persons working on their trains are likely to come into contact with it. *Hukill v. Maysville & B. S. R. Co.* (1896) 72 Fed. 745. The court says: "It is urged that nothing is charged against them but mere omission or

nonfeasance in violation of their duty to their employer, and that, while this may subject the company to liability to the plaintiff for injuries suffered by him because of such nonfeasance, it gives him no right of action against them, for the reason that there is no relation of privity between him and them. Conceding the validity of the distinction by which a servant is held liable directly to a stranger only for positive conduct which the servant might reasonably anticipate would result in injury, and which did so while acting in the business of his master, and not for an entire failure to enter upon his master's business at all, the averments of the petition make it inapplicable here. The petition charges that the defendants (which includes the defendant car inspectors), with gross and wanton negligence, placed the car with the board projecting therefrom in a defective, unsafe, and dangerous condition, whereby the defendant was injured. This was misfeasance, because, but for their act in placing the car where it was, in its dangerous condition, the plaintiff would not have been injured."

An agent of the owner of a lighter, who, by his negligent instructions as to loading it, causes it to overturn, to the injury of an employee, cannot escape liability on the theory that he is only an agent. The court said he would be liable for requiring the master to do a dangerous thing which caused the injury. *Chiarello Bros. Co. v. Pedersen* (1917) 155 C. C. A. 258, 242 Fed. 482.

Where the servant in charge of construction of a building caused a trench to be dug at the bottom of the wall in such a manner that it fell and injured another servant at work on the building, it was contended that a servant was not liable for injuries happening through his negligence to a fellow servant, but the court said that it did not clearly perceive how it could well be that, in the little community of employees of the same master, upon the same general undertaking, the common duties of humankind in society generally should cease to exist, and, as a consequence, liability for breach

of them. *Hinds v. Harbou* (1877) 58 Ind. 121.

One employee is liable for ordering another into a dangerous place to work, this being a misfeasance. *Jewell v. Kansas City Bolt & Nut Co.* (1910) 231 Mo. 176, 140 Am. St. Rep. 515, 132 S. W. 703.

In *Republic Iron & Steel Co. v. Lee* (1907) 227 Ill. 246, 81 N. E. 411, in which a servant was injured by reason of a negligent order given him by his superior, and sued him for the resulting injury, the court said that the superior, personally and individually, owed the injured servant the duty not to give him an order negligent in character. If the order was given by the superior, it was an affirmative wrong done by him in violation of his duty, and rendered him liable to suit.

A servant who directs a fellow servant to make use of an unsafe ladder, to the injury of the latter, will be liable for the injury. *Steinhauser v. Spraul* (1893) 114 Mo. 551, 21 S. W. 515, 859.

The action failed, however, on a subsequent appeal, on the ground of assumption of risk, although the opinion of *Sherwood, J.*, contains a discussion not concurred in by a majority of the court, upon the distinction between nonfeasance and malfeasance, holding that, in this case, there was mere nonfeasance. *Steinhauser v. Spraul* (1895) 127 Mo. 541, 27 L.R.A. 441, 28 S. W. 620, 30 S. W. 102.

The act of a superintendent of a bridge company in refusing to adopt proper precautions to protect employees from injury when rolling iron bars along the uncovered beams of the bridge is one of misfeasance for which he is personally liable to an employee, injured by the fall of a roller between the beams. *Kenney v. Lane* (1894) 9 Tex. Civ. App. 150, 36 S. W. 1063.

A foreman having direct supervision of a mine, who knows the dangerous condition of overhead rock, and takes no steps to remedy it, to the injury of an employee, is personally liable for the injury. *Gennaux v. Northwestern Improv. Co.* (1913) 72 Wash. 268, 130 Pac. 495.

3. Acts of omission.

If one servant owes another a duty the failure to perform which will result in injury to such other, he will be liable for injury resulting from failure to perform such duty. The true reason of this liability is the failure to perform the duty owing; but some of the courts which have felt themselves hampered by the formula with respect to misfeasance and nonfeasance have held that the omission was a misfeasance, notwithstanding it was negative in character.

The foreman of a mine may be liable to an employee for neglect of a duty to examine the walls for the purpose of discovering whether or not there was loose material liable to fall and injure persons working in the mine. *Evans Chemical Works v. Ball* (1914) 159 Ky. 399, 167 S. W. 390.

"A car inspector, who, after inspection and approval, sends out a car which he knows, or, by the exercise of ordinary care, could have known, was defective, is liable in damages to a brakeman who, because of the defect, is injured in attempting to use it in the ordinary manner, in the absence of contributory negligence on his part." *Ward v. Pullman Car Corp.* (1908) 131 Ky. 142, 25 L.R.A. (N.S.) 343, 114 S. W. 754. The court says: "The petition here charges more than a mere nonfeasance. The cars could not go out on the road until they were inspected and passed inspection. When the inspectors inspected the cars and approved them, they went out on the road. Their approval sent the car out on the road for the use of the trainmen; if they sent a car out which was defective, and which they knew, or by ordinary care could have known, was defective, they are as fully liable to the brakeman who was injured by reason of this, as if they had with their own hands handed him a wrench, telling it was safe and proper to be used, when it was in fact in a dangerous condition; and they either knew this, or could have known it by ordinary care in such inspection as they were required to make. They did not deliver the car by their own hands to the brakeman, but they approved

it, and their approval put the car in the hands of the brakeman. It is not a case of mere failure to act, but it is a case of one who was charged with the duty of seeing that the car was safe before delivering it to another to be used, with actual knowledge that, if it was unsafe, it would endanger his life; for they must be charged with knowing what they should have known by the exercise of ordinary care when they made the inspection and passed the car. If they had not inspected the car at all, and had not approved the car in any way, they would have done no positive act, and a different question would be presented."

In *Southern R. Co. v. Miller* (1907) 1 Ga. App. 616, 57 S. E. 1090, affirmed in (1907) 3 Ga. App. 410, 59 S. E. 1115, the crew of a train which had taken a switch to let another pass it, left the switch open, so that the oncoming train ran into it and collided with the standing train, to the injury of the former. Negligence was charged against them in leaving the switch open and failing to observe that it was open. These were claimed to be merely acts of nonfeasance, but the court says: "We do not so construe the acts of negligence set up. They really involve acts both of omission and commission. They present a case not where the agents failed to perform the acts which it was their duty to perform, but where they did actually perform them, but in a negligent manner. They were all co-operating in the running of the train, and in the specific acts of negligence in reference to the switch, and other acts charged which caused the injury to the plaintiff. 'Nonfeasance is the total omission or failure of the agent to enter upon the performance of a distinct duty or undertaking which he has agreed with his principal to do.'"

In *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367, a judgment against a section foreman for leaving a switch open, by reason of which a section hand was killed, was affirmed.

Where the agent in charge of a sawing machine set an inexperienced hand to work upon it when the saw was in-

securely fastened, so that the hand was injured, the question arose as to the liability for the injury. *Greenberg v. Whitcomb Lumber Co.* (1895) 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93. The court says the principle is well settled that the servant or agent is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere nonfeasance. It further says that it was defendant's duty to have the machine safe. His neglect to do so was nonfeasance. But that alone would not have harmed plaintiff if he had not been set to work upon it. To set him to work upon the defective and dangerous machine was doing improperly an act which one might do in a proper manner. It was a misfeasance. The misfeasance was the efficient cause of the accident.

One operating a derrick to assist timbers to their place in a building is liable for injury to an employee receiving the timbers on the wall, by his negligent operation of the derrick, so that such receiving employee is thrown to the ground. *Fox v. Sandford* (1856) 4 Sneed (Tenn.) 36, 67 Am. Dec. 587.

One in charge as agent of the transferring of logs from one railroad company to another is liable for injury to an employee through the breaking of an unsafe chain which he furnishes for use of the employees. *Malone v. Morton* (1884) 84 Mo. 436. The court emphasizes, however, the fact that the injured employee did not know that defendant was a mere agent.

A foreman who, in erecting a derrick, himself selects the material and directs how and where the stays shall be located and fastened, is liable to a fellow servant for injuries caused by its proving insecure and falling, through his negligence. *Atkins v. Field* (1896) 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375. The court says: "The defendant calls our attention to a distinction made in some cases between the misfeasance and mere nonfeasance of a person in the situation of the defendant. Such a distinction cannot avail here. If the defendant

had not undertaken to rig and set up the derrick, or, in so doing, had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

In *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321, where one engaged in the construction of a church was injured by the fall of a portion of the work, the court was evenly divided on the question whether or not the contractor was personally liable for the injury. The chief justice says the undertaker who puts up, to the danger of the public, a building defective in design, materials, or work, is liable in damages for its falling down. Indeed, a stronger moral responsibility exists on his part. The owner is rendered liable from the policy of the law alone. On the other hand, the undertaker is the responsible man.

A locomotive engineer is liable for injury to the fireman by his negligence in failing properly to protect a gauge which he installs in the engine. *Brower v. Northern P. R. Co.* (1910) 109 Minn. 385, 25 L.R.A. (N.S.) 354, 124 N. W. 10. The court says defendant undertook to execute the duty of replacing the gauge, and performed it negligently. Hence his act was one of misfeasance, and not of nonfeasance. Strictly speaking, the act of the engineer in failing to put on the guard was nonfeasance,—that is, not doing an act which he was required to perform. But the distinction between misfeasance and nonfeasance is sometimes fanciful.

In *Hagerty v. Montana Ore Purchasing Co.* (*Hagerty v. Wilson*) (1908) 38 Mont. 69, 25 L.R.A. (N.S.) 356, 98 Pac. 643, where the superintendent of a mine was sought to be held liable for injury to a miner because of the unsafe condition of a shaft, it was contended that, at most, he was guilty of nonaction, or omis-

sion of duty, in failing to have the shaft in working order, or in not forbidding its use, and that such omission or nonaction amounts only to nonfeasance, for which he is not liable to a third person, but, if liable at all, merely to his principal; and that the maxim "respondeat superior" applies. The court says: "If Wilson's misconduct in permitting the shaft to be out of repair, and in permitting its use while in such condition, amounts only to nonfeasance, then the contention of his counsel may be well founded. But we are not able to agree with them in their conclusion. . . . The courts and text-writers have not always been accurate, in defining the terms 'nonfeasance' and 'misfeasance,' or in discriminating between them. As applied in cases of this character, we think the term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible."

In an action to hold employers and their foremen liable for death of an employee, due to the falling of a platform, the necessary repair of which the foremen had been instructed to look after, the court held that the question of liability for nonfeasance had not been properly raised, but proceeded to state: "The agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to

him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the nonfeasance of the servant, causing injury to third persons, is not, in general, at least, a ground for a civil action against the servant in their favor." *Murray v. Usher* (1889) 117 N. Y. 542, 23 N. E. 564.

A mine superintendent who is required by statute to examine the working conditions of the mine each day is personally liable for injury to an employee through his failure to perform the duty so imposed upon him. *Durkin v. Kingston Coal Co.* (1895) 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237. The court says that with the knowledge of the conditions with respect to overlying rock he did nothing to protect employees from the consequences of its fall; and continues: Whether his conduct be considered with reference to the statute or regardless of it, his failure to do what he must have known to be necessary was a neglect of duty such as should render him liable to his fellow servant who has suffered by it.

Other cases in which the servant has been held liable after a discussion of the doctrine of nonfeasance are found *infra*, V. c. 1.

V. *Nonfeasance.*

a. *Absence of duty to third person.*

Notwithstanding the fact that a discussion of the question of the distinction between misfeasance and nonfeasance upon the servant's liability is found in very many of the cases in which actions have been brought against the servant, the cases in which the action has failed are comparatively few. As has already been suggested the fundamental question which must ultimately furnish the rule of decision in this class of cases is whether or not a servant owes a duty to the person injured. If he does, he is liable; if he does not, he is not liable. Some of the cases have made this test the rule of decision, as will appear from the following citations:

Where a man, as agent for his wife, impounds cattle trespassing on her land, and places them in her possession, he is not answerable for injuries caused by failure to mark them. *Kimbrough v. Boswell* (1903) 119 Ga. 201, 45 S. E. 977. The court says that while an agent is personally liable to those injured by his misfeasance, he is ordinarily not liable for mere nonfeasance.

A laborer employed to dig a ditch in a public highway is not personally liable for injuries caused by failure to properly guard it at night, since that duty rests upon his employer. *Jessup v. Sloneker* (1891) 142 Pa. 527, 21 Atl. 988.

The agent of the owner of the property, who, under a permit from the city, constructs a covering over the sidewalk while improvements are in progress on the property, is not liable for injury to a passer-by through its collapse. *Scheller v. Silbermintz* (1906) 50 Misc. 175, 98 N. Y. Supp. 230. The court says the agent owed no duty to plaintiff, and unless a servant is guilty of actual misfeasance or tort, he cannot be held liable with his master. If he neglects duty which the master owes to third persons, the remedy is against the master alone.

Where an action was brought against a railroad company for delay in shipment of freight due to a strike of engineers of the road, the court, as a reason for holding the railroad company liable, said the engineers owed no duty to the shipper which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the principal and hold them responsible; but for a nonfeasance, or simple neglect of duty, they were only answerable to their employers. The maxim "*respondeat superior*" applies. *Blackstock v. New York & E. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372.

In *Hill v. Caverly* (1834) 7 N. H. 215, 26 Am. Dec. 735, where, by direction of the owner of a dam, his agent kept the gates shut until an unsafe head of water had been raised, so that the dam gave way, to the injury of a

lower riparian owner, the court held the servant not liable, saying that no action can be maintained against a servant unless he can be considered as a wrongdoer. He is never liable for a neglect of his master. The court stated that the shutting of the gates was no wrongful act to anybody. The owner had a right to raise a head of water as high as the dam would safely bear. If the gate ought to have been raised sooner, that was the business of the owner, and not of the agent. He had no authority to raise it except when directed so to do. The case discusses no wrongful act, no breach of duty in the agent, no negligence which can render him liable to the lower owner. The case was evidently decided as one of fact, but it is submitted that the court took too narrow a view of the duties of the servant to a third person. Can it properly be said that an agent can co-operate in raising a head of water behind a defective dam with the knowledge that it is merely a question of the height to which the water rises when the dam will give way and devastate property along the stream below, without personal liability for the act? It would seem that the servant, under such circumstances, owed some duty to the lower owners, and if they were injured, he could not shield himself behind the directions given him by the employer. The court argued that the agent, who was under contract to follow directions of the owner in everything relating to the stoppage or flowage of the water, cannot be held personally liable for damages to lower proprietors, caused by the breaking away of the dam, although it may have been imprudent and improper to raise such a head of water with such a dam. That he had no authority from his master to raise the gate except when directed to do so. Such reasoning is certainly peculiar. If the master had directed the servant to load and aim a gun at the neighbor's house and attach to it a time clock which would discharge the gun at a given hour, and then watch to see that nothing interfered with the prepared mechanism, could it be possible that

the servant would not be liable for the injury caused by the discharge of the gun merely because he was obeying the master's orders, and had no authority from the master to interfere with the mechanism which had been set in operation?

An agent in charge of a mill, who had nothing to do with the erection of the dam, is not personally liable for setting back the water onto upper wheels merely because he maintains the dam in the condition and at the height intended by the owner. *Levi L. Brown Paper Co. v. Dean* (1877) 123 Mass. 267. The court says, in respect to his liability, that he had no such control as would authorize him to change or remove any such structure erected upon the premises by the owner. It is very plain, therefore, that he could not be liable to other persons for failing to do what he had no right to do.

Where a building the raising of which was being superintended by an architect, fell and injured a workman, the architect was held liable for the injury. *Lottman v. Barnett* (1876) 62 Mo. 159. The court said defendant is not assumed to be held responsible for omissions of duty to his employers. He is held responsible only for positive misfeasance, for negligence in the work which he undertook and carried out, but in which he failed to exhibit the care and skill which the law imposed upon him. For this want of care and skill,—in other words, for negligence,—he is responsible to persons injured by reason of his acts.

Where a foreman whose duty it was to see to the repair of the rolling stock of a railroad put into an engine a sight tube which was furnished by the railroad company, but which was alleged to have been of an improper kind, so that it burst, to the injury of an engineer, and he was made a party to an action for the injury, the court said: "Can a servant be made liable to one of another grade for the master's failure to provide safe and suitable machinery, although it was the superior servant's duty to look after the

condition of the machinery? For such servant's careless or negligent act, which is called a 'misfeasance,' he is liable to anyone injured thereby. In its nature it is or becomes a trespass. And the fact that he is acting for another, or even under the positive directions of another, will not excuse him. But where the injury results to some third person because the servant failed to act,—that is, because of his nonfeasance,—it is held upon authority that generally the servant is not personally liable, though his master is. . . . Whether this doctrine, in its fullest extent, can be sustained in sound reason, it is unnecessary for us to examine. Whether the nonfeasance of Brown was a negative act, in that it was a failure to do what he had undertaken to do, and therefore had done it imperfectly, we are relieved from considering by the state of the pleadings and of the records; for it is not charged that Brown had it in his power to do anything other than exactly what he did. To hold him liable in this state of case would be to hold that every servant is personally charged with the same liability as his master, although the sole fault was that of the master, over whose action the servant, of course, had no control. Such a rule would be unreasonable." *Cincinnati, N. O. & T. P. R. Co. v. Robertson* (1903) 115 Ky. 858, 74 S. W. 1061.

In an action by the owner of cotton against the agent of a factor to recover damages because of his failure to transmit to the factor the owner's instructions as to the disposal of the cotton, which resulted in a substantial loss to the owner, the court said it was conceded at the argument that the agent is not liable for damages to a third person resulting to him from nonperformance or neglect of a duty which the agent owes to the principal. The court says that by statute, where a tort is for a violation of any private obligation, that obligation results from the relations of the parties, created by contract, express or implied. *Reid v. Humber* (1873) 49 Ga. 207. Now, what rela-

tions existed between the plaintiff and defendant in this case, created by contract, either express or implied? To constitute a legal contract, there must be a consideration. Was there any here? A party shipped his cotton to his factor; he then told the agent of that factor, who was at another depot from where the cotton was shipped, that he did not wish the cotton sold until further orders. Was there a legal obligation on that agent towards the shipper to transmit his directions to the factor? From what did it spring? The agent was bound to his principal, and would have been responsible to him for any damages recovered against the principal, on account of the agent's failure. And the shipper may have been entitled to recover against the principal, either for the neglect of the agent in not forwarding the instructions, or for the violation of them by the principal, if that had been communicated. But we cannot see that there was any such relation between the agent and the shipper to render the agent liable to him for the neglect. Had the shipper made the agent his own agent in the matter for a consideration, the case would be different.

"An agent who has charge of the renting of a building owned by a nonresident, and promises a tenant that he will pay for connecting a drain with a sewer, but expressly refuses to take any responsibility in directing the work, and says that authority must be obtained from some other source, is not liable for the negligence of the tenant in leaving an ungraded excavation in the street while doing the work." *Crandall v. Loomis* (1884) 56 Vt. 664.

It seems probable that the result reached in some of the above cases was influenced by the idea that the servant was not liable for omission to perform duties owing his master, the court reasoning that if the delict was with respect to a duty owing the master, there would be no delict towards a third person; and it may be that the decision might have been changed had the question of duty to

the person injured been considered with the mind free from the misfeasance-nonfeasance formula.

b. Cases denying liability for nonfeasance.

A few cases have adopted and made a rule of decision the principle that the servant is not liable for nonfeasance. That principle being without foundation to support it, the decisions on the facts in the respective cases were merely fortuitous, and may or may not have been right, according to whether or not a duty was owing to plaintiff by defendant. The following cases have held that a servant was not liable to a stranger for mere nonfeasance:

United States.—*Carey v. Rochereau* (1883) 16 Fed. 87; *Cheatham v. Red River Line* (1893) 56 Fed. 248, reversed on other grounds in (1894) 60 Fed. 517; *Burch v. Caden Stone Co.* (1899) 93 Fed. 181; *Kelly v. Chicago & A. R. Co.* (1903) 122 Fed. 286; *Bryce v. Southern R. Co.* (1903) 125 Fed. 958; *Floyd v. Shenango Furnace Co.* (1911) 186 Fed. 539; *Plunkett v. Gulf Ref. Co.* (1919) 259 Fed. 968.

Indiana.—*Dean v. Brock* (1894) 11 Ind. App. 507, 83 N. E. 829.

Iowa.—*Williams v. Dean* (1907) 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931; *Minnis v. Younker Bros.* (1908) — Iowa, —, 118 N. W. 532; *Cramblitt v. Percival-Porter Co.* (1916) 176 Iowa, 733, L.R.A.1917C, 77, 158 N. W. 541; *Wendland v. Berg* (1919) 188 Iowa, 202, 174 N. W. 410.

Kentucky.—*Dudley v. Illinois C. R. Co.* (1907) 127 Ky. 221, 13 L.R.A.(N.S.) 1186, 128 Am. St. Rep. 335, 96 S. W. 835.

Louisiana.—*Delaney v. Rochereau* (1882) 34 La. Ann. 1123, 44 Am. Rep. 456.

Mississippi.—*Feltus v. Swan* (1884) 62 Miss. 415.

Missouri.—*Bissell v. Roden* (1863) 34 Mo. 63, 84 Am. Dec. 71; *O'Neil v. C. Young & Sons' Seed & Plant Co.* (1894) 58 Mo. App. 628.

New York.—*Denny v. Manhattan Co.* (1846) 2 Denio, 115, affirmed in (1846) 5 Denio, 639; *Phinney v. Phinney* (1859) 17 How. Pr. 197;

Burns v. Pethcal (1894) 75 Hun, 437, 27 N. Y. Supp. 499; *Van Antwerp v. Linton* (1895) 89 Hun, 417, 35 N. Y. Supp. 318, affirmed in (1899) 157 N. Y. 716, 53 N. E. 1133; *Potter v. Gilbert* (1909) 130 App. Div. 632, 115 N. Y. Supp. 425, affirmed in (1909) 196 N. Y. 576, 90 N. E. 1165.

Ohio.—*Stevens v. Little Miami R. Co.* (1850) 1 Ohio Dec. Reprint, 335; *Chambers v. Ohio L. Ins. & T. Co.* (1857) 1 Disney, 327; *Henshaw v. Noble* (1857) 7 Ohio St. 226.

Tennessee.—*Erwin v. Davenport* (1871) 9 Heisk. 44; *Drake v. Hagen* (1902) 108 Tenn. 265, 67 S. W. 470.

Texas.—*Labadie v. Hawley* (1884) 61 Tex. 177, 48 Am. Rep. 278; *Morrison v. Ashburn* (1893) — Tex. Civ. App. —, 21 S. W. 993.

In *Bissell v. Roden* (Mo.) *supra*, which was an action against a subcontractor by the property owner for injury to the property by negligent performance by the subcontractor of his contract, the court sets out the section of Story's Agency relating to the servant's liability for misfeasance and nonfeasance, and declares that the case comes within the operation of the principle thereby set out, and that there is no liability.

In *O'Neil v. C. Young & Sons' Seed & Plant Co.* (Mo.) *supra*, which involved the question of liability of an officer of a corporation, the court says it is only where the agent has been guilty of active negligence—that is, of some act of misfeasance—that he can be made to answer to third persons.

Where an action was brought against transfer agents of a foreign corporation because of their refusal to transfer stock on the books of the corporation, which were in their possession for that purpose, the court held that if the plaintiff had a cause of action against anyone, it was against the principal, and not the agents, saying that for a neglect to discharge this duty they were answerable to their principal, and to no one else. If third persons are injured by the negligence of a known agent, the rule is respondeat superior. *Denny v. Manhattan Co.* (N. Y.) *supra*.

Employees of a bank are not personally liable for turning over to a third person money, where the bank had agreed with the depositor not to turn over such money until such person signed a certain receipt, which he had not done when the money was turned over. *Morrison v. Ashburn* (Tex.) supra. The court says the attempt is merely to hold them liable for failure to perform a duty to the bank as its agents.

An agent for the rental of real estate, who permits the tenant to place a cooking range on the property, is not personally liable for injuries to neighboring property by operation of the range when its use proves to be a nuisance. *Labadié v. Hawley* (Tex.) supra. This ruling is placed upon the doctrine of nonliability for nonfeasance. The court, as a preliminary to the discussion, however, states that neither the construction of the range nor failure to move it caused the injury, which resulted solely by the manner in which the range was operated. Therefore, the liability must rest, if at all, upon the ground that he had not done something which he might have done. The court then cites with approval various textbooks which have laid down the rule of nonliability for nonfeasance.

Where agents for the care of property were sued because of injury to a tenant by the unsafe condition of the property rented by them, the court disapproves of the contention that their act was one of misfeasance instead of nonfeasance, saying: "An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort, and if he does, not only the principal, but the agent, may be made to answer in damages therefor. But where a duty rests on the principal, and not on the agent, its nonperformance by the latter creates no liability against him, if injury results. True, he may owe a duty to the principal to faithfully discharge his duties as agent, but he owes no duty to others except that, in the performance of those duties, he shall not do anything

which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and by reason of such nonperformance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof." *Dean v. Brock* (1894) 11 Ind. App. 507, 38 N. E. 829. The court further says the case cannot be said to be one of malfeasance, because the agents were under no legal duty to keep the property in repair and safe for use. They simply neglected to perform for their principal the duty which he owed to his tenant. Their failure to do this was merely a nonfeasance, and not a misfeasance.

In *Cramblitt v. Percival-Porter Co.* (1916) 176 Iowa, 733, L.R.A.1917C, 77, 158 N. W. 541, it appeared that contractors for the wiring of an apartment house left an improperly protected hole in a passage during the progress of the work, and a tenant of the building was injured and sought to hold agents of the building liable for the injury. There was nothing to show that they had anything to do with the work, the contract having been let by the owner, and the agents having no notice of the defect in the passageway. There was, therefore, no ground on which they could have been held liable, but the court, in disposing of the case, said that the most that can be said of these defendants is that they neglected to perform some affirmative duty which they owed to the owner. It is a case of nonfeasance, and not of malfeasance, on the part of these defendants, as to anyone. No liability can be predicated by this plaintiff upon the failure of these agents to discharge a contractual duty which they owed to the property owner. The court says: "The general rule is that an agent is not liable to a stranger simply for nonfeasance,—for a failure to discharge some duty which he owes to his master or principal,—even though the master and principal owes that duty to the person injured. The agent may be liable as for a breach of contract, but only to his

principal. Such breach, however, is not a tort of which a stranger may complain. In the instant case, if these defendants owed any duty to keep this building in safe repair, it was a duty which they owed to the owner, growing out of some relationship existing between them. If they assumed to discharge this duty, and were guilty of some active negligence to the hurt of the plaintiff, they would be clearly liable to her as for tort; but a mere failure to discharge the obligations assumed under the contractual relationship with the owner,—a mere failure to perform those duties,—was a breach of the contractual duty to the owner of which the owner might complain, but of which no stranger to such contractual relationship could complain."

Agents for the care and rental of property who had no knowledge of the danger are not liable for injuries to a tenant by the caving of a covered well thereon. *Wendland v. Berg* (1919) 188 Iowa, 202, 174 N. W. 410. The court says an agent may be held personally liable for wrongful acts of misfeasance committed by him. But when a charge of negligence against an agent is based upon mere nonfeasance, quite a different question is presented. Negligence by nonfeasance can occur only by failure to perform some duty owing to the injured person. It is the general rule, recognized in this state, that the agent is not personally liable to a third person for mere nonfeasance.

In *Chambers v. Ohio L. Ins. & T. Co.* (1857) 1 Disney (Ohio) 327, which was an action for injury to a passer-by through the fall of a cornice into the street, which was brought against the owner of the building, the court, in the course of its argument, said: It is proper to advert to a distinction which has been noticed in one of the cases, that if the act itself be unlawful, if it could not be done otherwise than in an unlawful manner, if it be a wrong and trespass, then it may well be that he who orders or procures it to be done, and he who does it, will be responsible; but if the thing to be done is lawful and proper, and

the wrongful act which causes injury is neglect on the part of those actually employed, then their principal is responsible to third persons, and those acting as servants or agents are not responsible.

Where an agent in charge of property for leasing failed to repair the defective covering of a drain, or to inform an incoming tenant of the defect, so that the tenant fell through the covering and was injured, the court held that it was a mere act of nonfeasance on the part of the agent, and that he was not liable for the injury. *Drake v. Hagan* (1902) 108 Tenn. 265, 67 S. W. 470. The court says that an agent is not liable to third persons for injuries received by them in consequence of his not performing some duty he owes his principal.

In *Williams v. Dean* (1907) 134 Iowa, 216, 11 L.R.A.(N.S.) 410, 111 N. W. 931, which was an action against directors of an agricultural society for injuries to a patron of a ball game because of insufficiency of the back stop, the court says the defendants were agents of the society. If liable at all it was because of what they did. If they were guilty of some misfeasance or trespass, as distinguished from mere nonfeasance, then they are liable, and cannot shield themselves by saying that they were acting as agents for the society. On the other hand, no agent is liable to a stranger simply for nonfeasance; that is to say, for failure to do some act which his principal commits to his charge. He may be liable for breach of contract to his principal, but not to a stranger for a tort.

Where ice formed on the pavement in front of property for the care and rental of which defendants were agents, an action was brought against them for injury caused by a fall on the ice. There was nothing to show that the agents were in any way responsible for the ice, or had knowledge of it. The court says the defendants were guilty of no misfeasance, and it is the rule of Iowa that an agent is not liable unless he is guilty of misfeasance. *Minnis v.*

Yunker Bros. (1908) — Iowa, —, 118 N. W. 532.

In *Erwin v. Davenport* (1871) 9 Heisk. (Tenn.) 44, the court held that subordinate agents of the state were liable for their positive wrongs to third persons to the same extent as private agents. They were responsible for misfeasance, but not for nonfeasance.

While an architect may be liable for the fall of a building, due to defects in the plans prepared by him, he is not liable for injury to a third person by his failure to comply with his contract with the owner to supervise the erection of the building, so that unsafe or insecure work gets into it. This is merely nonfeasance, for which he is not responsible to third persons. *Potter v. Gilbert* (1909) 130 App. Div. 632, 115 N. Y. Supp. 425, affirmed in (1909) 196 N. Y. 576, 90 N. E. 1165. The court says: "The architect may owe a duty to the owner to visit and inspect the work hourly, daily, or weekly, but he owes no duty to the employees of the contractor to remain on the ground any given length of time, or to inspect the work at given intervals, to see that the plans and specifications, which fully and definitely prescribe materials and dimensions and quantities, are followed by the contractor, who is presumed to be competent, or to employ a superintendent or foreman competent to follow them. It was the duty of the employer of the decedent, under his contract with the owner, to follow the plans and specifications. The supervising power conferred upon the architect was to insure this result for the protection of the owner. If the architect were guilty of an affirmative act which contributed to the accident, as by directing a departure from the plans or specifications, or the use of improper materials, or knowingly suffering such departure from the plans or specifications, or such use of improper materials, or failing to condemn improper work, he would doubtless be liable; but there is no such charge made in the complaint." The dissenting judge, however, said: "I think
20 A.L.R.—11.

the complaint states a cause of action, because it charges the defendant with misfeasance, and all of the authorities agree that for that an agent may be held liable to a third party. It alleges that the defendant undertook to supervise the construction of the building; that he had supervision of the work when the wall fell, which was occasioned by the negligent manner in which he performed his work; that the improper construction of the wall was known to him, or would have been if he had exercised reasonable diligence in the performance of his duties. The negligent performance of his contract with Graves, not mere nonperformance, is what is alleged. This is equivalent to a charge of misfeasance, and not nonfeasance."

Negligence of a committee appointed by a corporation owner of exhibition grounds to construct a stand for the use of patrons of a game to be played on the grounds, in failing to see that it is safe for the use to which it is to be put, is mere nonfeasance for which they are not personally responsible. *Van Antwerp v. Linton* (1895) 89 Hun, 417, 35 N. Y. Supp. 318, affirmed in (1899) 157 N. Y. 716, 53 N. E. 1133. The court says: "In this state an agent or servant is not liable to third persons for nonfeasance. As between himself and his master he is bound to serve him with fidelity; and for a breach of his duty he becomes liable to the master, who, in turn, may be charged in damages for injuries to third persons occasioned by the nonfeasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between nonfeasance and misfeasance has been expressed by the courts of this state as follows: 'If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he

is liable.' . . . Appellant urges that although these individual defendants were charged by the corporation with the duty of erecting this stand, and the acts complained of consisted in omitting to provide for a construction of sufficient strength to withstand the strain to which it was subjected, nevertheless they were guilty of misfeasance rather than nonfeasance."

The contention, however, was disallowed in *Feltus v. Swan* (1884) 62 Miss. 415, in which it was alleged that a levee had been built by the owners of two adjacent plantations for protection against high waters, and that it had always been the custom for the owner of one to have the water from his plantation drain through the other, and that it was the duty of the owner of the latter to keep open a drain on his property for the purpose of such drainage. Neglect of the performance of this duty by the owner of the servient plantation and his manager was alleged, to the injury of the dominant estate. There is nothing to show the foundation of the duty or its extent, but the court disposes of the case by saying that the manager, being a mere agent, was not liable for an omission of duty except to his principal. The charge against him was only that he failed to do, and not that he had done anything mischievously, and for nonfeasance, or omission to act at all, the agent is answerable only to his employer.

In an action by a passenger against the railroad company and the engineer and conductor, for injuries caused by the derailling of a train, the court says an agent or servant is not always personally liable to third persons for negligence. When he is charged with negligence, the facts must be stated wherein the negligence exists,—whether in the omission of an act he should have done, or in the commission of an act he should not have done. For the former, he will not be liable. *Bryce v. Southern R. Co.* (1903) 125 Fed. 958.

"For mismanagement of an estate by an agent he is responsible only to his principal, and not to other persons

who may claim to be the rightful owners of the property." *Phinney v. Phinney* (1859) 17 How. Pr. (N. Y.) 197.

In *Stevens v. Little Miami R. Co.* (1850) 1 Ohio Dec. Reprint, 335, the court, in arguing in favor of the liability of a master for injury done by one servant to another, said that if the plaintiff had sued his fellow servant, he would have been turned out of court, on the ground that there was no privity of contract; and that as to negligence or nonfeasance, the servant is responsible to his master, and not to his fellow servant.

In an action by an employee against his master and a coemployee for injuries caused by the falling upon him of a derrick, the court says it is not shown that the coemployee was guilty of any wilful or intentional wrongdoing respecting the derrick or the operations of the corporation by which plaintiff was injured. In the absence of any statement that he was guilty of any wilful wrongdoing, or that he had control superior to that of plaintiff over the operations of the derrick, and in the absence of any statement connecting him with the operations of the derrick in any manner not directed by the principal, or not within the scope of his employment, no cause of action is shown against him. With respect to the servant, it is a case of negligence only; and mere negligence, however gross, would not render the servant liable unless it was wilful or malicious. *Burch v. Caden Storage Co.* (1899) 93 Fed. 181.

The failure of a yardmaster to perform his duty to inspect an engine, and permitting it to go out on the road, to the injury of an employee, is a mere act of nonfeasance or omission, and nothing more. The servant or agent is personally liable to third persons for doing something, i. e., committing a positive act, which he ought not to have done, but not for not doing something which he ought to have done. In the latter case he is liable only to his employer. *Kelly v. Chicago & A. R. Co.* (1903) 122 Fed. 286.

Where a miner was injured by defects in a ladderway leading from one level to another, and sued the mine captain for damages on the theory that it was his duty to see that the way was safe, the court said the only negligence charged against him is simply nonfeasance, in that he failed to perform the positive duty of the master properly to inspect and repair the ladderway. Upon well-established principles of the common law he was not liable to third persons or coemployees for nonfeasance. For that he is liable only to his employer. *Floyd v. Shenango Furnace Co.* (1911) 186 Fed. 539.

Where a servant engaged in cleaning tar from a boiler or vat was badly scalded by a piece of false bottom splashing the tar, and brought an action against the superintendent of construction as well as the employer, alleging negligence in using a defective appliance, and failing to warn him of the danger, the court said the claim was that the superintendent was guilty, at most, of nonfeasance, and not of misfeasance, such as would make him, an employee, liable. *Plunkett v. Gulf Ref. Co.* (1919) 259 Fed. 968. The court says: "Taking this declaration altogether, the only possible wrong that can be charged to the defendant Plunkett is that, knowing the tar tank to have a false bottom, he failed to give the plaintiff notice thereof. The only thing, according to the declaration, which caused injury to the plaintiff, was the falling of the false bottom into the tar, causing it to splash on the plaintiff, severely burning him. . . . The most that the defendant Plunkett could be responsible for is for not telling the plaintiff of this false bottom and that it was likely to fall, and that is clearly nonfeasance. And it is well settled . . . by the authorities, that for mere nonfeasance an employee of a corporation will not be liable to a third person for injuries received."

In *Dudley v. Illinois C. R. Co.* (1906) 127 Ky. 221, 13 L.R.A.(N.S.) 1186, 128 Am. St. Rep. 335, 96 S. W. 835, a railroad employee having charge

of the water tanks and appliances was sued for injuries to a brakeman because of his alleged failure to remedy a defect to which his attention had been called. The court said that the evidence did not show what his authority over the structure was, whether he could have placed it further from the track or supplied different appliances, or that he had it in his power to do anything more than he had done. But the court says: "Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant, such as Mitchell was, is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed." And the court, on the authority of the *Robertson Case*, held that the employee was not liable; but it will be remembered that in *Cincinnati, N. O. & T. P. R. Co. v. Robertson* (1903) 115 Ky. 858, 74 S. W. 1061, the employee used in repair the materials which were furnished him, so that he was not in fact negligent; while in the *Dudley Case*, he did not do so, but left a known dangerous condition, to the injury of his coemployee. The case is explained, however, in *Ward v. Pullman Car Corp.* (1908) 131 Ky. 142, 25 L.R.A.(N.S.) 343, 114 S. W. 754, as resting upon the ground that the servant had done all that was in his power, and therefore was not negligent.

In *Burns v. Pethcal* (1894) 75 Hun, 437, 27 N. Y. Supp. 499, an action was brought to recover for the death of a laborer in a trench, against the foreman of the job, who was alleged to have been negligent in permitting the laborer to work at the place where the accident occurred, because of its dangerous condition. The court was of opinion that the evidence did not show any negligence on his part, but placed its ruling against the liability on the ground that the foreman was guilty of nonfeasance only, if negligent at all. The court says: "The conflict

in the authorities upon this question is more apparent than real. It has arisen to a great extent from a failure to observe clearly the distinction between misfeasance and nonfeasance, and from an omission to point out the fact that while a servant is liable in the one case, he is not in the other. Disregarding this distinction, some judges and authors have stated in general terms that a servant is liable for his own negligence to a person injured thereby. Such a statement is inaccurate and misleading. Nonfeasance is the omission of an act which a person ought to do. Misfeasance is the improper doing of an act which a person might lawfully do. If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable. . . . We are of the opinion that, as the defendant in this action was charged only with nonfeasance, and not with misfeasance, and as the evidence disclosed that the defendant was guilty only of an omission of duty which devolved upon him, if at all, purely from his employment, and not in his individual character, he was not, under the principle of the authorities cited, liable for the injury to the plaintiff's intestate, and that the court erred in refusing to grant the defendant's motion for a nonsuit."

In *Cheatham v. Red River Line* (1893) 56 Fed. 248, reversed on other grounds in (1894) 9 C. C. A. 124, 23 U. S. App. 19, 60 Fed. 517, which was in the Federal court in Louisiana, an action was brought against the master and owners of a vessel for death of a deck hand alleged to have been killed through the negligent handling of the boat. The court said it did not think the action would lie against the master. He was acting avowedly as the agent of others and within the scope of his authority, and he was guilty of no wilful or mali-

cious act. His acts are, therefore, by the well-settled principles of law, those of his principal alone.

In *Carey v. Rochereau* (1883) 16 Fed. 87, there was nothing in the report of the case to show what the delict on the part of the agent was, but the court says an agent is liable only to his principal for nonfeasance. At common law, this proposition is not disputed. The same is true under the law of Louisiana. It is very doubtful if the agent per se is liable to a third person on any account. A person acting as agent for another is liable for his own misfeasance, but this results not from the agency, but in spite of it.

In *Henshaw v. Noble* (1857) 7 Ohio St. 226, which was an action against owners, contractors, and servants, for negligently excavating on property adjoining that in which plaintiff's goods were stored, so that the building was thrown down, to the injury of such goods, it was objected that an action on the case for negligence could not be maintained by a third person against an agent, where the negligence consists of omission of duty imposed. The court says: "The agent is . . . personally liable to third persons for his own misfeasance and positive wrongs. But he is not, in general, liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; the privity exists only between him and his principal. And hence the general maxim, as to all such negligences and omissions of duty, is, in cases of private agency, 'respondeat superior.' . . . A mere nonfeasance, or neglect to perform a duty, however wrongful such negligence may be, cannot constitute a technical trespass, which is a positive act of misfeasance, accompanied with force. For such acts of misfeasance, all the agents, and those under whose authority they act, are jointly and severally liable. If, therefore, the injury for which the plaintiff sues in this case was occasioned by the dig-

ging in the street, or upon the adjacent premises leased to Curtis and Brown, we apprehend trespass would not be the proper remedy. Curtis and Brown might lawfully dig a cellar upon their own premises, and they might lawfully dig in the street, by the license of the proper authority. Neither of these acts is a direct, forcible invasion of the plaintiff's premises. Their wrongful character arises solely from the careless and negligent manner in which they were performed; from a want of such precautionary measures as the law demanded under the circumstances, in order to prevent consequential injury to the plaintiff's property. For this want of care and consequential injury, the remedy is by action on the case; and the liability of the defendants must be determined by the rules governing cases of negligence, and not by those applicable to trespass."

In *Delaney v. Rochereau* (1882) 34 La. Ann. 1123, 44 Am. Rep. 456, agents of a nonresident owner of a building permitted the gallery in front of it to become out of repair and dangerous. They permitted the property to stand vacant, and one evening, without their knowledge, third persons gained admission to it and proceeded to hold a party, during which the gallery fell, precipitating guests of the party to the sidewalk, and killing one, for whose death the agents were sought to be held liable. There is nothing to show any liability whatever to the persons who had taken possession of the property, because they were plainly trespassers; but the court says the theory on which the suit rests is that the agents are liable to third persons injured for their nonfeasance. The court says: "At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent, in the latter case, being liable to his principal only. For nonfeasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties stand-

ing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible."

c. Cases recognizing liability for nonfeasance.

1. In general.

The numerical weight of authority as well as of reason ignores the fact that the delict of the agent was a mere nonfeasance toward his master, and tests the question by the duty which the servant owes to the person injured.

Alabama. — *Mayer v. Thompson-Hutchison Bldg. Co.* (1894) 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620.

Georgia. — *Southern R. Co. v. Rowe* (1907) 2 Ga. App. 557, 59 S. E. 462; *Southern R. Co. v. Sewell* (1916) 18 Ga. App. 544, 90 S. E. 94.

Illinois. — *Baird v. Shipman* (1890) 132 Ill. 16, 7 L.R.A. 128, 22 Am. St.

Rep. 504, 23 N. E. 384; *Rising v. Ferris* (1919) 216 Ill. App. 252.

Indiana. — *McNaughton v. Elkhart* (1882) 85 Ind. 384; *Tippecanoe Loan & T. Co. v. Jester* (1913) 180 Ind. 357, L.R.A.1915E, 721, 101 N. E. 915.

Kansas. — *Wells v. Hansen* (1916) 97 Kan. 305, L.R.A.1916F, 566, 154 Pac. 1033, Ann. Cas. 1918D, 230; *Dowell v. Chicago, R. I. & P. R. Co.* (1910) 83 Kan. 562, 112 Pac. 136. This proposition was approved by the United States Supreme Court in (1913) 229 U. S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684.

Kentucky. — *Haynes v. Cincinnati, N. O. & T. P. R. Co.* (1911) 145 Ky. 209, 140 S. W. 176, Ann. Cas. 1913B, 719; *Murray v. Cowherd* (1912) 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6.

Maine. — *Campbell v. Portland Sugar Co.* (1873) 62 Me. 552, 16 Am. Rep. 503.

Maryland. — *Consolidated Gas Co. v. Conner* (1910) 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725.

Massachusetts. — *Osborne v. Morgan* (1881) 130 Mass. 103, 39 Am. Rep. 437.

Michigan. — *Ellis v. McNaughton* (1889) 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Bannigan v. Woodbury* (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531.

Missouri. — *Orcutt v. Century Bldg. Co.* (1907) 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062; *Carson v. Quinn* (1907) 127 Mo. App. 525, 105 S. W. 1088.

New Hampshire. — *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* (1902) 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363.

New Jersey. — *Horner v. Lawrence* (1874) 37 N. J. L. 46; *Van Winkle v. American Steam Boiler Co.* (1890) 52 N. J. L. 240, 19 Atl. 472.

Pennsylvania. — *New York & W. Printing Teleg. Co. v. Dryburg* (1860) 35 Pa. 298, 78 Am. Dec. 338.

Virginia. — *Belvin v. French* (1887) 84 Va. 81, 3 S. E. 891.

Washington. — *Lough v. John Davis & Co.* (1902) 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491,

17 Am. Neg. Rep. 146; *Howe v. Northern P. R. Co.* (1902) 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100.

It will be noticed that the above list contains citations from two or three states which appear in the list in the preceding subdivision. This may be accounted for, perhaps, by the fact that the cases may be distinguished on the facts; but if not, the cases upholding the liability are the more recent, so that they must be regarded as representing the present rule in those states.

Where an action was brought against the managing agent of a corporation which had contracted to construct a building adjacent to a sidewalk, for injury caused to a passer-by by a brick which fell from the top of the building, the court said: "If the proof had shown that the injury resulted from culpable negligence in the construction of the wall, the agent in control, by whose orders it was thus constructed, would be guilty of misfeasance, and jointly liable with the contractor. We think all the authorities are to this effect. . . . The second count charges the defendants with neglect, in their failure or omission to erect scaffold or guards so as to prevent brick from falling to the ground. On this proposition the defendant Thompson invokes the doctrine that an agent or servant is not liable for a mere omission or nonfeasance. . . . The principle upon which the rule is founded, as declared by Story, is that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master and principal. This relation of privity is that from which arises the maxim 'respondeat superior.' The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract

between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent; and his rights ought to be the same against the one whose neglect of duty has caused the injury. . . . We hold that the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable." *Mayer v. Thompson-Hutchison Bldg. Co.* (1894) 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620.

In *Haynes v. Cincinnati, N. O. & T. P. R. Co.* (1911) 145 Ky. 209, 140 S. W. 176, Ann. Cas. 1913B, 719, which was an action for death of a fireman because of alleged negligence of the engineer, the court held that the evidence did not show that he was negligent, but said: "If the accident had been caused by either misfeasance or nonfeasance amounting to a breach of duty on the part of the engineer, we would hold him liable. In some jurisdictions the servant is not held accountable to third persons for nonfeasance, but is for misfeasance; but a contrary rule, and one that is in accord with the weight of modern authority, prevails in this state. We do not recognize any distinction, so far as the accountability of the servant is concerned, between acts of misfeasance and nonfeasance. . . . If a servant performs in an unlawful manner an act that results in injury to a third person, or if a servant fails to observe a duty that he owes to third persons, and injury results from his fault of omission, he is liable in damages. There is no reason for making a distinction between acts of commission and omission, when each involves a

breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer, without respect to the position in which he acts, or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable. It is not at all material whether his wrongful or negligent act is committed in an affirmative or wilful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform. There are innumerable situations and conditions presented in the everyday affairs of life that make it the duty of persons to so act as not to harm others, and when any person, whatever his position or relation in life may be, fails, from negligence, inattention, or wilfulness, to perform the duty imposed, he will be liable."

In *Rising v. Ferris* (1919) 216 Ill. App. 252, where the manager of a theater was sought to be held liable for negligence in leaving an unguarded electric switchboard where a child, taking part in a performance on the stage, came in contact with it and was injured, liability was resisted on the ground that the manager was not liable for mere nonfeasance. The court held that the statements of nonliability under such circumstances were too broad, in that they seemingly failed to recognize the fact that an agent may, in some cases, owe a duty to third persons at the same time that he owes a duty to his principal; and that the common duty to guard the rights of others is none the less binding upon a person because he happens to be, at the time, an agent. And the court held the manager guilty of such negligence as to render him personally liable.

In an action against one charged with the duty of inspecting telephone poles, to hold him liable for fall of a

pole across a highway, to the injury of a passer-by, he contended that his negligence, at most, was mere nonfeasance, and that a servant is not answerable for mere nonfeasance,—that failure to perform his duty made him answerable only to his employer. And the court said that it was not his position as servant, but his relation as an individual wrongdoer to the person injured, which fixed his liability. 'It was this defendant's duty to inspect and maintain the poles. He owed travelers an affirmative duty, in the exercise of reasonable care, to inspect and maintain the poles in safety. For his negligent failure to perform this duty, whether it be called nonfeasance or misfeasance, liability attaches to him in favor of one injured by it. *Murray v. Cowherd* (1912) 148 Ky. 591, 40 L.R.A.(N.S.) 617, 147 S. W. 6.

In *Southern R. Co. v. Sewell* (1916) 18 Ga. App. 544, 90 S. E. 94, special attention is directed to a statement found in 31 Cyc. 1559, that while an agent is not responsible to third persons for injury resulting from nonfeasance, the meaning of the term "nonfeasance" in this connection is confined to the omission by the agent to perform a duty which he owes solely to his principal by reason of his agency. In other words, if the injuries arise on account of the failure to perform a duty which he has undertaken to perform by virtue of a contract with his principal, but which nevertheless (when once undertaken) involves an obligation on his part to third persons or to the public generally, he must perform the duty, which is not in that case solely to his master, in such a way that injury may not result to third persons on account of negligent, reckless, or wanton failure on his part to carry out and perform the duty he has so undertaken to perform.

Where a gas company under contract to supply gas to a city for illuminating purposes, and to keep the service pipe in repair, was sued for injuries to occupants of abutting property because of gas escaping from a defective pipe, it contended that its

duty was merely to the city, whose agent it was, and any neglect to perform it could be regarded only as a nonfeasance for which it would not be liable to third persons. *Consolidated Gas Co. v. Connor* (1910) 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725. The court says: "The distinction between these two classes of negligence has been frequently considered, and it is well settled that nonfeasance is the nonperformance of a duty for which the agent is liable only to his principal, while misfeasance is the improper performance of a duty for which the agent is liable to third persons injured by such negligence. If, for example, the gas company in this case had failed to supply gas to the city lamps, in accordance with its contract, this would have been a nonfeasance, for which the company would have been responsible only to the city. But when, in carrying out the contract, it distributes the gas through defective pipes, and thus permits it to escape into the streets and houses of the city, there is manifestly involved an affirmative element of negligence amounting to misfeasance, and for this the company is liable to anyone who may suffer in consequence."

A demurrer to a declaration to hold persons who had contracted to furnish heat to a mill liable for injury to goods of a tenant of the basement of the mill through the bursting of water pipes in the mill, due to failure to furnish the heat, was overruled in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* (1902) 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363. The court says the ground of defendant's liability to others is explained upon the analogy of the liability of a servant to third persons. As a general rule, a servant or agent who has contracted to perform a duty owed by his master or employer is liable only to his employer for his mere failure to perform such duty, and is not liable to third persons. So long as the servant does nothing, his contract creates no liability to third persons; but the moment he enters upon

the work, the obligation of care arises. He cannot create a dangerous situation and suddenly abandon the work without care for the danger to others.

An insurance company which, upon insuring a steam boiler, takes upon itself the duty of inspection and management of the boiler, is liable to a stranger injured by explosion of the boiler, due to its failure properly to perform its obligation. *Van Winkle v. American Steam Boiler Co.* (1890) 52 N. J. L. 240, 19 Atl. 472. The court says: "In all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The law hedges round the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes, in a way, everyone his brother's keeper; and therefore it may well be doubted whether, in any supposable case, redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm."

In *New York & W. Printing Teleg. Co. v. Dryburg* (1860) 35 Pa. 298, 78 Am. Dec. 338, which involved the question of the liability of a telephone company to a sendee for missending the message, it was contended that there was no liability, because the corporation was the agent of the sender, and was therefore not liable to the sendee for negligence. The court says: "For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim 'respondeat superior;' but, even to this rule, there is an exception in the instance of masters of ships, who, although they are the agents or serv-

ants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but for those of subordinate officers and others employed under them." And the court held that the company was guilty of misfeasance for which the action would lie.

One who, having been employed to haul logs, obtains permission to go through a neighbor's property on condition that the gate be kept shut to prevent escape of hogs pastured there, is liable for loss of hogs, due to his failure to keep the gate shut. *Horner v. Lawrence* (1874) 37 N. J. L. 46. The court says the loss was due to his own misfeasance, for which he cannot claim exemption as agent, against the claim of the person injured.

Where the conductor of a vestibule train refused to open the door to relieve a passenger whom he knew was clinging to the handrails in a perilous position, so that he fell from the train and was injured, the court said: "The conductor was under contract to operate the train of the railway company between certain points on its line, on certain days or during certain periods. Had he failed altogether to take charge of the train on any particular day or date, as required by his contract with the railway company, and in consequence of his failure to perform his contractual obligation the train had departed on its journey in charge of some flagman or other underling, through whose incompetency injury resulted to passengers thereon or to the general public, or if, on account of a breach of his contract, the departure of the train was delayed and damage thus resulted to any patron of the railway company, the persons injured would have no right of action against him, but the master alone might call him to account for the breach of his contract. He would be guilty of nonfeasance, in that he had failed to perform a duty which he owed solely to the master; that is, the duty of running and operating the

train of the master in accordance with the contract between himself and the master. On the other hand, where a conductor undertakes to operate the train in compliance with his obligation to his master, but in its operation neglects to observe that degree of care and caution required of him, or improperly performs some duty, and injury results to a third person thereby, the injured person has a right of action against him as well as against the master, because the negligent performance of the duty undertaken amounts to more than nonfeasance, and may properly be characterized either as misfeasance or malfeasance. . . . While running the train, the conductor was in the performance of a duty which exacted from him a due regard for the rights and safety of the public; and it cannot be said that he would incur no personal or individual liability if, on account of his failure to perform his duty towards the general public, injury resulted to one of that public, even though the injured person was at fault." *Southern R. Co. v. Sewell* (1916) 18 Ga. App. 544, 90 S. E. 94.

Where a locomotive engineer negligently injured a track hand, it was contended that he was not liable to third persons for mere omission of duty, but the court said: "This contention overlooks the theory that a servant owes duties to third persons as well as to his master. A servant or employee of a corporation cannot well escape liability for the nonperformance of a duty which he owes to an injured third party. . . . If it were granted that Johnson was not liable for mere nonfeasance, he would nevertheless be liable for the negligence charged against him in appellee's petition. The allegation is that he carelessly and recklessly ran down and injured appellee with an engine of which he was in charge. This amounts to a charge of violating his duty to appellee and of doing something to the latter's injury. Johnson's act was something more than a breach of contract with his master or an omission of duty to

the railway company. It was a positive wrong to appellee,—a misfeasance,—and he cannot be relieved from liability for it because of his contract relation with his master." *Dowell v. Chicago, R. I. & P. R. Co.* (1910) 83 Kan. 562, 112 Pac. 136. This proposition was approved by the United States Supreme Court in (1913) 229 U. S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684.

In an action against a section boss for injuries arising to a traveler on the highway by falling into a trench which he had dug across the highway for drainage purposes and failed to cover, it was contended that the petition charged only an act of nonfeasance. The court said it must be remembered that misfeasance may be negligence only. The section boss would be guilty of misfeasance if the ditch were improperly dug or improperly guarded, or if, without regard to the rights of others, it was negligently left in such a condition as to endanger the public or passers-by. Misfeasance is the omission to do an act as it should be done. The court summarizes by saying misfeasance is the improper doing of an act which the agent might lawfully do. Where the agent fails to use reasonable care or diligence in the performance of a duty, he will be personally responsible to a third person who is injured. His liability in such cases is put upon the ground that he is a wrongdoer, and, as such, responsible. *Southern R. Co. v. Rowe* (1907) 2 Ga. App. 557, 59 S. E. 462.

"It is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving

things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance,—doing improperly." *Osborne v. Morgan* (1881) 130 Mass. 103, 39 Am. Rep. 437.

2. *Management of property.*

A situation which brings out very clearly the inadequacy of the formula that an agent is liable for misfeasance, but not for nonfeasance, to solve the question of liability, is that where an agent having charge of property, with authority to care for and rent it, permits it to become out of repair by a mere act of nonfeasance, so that someone is injured by its defective condition. Here, he owes a duty to the property owner to keep the property in repair; but having sole charge of it, and being, perhaps, the only one to whom the public can look for redress in case of injury, because of nonresidence of the property owner, there is a strong tendency on the part of the courts to hold the agent personally liable.

Thus, an agent having absolute control and management of property for rental purposes is liable for letting the property with a rotten and unsafe railing to the veranda, which gives way, to the injury of the tenant. The contention was that defendant was not liable, because his act was a mere nonfeasance, but the court says: "The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation of their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the

other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operations, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. . . . If the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. . . . Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule. . . . The obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal, or in the operation of the property of another as agent." *Lough v. John Davis & Co.* (1902) 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491.

And that case was followed in *Howe v. Northern P. R. Co.* (1902)

30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100.

An agent in charge of property of his nonresident principal, who rents the property with knowledge that it is unsafe, is personally liable for injuries caused by the defects. *Baird v. Shipman* (1890) 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384. The court says: "An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot, in all cases, find shelter behind his principal. . . . It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable."

In an action to hold the agent of a building liable for negligence in permitting the fastening of an elevator door to become out of order, so that the door stood open and plaintiff fell into the well, where it was objected that the negligence was mere nonfeasance for which the company was not liable, the court said: "The real ground, as we see it, for the application or nonapplication of the rule as to liability, is not one of agency, but a question of the duty imposed by general principles of law upon the owner, or those in control of property for him, to so use or manage the property as not to injure the property of another by its negligent use, or to injure the person of another who is where he has a right to be, or is in the use of property, for which use he pays. There is a privity in law, by virtue of which everyone in charge of property is under obligation to so use it as not to injure another. It is a duty imposed by law, it is true, but privity arises from the obligation to those in a situation to insist upon its respect, and the neglect of performance must, in order to render the agent liable, be neglect

of performance of a duty which he owes third persons, independent of and apart from the agency, which arises from contract. . . . In the case at bar, even upon the theory of an agent not being liable for nonfeasance, but for misfeasance or malfeasance only, the nonfeasance was not inspecting or not keeping the elevator apparatus in repair, and the misfeasance in causing it to be operated in that condition. If . . . nonfeasance is held to apply only to cases where the agent fails to enter upon the performance of his contractual obligations, and not to cases where he has entered upon such performance, but neglected his duties in some respects, the confusion would not arise. That is to say, that for failure to perform his contractual obligations to his principal, a third person cannot hold him liable; but for negligence of omission or commission, after he has undertaken performance, he is liable under common-law rules. The violation of a duty giving rise to injury and a cause of action arises as much and as frequently from omission to do a thing which ought to be done in the discharge of his duty to his principal,—nonfeasance,—as in doing it in the discharge of that duty, in such a manner as to injure another,—misfeasance." *Tippecanoe Loan & T. Co. v. Jester* (1913) 180 Ind. 357, L.R.A.1915E, 721, 101 N. E. 915.

In *Campbell v. Portland Sugar Co.* (1873) 62 Me. 552, 16 Am. Rep. 503, where the agents in charge of a wharf to which the public were invited let it become out of repair, so that one going there on business fell through a hole in the planking, the court said that the agents were in no better position than their principal. It was the actual personal negligence of the agents that constituted the constructive negligence of the principal. When the acts or neglect of the agents result in injuries to third persons, they are equally responsible with their principals.

An agent having charge of the erection of a building is personally liable for failure to replace a walk in front of it, which was torn up by

workmen so as to render it unsafe for passers-by. *Ellis v. McNaughton* (1889) 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113. The court says he was bound to use reasonable care in the erection of the building so as not to cause injury to third persons. "To say that he only was guilty of a nonfeasance—an omission of duty to his principal—does not cover the case. He not only omitted a duty he owed to the traveling public, but by his acts he increased the danger, and every day committed a wrong and was guilty of a misfeasance in keeping this walk torn up, and using it as a driveway, in the execution of a particular work which he had entered upon, and of which he had complete superintendence and control. Irrespective of his relation to his principal, he was bound, while doing the work, to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve, to some extent, the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable."

In *Orcutt v. Century Bldg. Co.* (1907) 201 Mo. 424, 8 L.R.A.(N.S.) 929, 99 S. W. 1062, an agent having entire charge of a building was held personally liable for injuries caused by negligent operation of an elevator in it. The court says: We concede that for mere nonfeasance, pure and simple, the agent or servant is not liable to third persons. But when the agent undertakes the management of the building, it undertakes to do for the principal a particular work; and after it enters upon the

performance of the work, any act which it does, whether by omission or commission, is misfeasance. After making this contract, had it stood aloof and refused to take the management of the building, and in so doing thereby failed to do something which resulted in injury to a third person, it would not have been liable, because we would thus have had mere nonfeasance. But after it assumed the management and thereby commenced to do the work it contracted and agreed to do, then acts of omission or commission constituted misfeasance, or failure properly to do things which it had, in the line of its duty, commenced to do.

Where the agent in charge of a tenement building, in constructing a walk along a common passage, left a hole in it, into which a tenant fell and was injured, the court says: "All hold that the agent is liable to a third party for misfeasance and for acts of positive wrong. . . . A difficulty often arises to determine, under the facts and circumstances of the case, whether the act of the agent was misfeasance or mere nonfeasance. Plaintiff insists that the making of the hole in the court common to all the tenants occupying the premises, and leaving it open, in the circumstances shown in the evidence, exposed the tenants to danger and was a positive wrong,—a misfeasance. Defendant, on the contrary, argues that the making of the hole was a necessary improvement, and leaving it open was a mere omission of duty, and therefore should be classed as nonfeasance. . . . Defendant directed and superintended the construction of the hole or trap, had exclusive control of and supervision over the premises; and plaintiff's evidence tends to show he left the hole uncovered, and thus exposed the tenants to danger. In these circumstances, the omission to cover the hole was not mere nonfeasance, but a violation of the duty defendant owed the plaintiff and other tenants; it was a positive wrong for which he is liable." *Carson v. Quinn* (1907) 127 Mo. App. 525, 105 S. W. 1088.

Executors who, as such, care for and lease property belonging to the estate, are personally liable for injuries to a pedestrian, due to the unsafe condition of a coalhole in the sidewalk in front of the property. *Belvin v. French* (1887) 84 Va. 81, 3 S. E. 891. The court says it was the duty of the defendants to keep the cover in a safe and secure condition, and this duty, without any sufficient excuse, they failed to perform. A fiduciary ought not to be permitted to manage a trust estate in his hands in such manner as to injure others with impunity so far as any personal liability on his part is concerned, and to hold that defendants are not personally liable in this case would be as inconsistent with natural justice as with the well-settled principles of the common law.

An agent for the care and rental of property is liable to a tenant when he employs an incompetent person to repair a walk on the premises, and falsely informs the tenant that the walk is repaired and safe. *Wells v. Hansen* (1916) 97 Kan. 305, L.R.A. 1916F, 566, 154 Pac. 1033, Ann. Cas. 1918D, 230.

Where an agent in charge of city property employs men to make an excavation in the sidewalk in front of it, he is personally liable in case the excavation becomes a nuisance, and a passer-by is injured by falling into it. The court said that he is guilty of a misfeasance. *McNaughton v. Elkhart* (1882) 85 Ind. 384. But in that case the court held that it agreed with counsel that there are cases where the agent employed about his master's business, and acting un-

der his direction, is not liable to third persons for mere omissions.

One employed to repair a walk on leased premises is liable for injury to the tenant if he makes insufficient repairs, but reports to the tenant that the walk is safe and ready for use. *Wells v. Hansen* (Kan.) *supra*.

In *Bannigan v. Woodbury* (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531, which involved the liability of an administrator for injury caused by the dangerous condition of property under his control, the court says an agent in the control of property is responsible for his own tortious acts. And judgment in favor of plaintiff was reversed on a second appeal in that case for admission of incompetent evidence, but the court does not seem to question the soundness of the rule as above laid down. (1911) 166 Mich. 491, 132 N. W. 77.

The cases which have not held those intrusted with the care of buildings liable for injuries caused by their failure to keep them in repair are as follows:

Indiana.—*Dean v. Brock* (1894) 11 Ind. App. 507, 38 N. E. 829.

Iowa.—*Williams v. Dean* (1907) 134 Iowa, 216, 11 L.R.A. (N.S.) 410, 111 N. W. 931; *Minnis v. Younker Bros.* (1908) — Iowa, —, 118 N. W. 532; *Cramblitt v. Percival-Porter Co.* (1916) 176 Iowa, 733, L.R.A. 1917C, 77, 158 N. W. 541; *Wendland v. Berg* (1919) 188 Iowa, 202, 174 N. W. 410.

Ohio.—*Chambers v. Ohio L. Ins. & T. Co.* (1857) 1 Disney, 327.

Tennessee.—*Drake v. Hagan* (1902) 108 Tenn. 265, 67 S. W. 470.

H. P. F.

ELMER F. BURROWS, Admr., etc., of Mabel E. Burrows, Deceased,
v.

GLADYS T. BURROWS, Appt.

Massachusetts Supreme Judicial Court — March 2, 1922.

(— Mass. —, 134 N. E. 271.)

Gift — by check — validity.

1. Delivery by the drawer of his personal check to the payee does not

constitute a valid gift inter vivos or causa mortis, but it is revocable at any time before presentation to the drawee, and is revoked by death of the drawer.

[See note on this question beginning on page 177.]

Assignment — of funds in bank — effect of check.

2. That a check is for the whole amount which the drawer has on deposit does not take it out of the operation of a statute providing that a check does not operate as an assignment of the funds to the credit of the drawer until accepted by the bank.

[See 5 R. C. L. 489, 494; 1 R. C. L. Supp. 418; see also note in 5 A.L.R. 1667.]

Gift — accompanying check with pass book — effect.

3. That a gift of a check on a com-

mercial bank is accompanied by the drawer's pass book does not make it valid.

[See 12 R. C. L. 945, 965; 2 R. C. L. Supp. 1516, 1520.]

— effect of permitting bank to pay checks.

4. A gift of a check not collected before death of the drawer is not validated by a statute permitting the bank to pay checks during a specified time after the drawer's death.

APPEAL by defendant from an order of the Appellate Division vacating the finding of the Superior Court for Suffolk County (Murray, J.) in her favor and ordering judgment for plaintiff, in an action brought to recover the proceeds of a check claimed by defendant as a gift from plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Toye, Halligan, & Murray, for appellant:

The bank "transferred" the "account to the defendant's own name," without notice of the drawer's death, within ten days after her death. This it had a right to do under the statute.

Tate v. Hilbert, 2 Ves. Jr. 111, 30 Eng. Reprint, 543, 2 Revised Rep. 176; Hemphill v. Yerkes, 132 Pa. 545, 19 Am. St. Rep. 607, 19 Atl. 342; Taylor's Estate, 154 Pa. 183, 18 L.R.A. 855, 25 Atl. 1061; Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805; Hawes v. Blackwell, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245; Schuler v. Laclede Bank, 27 Fed. 424.

This was a valid gift inter vivos, but if this fails it is a valid gift causa mortis.

Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319.

The delivery was as complete as the donor and donee could make it. The donor parted with ownership, and left nothing essential to be done in the future.

Moore v. O'Hare, 224 Mass. 283, 112 N. E. 863.

Messrs. Herbert L. Pratt and Francis J. Geogan, for appellee:

Delivery of the pass book gives no title.

20 Cyc. 1205; Beak v. Beak, L. R. 13 Eq. 489, 41 L. J. Ch. N. S. 470, 26 L. T. N. S. 281.

The delivery of the check was not sufficient to give title to the funds in the bank.

20 Cyc. 1195, 1196; Beak v. Beak, supra; Gerry v. Howe, 130 Mass. 350; Cardoza v. Leveroni, 233 Mass. 310, 123 N. E. 672.

Negotiable instruments signed by the donor are not the subject of a valid gift, donatio causa mortis or inter vivos.

Mason v. Gardner, 186 Mass. 515, 71 N. E. 952; Re Bartlett, 163 Mass. 515, 40 N. E. 899; Warren v. Durfee, 126 Mass. 338; Carr v. Silloway, 111 Mass. 24; Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378; Gerry v. Howe, 130 Mass. 350; Mason v. Gardner, 186 Mass. 515, 71 N. E. 952; Hewitt v. Kaye, L. R. 6 Eq. 198, 37 L. J. Ch. N. S. 633, 16 Week. Rep. 835; Beak v. Beak, L. R. 13 Eq. 489, 41 L. J. Ch. N. S. 470, 26 L. T. N. S. 281; Second Nat. Bank v. Williams, 13 Mich. 282.

The gift is not good as against creditors.

Chase v. Redding, 13 Gray, 418; Mitchell v. Pease, 7 Cush. 350; Har-

mon v. Osgood, 151 Mass. 501, 24 N. E. 401.

Crosby, J., delivered the opinion of the court:

This is an action brought by the administrator of the estate of Mabel E. Burrows to recover the proceeds of a check, drawn by the intestate on the Commonwealth Trust Company, and payable to the order of her daughter, who is the defendant. The husband of the intestate is the plaintiff. The circumstances respecting the making and delivery of the check, briefly stated, are as follows:

The intestate, who had been in poor health, went to Florida, where she stayed from December, 1919, until April, 1920. She was accompanied by the defendant. The latter testified that on April 12, 1920, they boarded a train in Florida to return to their home in Scituate in this commonwealth; the next morning, while on the train, the mother complained of being ill; that she then told the defendant to get her check book, pen, and bank book, and bring them to her; that her mother then made the check in question, dated April 16, 1920, payable to the order of the defendant in the sum of \$700, and said to her, "Gladys, this is for you. I want you to have it. You are young and you will need it," and handed her the check, together with her pass book issued by the trust company. She further testified that her mother died on the night of April 13, 1920, while on the train; that she kept the check and pass book until she cashed the check at the trust company on April 16, 1920; that the money on deposit with the company was money her mother had earned and saved and deposited in her own name.

The question is whether the defendant is entitled to retain the proceeds of the check, or is bound to account therefor to the administrator of her mother's estate.

There is no evidence which would warrant a finding that there was any valuable consideration for the delivery of the check. Although the

defendant's counsel contends that the trial judge may have found that the defendant, being of full age, did not accompany her mother to Florida and minister to her wants without expecting to be paid for her services, there is no evidence to support that contention. The claim that the delivery of the check to the defendant was a valid gift, either inter vivos or mortis causa, cannot be sustained, nor can it be held to be a valid equitable assignment of the "entire deposit."

*Assignment—
of funds in bank
—effect of check.*

General Laws, chap. 107, § 208, defines a check as follows: "A check is a bill of exchange drawn on a bank payable on demand." Section 212 provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

See Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389.

The circumstances that the check was for a sum equal to or in excess of the whole amount of the deposit due the intestate, instead of for a part of it, does not render the provision of § 212 inapplicable. As the check of itself did not operate as an assignment of any part of the funds, it did not so operate as to the whole of them; in other words, § 212 applies to the whole fund on deposit as well as to part of it. The general rule is well established, in this and many other jurisdictions, that the mere delivery of a donor's personal check or promissory note of itself does not constitute

*Gift—by check
—validity.*

a valid gift, as it is revocable at any time before its presentation for payment, and is revoked by the death of the donor. Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378; Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Gerry v. Howe, 130 Mass. 350; Re Bartlett, 163 Mass.

509, 514, 515, 40 N. E. 899; Mason v. Gardner, 186 Mass. 515, 71 N. E. 952; Re Beak (1872) L. R. 13 Eq. 489, 41 L. J. Ch. N. S. 470, 26 L. T. N. S. 281.

The delivery by the donor to the defendant of the bank pass book with the check did not make the gift valid. By delivery of a savings bank book a gift may be shown, and may be proved by the presentation of the bank book unaccompanied by an assignment. The reason for this is because of the peculiar character of such a bank book, as was pointed out in *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285. An ordinary pass book, however, stands upon a different footing. Its production is not necessary to the withdrawal of funds; the presentation of a check or other order being required for that purpose. The production of the pass book will not entitle a depositor to withdraw any part of his deposit.

The death of the drawer before

the check was presented for payment operated as a revocation of the order, and rendered it invalid either as a gift inter vivos or a gift mortis causa. Cases which relate to gifts by a donor of promissory notes or other choses in action of third persons stand upon a different footing and have no application to the facts in the case at bar. *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168.

General Laws, chap. 107, § 17, protects a bank from liability by permitting it to pay a check or demand draft drawn on it by a depositor having funds on deposit to pay the same, notwithstanding his death, —effect of permitting bank to pay checks. upon presentation within ten days after its date; this statute does not effect the rights of the parties in the case at bar.

The order of the Appellate Division vacating the finding of the trial judge and ordering judgment for the plaintiff for \$689.83 must be affirmed.

So ordered.

ANNOTATION.

Donor's own check as subject of gift.

I. Scope, 177.

II. Rules in general:

- a. Majority rule, 177.
- b. Minority rule, 182.
- c. Where contest is between donee and the public, 184.

I. Scope.

The annotation does not, in general, include cases involving checks on savings banks, where presentation of the pass book is essential to cashing of the check, these cases being for the most part distinguishable from ordinary checks and turning largely upon the pass-book feature. As making a distinction, see, for example, the reported case (*BURROWS v. BURROWS*, ante, 174).

The annotation is limited to checks, except that one or two cases are cited

III. Where check is for entire amount of deposit, 184.

IV. Where check is presented but not paid during donor's lifetime, 185.

V. Payment during donor's lifetime, 187.

VI. Miscellaneous, 188.

where the order was on a third person, and not on a bank. But cases of notes or bills of exchange generally are not included. The note also includes only those cases where the intended gift was of the donor's own check, and not the check of a third person. As to gifts of bills or notes of third persons, see annotation following *Parker v. Moot*, — A.L.R. —.

II. Rules in general.

a. Majority rule.

The rule in most jurisdictions ap-

pears to be settled that the donor's check, prior to acceptance or payment by the bank, is not the subject of a valid gift, either *inter vivos* or *causa mortis*.

California.—*Zeller v. Jordan* (1894) 105 Cal. 143, 38 Pac. 640; *Pullen v. Placer County Bank* (1902) 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; *Edwards v. Guaranty Trust & Sav. Bank* (1920) — Cal. App. —, 190 Pac. 57.

Connecticut.—*Thresher v. Dyer* (1897) 69 Conn. 404, 37 Atl. 979.

Indiana.—*Roney v. Dunleary* (1906) 39 Ind. App. 108, 79 N. E. 398; *Zehner v. Zehner's Estate* (1920) — Ind. App. —, 129 N. E. 244.

Kentucky.—*Throgmorton v. Grigsby* (1907) 124 Ky. 512, 99 S. W. 650; *Foxworthy v. Adams* (1910) 136 Ky. 403, 27 L.R.A.(N.S.) 308, 124 S. W. 381, Ann. Cas. 1912A, 327; *Cox v. Walker* (1910) 140 Ky. 172, 140 Am. St. Rep. 367, 130 S. W. 984 (recognizing rule, but holding there was a consideration for the check in this instance).

Louisiana.—*Burke v. Bishop* (1875) 27 La. Ann. 465, 21 Am. Rep. 567 (obiter).

Maine.—*Whitehouse v. Whitehouse* (1897) 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374 (recognizing rule).

Massachusetts.—*BURROWS v. BURROWS* (reported herewith) ante, 174.

Michigan.—*Second Nat. Bank v. Williams* (1865) 13 Mich. 282.

Mississippi.—*Meyer v. Meyer* (1913) 106 Miss. 638, 64 So. 420 (obiter).

Missouri.—*Pennell v. Ennis* (1907) 126 Mo. App. 355, 103 S. W. 147; *Nelson v. Diffenderfer* (1914) 178 Mo. App. 48, 163 S. W. 271 (recognizing rule, but holding that in this case there was sufficient consideration for the check to support the recovery thereon).

New Jersey.—*Provident Inst. v. Sisters of the Poor* (1916) 87 N. J. Eq. 424, 100 Atl. 894, affirmed without opinion in (1917) 88 N. J. Eq. 349, 102 Atl. 1053; *Pfeifer v. Badenhop* (1914) 86 N. J. L. 492, 92 Atl. 273.

New York.—*Harris v. Clark* (1849) 3 N. Y. 93, 51 Am. Dec. 352 (draft

on third person); *Curry v. Powers* (1877) 70 N. Y. 212, 26 Am. Rep. 577; *Re Smither* (1883) 30 Hun, 632; *Cloyes v. Cloyes* (1885) 36 Hun, 145; *Bainbridge v. Hoes* (1914) 163 App. Div. 870, 149 N. Y. Supp. 20.

Ohio.—*Simmons v. Cincinnati Sav. Soc.* (1877) 31 Ohio St. 457, 27 Am. Rep. 521.

Pennsylvania.—*Waynesburg College's Appeal* (1885) 111 Pa. 130, 56 Am. Rep. 252, 3 Atl. 19; *Hawley's Estate* (1905) 32 Pa. Co. Ct. 160; *Oldfield's Estate* (1919) 72 Pa. Super. Ct. 340.

England.—*Easton v. Pratchett* (1835) 1 Crompt. M. & R. 798, 149 Eng. Reprint, 1302 (bill of exchange); *Hewitt v. Kaye* (1868) L. R. 6 Eq. 198, 37 L. J. Ch. N. S. 633, 16 Week. Rep. 835; *Re Beak* (1872) L. R. 13 Eq. 489, 41 L. J. Ch. N. S. 470, 26 L. T. N. S. 281; *Re Mead* (1880) L. R. 15 Ch. Div. 651, 50 L. J. Ch. N. S. 30, 43 L. T. N. S. 117, 28 Week. Rep. 891; *Re Beaumont* [1902] 1 Ch. 889, 71 L. J. Ch. N. S. 478, 50 Week. Rep. 889, 86 L. T. N. S. 410; *Re Davis* (1902) 86 L. T. N. S. C89.

Canada.—*Re Bernard* (1911) 2 Ont. Week. N. 716, 18 Ont. Week. Rep. 525; *McLellan v. McLellan* (1911) 23 Ont. L. Rep. 654, affirmed in (1911) 25 Ont. L. Rep. 214, 20 Ont. Week. Rep. 673.

In those states holding that a check does not operate as an assignment of the fund, it is clear that the donor's check, before payment or acceptance, cannot constitute a valid gift; delivery or consummation of the contract, placing it beyond the power of revocation by the donor, being an essential of such a gift; and a mere promise to make a gift being unenforceable. The difficulty with respect to a gift of the donor's check, if the check does not operate as an assignment, is that the mere delivery of the check to the donee, or to some other person for him, does not place the gift beyond the donor's power of revocation, prior to payment or acceptance. And there is the further consideration, if there is no assignment, that the death of the drawer works a revocation of the check; so that where the check is intended as a gift *causa mortis* and the donor dies before payment or accept-

ance, the death ordinarily revokes the gift. Whether the gift is *inter vivos* or *causa mortis* does not always appear, and, indeed, does not seem to be a material circumstance so far as the present question is concerned, although the point is for the most part preserved in the subsequent statement of the cases.

It may be noted that in most of the states in which the above cases were decided, the courts, in cases not within the scope of the annotation, have rejected the theory that a check constitutes an assignment of the fund. On this question, it appears that there was a conflict of authority before adoption of the Negotiable Instruments Law. The great weight of authority, however, was against the assignment theory, at least, if the check was not for the whole amount of a particular fund, in the absence of acceptance by the drawee. The Negotiable Instruments Law expressly provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. As to the effect of this law upon the theory of operation of a check as an assignment of the drawer's funds, see annotation following *McClain & Norvet v. Torkelson*, 5 A.L.R. 1667. It does not appear that the Negotiable Instruments Law settles the question whether a check of the donor may constitute a valid gift under the assignment doctrine. It is stated in the annotation above referred to that the provision of the law relating to a check operating as an assignment does not clearly indicate whether all the results that were ordinarily held to depend upon the assignment theory were intended to be affected, or only the one as to the holder's right to sue the bank.

It has been held immaterial whether the intended gift of the donor's check was a gift *inter vivos* or *causa mortis*, so far as regards the validity of the gift if the check is not accepted or paid prior to the drawer's death, the gift being invalid in either case

because lacking a complete delivery. *Pennell v. Ennis* (1907) 126 Mo. App. 355, 103 S. W. 147; *Pullen v. Placer County Bank* (1902) 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83.

"It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit where the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor." *Provident Inst. v. Sisters of the Poor* (1916) 87 N. J. Eq. 424, 100 Atl. 894, affirmed on opinion of lower court in (1917) 88 N. J. Eq. 349, 102 Atl. 1053.

The death of the alleged donor was held in the reported case (*BURROWS v. BURROWS*, ante, 174) to effect a revocation of the alleged gift of a check not presented for payment until after such death, notwithstanding a statute protecting the bank from liability in case of payment of checks after death of the depositor, within a certain time. And the delivery of the pass book with the check was held not to change the result, the court distinguishing between an ordinary pass book, as in this case, where the production of the book was not necessary to the withdrawal of funds, and a savings bank book.

And in *Re Beak* (1872) L. R. 13 Eq. (Eng.) 489, 41 L. J. Ch. N. S. 470, 26 L. T. N. S. 281, where the check was given to the donee, together with the pass books of the drawer, who was then in his last illness, but the check was not presented for payment until after the death of the drawer, when payment was refused, the court held that the pass book was not the equivalent of a deposit note, and did not affect the rule that the drawer's estate is not liable for the

amount of the check given to another but not presented for payment until after the donor's death.

A check delivered to the payee, but not payable until after the death of the maker, is not valid as a gift *inter vivos*. * *Foxworthy v. Adams* (1910) 136 Ky. 403, 27 L.R.A.(N.S.) 308, 124 S. W. 381, Ann. Cas. 1912A, 327.

And the delivery to the drawer's sons, of checks payable four days after his death for part of the funds in his name in banks, was held not a valid gift, in *Curry v. Powers* (1877) 70 N. Y. 212, 26 Am. Rep. 577, so as to be enforceable against the estate of the drawer after his death, since the drawer had the right to make other checks and thus retain control of the fund until his death, and there was no delivery essential to an executed gift. Although this was a savings bank case, and the pass-book feature was involved, the case appears to be authority for the above rule, independent of this element in it.

So, in *Waynesburg College's Appeal* (1886) 111 Pa. 130, 56 Am. Rep. 252, 3 Atl. 19, the delivery of a check made payable six months after the maker's death, to a payee named therein as trustee, was held not to be a valid gift. The court said that it was within the maker's power to control the gift or cancel and destroy the check; and that the facts were not sufficient to establish a gift *inter vivos* or to create a trust which equity would enforce.

And where an ordinary form of check printed on the back of a deposit note was signed by the depositor, and delivered to a donee, for a part of the fund, which, however, could not be withdrawn until seven days after notice, and during this period the drawer died, it was held in *Re Mead* (1880) L. R. 15 Ch. Div. (Eng.) 651, 50 L. J. Ch. N. S. 30, 43 L. T. N. S. 117, 28 Week Rep. 891, that the case came within the rule that the gift of a check on a bank, which is not payable during the donor's life, is not a valid gift *causa mortis*.

It was said in *Re Bernard* (1911)

2 Ont. Week. Notes, 716, 18 Ont. Week. Rep. 525, that the authorities are clear that a check not paid, either actually or constructively during the lifetime of the drawer, is not capable of being the subject of *donatio mortis causa*. And in this case where the check, which was delivered to a third party for safe-keeping, was accompanied by a written instruction that it was to be presented one month after the donor's death, the court, in disallowing the claim of the payee against the drawer's estate, said: "A check is not a chose in action, but merely a direction to someone who may or may not have in his possession funds of the drawer authorizing him to pay to the payee a certain sum of money. Death of the drawer before presentation revokes such authority. Thus, in this case, the claimant is met with two difficulties, each fatal to her claim, one being that the check, not having been acted upon by acceptance or payment, never lost its primary character of a mere check, which is not a chose in action, and is not the subject of *donatio mortis causa*; and the other being that the testatrix's death revoked the banker's authority to pay the check. It is not necessary to deal with the further question, whether there ever was any active or constructive delivery of the check."

In *Harris v. Clark* (1849) 3 N. Y. 93, 51 Am. Dec. 352, the donor's own draft upon a third person in favor of the donee was held not a valid gift *causa mortis*.

Attention is called, also, to *Gerry v. Howe* (1881) 130 Mass. 350, in which it was held that a written order or direction to one having charge of the donor's funds in the bank, to draw a certain amount and hand it to a certain person, is not a sufficient gift, where the direction is not obeyed.

The enforcement of a check as a gift against the donor himself is denied in *Cloyes v. Cloyes* (1885) 36 Hun (N. Y.) 145, where a check was given by husband to wife as a wedding present, and after its dishonor she brought an action against him thereon.

A similar decision was rendered in *Easton v. Pratchett* (1835) 1 Crompt. M. & R. 798, 149 Eng. Reprint, 1302, where the enforcement as a gift of a bill of exchange against one who drew the same in his own favor and indorsed it to the plaintiff was denied.

In *Bainbridge v. Hoes* (1914) 168 App. Div. 870, 149 N. Y. Supp. 20, where one contemplating suicide made out and mailed a check for substantially all of his deposits to his fiancée, payment of which after his death by suicide was refused, it was held that there was no valid gift either inter vivos or causa mortis.

And in *Pullen v. Placer County Bank* (1902) 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83, where a father delivered his check to his son, stating that he wished the latter would not present the check until after the father's death, the son complying with this wish and not presenting the check and receiving payment until the day after the father's death, of which the bank had notice, it was held that there was no completed gift at the time of the father's death, and the bank was liable to his estate for the amount so paid out. The court said that a gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor; but if, on the other hand, the thing given remains under the control of the donor, the gift is not complete.

It was said in *McLellan v. McLellan* (1911) 23 Ont. L. Rep. 654, affirmed in (1911) 25 Ont. L. Rep. 214, 20 Ont. Week. Rep. 673, that the law is well settled that the delivery of the donor's check, which is not presented before the donor's death is not a good donation mortis causa, because the death is a revocation of the authority to pay.

In *Hewitt v. Kaye* (1868) L. R. 6 Eq. (Eng.) 198, 37 L. J. Ch. N. S. 633, 16 Week. Rep. 835, where one in extremis gave a check for a charity, but died before it was possible to present the check, it was held that there was no completed gift causa mortis, and that the donee was not entitled to the fund. The court said the check was

worth nothing until acted upon, and the authority to act upon it was withdrawn by the donor's death; and by way of illustration the court supposed a case where one directed another to bring money in a desk, stating that he would give the other person the money, but died before it was brought, in which case there would be no gift.

There is no doubt of the correctness of the contention, said the court in *Nelson v. Diffenderfer* (1914) 178 Mo. App. 48, 163 S. W. 271, that a gift of a check is not complete until the check is paid, and if the same is without consideration it may be revoked at any time before actual payment.

The death of the maker of a check, given by him to another without any consideration, revokes the gift, and the payee cannot recover the amount from the maker's estate. *Cox v. Walker* (1910) 140 Ky. 172, 140 Am. St. Rep. 367, 130 S. W. 984.

The proposition that a check drawn on the drawer's general account in a bank will not constitute a gift to the payee of the amount of the check, if it is neither accepted nor paid prior to the death of the drawer, rests on the ground that a complete delivery is essential to a valid gift, and the check of the donor is no more than a promise to give the amount specified. *Pennell v. Ennis* (1907) 126 Mo. App. 355, 103 S. W. 147.

See also *Oldfield's Estate* (1919) 72 Pa. Super. Ct. 340, involving an alleged gift of a check on a savings bank, in which the court said that it was universally conceded that there was no such thing recognized by the law as an executory gift; that this was for the simple reason that a mere promise to make a gift, being unsupported by a valuable consideration, is revocable at the pleasure of the prospective donor, and such a promise would clearly be revoked by operation of law by the death of the promisor.

Burke v. Bishop (1875) 27 La. Ann. 465, 21 Am. Rep. 567, contains a dictum to the effect that where a check is a gift, the death of the donor revokes the check because the demise

revokes "the mandate to his agent, the bank."

b. Minority rule.

But although the prevailing rule is that above indicated, there are several cases which support the doctrine that one's check or draft may be the subject of a valid gift by the maker. *Carter v. Greenway* (1922) — Ark. —, 238 S. W. 65; *First Nat. Bank v. O'Byrne* (1913) 177 Ill. App. 473; *May v. Jones* (1893) 87 Iowa, 188, 54 N. W. 231; *Lawson v. Lawson* (1718) 1 P. Wms. 441, 24 Eng. Reprint, 463; *Rolls v. Pearce* (1877) L. R. 5 Ch. Div. (Eng.) 730, 46 L. J. Ch. N. S. 791, 36 L. T. N. S. 438, 25 Week. Rep. 899. (See also cases under III. *infra*, holding that a check of the entire amount of the donor's deposit in the bank may be the subject of a valid gift, since it constitutes an assignment of the fund.)

In *Lawson v. Lawson* (1718) 1 P. Wms. 441, 24 Eng. Reprint, 463, *supra*, a draft by a husband intended as a gift *causa mortis*, drawn upon his goldsmith in favor of his wife, was held good as an appointment, although it was not paid during the donor's life.

And in *Rolls v. Pearce* (Eng.) *supra*, a check intended as a gift *causa mortis* was held valid although not presented to the bank on which it was drawn until after the donor's death. The check was given in a foreign country, where it was put into a bank by the donee, the donor's wife, and money obtained by her thereon was used, in part, to pay the donor's debts. The court held that the donor must have anticipated from the circumstances of the case that the check would pass through various hands before reaching the bank on which it was drawn; and therefore must have intended it to be valid even if he died before it was paid.

See also *Tate v. Hilbert* (1793) 2 Ves. Jr. 111, 30 Eng. Reprint, 548, 2 Revised Rep. 175, where a bill in chancery to enforce the gift of a check drawn to self or bearer, and intended as an immediate gift, was dismissed without prejudice to a suit at law, the Lord Chancellor saying: "I do

not think it so clear as it seems to have been taken that an action will not lie by the holder against the executor."

In Iowa the doctrine was adopted that the giving of a check drawn upon a general deposit fund in a bank amounts to an equitable assignment *pro tanto* of such fund,—see, for example, *Kuhnes v. Cahill* (1905) 128 Iowa, 594, 104 N. W. 1025. And in accord with this view, it has been held that the donor's check may be the subject of a valid gift. *May v. Jones* (1893) 87 Iowa, 188, 54 N. W. 231. The court said: "It is said that as a check was designed to be a mere gift, payment was required to give it effect, and that the death of the donor before it was paid operated to revoke the authority of the bank to pay it, and, therefore, the gift was never perfected, and the check, if not a means of carrying out the provisions of the will, should be treated as a nullity.

Some authorities hold that a gift by check is not complete until the check is paid, on the ground that it is not an appropriation of money of the drawer in bank, but a mere request or order on the bank to pay the amount specified when the check is presented, which may be revoked before acceptance. . . . It may be true that a check cannot be regarded as an assignment of 'funds' within the ordinary meaning of that term, but it transfers to the payee a right to recover its amount of the bank on which it is drawn, if the drawer have a sufficient deposit when it is presented, and that right vests when the check is delivered. Some authorities distinguish between cases where the checks are drawn for a valuable consideration and where they are mere gifts, the holding of such authorities being that in the former class of cases death does not revoke the checks, and that in the latter it does. . . . But when the delivery is coupled with an intent to transfer a present interest in the money represented by the check, and no revocation is attempted, it seems to us the intent of the donor should be given effect, and the transaction is held to transfer a present in-

terest, and a right to the payment of the check after the death of the drawer, as well as before. . . . Whether the check in controversy should have been paid by the bank, or by the legal representative of decedent, we need not determine, as that question is not discussed, and, in view of the fact that the check has been paid, it is not material in this case."

In *First Nat. Bank v. O'Byrne*. (1913) 177 Ill. App. 473, although the check was for a greater amount than the donor had on deposit, and was held, therefore, to operate as an assignment of the deposit to the donee, the court was of the opinion that in any event a check signed by the donor and delivered to the donee should operate as a valid gift, on the ground that it was not a mere promise to pay as was a promissory note. The court said: "The authorities generally hold that a promissory note signed by the donor to the donee, and delivered to the donee as a gift, is void, because it is merely the delivery of a promise to give instead of a delivery of the thing promised to be given. It has been held, apparently for the same reason, that a check signed by the donor and delivered to the donee is void; that is to say, that it is not the subject of a valid gift. We do not regard the reasoning for such holding as sound, and think that the modern decisions do not sustain it. . . . It must be apparent that if in any case a check is delivered as a transfer and delivery of a bank fund and as a gift, and the gift is invalid because of an insufficient delivery, it is because the donor cannot or did not make a delivery of a bank fund by his check, so as to surrender and divest himself of all right and dominion over the subject of the gift, and not because the check is a promise to pay or to make a gift by the donor. . . . The question of whether or not there was a consideration for the check ought not, of itself, to settle the question of an assignment or transfer of the fund. More evidence, perhaps, should be required in any case to establish an assignment or a delivery of a bank deposit in the case of

gifts, than in those cases where there is a valuable consideration moving; but we are not willing to subscribe to the doctrine that an assignment or a delivery of a bank deposit cannot be made in any case of an attempted gift by a check or order for the entire deposit."

And although it appears that the checks were for the entire amount of the maker's deposit in the bank, and the case might, therefore, have been decided under the doctrine of the decisions holding that under such circumstances there is an assignment of the fund (see III., *infra*), yet it seems that the conclusion reached in the recent case of *Carter v. Greenway* (1922) — Ark. —, 238 S. W. 65, is not based especially on that ground but upon the broad proposition that the better rule is that there may be a valid gift of a check *causa mortis* where the rights of creditors are not involved. In this case two checks payable to different parties were drawn by the depositor aggregating the total amount of the deposit; the checks were delivered in a box with other papers to one of the payees; the maker was at the time in ill health, signed the checks only several days after being informed of his serious condition, and died about four months after the delivery of the checks, which, after the maker's death, were presented at the bank and certificates of deposit issued to the payees. In holding that the payees were entitled to the money as against heirs of the maker of the checks, the court said: "It is earnestly insisted by counsel for appellants that a check cannot be made the basis of a gift *causa mortis*. There is some conflict and confusion in the authorities on this question. But we think that the better reasoning and the trend of our own authorities, where the rights of creditors are not involved, is that, when the delivery of the check is coupled with an intent to transfer a present interest in the money, and no revocation is attempted, the intent of the donor should be given effect, and that the donee has the right to the payment of the check after the death of the drawer as well as before."

c. Where contest is between donee and the public.

Even though the check is not for the entire amount of the maker's account in the bank, the position has been taken that it should operate, as an assignment *pro tanto*, so as to sustain the check as a gift *causa mortis*, where the contest is between the state and the donee. *Phinney v. State* (1904) 36 Wash. 236, 68 L.R.A. 119, 78 Pac. 927. In this case the donor had standing to his credit in the bank approximately \$4,400, and the amount of the check was \$4,000. Payment of the latter was refused by the bank because of the maker's death before it was presented for payment. In holding the gift valid as a gift *causa mortis*, as against the state's claim of escheat, the court said: "The modern authorities almost universally hold that the greatest latitude ought to be given to carry out the expressed intent of the donor, and that, in cases like the one at bar, where there are no conflicting interests by creditors or other assignees or donees of the deceased, the giving of the check is an assignment of the interest. Many of the courts, it seems to us without any sufficient reason, have undertaken to make a distinction between cases where the check given was for the whole of the fund, and where it was only for a portion of the fund. In the case at bar, we think it may be justly concluded that it was the intention of the donor to give to his friend the whole of his estate. He evidently did not know the exact amount that he had in the bank, and, while there were a few hundred dollars over and above the \$4,000, he felt that he was going to die soon, and, according to his expressions, as shown by the testimony, it was evidently his intention that all his fortune should go to the appellant. But, in any event, there seems to be no reason why the giving of the check for a portion of the deposit should not be an assignment *pro tanto* of the deposit."

III. Where check is for entire amount of deposit.

See *Carter v. Greenway* (1922) —

Ark. —, 238 S. W. 65, under II. b, *supra*.

It has been held in several cases that, if a check intended as a gift is drawn for the full amount of the donor's deposit, it will be regarded as an assignment of the fund. *First Nat. Bank v. O'Byrne* (1913) 177 Ill. App. 473; *Aubrey v. O'Byrne* (1914) 188 Ill. App. 601; *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473; *Taylor's Estate* (1893) 154 Pa. 183, 18 L.R.A. 855, 25 Atl. 1061.

In *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473, the court held that a check on a bank for the entire amount of the drawer's credit therein, delivered to one as a gift of the money, though unaccepted by the bank, operates as an assignment of the fund; and if so delivered and intended by the donor, in anticipation of death from an impending peril from which he subsequently dies, it is valid as a gift *causa mortis*.

And it was held, also, that it was unnecessary that the check should disclose on its face that it covered the entire bank credit; this fact being provable *dehors* the instrument. *Ibid*.

In *First Nat. Bank v. O'Byrne* (Ill.) *supra*, a check intended as a gift *causa mortis*, for the greater amount than the donor had on deposit (the donor, being unable to find her bank book, made the check in such sum as would insure the payee's obtaining the entire deposit), was held to operate as an assignment of the deposit to the donee, and its validity as a gift was sustained. (See this case, also, under II. b, *supra*.)

A similar conclusion was reached in *Aubrey v. O'Byrne* (Ill.) *supra*, an action apparently by the same donee to recover from the executor of the estate of the donor, money which the donor had deposited in another bank, and which was claimed by the donee as a gift *causa mortis* under a check executed by the donor and delivered to the donee for an amount exceeding that on deposit. The check was held

to constitute a completed gift *causa mortis* of the amount of the deposit, and to entitle the donee to maintain an action against the executor to recover the same, where the latter wrongfully withdrew it from the bank.

Other cases, however, are opposed to the above. Thus, it has been held that, although the check is for the entire amount of the maker's deposit in the bank, it will not operate as an assignment of the fund, so as to constitute a valid gift *causa mortis* of the check, payment of which can be enforced by the donee against the bank after the maker's death. *Second Nat. Bank v. Williams* (1865) 13 Mich. 282.

Also, in *Re Smither* (1883) 30 Hun (N. Y.) 632, a check directing payment of "the amount of my deposit," payment of which was refused on presentation after the drawer's death, was held not valid as a gift *causa mortis*, the court applying the general doctrine that delivery of a check or order for the payment of money is not of itself sufficient to effectuate a gift of the fund upon which it is drawn. The court held that the delivery of the check was not an equitable assignment of the fund, citing authorities to the effect that a valuable consideration is an essential element of an equitable assignment, and that the doctrine of equitable assignment does not apply to uphold an unexecuted or imperfect gift.

And in the reported case (*BURROWS v. BURROWS*, ante, 174) the court held that the delivery of the donor's check to her daughter was not a valid gift either *inter vivos* or *causa mortis*, even though it was for a sum equal to or in excess of the whole amount of the deposit, since the check did not operate as an assignment, by reason of the express terms of the Negotiable Instruments Law, this provision applying to the whole fund on deposit as well as to a part of it. It may be observed, however, that even before the adoption of the Negotiable Instruments Law, the Massachusetts court seems not to have accepted the assignment theory. See, for example, *Bullard v. Randall* (1854) 1 Gray (Mass.) 605, 61 Am. Dec. 433;

and *Dana v. Third Nat. Bank* (1866) 13 Allen (Mass.) 445, 90 Am. Dec. 216, the check in the former of these cases was for less than the amount of the general fund from which it was payable, and in the latter case the check greatly exceeded the amount of the fund.

Also, in *Bainbridge v. Hoes* (1914) 168 App. Div. 870, 149 N. Y. Supp. 20, the check was for substantially all of the fund, but it was held not a valid gift either *inter vivos* or *causa mortis*.

And it may be observed that in *Simmons v. Cincinnati Sav. Soc.* (1877) 31 Ohio St. 457, 27 Am. Rep. 521, the check was apparently for the whole amount of the deposit, but the court held that the gift was not complete until payment or acceptance of the check by the bank; that the check being the mere order to the payee to draw the money, without consideration, was subject to revocation while it remained unacted upon in the hands of the payee, and that the death of the drawer operated as a revocation of the check; so that the payee could not recover from the bank, which had paid the money to the administrator of the drawer.

IV. *Where check is presented but not paid during donor's lifetime.*

Generally, the cases hold that if the check is not paid during the drawer's lifetime it does not constitute a valid gift, even though it has been presented for payment prior to his death; and this appears to be the rule, although payment is refused for an erroneous reason.

Thus, where the drawee bank refused payment on the ground that the signature on the check was incorrect, which was afterwards found to be a mistake, it was held that the subsequent death of the drawer before payment prevented the intended gift of the check from being complete before the donor's death, and the check could not be enforced by the payee against the donor's executor. *Edwards v. Guarantee Trust & Sav. Bank* (1920) — Cal. App. — 190 Pac. 57.

And in *Roney v. Dunleary* (1906) 39 Ind. App. 108, 79 N. E. 398, where

the check, which was given as a gift to a servant of the maker, was presented for payment to the bank on which it was drawn, during the lifetime of the maker, but payment was refused, although the drawer had sufficient funds on deposit to pay the same, the court held that the execution of the check was not sufficient to constitute a gift *inter vivos* or *causa mortis*, and that its presentation for payment in the lifetime of the drawer, with the bank's refusal of payment, did not change its character in this regard; that there was no right of action under it on behalf of the payee or holder against the bank; and that, without a valuable consideration, the check could not constitute the foundation of an action against the drawer in his lifetime, or of a claim against his estate.

Also, in *Zehner v. Zehner's Estate* (1920) — Ind. App. — 129 N. E. 244, where the payment of the check, which was presented during the lifetime of the drawer, was refused on account of insufficient funds to pay the same, it was held that, there being no valuable consideration, no action could have been maintained against the maker in his lifetime, and that it was not a valid claim against his estate. It was contended in this case that the court should give effect to the provision of the Negotiable Instruments Act that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." But the court held that while there was no direct allegation that the check was delivered as a gift, the facts alleged—that the check was delivered under instructions to use the money to educate the payee's son, with the remainder, if any, to be divided between the son and other children of the payee—showed conclusively that it was delivered as a gift.

And it was held that there was no valid gift *causa mortis*, where one who was very ill, and in expectation of death, executed a check which was delivered to the payee and presented at the bank for payment, but, the account being overdrawn and the sig-

nature being questioned by the bank, the latter required confirmation of the signature before payment, and before that confirmation was obtained the drawer died. *Re Beaumont* [1902] 1 Ch. (Eng.) 889, 71 L. J. Ch. N. S. 478, 50 Week. Rep. 389, 86 L. T. N. S. 410. It did not clearly appear whether payment was declined because of doubt as to the signature, or because the account was overdrawn; but the court found that the bank intended to "lend" the money for payment of the check if the signature was found to be correct. The court said that, even if the account had not been overdrawn, the drawee would not have obtained any right to the property, although it distinguished a possible situation where payment is declined because of the locking up of money for the day with a promise to pay the next day, in that, under the latter circumstances, if the donor died during the night, it might well be there would be an appropriation by the undertaking to answer the check, and it would be a good *donatio mortis causa*. The court said that the present case did not come up to that supposed, there being no promise in the case before it to pay, but only to lend, and that was insufficient.

Although a savings bank case, attention is called also to *Provident Inst. v. Sisters of the Poor* (1916) 87 N. J. Eq. 424, 100 Atl. 894, affirmed on opinion of lower court (1917) 83 N. J. Eq. 349, 102 Atl. 1053, where a check for part of the drawer's account in a savings bank was delivered to the payee, with the pass book, and the bank refused payment pending investigation; and it was held that the subsequent death of the drawer revoked the gift and it could not be enforced against her estate. The court held that there was a mere loan of the pass book, which it was necessary to present in order to cash the check; and that it was immaterial what delayed or prevented the cashing of the check.

But in *Bromley v. Brunton* (1868) L. R. 6 Eq. (Eng.) 275, 37 L. J. Ch. N. S. 902, 18 L. T. N. S. 628, 16 Week. Rep. 1006, the gift of a check *inter vivos*

was held valid, although it was not paid before the donor's death, where it had been presented and payment delayed merely to ascertain the genuineness of the signature.

V. Payment during donor's lifetime.

The gift of the donor's check may be operative and unassailable as a completed transaction, if the payee has turned the same into cash before the drawer's death.

California.—*Field v. Shorb* (1893) 99 Cal. 661, 34 Pac. 504; *Frantz v. Porter* (1901) 132 Cal. 49, 64 Pac. 92.

Louisiana.—*De Pouilly's Succession* (1870) 22 La. Ann. 97; *Stauffer v. Morgan* (1887) 39 La. Ann. 632, 2 So. 98; *Desina's Succession* (1909) 123 La. 468, 49 So. 23.

Michigan.—*Bangs v. Browne* (1907) 149 Mich. 478, 112 N. W. 1107.

New York.—*Picksley v. Starr* (1896) 149 N. Y. 432, 32 L.R.A. 703, 52 Am. St. Rep. 740, 44 N. E. 163.

Pennsylvania.—*Strang's Estate* (1917) 68 Pa. Super. Ct. 224.

South Carolina.—*Sharpe v. Sharpe* (1916) 105 S. C. 459, 3 A.L.R. 891, 90 S. E. 34.

England.—*Bouts v. Ellis* (1853) 17 Beav. 121, 51 Eng. Reprint, 978, affirmed in (1853) 4 DeG. M. & G. 249, 43 Eng. Reprint, 502, 17 Jur. 585, 1 Week. Rep. 400.

In *Strang's Estate* (Pa.) *supra*, the gift of the check was sustained as a completed transaction through the transfer, before the drawer's death, of the money from the drawer's account to the personal credit of the payee.

And in *Bangs v. Browne* (Mich.) *supra*, it was held that acceptance would be presumed, so as to support a valid gift, where a check signed by the donor was presented to the bank and the funds transferred to an account opened in the name of the donee, whose pass book was kept by the bank subject to call by her, although she did not know of the gift until after the donor's death. As to presumption of acceptance, see also *Varley v. Sims* (Minn.) under VI. *infra*.

It was held in *Picksley v. Starr* (N.

Y.) *supra*, that a Christmas gift of a check to an employee, according to a habit of previous years, although it was made in forgetfulness of the fact that the salary had been increased during the year, and was charged to his account a few days later,—without giving him notice of that fact, however, for several months,—could not be avoided by the donor on the ground of mistake. The court said: "In answer to the argument of the appellant, that the delivery of the donor's check did not make a valid gift of the sum of \$2,500, it is sufficient to say that it is not like the making of a promise, such as would be the donor's promissory note, where the gift is not consummated until the delivery of the thing promised and remains revocable until such delivery. The delivery of a check is the delivery of something which represents a certain sum of money which the drawer of the check intends that the payee shall, in fact, have. What the defendant gave to the plaintiff, while in form his own check, in fact was an order upon the bank to pay to him the sum of money represented by it. That the transaction was complete, by the payment of the check to the plaintiff, is amply evidenced, if by nothing else, by the very direction of the defendant to his bookkeeper to charge its amount to the account of the plaintiff in his books."

In *Sharpe v. Sharpe* (S. C.) *supra*, where the check was given as a gift *causa mortis* to a third person, who, prior to the donor's death, cashed it and placed the amount to his own account in the bank, afterwards giving the donee a check for the money, which the bank refused to pay, it was held that there was a sufficient delivery to sustain the gift.

In *Bouts v. Ellis* (Eng.) *supra*, a gift of the donor's check to a third person for the donor's wife, which was paid before the donor's death, was held a valid gift, although a check given by the third person to her was worthless because unstamped and postdated, where a valid check was given her in exchange therefor after the donor's death.

In *De Pouilly's Succession* (1870) 22 La. Ann. 97, *supra*, the gift of one's own check was held to be that of a corporeal movable, and to constitute a manual gift, needing no other formality than delivery, under a provision of the Code.

In *Fate v. Leithead* (1854) 1 Kay, 658, 69 Eng. Reprint, 279, 23 L. J. Ch. N. S. 736, 2 Week. Rep. 630, the question was as to a check which had been collected before the maker's death, and it was held not to be a gift *causa mortis*, but a trust by virtue of certain memoranda on the check showing that intent.

VI. Miscellaneous.

The doctrine that a check cannot be the subject of *donatio mortis causa* unless presented and paid in the lifetime of the donor was held inapplicable in *Whitehouse v. Whitehouse* (1897) 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374, on the ground that, in this instance, there was no gift, but a contract founded on a sufficient consideration, where the maker of the check, who had been engaged to the plaintiff, and caused a postponement of the marriage, agreed that if she consented to a renewal of the engagement he would provide her with sufficient means of support in case he died before the marriage took place, and the check was given in carrying out this agreement, although it never was delivered to the payee, the circumstances showing, however, a constructive delivery to a third person as trustee.

It is assumed in the annotation that the transaction is merely a gift, so that the question as to what will amount to a consideration so as to sustain the check and render it enforceable is not covered.

In *Philpot v. Temple Bkg. Co.* (1908) 3 Ga. App. 742, 60 S. E. 480;

Re Dillon (1890) L. R. 44 Ch. Div. (Eng.) 76, 59 L. J. Ch. N. S. 420, 62 L. T. N. S. 614, 38 Week. Rep. 369, and in *McDonald v. McDonald* (1903) 33 Can. S. C. 145, among possibly other cases of the kind, the gift of a certificate of deposit was held to be valid, though a check or order for the payment thereof was also given, and the same was not presented for payment until after the death of the donor.

In *McKenzie v. Downing* (1858) 25 Ga. 669, the attempted gift of a check by the maker was held invalid because there was no delivery, the check remaining in the custody of the drawer until after his death.

It was held in *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473, that the delivery of a check as a gift *causa mortis* to a person other than the donee, but for his use and benefit, and with instructions to deliver the same to the donee, is a sufficient delivery to pass title although it does not reach the hands of the donee until after the donor's death; that the person to whom the delivery is made is presumed, in the absence of a contrary showing, to be the trustee of the donee; and that acceptance by the latter, where the gift is beneficial and imposes no burdens, will be presumed. The feature of the case, apart from the above point as to the sufficiency of the delivery of the check, was that it constituted an assignment of the fund, being for the total amount thereof. (See the case under III. a, *supra*.) As to the presumption of acceptance, see also *Bangs v. Browne* (Mich.) under V. *supra*.

The above holding was approved in *Hillman v. Young* (1912) 64 Or. 73, 127 Pac. 793, 129 Pac. 124, a case involving the sufficiency of the delivery of notes.
R. E. H.

PETER HOFFMAN, Respt.,
v.

E. R. ROEHL, Impleaded, etc., Appt.

Montana Supreme Court — November 14, 1921.

(— Mont. —, 203 Pac. 349.)

Master and servant — scope of employment — permitting stranger to drive automobile.

One sent by an automobile dealer to demonstrate a car to a prospective customer acts within the scope of his employment in acceding to the suggestion of the customer to permit an inexperienced member of his family to drive the car, so as to render the employer liable for injury caused to a pedestrian by the driver losing control of the car and colliding with the pedestrian, where the agent sat beside and directed the driver, and had his hand on the steering wheel when the accident happened.

[See note on this question beginning on page 194.]

APPEAL by defendant Roehl from a judgment of the District Court for Fergus County (Briscoe, J.) in favor of plaintiff, and from an order overruling a motion for new trial in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Belden & De Kalb and Gunn, Rasch, & Hall, for appellant:

Even if defendant Roehl himself, the owner of the car, had been present and had turned the car over to Martha Bean for her use in making the trip to Judith place, as was done by Leedy, his employee, there would be no liability.

Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; McFarlane v. Winters, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Herlihy v. Smith, 116 Mass. 265; Wollaston v. Park, 47 Pa. Super. Ct. 90; Beville v. Taylor, 202 Ala. 305, 80 So. 370; Mangan v. Foley, 33 Mo. App. 250; Cooper v. Lowery, 4 Ga. App. 120, 60 S. E. 1015; Hills v. Strong, 132 Ill. App. 174.

The defendant Roehl could not be held in damages, even if Leedy, instead of Martha Bean, had been operating the car.

Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 Am. St. Rep. 721, 33 N. E. 381; Clawson v. Pierce-Arrow Motor Car Co. 182 App. Div. 172, 170 N. Y. Supp. 310; Lotz v. Han-

lon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Goodrich v. Musgrave Fence & Auto Co. 154 Iowa, 637, 135 N. W. 58; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Lewis v. Steele, 52 Mont. 309, 157 Pac. 575; Atherton v. Kansas City Coal & Coke Co. 106 Mo. App. 591, 81 S. W. 223; Ludberg v. Barghoorn, 73 Wash. 476, 131 Pac. 1165; O'Brien v. Stern Bros. 223 N. Y. 290, 119 N. E. 550; Reilly v. Connable, 214 N. Y. 586, L.R.A.1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656; Long v. Richmond, 68 App. Div. 466, 73 N. Y. Supp. 912; Spradlin v. Wright Motor Car Co. 178 Ky. 772, L.R.A.1918B, 990, 199 S. W. 1087; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; Neff v. Brandeis, 91 Neb. 11, 39 L.R.A.(N.S.) 933, 135 N. W. 232; Symington v. Sipes, 121 Md. 313, 47 L.R.A.(N.S.) 662, 88 Atl. 134; Wright v. Inter-mountain Motor Car Co. 53 Utah, 176, 177 Pac. 237; Brown v. Jarvis Engineering Co. 166 Mass. 75, 32 L.R.A. 605, 55 Am. St. Rep. 382, 43 N. E. 1181; Flinn v. World's Dispensary

Medical Asso. 64 App. Div. 490, 72 N. Y. Supp. 243; Walker v. Hannibal & St. J. R. Co. 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360.

Plaintiff not only failed to make a case against the defendant Roehl, but there was a like failure of showing negligence on the part of Leedy in connection with the operation of the car.

20 R. C. L. "Negligence," ¶ 22, p. 29; Hughes v. Oregon Improv. Co. 20 Wash. 294, 55 Pac. 119; Bracey v. Northwestern Improv. Co. 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; Eckert v. Long Island R. Co. 43 N. Y. 502, 3 Am. Rep. 721; Floyd v. Philadelphia & R. R. Co. 162 Pa. 29, 29 Atl. 396; Ackerman v. Union Traction Co. 205 Pa. 477, 55 Atl. 16, 14 Am. Neg. Rep. 392; Gumz v. Chicago, St. P. & M. R. Co. 52 Wis. 672, 10 N. W. 11; Bishop v. Belle City Street R. Co. 92 Wis. 139, 65 N. W. 733; Kelch v. National Contract Co. 178 Ky. 632, 199 S. W. 796; Pond v. Norfolk & W. R. Co. 111 Va. 735, 69 S. E. 949; Hartley v. Lasater, 96 Wash. 407, 165 Pac. 106.

Messrs. E. K. Cheadle and Wheeler & Baldwin, for respondent:

Proof that the driver of an automobile was, at the time of the injury resulting from the use thereof, in the employ of the owner as a chauffeur, raised the presumption that his use of the car on that occasion was within the scope of his employment.

Reilly v. Connable, Ann. Cas. 1916A, 661, note; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Burger v. Taxicab Motor Co. 66 Wash. 676, 120 Pac. 519; Knust v. Bullock, 59 Wash. 141, 109 Pac. 329; Kneff v. Sanford, 63 Wash. 503, 115 Pac. 1040.

Ownership of the car being established, that makes out a prima facie case that the operator of the car was engaged in the owner's service, and the burden is upon the owner to show that such is not the fact.

Hartnet v. Hudson, 165 N. Y. Supp. 1034; Ferris v. Sterling, 214 N. Y. 253, 108 N. E. 406, Ann. Cas. 1916D, 1161; George v. Carstens Packing Co. 91 Wash. 637, 158 Pac. 529; Benn v. Forrest, 130 C. C. A. 277, 213 Fed. 763.

The evidence shows that at the time of the injury defendant Roehl was the owner of the car, and that the same

was actually proceeding under the control of his agent, and, under this condition, the law presumes that the car was being driven for the owner, Roehl, and that in driving the same the defendant Leedy was acting within the scope of his employment.

Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Marshall v. Taylor, 168 Mo. App. 246, 153 S. W. 527, 6 N. C. C. A. 313; Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1010; Johnson v. Chicago, M. & St. P. R. Co. 52 Mont. 73, 155 Pac. 971.

The owner is liable for the chauffeur if, while using the car on his employers' business, he allows a third person, riding with him, to assume the management of the car, and an injury results from the negligent driving of such person.

Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55; Prince v. Taylor, — Tex. Civ. App. —, 171 S. W. 826; Wooding v. Thom, 148 App. Div. 21, 132 N. Y. Supp. 50; James v. Muehlebach, 34 Mo. App. 512; Hollidge v. Duncan, 199 Mass. 121, 17 L.R.A.(N.S.) 982, 85 N. E. 186; Thyssen v. Davenport Ice & Cold Storage Co. 134 Iowa, 749, 13 L.R.A.(N.S.) 572, 112 N. W. 177; Campbell v. Trimble, 75 Tex. 270, 12 S. W. 863; Wellman v. Miner, 19 Misc. 644, 44 N. Y. Supp. 417, 2 Am. Neg. Rep. 218; Bamberg v. International R. Co. 53 Misc. 403, 103 N. Y. Supp. 297; Kilroy v. Delaware & H. Canal Co. 121 N. Y. 22, 24 N. E. 192; Bank of California v. Western U. Teleg. Co. 52 Cal. 280.

Though the driver has been using the car for his own purpose, he is acting within the scope of his employment when he starts to go to a place to which he has been directed to go by his employer.

Barmore v. Vicksburg, S. & P. R. Co. 85 Miss. 427, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 574; Graham v. Henderson, 254 Pa. 137, 98 Atl. 870; Donahue v. Vorenborg, 227 Mass. 1, 116 N. E. 246; Ellinghouse v. Ajax Livestock Co. 51 Mont. 275, L.R.A. 1916D, 836, 152 Pac. 481; Missouri, K. & T. R. Co. v. Edwards, — Tex. Civ. App. —, 67 S. W. 891; Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55; George v. Carstens Packing Co. 91 Wash. 637, 158 Pac. 529.

Any use of the car which was rea-

sonably incidental to the performance of the duties with which the defendant Leedy was charged is deemed to be within the scope of his employment.

House v. Fry, 30 Cal. App. 157, 157 Pac. 500; Elliott v. O'Rourke, 40 R. I. 187, 100 Atl. 314; Whimster v. Holmes, — Mo. App. —, 190 S. W. 62; Ellinghouse v. Ajax Livestock Co. 51 Mont. 275, L.R.A.1916D, 836, 152 Pac. 481.

Galen, J., delivered the opinion of the court:

This is an action for damages on account of personal injuries sustained by the plaintiff by reason of having been run into by a Ford automobile belonging to the defendant E. R. Roehl, driven at the time on Main street, in the city of Lewistown, by one Martha Bean, the daughter of Daniel Bean; the latter at the time having been negotiating with Roehl for the purchase of the car. E. R. Roehl and Joseph Leedy, employee, were jointly made defendants. It appears that Daniel Bean wanted to buy a Ford automobile, and approached the defendant Roehl, an automobile dealer in Lewistown, and inquired whether he had any bargains in Ford cars. Roehl replied that he had one which he would sell for \$250, but that the engine had to be overhauled and the motor cleaned. Bean told Roehl to have the work done, "prove that the car would run uphill," and he would buy it. Three or four days subsequently, on November 21, 1916, Bean visited Roehl's place of business, and Roehl then and there said that the car was cleaned and in readiness to make a "go out." Bean asked Roehl whom he would send out with the car, to which he replied, "Joe Leedy." At the time Roehl was in his office, and Bean went therefrom into the workroom adjoining, and upon inquiry found Joe Leedy. Leedy cranked the car, and both Leedy and Bean got into the car and went away. At Bean's suggestion, Leedy drove the car to Bean's residence, several blocks distant from the starting point, in order that Bean might show it to his

wife and daughter. After arriving at Bean's house, his wife and daughter came out and looked at the car. His daughter Martha was accompanied by a friend, Miss Christopher, and both had their hats and wraps on, as Martha was intending to go across town to Judith place, in order to make delivery of a dress to a lady for whom she had made the same. Bean invited the girls to get into the car, and requested Leedy to let Martha drive, saying: "She will be my chauffeur if I get it, so let her be the first to run it." Martha got in, took the wheel, and Leedy sat in the front seat alongside of her; Mr. Bean and Miss Christopher getting into the rear seat. The car was then driven by Martha across town to Mrs. Taft's residence, where she stopped the car and made delivery of the dress. She then started the car again, and proceeded up Main street to the intersection of Fourth avenue, where traffic was greatly congested. At or near that point a speedy motorcycle caused two men to jump out of its way and into the path of the car driven by Miss Bean, in consequence whereof she lost control of the car and Leedy grabbed hold of the wheel, and the car was steered upon the sidewalk, striking and seriously injuring the plaintiff. Leedy testified: "I have resided in Lewistown, Montana, since January, 1914, continuously. On the 21st day of November, 1916, I had been engaged in the automobile business as an employee of E. R. Roehl since January, 1914. I saw Daniel Bean for the first time on November 21, 1916. On said date I took a certain Ford automobile from the garage of E. R. Roehl, at Lewistown, Montana, for the purpose of exhibiting or demonstrating the car to the said Daniel Bean, at the direction of Mr. Roehl. I first met Martha Bean on that day."

At that time the plaintiff was employed by the Chicago, Milwaukee, & St. Paul Railroad, as an engineer, and was earning from \$150 to \$175 per month. He was in good physi-

cal condition, thirty-five years of age, and married.

Issue being joined, the cause was tried to a jury and resulted in a verdict and judgment against the defendant Roehl in favor of the plaintiff for the sum of \$16,800. At the close of plaintiff's case, the defendant Roehl moved for a directed verdict, which motion was denied, and the case went to the jury without any evidence being offered in defense. Appeal is prosecuted by the defendant Roehl from the judgment and order overruling defendant's motion for a new trial.

Several errors are assigned, involving but one principal question, solution of which is determinative of the case, viz., the liability of the defendant Roehl for damages on account of plaintiff's injuries, in application of the doctrine of respondeat superior.

The rules applicable have been crystallized into statute in this state. Section 5442, Rev. Codes, provides: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

And § 5450 reads as follows: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his wilful omission to fulfill the obligations of the principal."

These statutory provisions are merely declarative of the common law, and in their application to the facts in the case before us the liability of the employer is clear. The employee, Leedy, was directed by his employer to take the automobile from the garage "for the purpose of exhibiting or demonstrating

the car" to Daniel Bean, a prospective purchaser; and in such position, and acting under such direction of his employer, the object and purpose of the employee was necessarily to bring about accomplishment of the sale in contemplation. In acceding to the wishes of Martha Bean to go across town to Judith place to make delivery of the dress,

Master and servant—scope of employment—permitting stranger to drive automobile.

and to the request of her father that she be permitted to drive the car, we think Leedy acted within the scope of his employment. The agent took his place in the front seat of the automobile, alongside of Martha Bean, showed her how to control the car, how to start it, what pedals to use, and the like. Miss Bean testified: "Mr. Leedy said that I was doing very good, and I told him that I had never driven a car in town before and that I wouldn't drive it if he hadn't been with me. I told him to pay particular attention to me and see that nothing happened, to be ready to help me if anything should happen, because I didn't feel exactly safe on Main street. That was the first time I had ever attempted to drive a car in the business section of any town."

As applicable to this case, we quote with approval the language used by Mr. Justice Young, speaking for the supreme court of New Hampshire, in *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535, as follows: "The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial [citing cases]. But, if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable."

And this view is entirely consistent with the provisions of our statute and in accord with the views expressed by this court in *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575.

The decisive question in every instance is whether the agent or employee was, at the time of negligent injury, acting within the scope of his employment. If he acted independently of his employer, or was upon missions or purposes of his own, then the employer is not to be held accountable in damages. Necessarily, in most instances, the question is one of fact. It becomes one of law, however, whenever it appears that the given deviation was made for the purpose of doing something which had no connection with the servant's duty.

"In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was, at the time, engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master." *Shearm. & Redf. Neg.* 6th ed. § 147.

The employer or principal is liable for the negligent acts of his employee while acting as his representative, and the purpose of the act rather than its method of performance is the test of the scope of his employment. 26 Cyc. 1534.

Defendant has cited many cases in support of his contention of non-liability, but they are all distinguishable from the case under consideration. In those cases the missions of the servant were outside the scope of his employment and pertained primarily to the employee's personal pleasure, business, or affairs, or were instances where the employee had surrendered control of the automobile to a third person for a purpose independent of

and not connected with the business of the employer.

We concede the law as contended for by the defendant, that where the servant steps aside from his master's business, if but for a short space of time, and does an act not connected with the business, which is harmful to another, the master is not liable, the reason being that the relation of master and servant does not at the time exist; but here the servant continued about the business of his employer, adopting methods deemed expedient, resulting in a third person's injury, and the employer is liable. 18 R. C. L. p. 796.

In this case the proof neither shows an independent mission by the employee for purposes of his own outside the scope of his employment, nor the surrender of control of the operation of the car to a stranger. In making exhibition and demonstration of the car to the prospective purchaser, Leedy permitted Miss Bean to operate the car; and at the time of the accident he was by her side on his master's business, grabbed the wheel, and the accident complained of resulted. There was no break in the continuity and purpose of the mission, and the hand of the servant was physically on the steering wheel of the car at the time of the accident. It is plain that the accident occurred through the negligence of the agent in the transaction of the business of the agency, and in consequence of the principal is liable.

By legal intentment the act of the employee became the act of the employer; the individuality of the employee being identified with his employer. The latter is deemed to have been constructively present, and the act of the employee that of the employer, and thus the latter becomes accountable for his own proper act or omission. 18 R. C. L. p. 786.

"He who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it," said Lord

Chief Justice Best in *Hall v. Smith*, 2 Bing. 156, 130 Eng. Reprint, 265.

We are not unmindful that the application of the rule may, and often does, work hardships, and that in the case before us a hardship is undoubtedly worked upon the employer; however, the rule is founded on reason and looks to the protection of third persons. The verdict might be considered excessive

in view of the evidence, but, as no contention is made in this respect, the subject is passed without further notice.

The judgment and order appealed from are affirmed.

Brantly, Ch. J., and Reynolds, Cooper, and Holloway, JJ., concur.

Petition for rehearing denied January 6, 1922.

ANNOTATION.

Who is responsible for injury by car during demonstration or instruction by dealer.

As to liability of employer for injuries inflicted by automobile while being driven by or for salesman or collector, see annotation in 17 A.L.R. 621.

As to liability of owner for injury by automobile while being operated by repair man, see annotation in 18 A.L.R. 974.

Although an automobile, at the time an injury occurred, was being driven by a prospective purchaser, or his representative, the owner may be held liable if the act of his employee sent to give instructions, in allowing the prospective purchaser or representative to drive, was within the scope of his employment and in furtherance thereof. *HOFFMAN v. ROEHL* (reported herewith) ante, 189; *Wooding v. Thom* (1911) 148 App. Div. 21, 132 N. Y. Supp. 50; *Holmboe v. Morgan* (1914) 69 Or. 395, 138 Pac. 1084.

It will be observed that in the reported case (*HOFFMAN v. ROEHL*) it was decided that one sent by an automobile dealer to demonstrate a car to a prospective purchaser acted within the scope of his employment in acceding to the suggestion of the customer to permit his inexperienced daughter to drive the car, so as to render the employer liable for an injury to a pedestrian by the driver losing control of the car, where the agent sat beside and directed the driver, and had his hand on the steering wheel when the accident occurred.

And in *Wooding v. Thom* (1911) 148 App. Div. 21, 132 N. Y. Supp. 50, affirmed in (1913) 209 N. Y. 583, 103 N. E. 1185, where the owner of an automobile who wished to sell it sent his chauffeur to demonstrate it, and the latter permitted an employee of a prospective purchaser to drive it, the owner was held liable for an injury caused to a pedestrian by the negligent operation of the car by the employee of the prospective purchaser. The court said: "In the present case the master's business upon which Simmons was engaged was demonstrating the capabilities of the car with a view to commending it to a possible purchaser. The evidence clearly shows that the act of Simmons, who was in sole control, in permitting Eglit to drive the car, was because he (Simmons) conceived that to be a good way to demonstrate the quality of the car. It was an act performed in furtherance of his employment. It is not important that he had not been instructed to permit anyone but himself to drive; for, as was said by Judge Grover in *Cosgrove v. Odgen* (1872) 49 N. Y. 255, 10 Am. Rep. 361: 'The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do.' If the owner him-

self had undertaken to demonstrate the car, and as a part of such demonstration had permitted Eglit to drive it, no one would have any doubt as to such owner's liability. The case here is no different. Simmons was authorized to demonstrate the car; that was his employment. In the course of that employment, as a part of the demonstration, he permitted Eglit to drive. This, I think, fastens upon Simmons's employer liability for the negligence which resulted in plaintiff's injuries."

And in *Holmboe v. Morgan* (Or.) *supra*, where an injury was inflicted by an automobile while it was being operated with the consent of the seller's demonstrator, by the purchaser, at the latter's request, a verdict against the seller was affirmed. The court said: "It is contended that Morgan insisted on driving the car at the time of the accident, and therefore should be held liable for damages. It appears that Robinson was out with Morgan for the express purpose of demonstrating the car and of teaching Morgan how to run it; that Morgan knew nothing about it or how to run it, had run it only 3 or 4 miles the day before, under Robinson's direction, and, at the time of the accident, was at the wheel for the second time only, under Robinson's control and immediate supervision. The question of whether Morgan or Robinson was the efficient cause of the accident, or whether they were jointly liable, was squarely and plainly presented to the jury for decision, and was the only question so submitted. All of the facts were before it, and we should not disturb its findings upon that matter. Although the defendant Howard contends that Robinson requested Morgan to let him (Robinson) drive the car when they came to the crowded streets of the city, that did not relieve Robinson of the control of the machine. He was in charge of the car and was to instruct Morgan as to running it, and, if he thought they were in a locality where the car should be in the hands of an expert, he should have taken control."

And in *Samson v. Aitchison* [1912; P. C.] A. C. (Eng.) 844, 82 L. J. P. C. N. S. 1, 107 L. T. N. S. 106, 28 Times L. R. 559, the owner of an automobile was held liable for an injury caused by its negligent operation by a prospective purchaser of the car who was driving, at the owner's suggestion, to test its qualities; it appearing that the latter accompanied the driver, and had given directions as to the operation of the car.

And a dealer in automobiles is liable for an injury to a prospective purchaser, sustained while attempting to crank the car at the implied invitation of the one sent to demonstrate it, who allowed the customer to get out of the car and attempt to crank it without warning him of the danger of cranking, although he knew that the purchaser was ignorant of such dangers. *Martin v. Maxwell Brisco Motor Vehicle Co.* (1911) 158 Mo. App. 188, 138 S. W. 65.

But in *Keck v. Jones* (1916) 97 Kan. 470, 155 Pac. 950, where an automobile was ordered by a dealer for a customer, supplied with gasoline, etc., and inspected and tested before noon of a certain day, and the customer called and paid for it in the afternoon, and declined assistance in operating it because he had had experience, and drove it away, but returned, after driving about a short time, and asked for someone to go with him and listen to the working of the car and make any necessary adjustments, it was held that the dealer was not liable for an injury to the plaintiff which occurred while it was being driven by the purchaser, accompanied by a machinist sent solely to observe the working of the car and adjust it, since the purchaser was not the agent of the dealer, and since he desired someone to accompany him, not to operate the car, but merely to observe its mechanical operations.

And one who purchased an automobile under a conditional bill of sale for another, to whom it was delivered, is not liable for an injury caused by the car while the latter was being driven in it by a chauffeur whom she

hired when she wanted to ride, although the one who purchased the car told the chauffeur to take good care of the person to whom it was delivered, and to teach her to run it and instruct her; it appearing that he had never hired the chauffeur to perform such service, or paid him. *Michael v. Pulliam* (1919) — Mo. App. —, 215 S. W. 763.

And it was held in the *Michael Case* that, even if it could be said that the one who purchased the car had made the chauffeur his agent to teach the one to whom the car was delivered to run it, he would not be liable for the injury, since it appeared that the chauffeur was not teaching her to drive the car at the time, but was merely taking her for a ride and acting as her chauffeur.

It has been held that a chauffeur sent by an automobile dealer with an inexperienced customer, to take a car which the customer had purchased through the crowded part of the town, and turn it over to him when the business streets were passed, might, while en route, be found to be acting for the dealer, so as to render him liable for injuries caused by negligent driving, although, by direction of the purchaser, they stopped at various places to do errands for the latter. *Dalrymple v. Covey Motor Car Co.* (1913) 66 Or. 533, 48 L.R.A. (N.S.) 424, 135 Pac. 91.

But in *Janik v. Ford Motor Co.* (1914) 180 Mich. 557, 52 L.R.A. (N.S.) 294, 147 N. W. 510, Ann. Cas. 1916A, 669, it was held that an automobile manufacturer who, after selling a car, delegates one of his employees, at the purchaser's request, to drive the car to the city limits, from which place the purchaser, who is an experienced automobilist, is to drive it to the destination, is not answerable for an injury by the driver to a person on the street, where the purchaser is in the car at the time of the accident, although he has given no directions except as to the route as to which he wishes to travel.

In *Hammons v. Setzer* (1913) 72 Wash. 550, 130 Pac. 1141, the evidence was held sufficient to warrant

a finding that an employee of a storekeeper was acting as the latter's agent, where there was evidence that a seller of automobiles agreed to demonstrate a car in delivering goods; that the defendant told the demonstrator to show the man sent on the car all about it, and that after they had driven around some the defendant's employee took the wheel, and while he was driving an accident occurred.

And in *Hiroux v. Baum* (1908) 137 Wis. 197, 19 L.R.A. (N.S.) 332, 118 N. W. 533, a finding was held justified that the son of the defendant was the latter's servant, and not the servant of the one who sold the car to the defendant, where there was evidence that the car was purchased with the understanding that the son should learn to operate it, and that the seller had agreed to teach the defendant's son to operate the car, and that the son, for the purpose of learning to run it, was driving it, accompanied by the seller, at the time the plaintiff was injured.

But a prospective purchaser who has instructed his employee merely to examine the engine of the car, and stated that he would arrange for a demonstration if the report was favorable, is not liable for his employee's negligence, since he was acting outside the scope of his employment in driving the car. *Wooding v. Thom* (1911) 148 App. Div. 21, 132 N. Y. Supp. 50, affirmed in (1913) 209 N. Y. 583, 103 N. E. 1135.

And where a manufacturer of automobiles sells a number of machines to the defendant for use in its business, and agrees to furnish chauffeurs to instruct its employees in the operation of the machines for a certain time, the defendant is not liable for an injury inflicted by one of the machines which was being driven by the manufacturer's chauffeur to the defendant's store where the instruction was to begin, since the operator was not the agent or servant of the defendant. In *Tornroos v. R. H. White Co.* (1915) 220 Mass. 336, 107 N. E. 1015.

And an employer is not liable for an injury if it occurs while its employee is using the employer's motor truck after business hours to take things to his own home, although there was evidence that he had been instructed by his employer to learn to operate the truck as soon as possible, and that he was accompanied by the chauffeur furnished by the seller of the truck to instruct him in operating it. *McGrath v. Wehrle* (1919) 233 Mass. 456, 124 N. E. 253.

In *Buick Auto. Co. v. Weaver* (1914) —Tex. Civ. App. —, 163 S. W. 594, it was held that a peremptory instruction in favor of the seller of an automobile, in an action by the purchaser for injuries, was properly refused, where there was evidence that the seller agreed to furnish a chauffeur to drive the car to the purchaser's home and teach him to operate it, and that while the latter was negligently operating the car the

plaintiff was injured, it being held that the fact that the car belonged to the plaintiff was not determinative, the master being liable for the servant's tortious acts done in furtherance of the master's business, and the instrumentality by which they are committed being immaterial.

In *Burnham v. Central Auto. Exch.* (1907) — R. L. —, 67 Atl. 429, where the purchaser of a motor car claimed to have received an injury while riding in it, by reason of the reckless driving of a chauffeur furnished by the seller to teach the former to operate the car, the court refused to disturb a verdict against the seller, although the latter claimed the accident was caused by a break in the machinery due to the purchaser's previous reckless operation of the car, and not to the negligence of the chauffeur, as under the evidence the question of liability was held properly submitted to the jury. J. T. W.

BENJAMIN F. DOUGLAS

v.

GUNLEK A. BERGLAND, Plff. in Err.

Michigan Supreme Court — December 21, 1921.

(216 Mich. 380, 185 N. W. 819.)

Negligence — duty to give notice of change of condition in rollways.

1. The owner of a log rollway in a lake is not bound to give notice to licensees who are in the habit of fishing from it, of its changed condition due to the removal of logs for use in his mill, failure to do which will render him liable for injury to a fisherman when he attempts to fish from the rollway.

[See note on this question beginning on page 202.]

Water — riparian right to use submerged land.

2. An owner of land on a lake has a right to use the submerged land in front of his property for storing logs so long as he does not interfere with the public right of navigation.

—right to fish.

3. The public has a right to fish in the waters of a navigable lake which has been stocked with fish by the public.

[See 11 R. C. L. 1030, 1033; see also note in 5 A.L.R. 1056.]

—right to use riparian land.

4. The right to fish in the waters of

a navigable lake does not include the right to trespass upon the fast land of a riparian owner or use his dock or rollway of logs for that purpose.

[See 11 R. C. L. 1033.]

Negligence — invitee — showing one where to fish.

5. The mere fact that a riparian owner points out to a person using his rollways as a fishing ground, where the owner thinks that fish may be caught, does not make the fisherman an invitee so that the riparian owner will be bound to exercise toward him the care due such person.

[See 20 R. C. L. 64.]

ERROR to the Circuit Court for Ontonagon County (Driscoll, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for injuries received while fishing from defendant's log rollways, for which he was alleged to be responsible. *Reversed.*

Statement by Fellows, J.:

Defendant owns and operates a sawmill at Bergland, on the shore of Lake Gogebic. The lake is navigable and of considerable proportions, being 17 miles in length and 3 miles in width at certain places. The village of Bergland has a population of about 400. It is sustained by defendant's mills, most of the inhabitants being his employees and their families. It is located on the Duluth, South Shore, & Atlantic Railroad. A spur track has been built out into the lake several hundred feet. In the winter months defendant gets in his supply of logs for the summer operations. They come in on the railroad, and the cars are run out on the spur track running into the lake, and the logs are unloaded and put in rollways on the ice. As the weight of the rollways increases with the addition of logs the ice breaks and the rollways settle in the water and rest on the bottom; the water being from 6 to 8 feet deep at this place. After the ice has gone out in the spring, and during the summer months, the rollways are broken up and the logs taken to the mill to be manufactured into lumber. In breaking up the rollways it was customary to pick out the key logs, and the wind and waves would then more readily cause the breaking up of the rollways. To prevent the logs floating away on the lake a boom was constructed.

For nine seasons prior to that of 1915 plaintiff spent the summer months at Bergland. While there he indulged in fishing, sometimes from a boat and sometimes from the rollways of defendant. Others, mostly defendant's employees, also fished from these rollways. Plaintiff came to Bergland for the season of 1915. On June 28th, after supper, he went to the rollways to fish. He stepped on a log, and, finding it insecure, stepped on another rollway, and remained

there a short time, when it likewise gave way, resulting in serious injuries to him. He recovered a judgment in the court below, which is here reviewed by defendant.

Messrs. Van Slyck & Walsh for plaintiff in error.

Mr. James A. O'Neill for defendant in error.

Fellows, J., delivered the opinion of the court:

There can be no serious question as to defendant's right as riparian owner to the beneficial use of the subaqueous land ^{Water-riparian right to use submerged land.} adjoining his premises so long as he does not interfere with the public rights in this navigable lake. *Rice v. Ruddiman*, 10 Mich. 125. We do not understand plaintiff's counsel to controvert this proposition. He bases plaintiff's right to recover here upon his right to fish in the navigable waters of the state, upon his rights as an invitee, and upon his rights as a licensee, and discusses these rights at length. We shall take them up in their order.

1. Lake Gogebic is a navigable lake. It has been stocked with fish, which are there found in abundance. There can be no question of plaintiff's right to fish in its waters. But ^{—right to fish.} that is not the precise question here involved. Plaintiff is not a riparian owner on this lake, so far as this record discloses. In order to exercise his right to fish, he must pass over the premises of a riparian owner, either those of defendant, the railroad company, or someone else. The question here is: Was plaintiff a trespasser in going across and upon premises of defendant for the purpose of exercising the right of fishing? Plaintiff's counsel insists that this question must be answered in the negative on the authority of *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439. There is language used in that opin-

ion which gives color to counsel's contention. This has prompted us to examine the record and briefs in that case to see if the question of trespass to the fast land of plaintiff was there involved. We find it was not. The testimony only showed that defendant went over plaintiffs subaqueous land in a boat, and plaintiff's counsel in that case conceded that defendant entered the lake from the land of one Arnold, another riparian owner; so that the question of trespass to fast land was not involved. In *Beach v. Hayner*, 207 Mich. 93, 5 A.L.R. 1052, 173 N. W. 487, we expressly recognized the right to fish in the navigable waters of the state when lawfully upon them. And in *Giddings v. Rogalewski*, 192 Mich. 319, 158 N. W. 951, we held (quoting from the syllabus):

"The right of the state, under its police power, to enforce the fish and game laws upon the lands of a private owner, does not take away the owner's right to maintain trespass against those who invade his close without permission for the purpose of fishing.

"Every unauthorized intrusion upon private lands is a trespass for which the owner has a right of action, and is entitled to at least nominal damages."

Plaintiff, being lawfully on the lake, no doubt would have the right to row his boat over the subaqueous lands of defendant and fish there, but he would not have the right to appropriate defendant's boat for that purpose if he found it tied to defendant's dock, nor could he, without license from defendant, use his dock or rollways of logs for that purpose. Plaintiff's right to fish in the water of Lake Gogebic did not carry with it the right to trespass upon the fast land of defendant, or to appropriate his property in the exercise of such right.

2. Was plaintiff an invitee? The testimony shows that plaintiff, his wife, and others fished off these

rollways. On one occasion defendant pointed out to plaintiff's wife where he thought she could catch a fish. We think this testimony established license at most, and did not establish that

plaintiff was an invitee. In *Benson v. Baltimore Traction*

Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973, the principal of the training school, Mr. Saville, had written to the president of the defendant for permission to the graduating class to visit its power house. The permission was granted, and some thirty or more of the scholars and teachers went to the power house and were shown through the plant. Part of the time they were accompanied by a guide, but in his temporary absence plaintiff fell into a vat of hot water used by defendant in its business, and received serious injuries. It was insisted on behalf of plaintiff that under the circumstances he was an invitee, and defendant's duty towards him was measured by the standard of such relation. The court declined to accept this view, held that he was a licensee, and, after reviewing the authorities, said: "And so in this case we are compelled to say that there is nothing in the declaration, supplemented with the request of Mr. Saville and the assent of the appellee, to justify the conclusion that the appellant was in any manner invited or induced, by any act of the appellee, to visit its power house, but he went there solely for his own personal benefit and pleasure, and he must accept the consequences, unfortunate though they be."

We are persuaded that, at most, plaintiff can claim no greater rights than those of a licensee.

3. This brings us to the crucial question in the case: Has the defendant been guilty of failure of any duty he owed plaintiff as licensee? The theory advanced by plaintiff's counsel to sustain this judgment is that, if we assume

Negligence—
invitee—show-
ing one where
to fish.

—right to use
riparian land.

plaintiff was a licensee, still defendant owed him the duty not to so change the character of the premises as to render them dangerous without notice to him and to the public generally, and that defendant's agents, by undermining the rollway in the work of tearing it down and getting out the logs, had changed its condition from a place of safety to one of danger, and for such action the defendant is liable, and counsel relies most strongly on *Morrison v. Carpenter*, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319, to sustain such contention. But that case involved a way, a path, and the text-writers and courts generally, including this court, have recognized that a different rule applies to the license to use a way or a path which has been openly and notoriously held out to the public for use, from a license to go upon premises generally. In 29 Cyc. 449, it is said: "The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or wilfully cause him harm. The licensee enters upon the premises at his own risk, and enjoys the license subject to its concomitant perils. There is a class of cases, however, which stand on a ground peculiar to themselves. They are where defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The liability in such a case is coextensive with the implied invitation."

And in 20 R. C. L. 64, it is said: "While an invitation to go upon premises will not be implied, ordinarily, from the fact that the owner or occupant has acquiesced in or tolerated trespasses thereon; many decisions have recognized an exception in case of a way across lands or structures thereon. If the owner or occupant has permitted persons

generally to use or establish a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon premises by invitation."

Mr. Justice Stone, who wrote the opinion in the *Morrison Case*, very clearly laid down the rule where a way, a path, was involved, and, by pointing out the distinction between the case then before us and *Habina v. Twin City General Electric Co.* 150 Mich. 41, 13 L.R.A. (N.S.) 1126, 113 N. W. 586, to which we shall presently refer, pointed out the distinction we must recognize between the *Morrison Case* and the one now before us. He said: "In other words, if the licensee has been using a defined path for a length of time with the knowledge and permission of the licensor, then, if the licensor interferes with said path by making it more dangerous, he should give notice to the licensee, or guard the dangerous place so made. We think this doctrine is clearly recognized by this court in *Habina v. Twin City General Electric Co.* 150 Mich. 41, at page 49. In that case a child had been injured; but, unlike this case, it did not appear that any path or way was shown to have existed at or over the land where the ditch in which the child was injured was opened. In that case it was distinctly found that it did not appear that the plaintiff ever traveled over the premises in a path or way in a direction used by anyone else, or that she twice pursued the same way herself, but that she and others had been in the habit of roaming over the entire premises."

The early case of *Hargreaves v. Deacon*, 25 Mich. 1, has been frequently cited by this and other courts. A child of tender years had fallen into a cistern on the premises of defendant and been drowned. Mr. Justice Campbell, who wrote for the court, first pointed out that no question of way existed, and then proceeded to determine the rights

of plaintiff's decedent as a licensee. In the course of the opinion he said:

"But where injury arises to a person from the neglect of one, in doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any legal obligation to look out for the protection of that particular person, under those particular circumstances. For the law does not require such vigilance in all cases, or on behalf of all persons. . . .

"Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which holds that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant."

The authorities are reviewed at considerable length, and the opinion concludes with the following: "We cannot help feeling much sympathy for the sad case of a child who was only following the natural and innocent curiosity of his age when he met with the accident which caused his death. But there is nothing to indicate any wanton or inhuman disposition in the defendants, and no illegality in their management of their business, and they have violated no right of the plaintiff or his intestate."

Habina v. Twin City General Electric Co. supra, was not a case of a way. The premises had, however, been used sufficiently by the

public to make plaintiff a licensee. In crossing them plaintiff fell into a ditch which contained hot water coming from defendant's plant, and was injured. There, as here, it was insisted that defendant had changed the conditions without notice to the public, but it was held that to entitle plaintiff to recover, the change must be such as indicated a reckless and wanton disregard of the safety of plaintiff and others. There, as here, the change in conditions was the result of the necessities of the business, and we denied liability. It was there said: "But assuming, as the trial judge did, that she belonged to the class known to the law as naked licensees, 'about the least favored in the law of men who are not actual wrongdoers' (Pollock, Torts, pp. 424, 425), her position, assuming further that she exercised proper care, is not improved, unless it should be said that defendant's conduct in opening the ditch and leaving it unguarded at the point where plaintiff fell into it was such a change in the condition of the premises, such creating of a new danger by its active conduct, as indicated a reckless and wanton disregard of the safety of plaintiff and others. Here, again, we come to the proposition that, if in the conduct of its business it became necessary to change the condition of the surface of its premises, defendant could change them in no place, in the 45,000 square feet occupied, without giving notice of such change."

The instant case is not distinguishable upon principle from this case.

In the case of *Clark v. Michigan C. R. Co.* 113 Mich. 24, 67 Am. St. Rep. 442, 71 N. W. 327, 3 Am. Neg. Rep. 194, the plaintiff tripped on a wire used by defendant to operate its semaphore. In denying liability it was said by Mr. Justice Hooker, speaking for the court: "Whether these persons were trespassers or naked and gratuitous licensees (which last we do not mean to intimate) is unimportant. In neither

case had they the right to expect the defendant to forego a reasonable use of its land, in which respect it stood on the same plane as a private person."

In *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, it was said: "Gramlich was in the lawful occupancy of the lot on which Wurst was killed, and was engaged in an employment that was entirely legitimate. In the absence of evidence to show the existence of exceptional hazards, he was not required to provide exceptional safeguards. An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner or to the public. . . . The law fully recognizes the right of him who, having the dominion of the soil, without malice, does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong, upon him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptance of the term."

See also *Newell v. Detroit*, G. H. & M. R. Co. 187 Mich. 697, 153 N. W. 1077, 157 N. W. 394 (on rehearing); *Sandstrom v. Minneapolis*, St. P. & S. Ste. M. R. Co. 198 Mich. 99, 164 N. W. 472; *Groesbeck v. Sheldon*, 185 Mich. 583, 152 N. W. 210; *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; *Sturgis v. Detroit*, G. H. & M. R. Co. 72 Mich. 619, 40 N. W. 914, 4 Am. Neg. Cas. 76; *Formall v. Standard Oil Co.* 127

Mich. 496, 86 N. W. 946, 10 Am. Neg. Rep. 402; *Downes v. Elmira Bridge Co.* 179 N. Y. 136, 71 N. E. 743; *O'Brien v. Union Freight Co.* 209 Mass. 449, 36 L.R.A. (N.S.) 492, 95 N. E. 861; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Vanderbeck v. Hendry*, 34 N. J. L. 467.

While the declaration alleges that defendant improperly piled rollways, there is no proof to support this claim. The proof, and all of it, showed that the rollways were properly piled, and that they were broken up in the usual, customary, and economical way. While plaintiff claims he did not know how they were broken up, for nine years he had seen, must have seen, as the seasons progressed, one after another of these rollways broken up and the logs floated to the mill. He was upon the premises where the accident occurred for his own convenience; had no business with the owner; he was, at most, a licensee. Defendant, in the usual and customary manner, used these premises in the conduct of his business. In the conduct of such business, and to get logs for the mills, he broke up these rollways, which were but temporary, and this he did in the usual and customary manner. Defendant has breached no duty he owed the plaintiff, and is not liable in this action.

-duty to give notice of change of condition in rollways.

The judgment will be reversed, without a new trial.

ANNOTATION.

Duty of owner to licensee as to changing condition of premises.

- I. General rule, 202.
- II. Application of rule, 203.
- III. Limitation of rule, 204.

I. General rule.

The general rule is that where the owner or occupant of premises, with knowledge, and for a long period of time, permits the public to use the

premises without objection, for the purpose of traveling across the same on a well-established and safe path or highway, he cannot, without giving notice, render the premises unsafe to the injury of those who have used such highway, and have no notice of the changed condition, without being responsible for the resulting injury.

United States. — *Phipps v. Oregon R. & Nav. Co.* (1908) 161 Fed. 376. See also *Nugent v. Wann* (1880) 1 McCrary, 438, 3 Fed. 79; *Felton v. Aubrey* (1896) 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405; *The Ansonia v. Sullivan* (1917) 152 C. C. A. 284, 239 Fed. 296.

Alabama. — *Nashville, C. & St. L. R. Co. v. Blackwell* (1918) 201 Ala. 657, 79 So. 129.

California. — See *Cahill v. E. B. & A. L. Stone & Co.* (1908) 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84.

Connecticut. — See *Rooney v. Woolworth* (1905) 78 Conn. 167, 61 Atl. 366, 18 Am. Neg. Rep. 351.

Kansas. — *De Tarr v. Ferd. Heim Brewing Co.* (1900) 62 Kan. 188, 61 Pac. 689.

Michigan. — *Morrison v. Carpenter* (1914) 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319.

Mississippi. — *Lepnick v. Gaddis* (1894) 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213.

Ohio. — See *Buchtell College v. Martin* (1903) 25 Ohio C. C. 494.

Pennsylvania. — See *Bush v. Johnston* (1854) 23 Pa. 209.

Texas. — *Allison v. Haney* (1901) — Tex. Civ. App. —, 62 S. W. 933; *Williams v. Mudgett* (1880) 2 Posey, Unrep. Cas. 254.

Virginia. — See *Nesbit v. Webb* (1913) 115 Va. 362, 79 S. E. 330.

Wisconsin. — *Thayer v. Jarvis* (1878) 44 Wis. 388. See also *Brinilson v. Chicago & N. W. R. Co.* (1911) 144 Wis. 614, 32 L.R.A.(N.S.) 359, 129 N. W. 664.

England. — *Corby v. Hill* (1858) 4 C. B. N. S. 566, 140 Eng. Reprint, 1209, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575. See also *Clark v. Chambers* (1878) L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28.

See also the cases cited *infra*, III.

The requirement of such a duty toward a licensee is justified on the ground that the creation of a danger on premises known to be used by licensees, of which no notice is given, constitutes "putting traps or pitfalls in the licensee's way." *Nashville, C.*

& St. L. R. Co. v. Blackwell (Ala.) *supra*.

So, in *Morrison v. Carpenter* (1914) 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319, it was said: "We think the rule may be stated that after granting a license to use the premises, the owner cannot lawfully, by his affirmative action, change the premises so as to make them more dangerous, without notifying the licensee of that fact, or warning him of the added danger."

Similarly, it was said in *Phipps v. Oregon R. & Nav. Co.* (1908) 161 Fed. 376: "The view founded in natural justice, which seems to have approval of many authorities, is that one who knowingly, and for a long period of time, permits the public to use his premises, without objection, for the purpose of traveling across the same upon a well-established and safe path or highway, cannot, without giving notice, render the same unsafe to the injury of those who have used such highway, and have no notice of the changed condition, without responding in damages for resulting injury."

II. Application of rule.

A failure to give notice of new obstructions of a dangerous nature on premises across which persons are accustomed to pass by license renders the owner of the premises liable for an injury to licensees passing over the premises. *Corby v. Hill* (1858) 4 C. B. N. S. 566, 140 Eng. Reprint, 1209, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575. See also *Clark v. Chambers* (1878) L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28 (obstacle placed by a third person); *Cahill v. E. B. & A. L. Stone & Co.* (1908) 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; *Quirk v. Siegel-Cooper Co.* (1899) 43 App. Div. 464, 60 N. Y. Supp. 228, 6 Am. Neg. Rep. 644, affirming (1899) 26 Misc. 244, 56 N. Y. Supp. 49 (skid on steps). A newly built barbed wire fence is considered a dangerous obstacle. *Carskaddon v. Mills* (1892) 5 Ind. App. 22, 31 N. E. 559; *Morrow v. Sweeney* (1894) 10 Ind. App. 626, 38

N. E. 187; *Allison v. Haney* (1901) — Tex. —, 62 S. W. 933; *Williams v. Mudgett* (1880) 2 Posey, Unrep. Cas. (Tex.) 254. Compare *Worthington v. Wade* (1891) 82 Tex. 26, 17 S. W. 520; *Galveston Land & Improv. Co. v. Levy* (1895) 10 Tex. Civ. App. 104, 30 S. W. 504.

The owner of the premises used by the public is liable for injuries incurred by persons from new excavations, where no notice of their existence is given. *Phipps v. Oregon R. & Nav. Co.* (1908) 161 Fed. 376; *Graves v. Thomas* (1884) 95 Ind. 361, 48 Am. Rep. 727; *Lepnick v. Gaddis* (1894) 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213; *Hanson v. Spokane Valley Land & Water Co.* (1910) 58 Wash. 6, 107 Pac. 863. See also *Nugent v. Wann* (1880) 1 McCrary, 438, 3 Fed. 79; *Felton v. Aubrey* (1896) 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405; *Rooney v. Woolworth* (1905) 78 Conn. 167, 61 Atl. 366, 18 Am. Neg. Rep. 351; *Young v. Harvey* (1861) 16 Ind. 314; *Oliver v. Worcester* (1869) 102 Mass. 489, 3 Am. Rep. 485. A person who makes an excavation on another's land used by the public is liable for injuries caused thereby to a person traveling over the land. *Hanson v. Spokane Valley Land & Water Co.* (1910) 58 Wash. 6, 107 Pac. 863. The removal of boards leaving a dangerous hole uncovered, renders the owner of the premises liable for an injury to a licensee passing over the premises. *DeTarr v. Ferd. Heim Brewing Co.* (1900) 62 Kan. 188, 61 Pac. 689; *Wheeler v. St. Joseph Stock Yards & Terminal Co.* (1896) 66 Mo. App. 260.

The placing of dangerous substances on premises traveled by the public, with the acquiescence of the owner, renders the owner liable in case of injury if there is no warning given. *Penso v. McCormick* (1890) 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 26 N. E. 156 (heap of burning embers); *Thayer v. Jarvis* (1878) 44 Wis. 338 (deposit of caustic matter).

In *The Ansonia v. Sullivan* (1917) 152 C. C. A. 284, 239 Fed. 296, it appeared that a hotel company, desirous of preventing the use at night of a

runway leading to its delivery entrance, stretched a chain across the same in the evening, removing it in the morning. A person desiring to make a delivery of goods to the hotel at night was injured by the chain. The court held that the hotel company was negligent in failing to give warning, by a light or otherwise, of the obstruction. A similar result was reached in *Nashville, C. & St. L. R. Co. v. Blackwell* (1918) 201 Ala. 657, 79 So. 129, wherein it appeared that a railroad company stretched a rope across a roadway which had previously been used by the public by license.

III. Limitation of rule.

In a number of cases it has been held, without directly questioning the general rule heretofore stated, that the mere passive acquiescence of the owner of premises in their use by other persons for their own convenience and pleasure does not render him liable for injuries to them caused by his failure to give notice of changes in the premises, where there is no invitation, express or implied, to use the premises.

Arkansas.—*Chicago, R. I. & P. R. Co. v. Payne* (1912) 103 Ark. 226, 39 L.R.A.(N.S.) 217, 146 S. W. 487.

Indiana.—*Martin v. Louisville & J. Bridge Co.* (1908) 41 Ind. App. 493, 84 N. E. 360.

Louisiana. — *Burbank v. Illinois C. R. Co.* (1890) 42 La. Ann. 1156, 11 L.R.A. 720, 8 So. 580, 9 Am. Neg. Cas. 398.

Massachusetts. — *Reardon v. Thompson* (1889) 149 Mass. 267, 21 N. E. 369 (distinguishing *Toomey v. Sanborn* (1888) 146 Mass. 28, 14 N. E. 921).

Minnesota. — *Ratte v. Dawson* (1892) 50 Minn. 450, 52 N. W. 965.

New York. — *McCann v. Thilemann* (1901) 36 Misc. 145, 72 N. Y. Supp. 1076, affirmed on opinion below in (1902) 74 App. Div. 630, 77 N. Y. Supp. 1131.

Washington. — *McConkey v. Oregon R. & Nav. Co.* (1904) 35 Wash. 55, 76 Pac. 526, 16 Am. Neg. Rep. 258.

See also *Evansville & T. H. R. Co. v. Griffin* (1885) 100 Ind. 221, 50 Am.

Rep. 783; *Sweeney v. Old Colony & N. R. Co.* (1865) 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Omaha & R. Valley R. Co. v. Martin* (1883) 14 Neb. 295, 15 N. W. 696; *Phillips v. Library Co.* (1893) 55 N. J. L. 307, 27 Atl. 478; *Beck v. Carter* (1877) 68 N. Y. 283, 23 Am. Rep. 175; *Fox v. Warner-Quinlan Asphalt Co.* (1912) 204 N. Y. 240, 38 L.R.A. (N.S.) 395, 97 N. E. 497, Ann. Cas. 1913C, 745, reversing 139 App. Div. 807, 124 N. Y. Supp. 382; *Albert v. New York* (1902) 75 App. Div. 553, 78 N. Y. Supp. 355; *Clyde v. Brooklyn Union Elev. R. Co.* (1912) 148 App. Div. 705, 133 N. Y. Supp. 1; *Carroll v. State* (1911) 73 Misc. 516, 133 N. Y. Supp. 274, reversed on other grounds in (1912) 153 App. Div. 514, 138 N. Y. Supp. 442.

In some of the foregoing jurisdictions the general rule heretofore stated has been laid down without reference to the limitation just referred to, in cases which apparently did not call for the application of the limitation.

Indiana. — *Young v. Harvey* (1861) 16 Ind. 314; *Graves v. Thomas* (1884) 95 Ind. 361, 48 Am. Rep. 727; *Penso v. McCormick* (1890) 125 Ind. 116, 9 L.R.A. 313, 21 Am. St. Rep. 211, 26 N. E. 156; *Carskaddon v. Mills* (1892) 5 Ind. App. 22, 31 N. E. 559; *Morrow v. Sweeney* (1894) 10 Ind. App. 626, 38 N. E. 187. See also *Knapp v. Doll* (1913) 180 Ind. 526, 103 N. E. 385.

Massachusetts. — *Oliver v. Worcester* (1869) 102 Mass. 489, 3 Am. Rep. 485; *Toomey v. Sanborn* (1888) 146 Mass. 28, 14 N. E. 921. See also *Sweeney v. Old Colony & N. R. Co.* (1865) 10 Allen, 368, 87 Am. Dec. 644; *Stevens v. Nichols* (1892) 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150.

New Jersey. — *Phillips v. Library Co.* (1893) 55 N. J. L. 307, 27 Atl. 478. See also *Nolan v. Bridgeton & M.*

Traction Co. (1907) 74 N. J. L. 559, 65 Atl. 992.

New York. — *Beck v. Carter* (1877) 68 N. Y. 283, 23 Am. Rep. 175. See also *Quirk v. Siegel-Cooper Co.* (1899) 43 App. Div. 464, 60 N. Y. Supp. 228, 6 Am. Neg. Rep. 644, affirming (1899) 26 Misc. 244, 56 N. Y. Supp. 49.

Washington. — *Hanson v. Spokane Valley Land & Water Co.* (1910) 58 Wash. 6, 107 Pac. 863.

The right of recovery of a licensee for an injury on premises used by the public has been limited by some courts to cases where the use is "definite, long, open, and continuous." *Habina v. Twin City General Electric Co.* (1907) 150 Mich. 41, 49, 13 L.R.A. (N.S.) 1126, 113 N. W. 586, distinguished in *Morrison v. Carpenter* (1914) 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319. See also *Beck v. Carter* (1877) 68 N. Y. 283, 23 Am. Rep. 175.

In the reported case (*DOUGLAS v. BERGLAND*, ante, 197) the general rule is held, distinguishing *Morrison v. Carpenter* (1914) 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319, supra, to be applicable only to changes in premises used by licensees as a way. It is accordingly held in that case that the owner of a log rollway, sometimes used by licensees to stand on while fishing, is not liable for an injury resulting from a failure to give notice of the removal of the key logs for the purpose of allowing the rollway to break up.

The owner of premises is not liable where a licensee wanders from the usual way and falls into a ditch recently dug on another portion of his premises. *Etheredge v. Central of Georgia R. Co.* (1905) 122 Ga. 853, 50 S. E. 1003. W. A. S.

CITY OF CHICAGO, Appt.,
v.
HEBARD EXPRESS & VAN COMPANY.

Illinois Supreme Court — February 22, 1922.

(301 Ill. 570, 134 N. E. 27.)

Municipal corporation — reasonableness of ordinance — record of moving.

1. An ordinance requiring draymen to file records of the destination of household goods moved by them is not a reasonable regulation of their business.

[See note on this question beginning on page 210.]

Commerce — interference — regulation of draymen.

2. An ordinance requiring draymen to file a notice of destination of any household goods moved by them does not interfere with the power of Congress over commerce, although goods may occasionally be moved into another state.

Courts — power to pass on reasonableness of ordinance.

3. The reasonableness of an ordinance passed by a municipal corporation in the exercise of power conferred by the legislature expressly to pass the particular ordinance in question is not a subject for judicial inquiry.

[See 19 R. C. L. 805; 3 R. C. L. Supp. 974.]

— when courts may inquire into reasonableness of ordinance.

4. When power to legislate on a particular subject is conferred by the legislature on a municipal corporation, but the particular manner of its exercise is not prescribed, the question whether or not an ordinance passed pursuant to the power is a reasonable exercise of it is a question for determination by the courts.

Evidence — presumption of validity of ordinance.

5. The presumption is in favor of the validity of an ordinance passed in pursuance of statutory authority.

[See 19 R. C. L. 805.]

Municipal corporation — extent of legislative authority.

6. Statutory authority to regulate draymen and to prescribe their compensation does not include power to require them to file records of the destination of household goods moved by them.

— police power — requiring record of moving.

7. Power conferred upon a municipal corporation to enact police ordinances does not authorize it to require draymen to file records of the owners of household goods moved by them and the destination of such goods, the facts necessary for which must be furnished by the owner of the goods under penalty, and information concerning which shall be furnished to inquirers by municipal employees for a fee.

[See 19 R. C. L. 861; see also note in 12 A.L.R. 499.]

APPEAL by plaintiff from a judgment of the Municipal Court of Chicago (Trude, J.) in favor of defendant in a suit brought to recover a penalty for violation by him of an ordinance of the city regulating the business of movers. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Samuel A. Ettelson, Louis P. Piquett, Daniel Webster, and Rupert F. Bippus for appellant.

Messrs. Brady, Rutledge, & Devaney for appellee.

Dunn, J., delivered the opinion of the court:

The city of Chicago sued the Heb-

ard Express & Van Company in the municipal court for a violation of an ordinance of the city by moving for hire certain household furniture and personal property from No. 855 Ainslee street, in the city of Chicago, without thereafter filing in the office of the bureau of statis-

tics and municipal reference library of the city of Chicago the statement required by § 1 of the ordinance. The court, on a trial without a jury, rendered judgment for the defendant, and the city appealed to this court; the judge having certified that the validity of an ordinance was involved, and the public interest required that the appeal should be taken directly to this court.

The first three sections of the ordinance are as follows:

"Sec. 1. Every person, firm or corporation owning or operating any moving van, furniture car, transfer wagon, express wagon, delivery wagon, or any other vehicle engaged in moving or hauling for hire in the city of Chicago, shall keep a record of the place from which and the place to which he or it moves the household goods or personal property, or any of them, of any person who is, or persons who are, removing or vacating any dwelling, house, flat, apartment, room, rooms or place of residence or abode or place of business in the city of Chicago, which record shall show the name and address of the mover, the name of the person for whom the moving was done, the name of the person who was the owner or ostensible owner of the said household goods or personal property moved, the address from which in the city of Chicago and to which in the city of Chicago, or outside of the city of Chicago, as the case may be, such moving was done, and the name and address of the common carrier to whom such household goods or personal property were delivered, with the date of such removal or delivery, and the character of the articles moved.

"Sec. 2. Every person, firm or corporation owning or operating any of the vehicles aforesaid, and any person, firm or corporation not engaged in moving or hauling for hire in the city of Chicago but in control or possession of any of the vehicles aforementioned, who shall,

for a valuable consideration or otherwise, move the household goods or personal property, or any of them, of any person who is, or persons who are, removing or vacating any dwelling, house, flat, apartment, room or place of residence or abode or place of business in the city of Chicago, shall, not later than Monday following the date of such moving, file in the office of the bureau of statistics and municipal reference library of the city of Chicago, or send by registered mail to such bureau, a full and correct statement of all such hauling or moving done, containing the information as required in § 1 hereof. Upon receipt of such statements the head of such bureau of statistics and municipal reference library shall keep a register of all such transactions in a book or books, or other suitable form of maintaining records, to be used for that purpose, with an alphabetical index of the names of the persons for whom such hauling has been done. Said register shall not be open to the inspection of the public, but the head of such bureau shall furnish to any person inquiring therefor, information as to any particular change or removal, for which a charge of 50 cents shall be made for information concerning each change or removal: Provided, that no fee shall be charged for any such information furnished to the department of police.

"Sec. 3. Upon request of the person, firm or corporation owning or in charge or in control of the vehicle in which said household goods or personal property, or any of them, are to be removed, the person for whom such moving is being done shall give to said owner or person in charge or in control of any vehicle, all information necessary to enable him to make and keep such record or statement. It shall be unlawful for any person to give to said owner or person in charge or in control of any vehicle hauling or moving said household goods or personal property, or any of them, a fictitious name or to deceive him, or

to make knowingly any false statement concerning any of said information requested by said owner or person in charge or in control of said vehicle, the obtaining of which is necessary to enable him to make and keep said record or statement."

The sixth section provides for a fine not exceeding \$200 for any violation of the ordinance.

It was stipulated on the trial that the appellee is engaged in the city of Chicago in the business of moving and hauling for hire; that it moved the property of Hobart Merrifield from No. 855 Ainslee street, in the city of Chicago, to some other point in the city, and did not file the statement required by the ordinance. The appellee proved that in its business it had in the course of a year approximately 5,000 moving jobs, and moved anywhere within a radius of 300 or 400 miles, where the roads permitted; that 80 to 90 per cent of the moving is done within the city of Chicago, about 9 per cent from Chicago to places outside the city, in the state of Illinois, and about 1 per cent to places outside the state.

The appellee contends that the ordinance is invalid because the legislature did not confer power upon the city to adopt it, because it is unjust, unreasonable, and oppressive, and because it is in conflict with the state and Federal Constitutions.

No provision of the state Constitution is referred to in the brief or argument of the appellee, and no provision of the Federal Constitution except that which declares that

Commerce—
interference—
regulation of
draymen.

Congress shall have power to regulate commerce among the several states.

The ordinance does not violate this provision. An ordinance adopted in the exercise of the police power, for the protection of the community, may extend, incidentally, to the operation of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Barrett v. New York*, 232 U. S. 14, 58 L. ed. 483,

34 Sup. Ct. Rep. 203; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

The appellant contends that authority to the city to pass the ordinance is found in clauses 42 and 66 of § 1 of article 5 of the Cities and Villages Act (*Hurd's Rev. Stat. 1919*, chap. 24, § 62), which are as follows:

"Forty-second. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

"Sixty-sixth. To regulate the police of the city or village and pass and enforce all necessary police ordinances."

Under these clauses the city has the right to regulate persons engaged in the business mentioned in the ordinance; that is, moving or hauling for hire. The reasonableness of an ordinance passed by a municipal corporation in the exercise of a power given by the legislature expressly to pass the particular ordinance is not a subject for judicial inquiry, but when the power to legislate on a particular subject is conferred and the particular manner of its exercise is not prescribed, then the question whether

Courts—power to
pass on reason-
ableness of
ordinance.

an ordinance passed pursuant to the power is a reasonable exercise of

—when courts
may inquire
into reasonableness of
ordinance.

it by the municipal corporation is a question of law for the determination of the court. While in the latter case an ordinance which is clearly unreasonable, unjust, and oppressive will be held void, the presumption is in favor of the validity of an ordinance passed in pursuance of statutory authority, and the

Evidence—
presumption of
validity of
ordinance.

burden is on the person questioning it to show clearly that it is unreasonable. *Lake View v. Tate*, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791; *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *People ex rel. Keller v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

The ordinance is clearly not a reasonable ordinance regulating the

Municipal
corporation—
reasonableness
of ordinance—
record of
moving.

business. The information required to be furnished has no relation to any purpose of regulating the business of moving.

The language of clause 42 indicates the purpose of the legislature, in giving the power of regulation to a city council, to be the fixing of compensation and to regulate the business so as to prevent extortion, imposition, and wrong to persons compelled to employ carriers of the classes mentioned in the statute, in having their property or persons carried from one part of the city to another. The information here required would be of no assistance to the city in accomplishing this purpose, and therefore the ordinance requiring it is unreasonable if the

—extent of
legislative
authority.

ordinance is to be referred only to the exercise of the power conferred by clause 42.

It is contended, however, that the power may be referred to clause 66, and the ordinance held valid as an exercise of the police power, and it is claimed that the information obtained is made use of by the police for the purpose of looking up persons wanted for crime, or under suspicion, or missing, and is of material assistance in the suppression of crime. It is also claimed that the information is important to the department of health in tracing and locating cases of contagious disease in the city. The ordinance is not limited to these purposes, even if possibly it may be incidentally of some value for such purposes, but provides for the sale of the infor-

20 A.L.R.—14.

mation to any person inquiring as to any particular change or removal. This provision, of course, has no reference to the suppression of crime or the discovery of contagious disease, but authorizes giving the information for any purpose, public or private, to any person who may be willing to pay for it from any motive, friendly or unfriendly, malicious or merely curious. The ordinance requires the carrier to state the character of the articles removed, and § 3 requires the person for whom the moving is done to give the carrier all the information necessary to enable him to make the report, and imposes a penalty for refusal to do so upon request. The ordinance applies to every person who removes from any house, flat, apartment, or room in the city of Chicago to any other place in the city, and has his personal property removed. His personal property may be contained in one or more trunks or boxes, but, upon the request of the person moving the property, the owner is required by this ordinance to furnish for the use of the police department of the city of Chicago, or any other person who may see fit to inquire and is willing to pay a small fee for the information, a statement of the character of the property which he is having moved. The effect would be that every person changing his place of abode in the city of Chicago would be obliged to report for the benefit, not only of the police, but of every inquirer, the place from which he moved and the place to which he moved and the character of the property which he took with him. There are some businesses in which police regulation is peculiarly needed, such as those of pawnbrokers and the keepers of junk shops, because thieves frequently attempt to dispose of stolen goods at the places where such businesses are carried on, and the keepers not infrequently become fences for such goods, and therefore provisions for the strict regulation and supervision by the police of those engaged in those businesses and of

their dealings have been sustained; but the same reason does not apply to the business of moving or to people generally who have their personal property moved.

The appellant cites *Lawson v. Judge of Recorder's Court*, 175 Mich. 375, 45 L.R.A.(N.S.) 1152, 141 N. W. 623, in support of the validity of the ordinance. The ordinance in that case was limited to public moving van drivers, and required a report to the police commissioner, only, of the place from and to which household furniture was moved, and the name of the person for whom moved. It required no information from the owner of the property or the person from whom it was moved, and imposed no penalty or requirement of any kind on them. Even if we were disposed to agree with that case, it affords no support for the broad and sweeping terms of the ordinance here in question. An ordinance more nearly resembling

that in question here was sustained by the supreme court of Missouri in *Wagner v. St. Louis*, 284 Mo. 410, 12 A.L.R. 495, 224 S. W. 413, but we do not agree with that case. It would not be a reasonable exercise of the police power for the city to require any person occupying temporarily or for an indefinite time a home or room in the city to procure a permit from the chief of police before he could remove to another house or room and have his baggage or property moved. Neither is it reasonable to require him to report such removal to the police department.

Without regard to any constitutional question, the ordinance is an unreasonable, inquisitorial interference with the liberty of individuals to move from place to place and have their property moved without interference, and is void.

—police power—
requiring record
of moving.

The judgment will be affirmed.

ANNOTATION.

Validity of statute or ordinance in relation to moving vans and moving operations.

Earlier cases will be found in the annotation in 12 A.L.R. 499.

Aside from the reported case (*CHICAGO v. HEBARD EXP. & VAN Co.* ante, 206), no additional cases have been found, since the earlier note, that have considered the question.

CHICAGO v. HEBARD EXP. & VAN Co., it will be observed, while recognizing generally the right of the municipality to regulate persons engaged in moving operations, holds that the ordinance in question was not a reasonable ordinance, in that the information re-

quired to be furnished has no relation to any purpose of regulating the business of moving, criticizing *Wagoner v. St. Louis*, to which the earlier annotation is attached, which upheld an ordinance somewhat similar to the one under consideration in the reported case.

It will be further observed that it is held in the reported case that the ordinance under consideration does not violate the commerce clause of the Federal Constitution. J. H. B.

GIBSON LAND AUCTION COMPANY, Appt.,

v.

W. T. BRITTIAN.

North Carolina Supreme Court—December 21, 1921.

(182 N. C. 676, 110 S. E. 82.)

Auction — right to recover commission from one who refuses to comply with bid.

An auctioneer cannot recover damages for loss of commissions from one who, after the property has been knocked down to him, refuses to comply with his bid because of a misunderstanding and is released by the owner.

[See note on this question beginning on page 214.]

APPEAL by plaintiff from a judgment of the Superior Court for McDowell County (Shaw, J.) sustaining a motion for nonsuit of an action brought to recover damages for loss of commissions. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pless, Winborne, & Pless, for appellant:

A broker can hold a third person with whom he has no contract for commissions liable for his commissions upon the failure of said third person to complete the sale as previously agreed to.

Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628; Cavender v. Waddingham, 2 Mo. App. 551; 4 R. C. L. 334; Eells Bros. v. Parson, 11 Ann. Cas. 475, and note, 132 Iowa, 543, 109 N. W. 1098; Livermore v. Crane, 26 Wash. 529, 57 L.R.A. 401, 67 Pac. 221; Lockwood v. Halsey, 41 Kan. 166, 21 Pac. 98; Seymour v. St. Luke's Hospital, 23 App. Div. 119, 50 N. Y. Supp. 989; Knapp v. Wallace, 41 N. Y. 479; Kalley v. Baker, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091; Eichberg v. Ware, 92 Ga. 508, 17 S. E. 770.

Messrs. Avery & Ervin for appellee.

Stacy, J., delivered the opinion of the court:

The following statement of the case will suffice for our present decision:

Plaintiffs auctioneers, by agreement with the owner of the property, were to receive, as their compensation for conducting the sale, a given per cent, of the selling price of the lands. The defendant was present and became the last and highest bidder of the lots in question,

and signed memoranda containing the following stipulation: "This is to certify that I have this day bought of R. Williams through Gibson Land Auction Company the following real estate as shown on the map of the R. Williams property, and on the terms and conditions announced at sale of said property."

The defendant refused to accept the deeds, which were tendered for the lots bid off by him, and declined to pay the purchase price, as per his agreement, because of some misunderstanding on his part; and in consequence of which the owner of the land afterwards released the defendant from his bid, and sold the lots to another or other parties.

The written contract between plaintiffs and the owner of the land contained a stipulation to the effect that plaintiffs should receive "a commission of 10 per cent for any sale or sales of any part or all of the property that may be sold by the parties of the second part, and confirmed by the parties of the first part."

The plaintiffs never had any contract with the defendant for their commissions, and the sale to him was not carried out. It is alleged, however, that by reason of the de-

defendant's failure to take the property, according to his bid at the auction sale, the plaintiffs have suffered a loss to the extent of the value of their commissions, and that the defendant should be held liable in damages therefor.

Upon the foregoing facts being made to appear in evidence, his Honor granted the defendant's motion for judgment as of nonsuit, and the appeal presents for review the correctness of this ruling.

It will be observed that the plaintiffs had no contract with the defendant, but their commissions were to be paid by the owner of the land. The case, therefore, in principle, is not unlike *Faison v. Marshburn*, 108 S. E. 510, at the present term, where a recovery was denied to the broker, who had sued

Auction—right to recover commission from one who refuses to comply with bid.

the prospective purchaser when he alone had a contract for his commissions with the owner. Here, as was the case there, an attempt is being made to hold the defendant responsible for violating his contract, not with the plaintiffs, but with a third party, who is a stranger to the suit. It is conceded that the plaintiffs have no interest in the land, and that they cannot sue upon the contract of purchase. They are unable to perform the contract as vendors, or to enforce its performance; hence they are not in position to maintain an action for its breach. The only contractual obligations which may be insisted on by reason of defendant's bid, so far as he is concerned, are those existing between the defendant and the owner of the land. The plaintiffs are neither parties nor privies to the contract of sale, and the defendant is neither party nor privy to plaintiffs' contract for commissions. So whatever rights, if any, the plaintiffs may have, as against the defendant, apparently are not contractual in their nature. On the other hand, there is no contention that the defendant has breached any extracontractual legal duty for which the plaintiffs may

maintain an action in tort. In all events, if the plaintiffs be entitled to recover, they must recover in an action growing out of contract; and none has been shown with the defendant.

In all the cases called to our attention by the plaintiffs, seemingly in support of their position, there was a contract direct with the defendant, or a request by him for the broker's services; and, in each case, recovery was allowed on this contract, or upon an implied contract, for services rendered to the defendant, and not upon the contract of purchase, though the loss of commissions may have been fixed as the proper measure of damages. 4 R. C. L. 333.

In *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628, a case chiefly relied on by plaintiffs, the above distinction is clearly drawn, the court saying: "There were plainly two contracts made by plaintiffs,—the one with defendant, the effect of which was that plaintiffs would provide a purchaser of the land at the agreed price, commissions to be paid by the purchaser; the other with the purchaser, that he would pay the plaintiffs' commissions upon the conclusion of the sale. If through the negotiation of plaintiffs the parties had been brought together and had concluded the trade between them, the plaintiffs would have been entitled to their commissions from Harding, the purchaser, according to the terms of their contract. But this action is for damages. The gravamen of the charge is that defendant committed the wrong and injury upon plaintiffs by a refusal, without cause, to comply with his contract with plaintiffs to sell the land to plaintiffs' principal, with the distinct understanding that plaintiffs were to be compensated by the purchaser. The natural effect and consequence of this refusal by defendant was the loss by plaintiffs of their commissions."

To like effect is the decision of the St. Louis court of appeals in the case of *Cavender v. Waddingham*, 2 Mo.

App. 551. There it was understood that the plaintiffs were to receive, as commissions, a certain percentage of the purchase price of the land, but it was stipulated that this should be paid by the vendors, and the plaintiffs would divide the same, when realized, with the defendant, allowing him one fifth part thereof. Plaintiffs consummated the agreement for the purchase in exact accordance with defendant's directions. The defendant then refused to accept the deed. Upon these facts, the court observed:

"The first question to which our attention is directed is whether, upon the facts stated, the plaintiffs had any right of action against the defendant? It is argued that they had none, because it was expressly stipulated that their commissions were to be paid by Messrs. Scudder, and not, in any event, by the defendant; that this is an attempt to hold a party responsible for violating his contract, not with the party suing, but with a third party—the defendant here having violated none except that made through the plaintiffs, Messrs. Scudder. But this argument ignores the prominent fact that there were two distinct contracts,—one was made by defendant, through his agents, in the purchase of the property; the other was made with the agents, in securing their services to bring about the purchase. The latter is the subject of the present suit.

"When the plaintiffs were employed by the defendant to effect a purchase for his benefit, they undertook to do so for a consideration, which was clearly understood. This was that, in the event of success, they were to be compensated, according to the usages of their business, by a percentage upon the amount of purchase money. The defendant said to them, in effect:

'You procure the consent of the property owners to sell to me upon the terms indicated. I undertake, on my part, to consummate the trade by paying the purchase money, so that you will realize your commissions.' The defendant's undertaking to take and pay for the property so that plaintiffs would get their compensation, was as emphatic and as binding as if he had agreed to pay the commissions himself."

Without prolonging this discussion, it may be stated that we have examined the following cases, cited by plaintiffs, and find them to be in support of, rather than in conflict with, what is said above: *Livermore v. Crane*, 26 Wash. 529, 67 Pac. 221, and cases cited in briefs as reported in 57 L.R.A. 401; *Eells Bros. v. Parsons*, 132 Iowa, 543, 109 N. W. 1098, and cases cited in note as reported in 11 Ann. Cas. 475; *Ackerman v. Bryan*, 33 Neb. 515, 50 N. W. 435; 4 R. C. L. 334, and cases there collected. See also *Tinsley v. Dowell*, 87 Tex. 23, 26 S. W. 946, and *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353.

But for a further reason the plaintiffs are not entitled to maintain this suit. The owner of the land, plaintiffs' principal, has voluntarily released the defendant from his contract of purchase; hence whatever obligations may have been incurred by the defendant's bid are now at an end. They have been surrendered and discharged with the consent of the owner, who alone was entitled to insist upon performance. There is no contract, now existent, of any kind, relating to this matter, to which the defendant is a party. Therefore upon the record we think the judgment of nonsuit must be upheld.

Affirmed.

ANNOTATION.

Right of broker or auctioneer employed by owner as against prospective purchaser or bidder who refuses to complete purchase.

There is but little direct authority on the right of a broker or auctioneer to recover from a prospective purchaser who refuses to complete his purchase. In nearly all cases involving the right of a broker or auctioneer employed by the owner of land to recover compensation or commissions where the sale has not been completed, the suit has been brought against the owner on the broker's contract of employment, and not against the prospective purchaser. In the comparatively few cases considering the question the rule appears to be that, as there is no privity of contract between the parties, no right to recover against the purchaser exists in favor of the broker or auctioneer. *Evrit v. Bancroft* (1871) 22 Ohio St. 172; *Tinsley v. Dowell* (1894) 87 Tex. 23, 26 S. W. 946; *Tinsley v. Anderson* (1895) — Tex. Civ. App. —, 33 S. W. 266; *Le Master v. Dalhart Real Estate Agency* (1909) 56 Tex. Civ. App. 302, 121 S. W. 185. And see the reported case (*GIBSON LAND AUCTION CO. v. BRITIAN*, ante, 211). See also *Jenkins v. Hollingsworth* (1899) 83 Ill. App. 139. Compare *Moscovitch v. Desambor* (1914) 21 Rev. de Jur. (Can.) 81, 18 D. L. R. 230.

Thus, in *Le Master v. Dalhart Real Estate Agency* (1909) 56 Tex. Civ. App. 302, 121 S. W. 185, supra, the court said: "A mere selling agent or broker has no such interest in a contract for the purchase of land secured by him as authorizes a recovery of damages in the way of lost commissions from the proposed purchaser who has refused to comply with the contract."

In *Evrit v. Bahcroft* (Ohio) supra, it appeared that a real estate agent's agreement with his principal provided that he should receive for his services in selling the principal's farm all above a specified price. A contract of sale was entered into between the agent in his own name and prospective purchasers, who subsequently refused

to complete the sale. In denying the right of the agent to recover as damages from the purchasers the amount of the difference between the sale price and the amount the principal had agreed with the agent to accept, the court said: "The claim which the plaintiff sought to enforce against the defendants consisted of the compensation to which he would have been entitled, under his agreement with his principal, if the agreement with the defendants for the sale of the farm had been performed. As his loss of this compensation resulted from the default, as he alleges, of the defendants, he claims the right to make them respond in damages to the extent that may be necessary to repair it. We think he has no such right. The defendants were not parties to the agreement providing for this compensation. Their liability is to be ascertained from their own agreement, and the rule of damages is the same whether the suit is brought in the name of the principal, or in the name of the agent as one of the contracting parties."

Similarly, in *Tinsley v. Dowell* (1894) 87 Tex. 23, 26 S. W. 946, it was shown that the owners of lands placed the same in the hands of a real estate broker, with the understanding that the latter was to receive for his services in making a sale, certain commissions and all the lands brought above a stipulated price. A contract was entered into by the agent and an intending purchaser, who subsequently failed to carry out his part of the contract. The agent brought suit to recover from him the amount he would have received above the stipulated price had the sale been consummated. The court held that no right of recovery existed against the purchaser, saying: "It would be remarkable as a legal consequence that a man who was not bound to convey land, and could not be held liable for a failure to comply with the contract.

might maintain a suit against the other party for a failure to complete the purchase. In this case Dowell could not have been made liable for the damages if the land had appreciated in value and Rogers had refused to convey in accordance with the contract. The subject-matter of the contract made between Tinsley and Dowell was the land which Rogers and wife authorized Dowell to sell. The question is, Did Dowell have any such interest in the land as would authorize him to maintain this action? If Dowell had any such interest, he must have acquired it by his contract with Rogers; and that, being an authority to sell land, did not by its terms confer any title upon Dowell; the power to convey was reserved by Rogers and wife. A vendor with no power to make a deed would be an anomaly in the law. It is clear that Dowell acquired no title by virtue of that contract. It must be borne in mind that the interest which the agent has must not be simply in the contract, or in the proceeds to be derived from the execution of the power; it must be an interest in the land itself. . . . A power to sell land or other property . . . and to receive a part of the proceeds as compensation for services to be rendered in the execution of the power does not carry an interest in the property . . . to the agent."

The foregoing decision was followed in *Tinsley v. Anderson* (1895) — *Tex. Civ. App.* —, 33 S. W. 266, wherein the court said: "This is a plain declaration on a contract to purchase land, and the liability of the appellant is based on his failure to carry out the terms of the contract. Appellee did not own the land, but was acting for the owners in the sale of it. It is neither alleged nor proved that appellee had been made and constituted the agent of the appellant to buy the land, and that he was to receive, as remuneration for his services, the sum of \$35 per acre, but the written contract shows that it was a mere naked offer to buy land at a certain price. The contract must be looked to as the culmination of the wishes of the parties, and it certainly does not indicate that

the relation of principal and agent existed between the parties. We can see no material difference between this case and that of *Tinsley v. Dowell* (1892) — *Tex. Civ. App.* —, 24 S. W. 928, reversed in (1894) 87 *Tex.* 23, 26 S. W. 946. . . . In the case before us, Dignowity and others owned certain land in the city of San Antonio, which Anderson was authorized to sell, and his compensation was to be all that he obtained in excess of \$240 per acre. Anderson made a contract of sale with Tinsley at a price exceeding that fixed by the owners in the sum of \$875. Tinsley failed to comply with his contract, although the owners of the land executed a deed to the land to him. Anderson sued for the excess over the price fixed by the owners of the land. In both cases there was nothing to indicate that the land at time of default was not of value equal to the value agreed to be paid by Tinsley. The Dowell Case is decisive of this, and to it we refer for the law applicable to the facts before us."

In the reported case (*GIBSON LAND AUCTION CO. v. BRITTIAN*, ante, 211), it is held that as there is no privity of contract between auctioneers employed by the owner of land to sell the same, and a purchaser at auction who repudiates his contract to purchase by refusing to accept deeds and by declining to pay for the land, the auctioneer cannot maintain an action for commissions against the purchaser.

The case of *Moscovitch v. Desambor* (1914) 21 *Rev. de Jur. (Can.)* 81, 18 D. L. R. 230, appears to be in direct conflict with the rule laid down in the foregoing cases. In that case it was held that an agent who, according to a landowner's promises, was to receive a commission for selling a parcel of land, was entitled to recover damages against a prospective purchaser refusing to complete his purchase, the terms of which had been accepted by the owner; although the agent might subsequently have earned the promised commission by securing another purchaser for the same parcel of land.

While not directly in point, the fol-

lowing analogous decisions are included in the note as being of possible value to the reader:

Faison v. Marshburn (1921) 182 N. C. 133, 108 S. E. 510, was a joint action by the owner of land and a real estate broker employed to sell the same against a prospective purchaser to recover the amount of the purchase price, out of which were to be paid the broker's commissions. Although the complaint alleged that the purchaser had failed and refused to carry out his agreement, it appeared that the owner had not insisted on or demanded performance. The court said: "We fully concur with his Honor below that, upon the evidence, J. J. Matthis is not entitled to recover of the defendant Marshburn, and further, that the complaint fails to allege facts sufficient to constitute a valid cause of action. It will be observed that J. F. Faison, the owner of the land, is not insisting or demanding that the defendant comply with his bid. No deed has been tendered, and he expressly states that he is not asking for any relief in this action. The broker is seeking to recover his commissions out of the prospective purchaser without any sale having been consummated. His agreement was with Faison, the owner of the land, not with the defendant."

In *Hevia v. Wheelock* (1914) 162 App. Div. 759, 148 N. Y. Supp. 165, the complaint alleged that the broker had been employed by a property owner to secure a loan on certain property to be conveyed to her according to a contract for an exchange of lands, and that by reason of the refusal of the defendant, who was the other party to the contract of exchange, to convey, he was deprived of the opportunity of earning his commission. The court held that the complaint did not state a good cause of action, as the defend-

ant was not a party to the contract between the broker and property owner.

It appeared in *Eells Bros. v. Parsons* (1906) 132 Iowa, 543, 109 N. W. 1098, 11 Ann. Cas. 475, that a real estate broker entered into an agreement with a prospective purchaser of land under the terms of which the latter agreed to buy, if suited, land which the broker was to have him look at. The owners were to pay the broker's commissions in case of a sale. The land proving satisfactory, a contract of purchase was entered into between the owner and the purchaser, which the latter subsequently refused to carry out. On the broker's suit for damages for breach of the purchaser's contract, the court upheld the right to a recovery, saying: "The action is for breach of defendant's contract, and not for the commissions from the landowner. To the latter, plaintiff was not entitled, for the reason that through defendant's fault, as it alleged, it had not earned them. It is for damages for defendant's breach of contract to do as he agreed in purchasing and paying for the land which so well suited him that he entered into a contract for its purchase, which it is charged he, without cause, refused to perform. If plaintiff were attempting to recover a commission for the sale of the land he should be defeated, for defendant never promised him this. What he (defendant) did agree to do was to purchase the land which suited him, thus enabling plaintiff to earn his commission. The parties understood when they made the contract what plaintiff's damages would be in the event defendant failed to perform it. In other words, loss of plaintiff's commission was within the contemplation of the parties in the event of defendant's failure to perform." L. F. C.

ASHTABULA GAS COMPANY et al., Pffs. in Err.,
v.

PUBLIC UTILITIES COMMISSION et al.

Ohio Supreme Court — March 2, 1920.

(102 Ohio St. 678, 133 N. E. 915.)

Public service corporation — rates — service charge.

Where a minimum charge for service to be rendered is made or prohibited by the ordinance under which a public utility is operated, the utility is not authorized to make a "readiness-to-serve" charge to be paid in addition to the just and reasonable rate fixed for the rendering of the service.

[See note on this question beginning on page 225.]

Headnote by the COURT.

ERROR to the Public Utilities Commission to review its order fixing the terms and rates which the gas company should be permitted to make for the service of gas to the city in a proceeding for modification of such order. *Order set aside and cause remanded to commission with instructions.*

Statement by Johnson, J.:

This is a proceeding which seeks the modification of an order of the Public Utilities Commission in an appeal proceeding before it, in which the plaintiff in error the Ashtabula Gas Company and others appealed from an ordinance of the city of Ashtabula passed September 14, 1914. The city intervenes by cross petition in error, also asking a modification of the order.

The order complained of fixed the terms and rates which the gas company should be permitted to make for the service of gas to the city.

Prior to 1901 the gas company furnished to the city artificial gas. During that year natural gas was discovered in the vicinity and the company secured a franchise from the city to lay pipes and furnish both artificial and natural gas for a period of twenty-five years.

In November, 1901, the Ashtabula Gas Company entered into an agreement with the Northeastern Oil & Gas Company, by which the latter agreed to furnish natural gas to the Ashtabula Company "as long as it has gas or can get it at a reasonable expense, the Ashtabula Company to pay the Northeastern Com-

pany two thirds of its gross charges for sale of gas."

In November, 1905, the Northeastern Company entered into a contract with the Clarion Gas Company. On July 5, 1904, the council of Ashtabula, supplementing the former franchise ordinance, passed a price ordinance granting to the Ashtabula Company the right to serve the citizens of Ashtabula, under the previous ordinance, at the price of 33 cents per 1,000 cubic feet, with a discount of 3 cents per 1,000 cubic feet if paid on or before the 10th of each month. This ordinance expired by its terms in July, 1914.

On the 19th of October, 1914, the council passed a renewal ordinance, fixing the price which the company should charge for gas for the ensuing ten years at the same rate as for the previous ten years. The ordinance provided that the company might collect as a "readiness-to-serve charge" for each meter each month such sum as, added to the net gas bill for such month, would make a total of 25 cents, but, if the net gas bill for gas registered by any meter amounted in any month to 25 cents,

no "readiness-to-serve charge" should be charged for such meter during said month. The gas company notified the city that it would not accept this ordinance, and filed its schedule with the Utilities Commission, fixing the price for which it would furnish gas at 39 cents, less a discount of 3 cents per thousand if paid before the 10th of the month. The company appealed from the ordinance of the commission, and gave bond to authorize it to charge the rate fixed by the schedule pending the determination of the appeal. The hearings were extended over a considerable period, and a large amount of testimony was taken on the question of the value of the company's property used and useful for the service. After consideration of this testimony and argument thereon, the commission found that the rates fixed by the ordinance were unjust and unreasonable, and ought not to be ratified, and ordered that the rates and charges should be fixed at not exceeding 36 cents per 1,000 feet, with a discount of 2 cents per thousand if paid on or before the 10th of the month next following, and in addition thereto a "readiness-to-serve charge" to the distributing company of 20 cents per meter per month. As stated, this proceeding is brought to reverse or modify that order.

Messrs. Freeman T. Eagleson and L. B. Denning for plaintiffs in error.

Messrs. John G. Price, Attorney General, and Edward E. Corn, for defendant in error Commission:

The "readiness-to-serve" charge is now, without exception, recognized, and is the fairest and most equitable way of fixing rates.

State v. Sloan, 139 La. 882, P.U.R. 1916E, 1014, 72 So. 428; Ben Avon v. Ohio Valley Water Co. (Pa.) P.U.R. 1917C, 421; Greensburg v. West Moreland Water Co. (Pa.) P.U.R.1918E, 713; Re Hackensack Water Co. (N. J.) P.U.R.1917E, 179; Re Ocean County Gas Co. (N. J.) P.U.R.1919B, 874; Re New Jersey Gas Co. (N. J.) P.U.R. 1918B, 438; Re New York & Q. E. L. & P. Co. (N. Y. 1st Dist.) P.U.R.1917D, 773; Wisconsin Railroad Commission, 2 Wis. R. C. 24; Wiseman v. Rupert

Electric Co. (Idaho) P.U.R.1919A, 552; Re Manitowoc Gas Co. (Wis.) P.U.R.1918A, 710; San Francisco v. Spring Valley Water Co. (Cal.) P.U.R. 1919A, 427; Landon v. Lawrence (Kan.) P.U.R.1915E, 798; Hartford v. Hartford City Gaslight Co. (Conn.) P.U.R.1920F, 840; Re City Light & Traction Co. (Mo.) P.U.R.1918F, 949; Pekin v. Pekin Waterworks Co. (Ill.) P.U.R.1917C, 856; Re Indiana Power & Water Co. (Ind.) P.U.R.1918A, 720. Messrs. F. R. Hogue and Harry E. Hammar for the city of Ashtabula.

Johnson, J., filed the following opinion:

The record contains considerable testimony which was offered touching the contentions of the different parties. The results of extensive examinations by experts, officers of the gas company, and other witnesses were produced. We have also had the benefit of the written opinion of the commission, from which it appears that that body, in the consideration of the case, proceeded in compliance with the requirements of the statute which defines its duties. In the effort to arrive at a just and reasonable rate as required by the statute, it ascertained values, costs, expenses, depreciation, and the other elements which are essential to approximately a correct result.

Before this court will interfere with an order of the Public Utilities Commission it must appear from a consideration of the record that its action was unlawful or unreasonable. From a careful examination of the evidence and briefs of counsel, we are not able to say that the order of the commission, fixing the rate which the company was entitled to charge for gas at 36 cents per 1,000 cubic feet, with a discount of 2 cents per thousand if paid on or before the 10th day of the month, was unreasonable or unlawful. We think that portion of its order was sustained by the evidence. The reasons given by the commission in its opinion are convincing, and are sufficient on that part of its order. But the order contains the further provision that there shall be paid,

"in addition thereto, a readiness-to-serve charge to the distributing company of 20 cents per meter per month."

The city contends that the inclusion of the charge referred to is unreasonable and unlawful. It must be conceded that there has been considerable confusion and inaptness in the use of the terms "minimum charge" and "readiness to serve," in connection with public utilities rate fixing. The terminology involved in the entire subject is as yet too indefinite and extensive. But there is not much dispute concerning the meaning of the term "minimum charge," as applied to that service. In substance it means the minimum monthly bill which will be rendered regardless of whether or not the consumer has used sufficient of the commodity to make up that sum at the agreed rate. If the consumer uses as much of the gas as will make up this minimum charge, or more, the minimum charge is absorbed in that sum. It means simply that the consumer binds himself to pay for "at least" so much of the commodity during each month. It is manifest that the main purpose of the minimum charge is to make sure that each consumer shall bear a proper proportion of the expense incurred in the furnishing of the commodity or service. The consumer, having become a customer of the company, simply stands in the attitude of having agreed that he will pay for "at least" so much per month whether he has used that much or not. It is easy to understand that many customers do not at times use sufficient service to incur a bill large enough to meet their proper part of the fixed expenses of the company in furnishing the service. It seems clear, therefore, that a minimum charge is not only necessary to compensate the company, but that it is equitable and just as between the company and all of the consumers taken collectively. As to the "readiness-to-serve charge," while there is some difference in the statements of different experts and

other authorities and reported cases, there is general agreement that the "readiness-to-serve charge" has been understood to cover the cost incurred by the utility in holding itself in constant readiness to render the service, without reference to the delivery of any of the commodity or the rendering of any of the service, it being understood that for the actual commodity or service rendered or used payment shall be made by additional rate schedule.

Now, as stated, the order of the commission in this case, after fixing the rate of 36 cents per thousand, is that there shall be "in addition thereto a readiness-to-serve charge to the distributing company of 20 cents per meter per month." It will be observed that there is in this clause the simple provision that there shall be paid to the company 20 cents per meter per month in addition to the amount due for gas used. There is nothing in addition to this to indicate what is meant by the term "readiness-to-serve charge."

Section 9329, General Code, contains the provision that no gas company shall charge rent for meters.

Section 3982, General Code, provides that the council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by the companies, and in such case meters shall be furnished and kept in repair by the company, and no separate charge shall be made, either directly or indirectly, for the use or repair of them.

In the ordinance appealed from there was a provision that the company might collect as a "readiness-to-serve charge" for each meter, each month, such sum as, added to the net gas bill for such month, will make a total of 25 cents, but if the net gas bill registered by the meter for any one month amounts to 25 cents or more no readiness-to-serve charge shall be charged during said month.

It will be observed that this is simply and only a minimum charge; that is, that each customer agrees to pay at least 25 cents a month. If he uses that or more there is no ready-to-serve charge, but it is absorbed in the bill. But in the order of the commission it is provided that, in addition to the rate fixed, there shall be a "readiness-to-serve charge" of 20 cents per meter per month, which is, of course, a very different thing. Whatever the bill for any month may be the charge is added.

By the provisions of §§ 614-44, General Code, the city Ashtabula was empowered to fix the rate and do the things provided for in §§ 3982 and 3983, General Code. These sections provide that the council may from time to time regulate the price of gas, etc., and also contain the provision as to regulating the charge for meters which is above referred to. The ordinance did not regulate or fix the price which the company could charge for the rent of meters. In legal effect it simply provided for a rate to be charged for gas, and required the use of at least so much at that rate. That ordinance was the thing appealed from.

Section 614-46 provides that if the commission shall be of the opinion that the rate, etc., so fixed by ordinance, is or will be unjust or unreasonable or insufficient to yield reasonable compensation, it shall, under the conditions set forth in detail in the section, proceed to fix and determine the just and reasonable rate, etc., to be charged during the time fixed by the ordinance. In this case the order of the commission not only found that the rate fixed by the ordinance was unjust and unreasonable, and fixed a rate which it found to be just and reasonable, but made the additional charge described.

It is contended that by the provisions of § 614-17 authority was given to make the addition of the "readiness-to-serve charge" referred to. That section contains the provision that nothing in the act shall be

taken to prohibit a public utility from entering into any reasonable arrangement with its customers, consumers, or employees for the division or distribution of its surplus profits, or providing for a sliding scale of charges, or providing for a minimum charge for service to be rendered, unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which the utility is operated, the classification of service based upon the quantity used, the time when used, the purpose for which used, duration of use, and any other consideration, or providing any other financial device that may be practicable or advantageous to the parties interested.

The section provides that such arrangement, etc., shall be first filed with the commission and approved by it before it is effective. It will be observed that by this section there is an express provision allowing a minimum charge, unless it is made or prohibited by the ordinance under which the utility is operated. There is no mention of a provision for a "readiness-to-serve charge," and the presumption is that none was intended to be included or implied, unless the language "providing any other financial device" permits a readiness-to-serve charge. This language, "any other financial device that may be practicable or advantageous to the parties interested," is extremely vague and indefinite, and we do not feel warranted to hold that the legislature intended by such language to grant the privilege to make material additions to the just and reasonable rate which the public is required to pay for the service of the public utility, which just and reasonable rate is fixed (when appeal is taken from ordinances fixing rates) by the commission in the specific manner laid down in § 614-46, General Code. As we have seen, the minimum charge, which is provided for with due regard to the circumstances, is just and reasonable.

Moreover, as pointed out, § 614-17, General Code, above referred to, contains an express provision allowing a minimum charge "unless made or prohibited by the ordinance." This ordinance contains what is in effect a minimum charge, though it is denominated a readiness-to-serve charge in the ordinance. It is "made by the ordinance," and cannot be made by the company in its own schedule. This conclusion follows from the plain implication of the statute.

The commission found that the rates fixed by the ordinance were unjust and unreasonable. As pointed out, it ordered that the rate should be fixed at not exceeding 36 cents per 1,000 feet, and in addition thereto a readiness-to-serve charge of 20 cents per meter per month. The effect of this was to set aside the minimum charge fixed by the ordinance and to insert in its place the readiness-to-serve charge referred to.

We think it clear that the portion of the commission's order touching the readiness-to-serve charge and setting aside the minimum charge was not, under the facts and circumstances of this case, authorized by our statutes. And it is well settled that the commission has only such authority as is conferred by the statutes which created it and which define its powers and duties.

The order of the Commission will be modified by striking out the portion thereof which refers to the readiness-to-serve charge and inserting therein that portion of the ordinance in question which follows the clause fixing the rate, and, as

thus modified, the order of the Commission will be affirmed.

Order modified and affirmed as modified.

Nichols, Ch. J., and Wanamaker and Robinson, JJ., concur.

Matthias, J., concurs in the judgment.

Merrell, J., not participating.

A rehearing having been granted the following Per Curiam response was handed down June 7, 1921:

The court adheres to the views stated in the opinion filed herein after the former hearing of the case; but, inasmuch as the commission now asserts that the language of its former order inadvertently provided for a charge to be paid to the company in addition to the just and reasonable rate which the commission fixed for the service, and that the language of the order of the commission conveys a meaning not intended by the commission, it is ordered and adjudged that the order heretofore made by this court herein be set aside, and that this cause be remanded to the Public Utilities Commission, with instructions to fix a just and reasonable rate in accordance with the statute and the opinion of this court.

Johnson, Hough, Robinson, and Matthias, JJ., concur.

Marshall, Ch. J., took no part in the consideration or decision of the case.

NOTE.

The validity of service charge for gas meters is the subject of the annotation following RIVELLI v. PROVIDENCE GAS CO. post, 225.

Public service corporation—
rates—service charge.

FRANK J. RIVELLI et al., Appts.,
v.
PROVIDENCE GAS COMPANY.

CITY COUNCIL OF CRANSTON, Appt.,
v.
SAME.

Rhode Island Supreme Court — December 9, 1921.

(— R. I. —, 115 Atl. 461.)

Gas — validity of service charge.

The imposition of a service charge upon each consumer by a gas company is not unreasonable or prohibited by a statute imposing a penalty on a gas company which shall collect a larger sum for gas than appears to be due by inspection of the meter put in to register the consumption.

[See note on this question beginning on page 225.]

SEPARATE APPEALS by complainants from an order and decree of the Public Utilities Commission dismissing their complaints against certain schedules filed by the respondent gas company with the commission. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Frank J. Rivelli, in propria persona:

The service charge, so called, is unreasonable, unjust, and unlawful.

Montgomery Light & Water Power Co. v. Watts, 165 Ala. 370, 26 L.R.A. (N.S.) 1109, 138 Am. St. Rep. 71, 51 So. 726; Louisville Gas Co. v. Dulaney, 100 Ky. 405, 36 L.R.A. 125, 38 S. W. 703; Buffalo v. Buffalo Gas Co. 81 App. Div. 505, 80 N. Y. Supp. 1093; People ex rel. McAuliffe v. New York City, 129 App. Div. 551, 114 N. Y. Supp. 312; Montgomery v. McDade, 180 Ala. 156, 60 So. 797; Capital Gas & E. Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462; Re Rochester Gas & E. Corp. (N. Y.) P.U.R.1921A, 415; Re Hannes Light & P. Co. (N. D.) P.U.R.1921B, 396; 2 Wyman, Pub. Serv. Corp. § 1251; Re Pacific Power & Light Co. (Idaho) P.U.R.1918D, 665; Re Portland Gaslight Co. (Me.) P.U.R.1921B, 675 (abstract); Re Stadtlander v. New York Edison Co. (N. Y.) P.U.R.1915B, 685; Re Heisen (Ill.) P.U.R.1917B, 644; Re Portland Gaslight Co. (Me.) P.U.R.1919F, 148.

Mr. Frank H. Wildes for appellant city council.

Messrs. Harold W. Thatcher, Frank H. Swan, and Swan, Keeney, & Smith, for appellee:

The establishment of a so-called

service charge is not unreasonable, unlawful, or discriminatory.

Brown's Directory of Am. Gas. Co. 1921 ed. p. 1015; Re Consolidated Gas E. L. & P. Co. (Md.) P.U.R.1921D, 5; Re Grand Haven (Mich.) P.U.R. 1921D, 318; Re New Jersey Gas Co. (N. J.) P.U.R.1918B, 438; Re Rochester Gas & E. Corp. (N. Y. 2d Dist.) P.U.R.1921A, 415; Sellersville v. Highland Gas Co. (Pa.) P.U.R.1920A, 321; Providence v. Providence Gas Co. (R. I.) P.U.R.1921D, 842; Re Utah Gas & Coke Co. (Utah) P.U.R.1919D, 645; Re Middlebourne Gas Co. (W. Va.) P.U.R.1917F, 742 (abstract); State v. Sloan, 139 La. 881, P.U.R.1916E, 1014, 72 So. 428; Re City Light & Traction Co. (Mo.) P.U.R.1918F, 949; Hartford v. Hartford City Gaslight Co. (Conn.) P.U.R.1920F, 840; Kinch v. Concord Light & P. Co. (N. H.) P.U.R.1919B, 884; Re Ashtabula Gas Co. (Ohio) P.U.R.1917D, 801; Re Ocean County Gas Co. (N. J.) P.U.R.1919B, 878; Little Rock R. & Electric Co. v. Newman, 91 Ark. 89, 120 S. W. 824.

Sweeney, J., delivered the opinion of the court:

These are appeals from an order and decree of the public utilities commission dismissing the complaints of the appellants, and are

heard together in this court upon the transcript of the evidence taken before said commission.

The reason for the complaints was the filing, April 14, 1920, by the Providence Gas Company with the commission, of a schedule of rates to take effect May 17, 1920. The schedule of rates thus filed increased the rates for gas, provided for a service charge of 50 cents for each meter each month, and lowered the standard of the gas.

The appellants filed objections to the proposed schedule with the commission, and the city council of Providence also filed its objections to the proposed rates. All of said objections were heard together by said commission in July, 1920, and at the same time the gas company was given an opportunity to introduce testimony to justify the changes made by its proposed schedule. Eight days were occupied in presenting testimony or reading exhibits, and the transcript of the evidence produced in this court is voluminous.

The commission made a careful examination and analysis of the evidence presented to it, and found that the gas company had sustained the burden of proof imposed upon it by showing the necessity for the increased rate; that the service charge was reasonable; that the schedule of rates as filed was just and reasonable; and that the reduction in the standard of gas, under the conditions then confronting the company, was necessary, and denied and dismissed the complaints on the 14th day of May, 1921.

The city council of Providence claimed no appeal from this action, but the city council of Cranston and the complainants Rivelli and others duly claimed appeals therefrom to this court.

The appellants claim in their reasons of appeal that the imposition of the service charge is illegal and unreasonable, that the lowering of the standard of gas is unreasonable, and that the proposed schedule of rates is unjustly discriminatory.

The schedule of rates was filed by

the gas company with the commission as required by § 48, chap. 795, Public Laws 1912, known as the Public Utilities Act, which provides, among other things, that no change shall be made in existing rates, excepting after thirty days' notice to the commission and to the public of the changes proposed to be made in the schedule then in effect, and the time when the change of rates will go into effect. The commission has no authority to fix rates for a public utility excepting when, after a hearing and investigation, it finds that the existing rates are unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of the provisions of said Public Utilities Act, § 21, chap. 795, Public Laws 1912.

The commission found that the service charge made by the company, in the schedule of rates under consideration, was reasonable, and that if such a charge was not made it would be necessary to directly increase the price of gas.

The appellants now claim that the service charge is illegal because it is in violation of § 53, chap. 345, General Laws 1909, which provides, among other things, that every person or corporation who shall wilfully collect a larger sum for gas than appears to be due on inspection of the meter put in to register the same shall be fined not exceeding \$500. This law does not penalize the collection of

a service charge. Gas—validity of service charge.

It only provides a penalty on any person or corporation for wilfully furnishing a meter which does not correctly register the quantity of gas consumed, or who collects a larger sum of money for gas than appears to be due upon an inspection of the meter. It imposes a penalty for using meters incorrectly registering the amount of gas consumed, or for wilfully collecting money for gas not shown by the meter to have been consumed.

The service charge is a uniform charge to all customers which, together with another charge based

upon the amount of gas consumed as shown by the meter, constitutes the entire amount to be paid. The service charge is an equal distribution of those burdens incident to the manufacture and distribution of gas which should be borne by all consumers, irrespective of the quantity used. The consumer of gas pays his equalized cost of the service, and neither the small consumer nor the large one is compelled to carry a load that should be shared by both.

The principle of the service charge has been allowed by many public utilities commissions throughout the United States on the ground that it is equitable and just. In the case of the Rochester Gas & E. Corp. (N. Y. 2d Dist.) P.U.R.1921A, p. 415, at page 420, in allowing a service charge, the commission said: "The corporation provides and installs meters and it bears the expense of the pipe from the main to the property line. Here is an investment upon which it is entitled to a return, and which is constant whether gas is used or not used. Meters must be inspected and kept in repair and so must the service pipes. Meters must be read whether gas is used or not, accounts must be kept with the individual consumer, and bills must be rendered and accounts collected. While the rendition and collection of bills are not regardless of whether any gas is consumed, the expense in no wise relates to the amount of the consumption, and it is therefore a charge which should be distributed among the customers as a total. Meters and services depreciate regardless of the consumption, and the total depreciation depends upon the number of meters and number of services."

It would be possible to increase the rates for furnishing gas used so as to cover the service charge. When the consumer uses such a small quantity of gas that the profit upon it will not defray the costs of serving him with it, it is not unreasonable that he should be required to pay for such service in addition to paying for the gas used by him.

The commission found that the reduction in the standard of gas was necessary under the conditions then confronting the company. The company presented testimony to show that it has ample equipment to produce coal gas and water gas in sufficient quantities to meet the requirements of the people living within the territory served by it. It was also shown that owing to the extraordinary conditions then existing it was impossible for the company to get its necessary supply of gas coal and oil to produce coal gas and water gas at prices sufficiently low to enable to continue to sell gas to its consumers at the proposed rate, without lowering the standard or quality of the gas. The testimony also showed that the lowering of the standard of gas would affect the use of gas for illuminating purposes but slightly, as only 5 per cent of the gas manufactured is used for this purpose, and the objection to the lower standard of gas could be easily overcome by the use of mantles instead of using the open flame burner; and that the lower standard of gas would affect but little its use for heating or industrial purposes.

The claim that the schedule of rates is unjustly discriminatory is based upon the claim that the service charge is illegal and places an unjust burden upon the so-called "small consumer." Inasmuch as we have held that the service charge is legal and applies to all consumers alike, it cannot be held to be unjustly discriminatory.

An analysis of the testimony is stated at length in the opinion of the commission, and it is unnecessary to incorporate it in this opinion.

After a careful consideration of the facts, as shown by the testimony and the law applicable thereto, the court is of the opinion that the claims made by the appellants cannot be sustained, and therefore the order and decree of the Public Utilities Commission appealed from is sustained and affirmed, and the appeals therefrom are denied and dismissed.

ANNOTATION.

Validity of service charge for gas meter.

In the absence of statutory or contract regulation of the subject, it seems that a gas company may make, under ordinary circumstances, a reasonable service charge for the use or rental of its meters. Thus, in *Smith v. Capital Gas Co.* (1901) 132 Cal. 209, 54 L.R.A. 769, 64 Pac. 258, holding that it is not an unlawful discrimination to require such a payment from a consumer who uses but a small quantity of gas, although larger consumers are not charged therewith, the court said: "There can be no doubt . . . of the right of gas companies, ordinarily, to charge rent for meters."

In upholding a rule or regulation of a gas company prescribing payment by the consumer of a certain sum per month as meter rent where the amount of gas used was less than 500 cubic feet, which was attacked as unreasonable, the court, in *State ex rel. Weise v. Sedalia Gaslight Co.* (1889) 34 Mo. App. 501, said: "Can it be said that this charge of \$1.25 per month on a consumer of less than 500 cubic feet of gas is unreasonable? We think it is not unjust or unreasonable. The evident purpose of this rule was to exact fair compensation from those requiring gas connection and gas furnished at hand, though the amount consumed should be very small, almost nominal. It is a matter of common knowledge that to furnish the gas at hand for the very small or nominal consumer requires the same outlay, in the way of a meter, periodical inspection, and repairs, with weekly or monthly visitations, that is required of very large consumers. The same investment and the same care and oversight are required where the gas monthly consumed shall not exceed 10 cubic feet or even 1 cubic foot, as where the amount used may be 10,000 cubic feet. At the rate charged then in Sedalia, as alleged in relator's complaint, the gas company would be required to invest

and expend, for the benefit of this merely nominal consumer, more dollars than cents received."

In *RIVELLI v. PROVIDENCE GAS CO.* (reported herewith) ante, 222, it is held that as the imposition of a monthly service charge for gas meters is but a fair and equal distribution of those burdens incident to the manufacture and distribution of gas which should be borne by all consumers, irrespective of the quantity used, such a charge is not violative of a statute providing that every person or corporation who shall wilfully collect a larger sum for gas than appears to be due on inspection of the meter shall be subject to fine.

But where the rate to be charged for gas is fixed by contract, ordinance, or statute, a meter charge is unauthorized. *Montgomery Light & Water Power Co. v. Watts* (1910) 165 Ala. 370, 26 L.R.A. (N.S.) 1109, 138 Am. St. Rep. 71, 51 So. 726; *Capital Gas & E. L. Co. v. Gaines* (1899) 20 Ky. L. Rep. 1464, 49 S. W. 462; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* (1878) 34 Ohio St. 572, 32 Am. Rep. 390. Compare *State ex rel. Weise v. Sedalia Gaslight Co.* (Mo.) supra.

Thus, in *Capital Gas & E. L. Co. v. Gaines* (1899) 20 Ky. L. Rep. 1464, 49 S. W. 462, supra, it was held that a gas company had no right to require consumers to pay meter rent in addition to the rate prescribed by contract between the company and the municipality wherein it was located, although a usage existed at the time the contract was entered into to charge meter rents, the usage being inconsistent with the terms of the contract.

In *Montgomery Light & Water Power Co. v. Watts* (Ala.) supra, the court said: "The decisions are not in harmony on this question, though it will be found that the cases generally which justify such a charge are based upon ordinances or con-

tracts differently worded, or upon general principles without regard to any contract,—all of which can be ascertained from an examination of the cases cited in appellant's brief. However, the ordinance constitutes the charter of the company, and the contract between it and the city is for the benefit of the citizens; and the reasoning of the cases which deny such right to the company under like circumstances commends itself to our judgment. It may be admitted that, upon general principles, it would be reasonable to allow such a rule where the amount of gas consumed is so small as to render it unreasonable that the company should furnish a meter and keep it up for so small an amount of business, yet we do not see how a court can write into the contract an additional provision. The agreement of the company is to furnish gas at so much per cubic foot, and that must necessarily mean that all the means and instrumentalities necessary to furnish it at those rates shall be provided by the company. It may adopt any means, suitable and accurate, for ascertaining the number of feet consumed, and the customer cannot direct or provide what means shall be used; his only concern being that he receives the service and is not charged more than the rate fixed by the law or the contract. If the company desired the privilege of charging more in certain cases, it should have had a provision to that effect inserted in the ordinance before it accepted the same."

The same rule obtains where the rate to be charged is prescribed by the charter of the gas company. Thus, in *Louisville Gas Co. v. Dulaney* (1897) 100 Ky. 405, 36 L.R.A. 125, 38 S. W. 703, it was held that a gas company, having accepted its charter, was bound by a provision contained therein limiting the rate to be charged for gas furnished to a certain sum, and could not charge, in addition thereto, for the use of meters which it furnished consumers to measure the gas supplied to them.

The exaction of a "readiness-to

serve charge" in addition to the rate stipulated in a contract between a municipality and a gas company, where the contract further provides that no meter rental shall be charged by the company, has been held to be violative of the terms of the contract. *Lima v. Public Utilities Commission* (1919) 100 Ohio St. 416, 126 N. E. 318.

But in *Otsego v. Allegan County Gas Co.* (1918) 203 Mich. 283, 168 N. W. 968, it appearing that the gas company's charter provided that all gas meters should be furnished by the company, free of charge, subject to removal if the consumer failed to pay a certain minimum charge per month, the court said: "We cannot accept counsel's argument that a meter charge is forbidden by § 6. A meter charge is not forbidden by § 6 in a certain contingency. The meter in the first instance must be furnished free to the consumer, and he may use it free of charge as long as he uses some gas each month. If he desires to retain it, without using any gas, he must pay 75 cents per month, or be deprived of it. In other words, the consumer is furnished a mechanical device free. He may retain it in one of two ways,—either by taking gas each month, or paying 75 cents each month. Under such a regulation we think the average mind would conclude that he was paying a meter rental, rather than a minimum price for gas. This was the conclusion of the parties to the contract, and they dealt with each other for upwards of five years on the theory that this was the proper interpretation of the contract."

In *ASHTABULA GAS CO. v. PUBLIC UTILITIES COMMISSION* (reported herewith) ante, 217, it was held that where a minimum charge for service to be rendered is made or prohibited by the ordinance under which a gas company operates, it is beyond the authority of the Utilities Commission to order a "readiness-to-serve charge" of 20 cents per meter per month in addition to the amount due for gas used. The court distinguished such charge from a charge provided for by the ordinance, which,

although denominated a "readiness-to-serve charge" for each meter was in reality a minimum service charge; it, unlike the charge fixed by the commission, being absorbed in the bill for gas consumed if that bill reaches a certain amount per month.

Under a New York statute (Transp. Corp. Law 1890, § 69; 62 McKinney, Consol. Laws, p. 42) prohibiting the charging, directly or indirectly, of a rental on its gas meters, a minimum service charge graduated according to the size of the meter has been held to be a violation of the statute. *Buffalo v. Buffalo Gas Co.* (1903) 81 App. Div. 505, 80 N. Y. Supp. 1093.

But in *Rochester v. Rochester Gas & E. Corp.* (1922) 233 N. Y. 39, 134 N. E. 828, and in *North Hempstead v. Public Service Commission* (1921) 199 App. Div. 189, 191 N. Y. Supp. 394, an order of a public service commission authorizing a gas company to charge a certain rate per 1,000 cubic feet, together with a monthly service charge for each meter, was held not to violate the New York statute heretofore referred to, and in the latter case such order was held by the lower court in (1921) 116 Misc. 585, 190 N. Y. Supp. 794) not to contravene a franchise provision that the company "shall furnish and connect all meters free and shall not make a minimum charge to any consumer."

And it was held in *Rochester v. Rochester Gas & E. Corp.* (N. Y.) supra, that, under the provisions of the New York Public Service Commission Law, § 65, subs. 1, 2, and 5, and § 66, subd. 14, it was within the jurisdiction of the commission to make such an order, and that such a service charge, when reasonably computed, and moderate in amount, did not involve per se an illegitimate discrimination between classes of consumers. In replying to the argument that the jurisdiction of the commission was limited to prescribing the charge for gas as distinguished from the charge for service, the court said: "We find no such limitation in the statute. 'Every gas corporation' is required to 'furnish and provide such

service, instrumentalities, and facilities as shall be safe and adequate and in all respects just and reasonable.' Public Service Commission Law, § 65, subd. 1; Consol. Laws, chap. 48. 'All charges made or demanded by any such gas corporation, . . . for gas, . . . or any service rendered or to be rendered, shall be just and reasonable, and not more than allowed by law or by order of the commission.' § 65, subd. 1. 'Every unjust or unreasonable charge made or demanded for gas, . . . or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission, is prohibited.' § 65, subd. 1. We are told that the plaintiff, being a public service corporation, is bound to serve, and that since it is bound to serve, it may not charge inactive accounts for maintaining facilities for service. The conclusion does not follow from the premise. The law imposes the duty to establish connections for the householder who demands them, but it does not impose the duty either to install or to maintain gratuitously. No one is under an obligation to permit connections to be made between his building and the mains. If he demands the facilities, with the added expense that follows, he thereby invites a service, and must be numbered among those for whom service is maintained. The legislature has nowhere said that benefit shall be divorced from burden. On the contrary, permission is expressly given to assess upon the householder the entire cost of installing service pipes beyond the street line (Transp. Corp. Law, § 62; Consol. Laws, chap. 63; *Moore v. Champlain Electric Co.* (1903) 88 App. Div. 289, 85 N. Y. Supp. 37), and to demand a deposit in advance sufficient to pay therefor. If there is a right to require payment for installation, there must be a right to require payment for repairs. If there is a right to insist upon payment in a lump sum, there must be a right to distribute the payment in accordance with the monthly average of cost. Even if installation were at the cost of the company alone, this would not

mean that a return upon the cost would cease to be a factor in the computation of the charge for service. The burden of maintaining the agencies of distribution is to be apportioned among the total body of patrons for whose benefit the agencies exist. No doubt it is to be apportioned fairly and reasonably. But if that requirement is satisfied, it is not a ground for complaint that each has been required to contribute his share of the expense. A service charge is not something in addition to the price that would otherwise be fair and reasonable. It enters into the price of the commodity, not as an element of addition, but as an item of deduction. In the case at hand, the finding is that if the service charge were dropped, the price of gas, now \$1.30 per 1,000 cubic feet, would become \$1.45. The revenues of the company are the same whether rates are computed on the one basis or the other. The variance is solely in the distribution of the burden."

And in discussing the objection that the service charge was 'unjust and unreasonable or unjustly discriminatory, regardless of the amount thereof,' the court in *Rochester v. Rochester Gas & E. Corp.* supra, said: "The statute prohibits a gas corporation from charging, demanding, collecting, or receiving 'from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith . . . than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.' Public Service Commission Law, § 65, subd. 2. Formal equality there indisputably is. The service charge is imposed not on some only, but on all, and on all at the same rate. Discrimination, if it exists, must inhere in remoter incidents or consequences. We start with the recognition of the truth that perfect equality in operation as well as in form is not to be attained by any scheme of

rates. Classification is not forbidden, if founded upon reason, and not upon caprice or favor. There are those who think that a schedule which does not impose a service charge is discriminatory, since it shifts upon some consumers the burden of carrying the others. Occasional hardships there will be with any plan. It is a question largely of degree. The argument against the charge seems to rest upon the assumption that unjust discrimination inheres in every rate that is not a flat or uniform rate for every foot of gas supplied. The scale of charges must not be graduated, it is said, so as to adapt the payment to the cost. But that has never been the rule of rate making for public service corporations. Varying charges are not prohibited always and everywhere, but only varying charges for like services in substantially similar circumstances or conditions. The commuter does not pay the same rate as the occasional traveler. The shipper by carload is not charged as the shipper of a single package. Telephone rates per message are lowered as the number of messages increases. Cf. *New York Teleph. Co. v. Siegel-Cooper Co.* (1911) 202 N. Y. 502, 36 L.R.A.(N.S.) 560, 96 N. E. 109. Charges for water vary with the quantity consumed. *Silkman v. Water Comrs.* (1897) 152 N. Y. 330, 37 L.R.A. 827, 46 N. E. 612. If there was ever doubt that rates for gas are subject to like tests, the doubt has been removed by recent amendments of the statute. 'Nothing in this chapter shall be taken to prohibit a gas corporation or electrical corporation from establishing classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use or upon any other reasonable consideration, and providing schedules of just and reasonable graduated rates applicable thereto. No such classification, schedule, rate or charge shall be lawful unless it shall be filed with and approved by the commission, and every such classification, rate or charge shall be subject to change, alteration and modification by the

commission. § 65, subd. 5, Public Service Commission Law, as amended by Laws 1921, chap. 134, in effect March 30, 1921. "The commission shall have power to require each gas corporation and electrical corporation to establish classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and upon any other reasonable consideration, and to establish in connection therewith just and reasonable graduated rates and charges; and it shall have power, either upon complaint or upon its own motion, to require such charges in such classifications, rates and charges as it shall determine to be just and reasonable." Public Service Commission Law, § 66, subd. 14, as amended by Laws 1921, chap. 134. With these provisions in force, we see no escape from the conclusion that a service charge, reasonably computed, and moderate in amount, does not involve per se an illegitimate discrimination between classes of consumers."

In discussing the question whether the service charge constitutes "rent on a gas meter" within the prohibition of the statute, the court in *Rochester v. Rochester Gas & E. Corp.* (1922) 233 N. Y. 39, 134 N. E. 828, supra, said: "Here the burden of the consumer, so far as affected by the meters, is limited to the cost of installation and repair. The charge is not intended as an equivalent for the value of the use. It is compensation for expenses that must be incurred to put the meters in such a condition that the use may be enjoyed. True it is that the individual must pay his monthly quota though his own meter has been neither changed nor repaired during the month, just as he must pay his quota for the maintenance of service pipes and their accessories though his own may have remained intact. In the long run, however, and on the average, what he pays is counterbalanced by what he receives. If he must contribute to a fund to preserve the distributing agencies for others, they must contribute on their part to preserve like

agencies for him. We think it would be a strained and forced construction that would find in the distribution of such expenses among the entire body of consumers the quality of rent. Such license of construction is surely not permissible to extend to doubtful situations the prohibitions of a penal statute. . . . Give the words their uttermost extension, and a gas corporation would be unable to include its meters or the cost of upkeep in reckoning the price of gas, since a substitute for rent might be found in an increase of the price. Such an extension would involve a conflict, if not with constitutional rights, at all events with other statutes which assure a reasonable and fair return. Public Service Commission Law, § 72. . . . We are satisfied that it is not rent, within any fair construction of a penal statute, when profit is excluded."

In *Amesbury & S. Gas Co. v. Gibney* (1912) 210 Mass. 498, 97 N. E. 88, it was held that the making of a contract to pay rental on gas meters for a season of four months was not inconsistent with a statute providing that "no charge for the use of a meter during any portion of twelve consecutive months shall be made if the consumer, during said time, uses gas to the value of \$7."

It was held in *State ex rel. Weise v. Sedalia Gaslight Co.* (1889) 34 Mo. App. 501, that a gas company had authority, under a city ordinance granting its franchise, and providing that it should furnish "a good article of illuminating gas, at a price per cubic foot not exceeding the rate charged in similarly situated places," to adopt or enforce a rule prescribing the payment of a meter rental.

In *Cunningham v. Iola* (1911) 86 Kan. 86, 119 Pac. 317, it appeared that the defendant city, which owned and operated a gas works, passed an ordinance providing for a charge of 20 cents per 1,000 cubic feet, and a minimum charge of 50 cents per month whether that amount of gas was used or not. The ordinance further provided for a monthly rental of 20 cents for meters furnished to

a landlord for his tenants. The plaintiffs, who up to that time had been paying a flat rate for all gas consumed, contended that the ordinance was void on the ground that it was unreasonable and discriminating. In refusing to enjoin the defendant from the enforcement of the ordinance, the court said: "While no specific statutory authority is cited for the enactment of an ordinance fixing rates, we shall assume, as the plaintiffs apparently have done, that such power exists by implication and under the general power vested in cities of the second class to make contracts and enact ordinances. The council evidently deemed it proper and reasonable to collect 50 cents a month from each patron whether he used gas amounting to that sum during the month or not, on the theory that this minimum charge would pay for reading meters and other services performed by the city in connection

with the service, although the amount of gas used in one month might not entitle the city to this sum. . . . The 20-cent rental for meters placed in buildings for the purpose of enabling the landlord to know how much gas each tenant used was doubtless deemed a reasonable compensation for the service and expense on the part of the city. What the exact circumstances were, and what facts may have justified or failed to justify the council in these supposed views, we do not know. No provision appears requiring anyone to purchase or procure meters from the city, the provision merely being that those used must be approved by the city inspector, and if, instead of purchasing seventeen meters for their tenants, the plaintiffs saw fit to rent them of the city, we see no reason why the required rental should not be paid."

L. F. C.

NICOLAUS H. HULTIN

v.

T. HENRY KLEIN et al., Appfs.

Illinois Supreme Court — December 22, 1921.

(301 Ill. 94, 133 N. E. 660.)

Covenant — against erection of outbuildings — greenhouses as breach.

Greenhouses, although connected with the dwelling house, are outbuildings within the meaning of a covenant forbidding the erection of such buildings on a specified portion of granted premises.

[See note on this question beginning on page 234.]

APPEAL by defendants from a decree of the Superior Court for Cook County (Sullivan, J.) in favor of complainant in a suit brought to restrain defendants from interfering with plaintiff's use of an easement for ingress and egress over a certain strip of land. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Edward J. Kelley for appellants.
Messrs. Anderson & Anderson for appellee.

Dunn, J., delivered the opinion of the court:

The question in this case is as to the existence of an easement for in-

gress and egress over a 12-foot strip of ground for the benefit of adjoining property. A bill in chancery was filed by the appellee to enjoin the defendants from interfering with the enjoyment of the easement, and after a hearing the court en-

tered a decree granting the relief prayed for, from which the defendants appealed.

On March 18, 1869, Samuel B. Chase, through whom all the parties claim, made a deed conveying to Charles H. Cram the west 187 feet of lot 28 in Pine Grove, section 21, township 40, range 14, "together with the right to said Cram, his heirs and assigns forever, to use for the purpose of ingress and egress to said premises and to the south half of the west 187 feet of lot 27 in Pine Grove, and for no other purpose whatever, the 12 feet in width next east of and adjoining said west 187 feet of lot 28 and the south half of lot 27. Said Cram, for himself, his heirs, and assigns, hereby covenanting and accepting this conveyance, subject to the condition that neither he, they, nor any of them shall place or allow to be placed within 115 feet of the south line of the east 60 feet in width, east and west, of said portion hereby conveyed of said lot 28, any shed, barn, or other outhouse or outbuilding, and that a violation of this condition shall have these effects: First, to subject the owner of that part of said described premises whereon such shed, barn, outhouse, or outbuilding shall be placed to the payment of \$10 for each and every day the same shall be allowed to remain in violation of this agreement, the same to be paid to the owner of the land (at such time owning the same) lying next east of and adjoining said strip of land 12 feet wide; and, second, that the uses of said alley right shall, upon the violation of this agreement, forever cease as to the owner or owners so violating this agreement and all persons who may afterwards own or have any interest in that part of said premises owned by him, her, or them, the right to use said private alley, as aforesaid, to run with said above-conveyed land as appurtenant thereof."

On August 1, 1870, Chase conveyed the 112 feet immediately east of the west 187 feet which had

been conveyed to Cram to William M. Blackburn, reserving "a right of way over the west 12 feet in width in lot 28 hereby conveyed, and also reserving and making this conveyance subject to such right of way and of use over 12 feet in width as was granted to C. H. Cram." On August 10, 1889, Blackburn conveyed the property so conveyed to him to Henry P. Klein, subject to such rights of the use for purposes of ingress and egress of the west 12 feet in width of the premises described as were reserved or granted by Chase to Cram. At the time of this latter conveyance William H. Chadwick had acquired title to the Cram property. In 1891 or 1893 he erected an apartment building and a dwelling house on this property, the dwelling house being east of the apartment house. He also erected on the east side of his dwelling four greenhouses, which covered substantially that part of the premises east of the house, leaving only a narrow passageway of about 3 feet east of the greenhouses. There were four of the greenhouses, two extending east and west, which were connected by two extending north and south. They were attached to the house, and there was an entrance to them from the house, and also from the outside. The house was built of brick with a stone front, and the greenhouses were built with wooden walls about 3 feet high. The roofs were of glass. The front of the most southerly of the greenhouses was about 25 feet from the front of the lot.

When Chadwick built his house and greenhouses he also built a fence on the east line of the west 187 feet of the lot, extending all the way through from the street the full length of the lot. When Klein took possession of his premises he built a barn on the northwest corner. He had some disagreement with Chadwick and Schoeninger, who owned the property north of Klein's, in regard to the use of the alley and the location of this barn which Klein

started to build, covering the west 12 feet of his premises. It was actually constructed with the west side of the barn 12 feet east of the west line of Klein's property, leaving the 12 feet clear. There was at one time a 12-foot gate extending from the northwest corner of the barn to the west side of the lot. There is a dispute in the evidence as to whether the gate was kept closed and locked or not. As long as Chadwick continued to live on the premises he made no attempt to make use of the right of way, except that coal was sometimes delivered at the back part of Chadwick's lot by teams coming from the north through an alley which was there, and backing down over the north few feet of the 12-foot strip, where the coal was unloaded on Chadwick's premises and the teams returned as they had come in. Chadwick was adjudicated a bankrupt, the property was conveyed to his trustee in bankruptcy, and on April 10, 1912, by mesne conveyances, the title to the east 37 feet of the south 143 feet of the tract became vested in the complainant.

The appellants insist that the chancellor erred in finding that the appellee and all of his grantors had always observed the covenants and conditions contained in the deed from Chase to Cram; in not finding that the erection of the greenhouses was a breach of the condition against placing within 15 feet of the south line of the east 60 feet of the premises any shed, barn, or other outhouse or outbuilding, and terminated the easement of a right of way over the west 12 feet of the appellants' property; and in not finding that the complainant was barred from maintaining his bill by twenty years' adverse possession of the defendants.

The property in controversy is situated on the north side of Belmont avenue. The property conveyed to Cram was bounded on the west by Evanston avenue, which is now known as Broadway. Further north was Melrose avenue, which

bounded the block on the north. From Melrose avenue an alley extended south through the middle of the block to the northwest corner of the Klein property and then at right angles east. This alley would have formed, with the 12-foot strip in controversy, if the latter had been open, an alley through the block from Melrose avenue to Belmont avenue. When Klein took possession of the property he put the 12-foot strip in controversy in grass; a flower bed extended along the fence; an arch was erected, the west side of which rested on the west 9 feet of the 12-foot strip; and the driveway which entered through the arch occupied only the east 3 feet of the extreme south end of the 12-foot strip, going off then to the northeast to Klein's barn. As has been said, neither Chadwick nor his successors ever attempted to make any use of the right of way, so far as appears, except in respect to the hauling in of coal, which has been mentioned, until the complainant acquired title. Soon afterward he filed a bill to enforce the easement, which for some reason was permitted to be dismissed for want of prosecution in 1915, and this bill was afterward filed and brought to a hearing in 1920.

There was some evidence of teams going through from Melrose avenue to Belmont avenue, coming down the alley in the north half of the block, and going through the 12-foot strip west of Klein's barn, then turning to the left and using Klein's driveway down to Belmont avenue. But for the greater part of the way this was not a use of the 12-foot strip, and it was not a use of the easement, because the teams thus going through from Melrose avenue to Belmont avenue were not connected in any way with the easement. We do not regard it as necessary, however, to discuss the evidence in regard to the abandonment of the easement or its loss by adverse possession. The deed by which the easement was created contained a plain provision that the

permitting of any shed, barn, or other outhouse or outbuilding on the south 115 feet of the east 60 feet of the premises should terminate the easement.

Covenant—
against erection
of outbuildings
—greenhouses
as breach.

If the greenhouses were outbuildings the easement was terminated by their erection, and it is our judgment that they were outbuildings.

Outhouses are defined by Bouvier as: "Buildings adjoining or belonging to dwelling houses; buildings subservient to yet distinct from the principal mansion house, located either within or without the curtilage."

The definition as given by the Standard Dictionary is: "A smaller building standing apart from, but appertaining to, a main or larger building or dwelling."

And an outbuilding is "a smaller building appurtenant to a main building and generally separate from it."

Webster's New International Dictionary has these definitions:

Outhouse: "A small house or building at a little distance from the main house; an outbuilding."

Outbuilding: "A building separate from and subordinate to the main house; an outhouse."

The Century Dictionary defines an outhouse as a "small house or building separate from the main house; an outbuilding, specifically in law, under the definition of arson, a building contributory to habitation separate from the main structure, and so by the common-law rules a parcel of the dwelling house or not, according as it is within or without the curtilage."

At common law the curtilage was the land, with the castle and out-houses, inclosed often with high walls, where the old barons sometimes held court in the open air, from which comes the word "court-yard." *Coddington v. Beebe*, 31 N. J. L. 485. The term is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, but is not ap-

plicable to the common description of inclosures and buildings constituting the homestead of the inhabitants of this country. In England dwellings and outhouses of all kinds are usually surrounded by a fence or stone wall inclosing a small piece of land embracing the yards and outbuildings near the house, constituting what is called the court. Such precautionary arrangements have not been necessary in this country. *People v. Taylor*, 2 Mich. 251.

The question of curtilage is of no importance in this case. It was important at common law because the protection and privilege of the mansion house extended to all its branches and appurtenances within the curtilage, and if a barn, stable, or warehouse were parcel of the mansion house, and within the same common fence, though not under the same roof or contiguous, a burglary might be committed therein; otherwise not. 4 Bl. Com. 225. An outbuilding must be appurtenant and appertain to the main building. Though distinct from the main building, it must be subservient to it, and contributory to the habitation. It must belong to or be intended to be used with the dwelling house. The principal argument of the appellee on the question whether the greenhouses were outbuildings is that they were erected at the same time with the house, and were attached to it, and could be entered from the house as well as from the outside. This does not affect the question. From the definitions which have been given, it will be seen that an outbuilding is usually separate from the main building, but this does not necessarily imply removal to such a distance as to not be adjacent or abutting and in tangible connection. An outbuilding may be built a few feet, or a few inches only, from the main house. It may be connected with the house by a covered passage. If for convenience the covered passage is eliminated, and the outbuilding moved or originally con-

structed immediately against the main building, it would not therefore cease to be an outbuilding. If the outbuilding is separated from the main house only by the space of a common wall, this does not necessarily change its character as an outbuilding. It is the character of the building and the use which is made of it which determine whether or not it is an outbuilding. Though it is adjacent to the house, and may be entered from the house through a passageway, or through a door directly, it is still an outhouse if its use is not for the ordinary purpose of a dwelling, but for some subsidiary purpose in connection with the dwelling. A washhouse, a woodshed, a granary, a barn, may all be connected with the house so that a person can pass from the house to one or all of the outhouses mentioned without going from under the roof, and yet they do not for that reason lose their character of outhouses. A greenhouse is a building covered chiefly with glass, usually provided with artificial heat for the protection and growth of exotic and other tender plants. In this case it appears that Chadwick did not engage in the raising of flowers as a business, but that his building of the greenhouses was merely for pleasure, and he took de-

light in the raising of orchids and the giving of flowers to his neighbors and friends. The greenhouses were thus subservient to his use of the main house as a dwelling, but they were entirely independent of the house. They could be removed without interfering with the rest of the building, and, in fact, they have been removed. If they had been built at a distance of several yards from the house they would undoubtedly have been outbuildings, and the fact that one wall of the house was used for a wall of the greenhouses did not change the character of the structures from outbuildings so as to make them a part of the dwelling house. In our judgment, the construction of the greenhouses was a violation of the condition in the deed from Chase to Cram, which terminated the easement, and the action of the parties is consistent with their assent to the same view.

The defendants are not entitled to any relief on their cross bill, for it does not appear that any trespass on their premises is threatened.

The decree will be reversed and the cause will be remanded, with directions to the Superior Court to dismiss the bill and the cross bill.

Petition for rehearing denied February 9, 1922.

ANNOTATION.

What is "outhouse" or "outbuilding."

- I. Generally, 234.
- II. Particular structures:
 - a. Barn, 236.
 - b. Brickkiln, 236.
 - c. Building on adjoining lot, 236.
 - d. Chicken house, 236.
 - e. Dugout, 237.
 - f. Freight car used as warehouse, 237.
 - g. Garage, 239.
 - h. Greenhouse, 239.
 - i. Ice or meat house, 239.
 - j. Pigsty, 239.
 - k. Residence violative of restriction as to cost and value, 239.

I. Generally.

The term "outhouse" is one the meaning of which in the law has been

II.—continued.

- l. Sample room, 240.
- m. Schoolhouse, 240.
- n. Shed, 241.
- o. Smokehouse, 241.
- p. Spring house, 242.
- q. Stable, 242.
- r. Stillhouse, 242.
- s. Storehouse, 242.
- t. Unfinished dwelling house, 243.
- u. Unoccupied house, 243.
- III. "Outhouse where people resort," 243.

considered by the courts for the most part in criminal proceedings. It has become important in prosecutions for

arson and burglary to observe and define the lines of distinction between three classes of buildings; to wit, dwelling houses proper, buildings used in connection therewith and known as outhouses, and buildings which are neither dwelling houses nor used in connection therewith. The term has also been frequently construed by reason of its use in a restrictive covenant. The distinguishing feature of an outhouse has been found in its subserviency to the mansion house, or principal building. "This test serves to mark the distinction between outhouses and other buildings, not including the manor house, which do not possess the peculiar quality assigned to outhouses. It does not, however, assist in distinguishing between the dwelling house and outhouses appurtenant thereto." *Bassett v. Pepe* (1920) 94 Conn. 631, 110 Atl. 56.

The term "outhouse" has been variously defined. Thus it has been said that an outhouse is a building that belongs to a dwelling house, and is in some respects a parcel of the dwelling house and situated within the curtilage. Such was the meaning of the term at common law, and under the English statutes in relation to the burning of houses. *State v. Roper* (1883) 88 N. C. 656; *State v. Rowland Lumber Co.* (1910) 153 N. C. 610, 69 S. E. 58; *Elsmore v. St. Briavells* (1828) 8 Barn. & C. 461, 108 Eng. Reprint, 1114, 6 L. J. K. B. 372, 2 Moody & R. 514; *Rex v. Haughton* (1833) 5 Car. & P. (Eng.) 555.

Another definition is that it is a building appurtenant to some main building or mansion house. *Firth v. Marovich* (1911) 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; *State v. Bailey* (1834) 10 Conn. 143; *Blakemore v. Stanley* (1893) 159 Mass. 6, 33 N. E. 689. So it has been said that an outhouse means something annexed to an in-house. *Reg. v. Hammond* (1844) 1 Cox, C. C. (Eng.) 60.

But a building is not an "outhouse" if it is used for a dwelling or for business purposes. *Downey v. State* (1896) 115 Ala. 108, 22 So. 479.

It has been held, however, that it is not necessary that a building

should be within the curtilage in order to be an outhouse. *Shotwell v. State* (1884) 43 Ark. 345. So, it has been said that an outhouse is a building without the mansion house, intended for the accommodation of the owner or occupant; that it is the subserviency of it to the mansion house that gives it the denomination of an "outhouse," and not the fact that it is included within the same fence, or within what is denominated the curtilage or homestead. *State v. Brooks* (1823) 4 Conn. 446.

Again, it has been said that the term "outhouse" denotes a building contributory to the habitation, separate from the main structure, either within or without the curtilage. *State v. Randall* (1904) 36 Wash. 438, 78 Pac. 998.

As used in a statute relating to burglary, the term "outhouse" has been said to denote a part of the dwelling house or mansion, if it is so near the dwelling house that it is used with it as appurtenant thereto, though not within the same inclosure, and hence it is defined to be a small house or building belonging to a mansion or dwelling house, and usually standing separate from or without it, and a small distance from it. *Wheelock v. State* (1855) 15 Tex. 253.

Under a statute making guilty of burglary every person who shall unlawfully break and enter any dwelling house, or outhouse thereunto adjoining and occupied therewith, it has been held that the term "outhouse thereunto adjoining and occupied therewith" was used in its usual and ordinary sense, and meant that any outhouse, to be a subject of burglary, must both adjoin the dwelling house and be occupied therewith, and that other outhouses, even though within the inclosure, were not subject to burglary unless they were specifically named by the statute or fell within the meaning of buildings named therein. *State v. Randall* (Wash.) *supra*.

It has been said that an outbuilding is one that from its character is to be used in connection with the main building, and may thus be held to be a parcel thereof, even if not immedi-

ately attached thereto, as the barns, sheds, wood and store houses belonging to a dwelling house. *Com. v. Certain Intoxicating Liquors* (1885) 140 Mass. 287, 3 N. E. 4, 5 Am. Crim. Rep. 627.

II. Particular structures.

a. Barn.

It has been held that a barn not connected with the mansion house or any other building, but several rods away, and used for the purpose of keeping hay, grain, and cattle, was an "outhouse" within the meaning of a statute against breaking and entering "the . . . outhouse of another, whether parcel of any mansion house or not." *State v. Brooks* (1823) 4 Conn. 446.

A tobacco barn situated in a 10-acre field in which there was no other structure, and from 90 to 200 yards from the owner's dwelling house, and built for the purpose of storing tobacco, has been held not to be an "outhouse" within a statute penalizing the breaking and entering of "any outhouse belonging to or used with any dwelling house." *White v. Com.* (1888) 87 Ky. 454, 9 S. W. 303.

A deed conveying the north half of a certain dwelling house, "together with the land under the same, and the land used with it and belonging thereto, and all outbuildings and fences thereon and thereto belonging, being the same premises heretofore occupied by me as a dwelling house," has been held to convey a barn used with and belonging to the house as one of the outbuildings. *Woodman v. Smith* (1865) 53 Me. 79.

Barn as "Outbuilding to which people resort," see *infra*, III.

b. Brickkiln.

In *Rex v. Haughton* (1833) 5 Car. & P. (Eng.) 555, it appeared that a building had been built for an oven to bake bricks, but was afterwards roofed and a door attached. In this place the prosecutor kept a cow. Adjoining it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor, nor the person of whom

he rented this building, had any house or farmyard near it, nor did any wall connect it with any dwelling house, the nearest dwelling being 100 yards off, and not belonging to either the prosecutor or his landlord. It was held that the building was not an outhouse, and that a person who set it on fire was not indictable for arson.

c. Building on adjoining lot.

A search warrant authorizing a search of "a certain building, the cellar under the same, and the outbuildings within the curtilage thereof," has been held not to authorize the search of a building situated on an adjoining lot, and separate from the other building by a fence, and with distinct modes of access and use, although connected by a passageway. *Com. v. Certain Intoxicating Liquors* (1885) 140 Mass. 287, 3 N. E. 4, 5 Am. Crim. Rep. 627.

d. Chicken house.

A chicken house on the same lot with a dwelling house, and about 60 yards therefrom, owned by the same person, there being between it and the house a garden inclosed by a wire fence through which there was a passway, has been held to be an "outhouse" within the meaning of the statute relating to breaking and entering. *Price v. Com.* (1894) 15 Ky. L. Rep. 837, 25 S. W. 1062, wherein the court said: "The evidence shows a chicken house was broken and four chickens carried away by appellant. But it is contended that the chicken house in question is not, in the meaning of the statute, an outhouse, and consequently he was not guilty of the offense for which he was indicted. The chicken house broken into is on the same lot as the dwelling house, both being owned and in possession of the same person. It adjoins the stable of the same person, and is about 60 yards from the dwelling house, there being between them a garden inclosed by a wire fence, and through which there is a passway from one to the other. As is manifest from the language of the statute, an outhouse is not to be understood as being part of the dwelling house; but it must be a

house belonging to, or used with, the dwelling house, or, in language used in Bishop on Statutory Crimes, ‘contributory to habitation.’ It seems to us the statute itself plainly enough shows that a chicken house, like a meat house or ice house, was intended to be regarded and treated as an outhouse, to break which, and take away anything of value, is made a felony; for unquestionably it does, in meaning of the statute, belong to, and is used with, a dwelling house.”

e. Dugout.

See *infra*, III.

f. Freight car used as warehouse.

In *Carter v. State* (1898) 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262, 11 Am. Crim. Rep. 125, the defendant was indicted for the wilful and malicious burning of “a certain freight warehouse, . . . the same being then and there an outhouse.” The evidence showed that the body of a freight car had been taken off the wheels and placed near the railroad track at a station; that it was supported on permanent posts; and that a platform, to be used in transferring freight to and from the car body, had been attached to the same. It further appeared that the structure thus located was used as “a freight warehouse” by the railway company in precisely the same manner as if it had been an ordinary warehouse built for this identical purpose. There was no evidence showing that the railroad company had any other building at this station; and counsel for the accused thereupon insisted that the house in question could not, in legal contemplation, be an “outhouse,” and accordingly that there was a fatal variance between the allegations of the indictment and the proof. The court said: “It is true that the word ‘outhouse’ primarily means a building adjacent to a dwelling house and subservient thereto, but distinct from the mansion itself. . . . After careful consideration, however, we have reached the conclusion that the word ‘outhouse,’ as used in §§ 136, 141, and 142 of our Penal Code, as applied to a structure not located within a city,

town, or village, is intended to embrace a house of any description which is not a dwelling house. . . . That all houses other than dwelling houses, thus located, were intended to be regarded as ‘outhouses,’ seems manifest from the provisions of § 142 of the Penal Code, which declares that ‘setting fire to an outhouse of another, as described in the preceding section, shall be punished,’ etc.; for, unless this meaning be given to the word ‘outhouse’ as used in § 142, we would have no penalty whatever for the offense of setting fire to a house of the kind described in the present indictment. The truth is, the prefix ‘out’ was totally unnecessary in this connection, except for the exclusive purpose of distinguishing dwelling houses from other houses; but the use thereof should not, we think, be given the effect of defeating the legislative will, which clearly was to include buildings other than those which would ordinarily be understood as falling within the class designated by the word ‘outhouse.’ ”

g. Garage.

A garage affixed to a residence, i. e., constructed as a part of the building, has been held not to be an outhouse or outbuilding. *Peirce v. Beyer* (1919) 66 Colo. 554, 185 Pac. 348; *Bassett v. Pepe* (1920) 94 Conn. 631, 110 Atl. 56. In the case first cited, the court said: “The parties to this action were owners of adjoining lots, holding under deeds containing the restriction that ‘all stables and outbuildings shall be placed at the rear of the lots.’ Plaintiff in error was proceeding to erect a one-story brick garage at the rear of his house, using a portion of the rear wall thereof as a part of one of the walls of the garage. The garage extended to within a few inches of the lot line between the lots of the parties, and within 3 feet and 8 inches of the sleeping porch of defendant in error. The latter secured a permanent injunction against the erection of said garage; the district court holding that it was an outbuilding within the meaning of said restrictive clause. It was shown

in evidence that the construction of garages as part of residence buildings is not uncommon, and that this garage was to be architecturally in harmony with the house of which it was made a part. We cannot agree with the district court that such a construction is an outhouse within the meaning of said restriction. No objection is made to the use to which the room is to be put, and we see no more reason for calling it an outhouse than for so designating it if it were to be used as a kitchen or bedroom."

It appeared in *Bassett v. Pepe* (Conn.) supra, that the defendant's deed contained a restrictive covenant forbidding "the erection or maintenance of any building or structure within 3 feet of the side lines, or the erection or maintenance of any barn or outhouse on the land conveyed." When the defendant purchased his lot there was a house on it, but no garage or other accommodations for housing an automobile. To provide such accommodations he began the erection of an annex to the house, designed for that purpose, and planned to be permanently attached to the rear of the house and form a part of it. The attachment was to be about 10 feet in length on one side of the house and 8 feet on another. At all points the new construction was to be located more than 3 feet distant from the division line between the parties. The work of construction had proceeded but a little way when a temporary injunction was issued in the case at bar to prevent the completion of the building. The structure planned and begun was to be built in a substantial manner, and would not have been unsightly in form or appearance. The trial court held that the proposed structure was neither a barn nor an outhouse, in the strict sense of those words, that it was not within their meaning and intent as used in the restrictive covenant in question, and that its erection and maintenance would not be in violation of either the letter or spirit of that covenant. On appeal the decision of the trial judge was affirmed, the court saying: "The term 'outhouse' naturally im-

plies that the structure under consideration is not one with a dwelling house. Clearly it must be something distinguishable and distinct from the dwelling house to which it is subservient. Otherwise it were ill named. Upon the question as to what the requirement as to distinction and separation imports and what it signifies, adjudicated cases, in so far as we have been able to discover, throw little light. . . . Looking at the conditions attending and surrounding the Laurel beach properties, the character of their use, and the language of the restriction itself, its purpose is manifest. Its aim, beyond question, as the court has in effect found it to have been, was to contribute to make the restricted property desirable as a location for a summer residence colony by forbidding erections thereon which might detract from its attractiveness or be deemed otherwise objectionable. Small structures scattered over the tract might well be regarded objectionable from an esthetic point of view, and structures devoted to certain uses might be offensive for more substantial reasons. At the time that the restriction was framed and imposed the classes of structures which might most reasonably be anticipated under the conditions then existing were barns where horses could be stabled, and privies, both objectionable for similar substantial reasons, and naturally expected to be erected, if erected at all, quite apart from the dwellings. Such other structures as might have been anticipated would neither in themselves nor in their use have been of a kind to be objectionable otherwise than esthetically. This would be true of the more modern garage, and it is scarcely conceivable that a garage appurtenant to a house, so constructed as not to give the effect of a separate building, and so attached to the house as to present the appearance of a part of it, could be considered objectionable from that point of view. This garage, as we read the record, was so built onto the house that no one, not critically examining it, would be struck with the fact that it was not

a part of the dwelling-house structure, and used for the immediate purposes of residence and housekeeping therein. Its points of contact with the house were, to be sure, not extensive, and the critical observer might conclude that there were no interior means of communication between it and the house, but for all that it might well, as far as structure and location are concerned, be adapted for summer housekeeping purposes. Whether or not, therefore, an outhouse is of necessity a structure separate and standing physically apart from the dwelling house to which it is subservient, we are of the opinion that the present structure is not one forbidden by either the letter or spirit of the restrictive covenant in controversy, interpreted according to the manifest intent and purpose of those who imposed it.”

It was said in the case last cited, however, that if the garage as constructed was to be considered as a structure apart from the dwelling house, there could be no doubt that, as a structure subservient to the use of the defendant's dwelling, it would fully meet the conditions entitling it to be considered as an outhouse. This statement is in accord with the conclusion reached in *Ringgold v. Denhardt* (1920) 136 Md. 136, 110 Atl. 321, wherein a restriction “that no other building is to be made, erected, placed, or put upon or on the aforesaid lot other than that now erected, this condition to include and embrace all stables, chicken or pigeon coops, pigsties, privies, or any outbuildings of whatsoever description,” was held to prohibit the construction of a garage. The court said: “As the garage about to be erected was not a dwelling house, there would seem to be no doubt about it being embraced in the first restriction. No building other than that now erected would have been sufficient, but it says what the condition is to include and embrace; namely, ‘all stables, chicken or pigeon coops, pigsties, privies, or any outbuildings of whatsoever description.’ It would be difficult to use more comprehensive language for the purpose

of prohibiting the erection of any building not then on the lot. A garage is a building ‘other than that now erected,’ and it is an outbuilding of some description.”

h. Greenhouse.

The reported case (*HULTIN v. KLEIN*, ante, 230) holds that greenhouses are outbuildings within the restriction of a deed providing that the permitting of any shed, barn, or other outhouse or outbuilding shall terminate an easement for ingress and egress over a strip of ground for the benefit of adjoining property.

i. Ice or meat house.

See dictum in *Price v. Com.* (1894) 15 Ky. L. Rep. 837, 25 S. W. 1062, set out supra, II. d.

j. Pigsty.

In *Reg. v. Janes* (1844) 1 Car. & K. (Eng.) 303, 2 Moody, C. C. 308, the defendant was indicted for setting fire to an outhouse. The building set on fire was a pigsty, situate in a yard in the possession of the prosecutor, into which yard the back door of the prosecutor's house opened, the yard being bounded by fences, and by other buildings of the prosecutor, and by a cottage and barn which were let by the prosecutor to a tenant, but which did not open into this yard. The pigsty was held to be an outhouse within the statute against arson.

k. Residence violative of restriction as to cost and value.

It appeared in *Firth v. Marovich* (1911) 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190, that the plaintiff conveyed a residential lot by a deed containing the following provisions: “This conveyance is made and said real property is sold subject to the following conditions: That no building whatever except a private residence with the customary outbuildings, including a private stable, shall be erected, placed, or permitted on said premises or any part thereof, and that such building shall be used as a private residence only, and shall cost, and be reasonably worth, not less than fifteen hundred (\$1,500) dol-

lars, and shall be located not less than twenty (20) feet from the front or street line of said lot, namely, on Vernon avenue; and it is further agreed that no barn or shed or other building shall be built or located closer than ninety (90) feet from the front or street line of said lot." It also appeared that shortly after the defendant went into possession of the property she erected, without the plaintiff's consent, a building the cost of which did not exceed \$800. There was testimony that the building complained of (which was admitted to be over 100 feet back from the street line) was a one-story structure, covering a space of 24 by 26 feet, and built of rough boards, battened. It was partitioned into rooms, and contained a kitchen with a sink and other conveniences. It was furnished and occupied as a residence, and had been so occupied from the time it was built until shortly before the trial,—a period of about two years. In this state of the evidence the defendants moved for a nonsuit on the ground that there had been no violation of the restriction in the deed, which was granted. On appeal a new trial was ordered, it being held that the structure was not an outbuilding. The court said: "The meaning and intent of the restrictive clause is plain. The purchaser is required, if he desires to put improvements upon the lot, to erect a residence, which shall cost and be worth not less than \$1,500. Such residence may be accompanied by the 'customary outbuildings, including a private stable.' There is no provision governing the cost of such outbuildings. The residence is to be not less than 20 feet from the street line. The provision that 'such building shall be used as a private residence only,' of course, refers to the main building, not to the stable or other outhouses. So far there is no room for doubt. The respondents point, however, to this clause, 'And it is further agreed that no barn or shed or other building shall be built or located closer than ninety (90) feet from the front or street line of said lot,' and argue that it permits the

erection, at a distance of 90 feet or more from the street line, of any building, whatever its cost, and for whatever use. This is an entirely inadmissible construction of the language. In view of the earlier provisions that no building except a residence with outbuildings should be erected on the premises or any part thereof, the words 'or other building' plainly have reference to the outbuildings permitted at the outset of the paragraph. This meaning is rendered more evident by the fact that this phrase is used in connection with and following the words 'barn or shed.' The effect of this final provision, reading it as a part of the entire restrictive clause, is to require outbuildings to be set back 90 feet from the street line, while the main residence building may be built at a distance of only 20 feet from the street. The word 'outbuilding' or 'outhouse' has been defined as 'a building adjoining or belonging to a dwelling house' (Bouvier's Law Dict.). 'It is the subserviency of it to the mansion house that gives it the denomination of an outhouse.' *State v. Brooks* (1823) 4 Conn. 446. An outbuilding is 'something which is to be used in connection with a main building.' *Blakemore v. Stanley* (1893) 159 Mass. 6, 33 N. E. 689. The structure erected by Mrs. Marovich was not an outbuilding. It was not an adjunct to any main building. So far as the evidence and the admissions of the pleadings show, it was built for no other purpose and put to no other use than that of a dwelling. Viewed as a residence, it did not comply with the requirements of the deed as to cost and value."

l. Sample room.

A house contiguous to and used in connection with a hotel as a sample room, and used and controlled by the owner of the hotel, has been held to be an outhouse. *Shotwell v. State* (1884) 43 Ark. 345.

m. Schoolhouse.

In an early Connecticut case, *State v. Bailey* (1834) 10 Conn. 143, over-

ruling *State v. O'Brien* (1797) 2 Root (Conn.) 516, it was held that a schoolhouse was not an outhouse. It appeared that the building described in the information was occupied, at the time specified, as a schoolhouse, for the purpose of teaching a district school therein; that at evening the schoolhouse was locked up; that there were deposited therein the books used by the scholars; and that the prisoner, in the night season, broke and entered the schoolhouse, with an intent to steal. The court said: “The prisoner was charged, by the information, with breaking and entering an outhouse, wherein were deposited goods, wares, and merchandise, in the night season, with an intent to steal, under the 30th section of the ‘act concerning crimes and punishments.’ On trial he was convicted and sentenced to imprisonment in the state prison, where he now is. The outhouse mentioned and described in the information was a district schoolhouse, containing books and other articles commonly used in district schools. In the case of *State v. O'Brien* (Conn.) supra, it is said that a schoolhouse may come under the denomination of a dwelling house or outhouse; and it was in that case adjudged that the felonious burning of such a building was arson. The doctrine of that case cannot be approved without an entire disregard of an established principle of the law that penal laws are to be construed strictly. Subsequently, at the revision of the statute, and when the law punishing arson was re-enacted, schoolhouses were included in the enumeration of buildings in addition to outhouses,—a circumstance very clearly implying that the legislature did not consider a schoolhouse to be an outhouse, notwithstanding *O'Brien's Case*. An outhouse is a building appurtenant to some main building or mansion house; and whether it be parcel of it or not depends upon its particular location, or its connection with such mansion house. It is plain that a schoolhouse is not of this description, and therefore is not an outhouse, in legal signification.”

20 A.L.R.—16.

The Maryland court, however, reached the conclusion in *Jones v. Hungerford* (1832) 4 Gill & J. (Md.) 402, that a schoolhouse which was not a parcel of a dwelling house was embraced within the terms “any other outhouse, not parcel of any dwelling house,” as used in a statute relating to arson.

So, in *Rex v. Winter* (1815) Russ. & R. C. C. (Eng.) 295, it was held that a schoolroom separated from a dwelling house by a narrow passage about a yard wide, with the tile roof of the house reaching over part of the schoolroom within the same inclosure, was an “outhouse” within the law making it a felony to set fire to any “house, barn, or outhouse.”

n. Shed.

An open shed in a farm yard, constructed of upright posts supporting pieces of wood laid across them and covered with straw as a roof, has been held to be an “outhouse” within the statute against arson. *Rex v. Stallion* (1834) 1 Moody, C. C. (Eng.) 398. But an open building in a field, at a distance from and out of sight of the owner's house, though boarded and covered in, has been held not to be an outhouse within the same statute. *Rex v. Ellison* (1832) 1 Moody, C. C. (Eng.) 336. Likewise, it has been held that a cart hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, is not an outhouse within the statute. *Rex v. Parrot* (1834) 6 Car. & P. (Eng.) 402.

o. Smokehouse.

It has been held that a smokehouse is not necessarily an “outhouse belonging to or used with a dwelling house,” within a burglary statute. *Dunn v. Com.* (1905) 119 Ky. 457, 84 S. W. 321, wherein the court said: “It will be observed that the charge in the indictment is that the defendant feloniously broke and entered the smokehouse of J. N. Chambers, and that the statute punishes the breaking of any dwelling house or any outhouse belonging to or used with any dwelling house. It is not charged in the

indictment that the house broken belonged to or was used with any dwelling house. It is said that a smokehouse is used with a dwelling house, and therefore the charge that the defendant broke the smokehouse is sufficient. But the court cannot so declare as a matter of law. A smokehouse is not necessarily an outhouse belonging to or used with a dwelling house. True, it usually is used with a dwelling house, but is not always so. The smokehouse may be at one place and the dwelling house at another. The owner, as where his dwelling house is burned, or where he has moved to another, may still retain the smokehouse at the old site. The charge in the indictment that it was a smokehouse which was broken is not, therefore, equivalent to the words of the statute punishing the breaking of 'any outhouse belonging to or used with any dwelling house.' The indictment is therefore insufficient, and the court should have sustained the demurrer to it."

p. Spring house.

A "spring house" has been held to be embraced within the term "outhouse." *Willoughby v. Shipman* (1859) 28 Mo. 50.

q. Stable.

A stable has been held not to be an outhouse within the meaning of a statute providing that "if any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, injure, or damage any tenement house, uninhabited house, or other outhouse belonging to his landlord or upon his premises, . . . he shall be guilty of a misdemeanor." *State v. Rowland Lumber Co.* (1910) 153 N. C. 610, 69 S. E. 58.

In *Reg. v. Hammond* (1844) 1 Cox, C. C. (Eng.) 60, it was held that a stable not connected with a dwelling house was not an outhouse, the court saying: "An outhouse means something annexed to an in-house."

So, where a building restriction in a deed provided that no building should be erected other than dwellings, with necessary outbuildings,

said dwellings to cost not less than \$2,000 each, and all of said buildings to be not less than 20 feet from the street line, it was held that a stable could not be erected on the lot before there was a dwelling thereon. *Blake-more v. Stanley* (1893) 159 Mass. 6, 33 N. E. 689.

See also *Rex v. Haughton* (1833) 5 Car. & P. (Eng.) 555, set out *supra*, II. b.

r. Stillhouse.

A stillhouse, or distillery, has been held to be an outhouse under an act to prevent gaming in "any house used as a place of gaming, or in any barn, kitchen, stable, or other outhouse," the court saying: "There is nothing in the act to limit their meaning to the outhouses appurtenant to the mansion house. The policy of the law should lead us to extend it to outhouses of every description. For its professed object is 'to prevent the pernicious practice of gaming.' With that view it is made to embrace highways, open fields, and race paths, kitchens, barns, stables, and every other outhouse. It would have been difficult to have made use of words more comprehensive. Both the latter and the spirit of the act, therefore, seem to lead to the same construction. If gaming has a tendency to lead to quarrels and controversies, and to the corruption of morals, etc., when carried on in an open field, that tendency cannot be much lessened by carrying it on at a stillhouse. And although penal laws are not to be extended by construction, yet the policy of the law is to be regarded. In this case, however, the court can discover no inconsistency between the letter and policy of the law." *State v. Faulkener* (1823) 13 S. C. L. (2 M'Cord) 438.

s. Storehouse.

In *State v. Roper* (1883) 88 N. C. 656, an old building located at a cross-road, and not inclosed or used in any way as a dwelling house, but which was occupied at the time of the burning as a storehouse, was held not to be an "outhouse," as that term was used in a statute making it a misde-

meanor unlawfully and wilfully to burn any church, uninhabited house, outhouse, or other house or building.

Storehouse as “Outhouse where people resort,” see *infra*, III.

t. Unfinished dwelling house.

A building intended for and constructed as a dwelling house, but which was not completed or inhabited, and in which the owner had deposited straw and agricultural implements, has been held not to be an outhouse within the meaning of a statute entitling the owner to maintain an action against the hundred for an injury sustained by him in consequence of maliciously setting fire to an outhouse. *Elsmore v. St. Briavells* (1828) 8 Barn. & C. 461, 108 Eng. Reprint, 1114, 6 L. J. K. B. 372, 2 Mann & R. 514.

u. Unoccupied house.

See *infra*, III.

III. “Outhouse where people resort.”

The phrase “outhouse where people resort” in laws to suppress gaming has been held to be used in the ordinary and popular acceptance of the term as meaning any house standing out and apart from houses occupied and used as dwelling or business houses, and therefore as including all unoccupied houses “where people resort” for gaming and other purposes. *Pickens v. State* (1893) 100 Ala. 127, 14 So. 672; *Wheelock v. State* (1855) 15 Tex. 260. Therefore such a statute does not apply to an unoccupied dwelling house. *Pickens v. State* (Ala.) *supra*.

It seems that an outhouse to which people may and do resort at pleasure, for the purpose of gaming, though it may be only occasionally, comes within the statutory provision. *Downey v. State* (1890) 90 Ala. 644, 8 So. 869.

Under a statute prohibiting card playing in any “outhouse where people resort,” it has been held that the fact that the house where the playing took place was detached from the others, and inclosed by a fence, did not show that it was not such as the statute alleged; that to make it an “outhouse,” within the contemplation of the legislature, it was not necessary that it should be in the same inclosure with a mansion house, or other building in which persons resided. *Cameron v. State* (1849) 15 Ala. 383.

So it has been held that a vacant storehouse which was commonly kept locked, and which was one of a continuous line of buildings fronting on the street, was within the meaning of the statute. *Swallow v. State* (1852) 20 Ala. 30; *Downey v. State* (1895) 110 Ala. 99, 20 So. 439; *Downey v. State* (1896) 115 Ala. 108, 22 So. 479.

It was held in *Sisk v. State* (1890) 28 Tex. App. 432, 13 S. W. 647, that a room used as a sleeping room in a building in which no other rooms were occupied might be an “outhouse where people resort” within the meaning of the statute.

Likewise, in *Huse v. State* (1904) 46 Tex. Crim. Rep. 585, 80 S. W. 618, it was held that a dugout within a few feet of a dwelling house and occasionally used in connection with the house was an “outhouse where people resort,” when gambling occurred there.

A barn used for keeping stock and storing grain, and used in connection with the residence of the owner, is not shown to be “an outhouse where people resort,” where the only proof is that the defendant and another person played a game of cards there, no others being present when the game was played. *Stockton v. State* (1898) — Tex. Crim. Rep. —, 44 S. W. 509.

A. S. M.

HOLLIS & RAY, Appts.,

v.

J. M. ISBELL.

Mississippi Supreme Court (Division B) — March 7, 1921.

(124 Miss. 799, 87 So. 273.)

Mechanic's lien — priority — existing lien.

All liens are created by law or by contract, and to establish a lien the contract must be made by the owner of the property upon which a lien is sought to be impressed. The contract may be expressed or implied. But, where a mechanic repairs property on which there exists a prior lien which he knows exists, his lien for repairs will be subject to the prior lien, unless the facts show a waiver by the prior lienholder, or an implied contract to subordinate his lien to that of the mechanic.

[See note on this question beginning on page 249.]

Headnote by ETHRIDGE, J.

APPEAL by plaintiffs from a judgment of the Circuit Court for Copiah County (Miller, J.) reversing a judgment in their favor before a justice of the peace, in a suit to establish a mechanic's lien on an automobile repaired by them for defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. N. Miller and L. F. Hendrick for appellants.

Mr. J. F. Guynes for appellee.

Ethridge, J., delivered the opinion of the court:

Hollis & Ray instituted a proceeding to establish a mechanic's lien on an automobile which they had repaired for Isbell. Isbell had bought the automobile from William Atkinson & McDonald Company, a corporation, which had retained title until the purchase money was paid. The suit originated in a justice of the peace court, in which court there was a judgment holding the appellants' claim superior to that of Atkinson & McDonald Company, from which judgment an appeal was prosecuted to the circuit court, where there was a judgment holding that the lien of Atkinson & McDonald Company was superior to that of the appellants, from which judgment this appeal is prosecuted.

The case was tried in the circuit court on an agreed statement of facts, before the circuit court with-

out a jury. The agreed statement of facts reads as follows:

"In this case it is agreed between counsel to submit to the court, waiving a jury, the following facts:

"It is agreed that Atkinson & McDonald Company, on March 22, 1919, sold and delivered to J. M. Isbell a Maxwell touring car for the sum of \$275 and interest, for which amount they accepted his note, reserving to the said company title to the said car until the purchase money should be paid; that said note is filed herewith as exhibit A hereto. On the — day of September, 1919, there was due on the said note a balance of \$215, which fact that there was a balance due by Isbell on the car to claimant was fully known to Hollis & Ray, plaintiffs in the original suit.

"On the last date named, without the knowledge or consent of William Atkinson & McDonald Company, the said Isbell took the automobile to Hollis & Ray for repairs, and they repaired it at their garage. The amount due for said

repairs amounted to \$51. Before the said bill was paid they, Hollis & Ray, consented for the said Isbell to take possession of said car.

"On the — day of —, 1920, the said bill for repairs being still due and unpaid, said Hollis & Ray filed their suit in the justice of the peace court to enforce their lien on said car for the said sum. The car was seized. Atkinson & McDonald Company, before the trial, filed their claimant's issue, claiming the title to said car by virtue of said note.

"At the trial Hollis & Ray obtained judgment for said amount of \$51, and for the sale of said car for which to pay the said amount. On trial of claimant's issue the said lien of Hollis & Ray was held to be paramount to the claim of title of Atkinson & McDonald Company. Whereupon said company appealed to the circuit court."

The appellant relies upon the case of *Broom v. Dale*, 109 Miss. 52, L.R.A.1915D, 1146, 67 So. 659, in which this court held that where a vendor reserving title to secure the purchase money had knowledge that a car sold with title retained was being repaired by a mechanic, and made no objection thereto, the mechanic's lien was superior to that of the vendor. The appellant also relied on the case of *Orr v. Jackson* *Jitney Co.* 115 Miss. 140, 75 So. 945. In the *Broom Case*, supra, a ground of liability rests upon the proposition that the vendor had knowledge, and impliedly consented to the repair of the car, and that the repair resulted to his benefit as well as to the benefit of the vendee. In the case before us the vendor had no knowledge whatever that repairs were being made, or were to be made, until after their completion. There is nothing in the record to show that the repairs increased the value of the car over and above its value at the time of the sale.

The appellant also argues that the principle of commercial necessity enters into this case, and for

that reason a mechanic's lien should be superior to the vendor's lien or the vendor's title, even though the mechanic had knowledge of the seller's rights.

In 3 R. C. L. 133, § 55, it is stated: "All liens are created by law or by contract of the parties. Hence, while ordinarily a bailee has a lien on a chattel where, by the bestowal of skill and labor, he has enhanced its value, such a lien arises from his employment to render the services, and, as a lien is in effect a proprietary interest or qualified ownership, it follows that the employment must be by the owner whose property is to be affected by the lien, or by his consent, express or implied; otherwise the bailee has no lien, and the true owner, on demand, is entitled to a delivery thereof without satisfying any charges which may have accrued in favor of the bailee against his bailor."

The general rule of priority is that one acquiring a right with knowledge of a prior right acquires subject to the prior right, and this rule will be enforced, unless circumstances are such that an agreement to the contrary may be implied on the part of the holder of the prior right. In many cases the circumstances warranted the court in holding from the circumstances, that the prior lienholder has waived his lien or agreed to subordinate it to that of the subsequent lienholder, and that was the foundation upon which the case of *Broom v. Dale* rested. In the present case it was agreed, in the agreed statement of facts above set out, that the seller had no knowledge of the transaction between the mechanic and his vendee, but shows, on the contrary, that the mechanic had full knowledge of the seller's right.

**Mechanic's Lien
—priority—
existing lien.**

This being true, he must have contracted upon the faith of the credit of the vendee and such right as the vendee had in the property repaired. There are no circumstances in this record suffi-

cient to warrant us in applying the doctrine of *Broom v. Dale*, supra, to this case. There is a clear distinction between this case and that one.

The learned court below decided in accordance with this opinion, and the judgment is affirmed.

NOTE.

The question of priority as between a lien for repairs and the right of the seller under conditional contract is the subject of the annotation following *SCOTT v. MERCER GARAGE & AUTO SALES Co.* post, 249.

W. A. SCOTT, Plff. in Err.,
v.
MERCER GARAGE & AUTO SALES COMPANY.

West Virginia Supreme Court of Appeals — March 1, 1921.

(88 W. Va. 92, 106 S. E. 425.)

Lien — priority — mechanic's and vendor's.

The common-law lien of a mechanic for repairs on a chattel in his possession is subordinate to the lien of a former owner of the chattel, who, in his contract of sale, reserved the title as security for unpaid purchase money, duly recorded as provided by § 3 of chapter 74 (§ 3831) of the Code, unless by the terms of the contract, or by the subsequent conduct of the seller, he has given express or implied authority to the vendee to keep the property in repair.

[See note on this question beginning on page 249.]

Headnote by MILLER, J.

ERROR to the Circuit Court for Mercer County to review a judgment in favor of defendant in an action brought to recover possession of an automobile. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Sexton & Roberts for plaintiff in error.

Mr. Arthur F. Kingdon, for defendant in error:

Even if the plaintiff had a valid lien against the purchaser of the automobile, nevertheless the defendant's lien would take precedence over the plaintiff's lien.

Jones, Liens, § 744; *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680; *Allred v. Haile*, 84 Ga. 570, 10 S. E. 1095; *Smith v. Stevens*, 36 Minn. 303, 31 N. W. 55; *Ruppert v. Zang*, 73 N. J. L. 216, 62 Atl. 998; *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966; *Reeves & Co. v. Russell*, 28 N. D. 265, L.R.A.1915D, 1149, 148 N. W. 654; *Peter Barrett Mfg. Co. v. Van Ronk*, 212 N. Y. 90, 105 N. E. 811; *Gardner v. First Nat. Bank*,

122 Ark. 464, 184 S. W. 51; *Globe Works v. Wright*, 106 Mass. 207; *Hammond v. Danielson*, 126 Mass. 294; 5 R. C. L. p. 83; *Meyer v. Berlandi*, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; *Tucker v. Werner*, 2 Misc. 193, 21 N. Y. Supp. 264; *Garr v. Clements*, 4 N. D. 559, 62 N. W. 640.

Miller, J., delivered the opinion of the court:

In this action of detinue, begun in the circuit court of Mercer county, and there determined adversely to plaintiff, upon agreed facts submitted to the court in lieu of a jury, the question is now presented for our decision whether the common-law lien of the defendant company for repairs upon an auto-

mobile, done in December, 1916, and for the payment of which it was detaining said machine, is, as the circuit court held, superior and paramount to that of the plaintiff for the purchase money thereof, represented by notes, for which in his written contract of sale he retained the title thereto, duly recorded in the clerk's office of the said county, prior to the delivery thereof to the defendant by Mary L. Holley, or her husband, the purchaser thereof, for the purpose of such repairs.

The contract of sale, made a part of the agreement of facts, after describing the parties and reciting the consideration, \$750, \$150 whereof is acknowledged as paid, and the balance, \$600, represented by twelve negotiable notes of \$50 each, payable one each month with interest, for the period of twelve months, further provides: "The title to the above-mentioned automobile is reserved to the party of the first part until all said purchase-money notes are fully paid."

Another provision of the contract is: "It is further understood and agreed between the parties hereto that in the event the party of the second part shall fail to discharge any two of said notes as they fall due, and any two or more of said notes shall be due at the same time, then the party of the first part shall have the right, or option, if he so desires, to retake possession of said automobile, in the event the said party of the first part cannot otherwise collect said notes."

The facts agreed show that plaintiff did not know said car was out of the possession of the purchaser and in possession of defendant until sometime in 1918, but believed it to be in his possession; that four of the purchase-money notes had been paid, but that, the remainder being unpaid, suit was brought thereon by plaintiff, judgment taken therefor against maker and indorser in May, 1918, for \$410.92 and costs, and every legal remedy available was taken to collect the same, with-

out avail; and that thereafter demand for the possession of the said automobile was made by plaintiff upon defendant, which being refused, this suit was brought to obtain possession thereof.

We recognize the fact that we are presented a clear case of a common-law lien of a repair man in possession of the chattel, holding it as security for labor and material expended upon it. But we also emphasize the fact that plaintiff is the vendor thereof, with recorded reservation of title held as security for the purchase money, giving notice to creditors of and purchasers from the vendee, the mortgagor. This lien was good at common law without notice, but by § 3 of chapter 74 (§ 3831) of the Code, such lien for purchase money is lost without recorded notice thereof as therein provided. There is nothing in the equities of the case now before us which should allow the subsequent lien to supplant the prior lien of the vendor. The defendant no doubt acquired a common-law lien on the chattel for the amount of the repairs, but was it not subordinate to that of plaintiff for purchase money? Plaintiff furnished the automobile, practically new, with all the material and labor bestowed upon it to make it a valuable machine, and there is nothing in the provisions of the contract of sale implying authority in the purchaser to encumber the property, voluntarily or involuntarily, in such a way as to supersede the prior lien for purchase money. The instrument so reserving title of a chattel partakes of the nature of a mortgage, the vendor being mortgagee, the vendee the mortgagor. As a general rule, say all the authorities, a mortgagor cannot create a lien upon the property to take precedence over his recorded mortgage. Jones, Chat. Mortg. § 472. This authority says: "An agreement which will defeat the purpose of the transaction should not be inferred or implied against

a mortgagee, without very cogent evidence."

Following the general rule referred to, we find directly in point the case of *Denison v. Shuler*, 47 Mich. 598, 41 Am. Rep. 734, 11 N. W. 402, opinion by Graves, Ch. J., holding that a mechanic's lien for repairs is subordinate to a prior duly recorded mortgage thereon for the purchase money. This case involved repairs on a steam engine which was then in the possession of the defendants, the mechanics, and held by them for the repair bill of \$185.86. The court, referring to the fact that the plaintiff had furnished the machine, says: "The repairers did less. Their expenditure was comparatively small, and they acted, in making it, under circumstances which charged them with notice of the plaintiff's prior lien. Why should their claim be preferred?"

What was said by Chief Justice Marshall, in *Rankin v. Scott*, 12 Wheat. 177, 179, 6 L. ed. 592, 593, referred to by the Michigan court, is as applicable here as in that case, namely, that a prior lien gives a prior claim, which is entitled to prior satisfaction of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant.

The comparatively recent case of *Shaw v. Webb*, 131 Tenn. 173, L.R.A.1915D, 1141, 174 S. W. 273, Ann. Cas. 1916A, 626, involved the lien of a repairer of an automobile—first a common-law lien lost by surrender of possession, but for which the statute also gave him a lien. In that case the court in a well-considered opinion, which reviews many of the decisions and analyzes them, held that the lien given by statute was subordinate to the lien of the vendor of the chattel reserved to secure the payment of the purchase-money notes, and that if the vendor intended to subordinate his lien to that of the mechanic

for repairs, it should be manifested in the contract (in that case, in the purchase-money notes), in which the title was reserved to secure the payment thereof, else the notes would be deprived of a considerable element of marketability. In *Baughman Auto. Co. v. Emanuel*, 137 Ga. 354, 38 L.R.A.(N.S.) 97, 73 S. E. 511, the common-law lien of the repairer of an automobile was held to be subordinate to the rights of the vendor, in his title retained to secure the purchase money. In that case it appears that the lien claimant had notice of the rights of the conditional vendor. Here our recording statute was the legal equivalent, for it gave defendant record or constructive notice binding him.

An examination of the cases apparently in conflict with those cited, and others that might be referred to,—unless it be those of New Jersey, constituting an exception,—will show that wherever such common-law lien has been allowed to supersede a lien reserved by the vendor of the chattel, the courts have attempted, at least, to refer their conclusions to some actual or implied authority of the vendor or mortgagee to have the chattel kept in repair. An illustration is the case of *Hammond v. Danielson*, 126 Mass. 294, involving a mortgage of a hack described as "let for hire," and "now in use," from which authority was implied in the mortgage to keep the vehicle in repair. And in accordance with this class of cases, it was sought in the present case to imply authority in the vendee to cause the automobile to be repaired, because of the fact that plaintiff knew that the purchaser intended to use the machine on some occasions to carry passengers for hire. No such authority was given in the recorded contract. May he not stand on that, if he has done nothing in the meantime to deprive him of his rights? The facts agreed show nothing justifying any such implied authority.

For the reasons aforesaid, we are of opinion that plaintiff is en-

titled to recover possession of the property sued for, and that the judgment below must be reversed. But as the facts agreed do not include the value of the property, and the court made no finding thereon, before a final judgment the value of the property must be ascertained, as provided by § 6 of chapter 102 (§ 4403) of the Code.

We, therefore, reverse the judgment and remand the case to the Circuit Court, with direction by proper proceedings to ascertain the value of the property and give judgment for the plaintiff for possession thereof, if possession thereof can be had; if not, for the value thereof, with costs according to law.

Petition for rehearing denied March 29, 1921.

ANNOTATION.

Priority as between lien for repairs and right of seller under conditional contract.

In general.

As a general rule, the lien of a person making repairs to a chattel, at the instance of the buyer in possession thereof, is subordinate to the rights of the seller under a contract of conditional sale of which the person making the repairs has actual or constructive notice. *Baughman Auto. Co. v. Emanuel* (1911) 137 Ga. 354, 38 L.R.A.(N.S.) 97, 73 S. E. 511; *Small v. Robinson* (1879) 69 Me. 425, 31 Am. Rep. 299; *HOLLIS v. ISBELL* (reported herewith) ante, 244; *Shaw v. Webb* (1914) 131 Tenn. 173, L.R.A. 1915D, 1141, 174 S. W. 273, Ann. Cas. 1916A, 626. See also *SCOTT v. MERCER GARAGE & AUTO SALES CO.* (reported herewith) ante, 246.

Thus, in *HOLLIS v. ISBELL* (reported herewith) ante, 244, it was held that the title retained by a seller under a recorded contract of conditional sale was superior to a lien for repairs, made at the instance of the buyer without the knowledge of the seller. The court distinguished *Broom v. Dale* (1915) 109 Miss. 52, L.R.A. 1915D, 1146, 67 So. 659, on the ground that the agreed statement of facts in the latter case showed knowledge on the part of the seller that the repairs were being made. See *infra*, under "Implied consent of seller to repair."

A fortiori, where the person making the repairs has actual notice that a conditional buyer who requests repairs on a chattel is not the owner thereof, he will not be permitted to

assert a lien for repairs as against the seller who retains the title to the chattel. *Baughman Auto. Co. v. Emanuel* (Ga.) supra.

However, under a statute providing that "a person who makes, alters, or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid," it has been held that a person making repairs to an automobile at the request of a buyer was entitled to a lien, even as against an unpaid conditional seller thereof. *Davenport v. Grundy Motor Sales Co.* (1915) 28 Cal. App. 409, 152 Pac. 932, wherein the court said: "The sole question involved is whether or not the Grundy Motor Sales Company was entitled to a lien for the work done and materials furnished in making repairs upon the automobile at the request of Seymour, to whom the plaintiff had delivered possession under the terms of the contract for the conditional sale thereof. Appellant insists that, as Seymour did not have title to the property, no lien for repairs could be based upon any act or request of his. This contention, however, is contrary to the plain import of the language used in the statute, which, as we have seen, expressly provides that one making repairs at

the request of the legal possessor of the property shall have a lien therefor. That Seymour was the legal possessor of the automobile admits of no question."

Likewise, under a statute providing that whenever any person shall intrust to any mechanic, artisan, or tradesman an article of value to be repaired, such mechanic, artisan, or tradesman shall have a lien on the article, it has been held that a lien for necessary repairs by a mechanic was effective as against an owner and conditional seller, where the mechanic made the repairs at the request of the purchaser and without objection from the seller, though the latter had advance notice of the contemplated repairs, and told the mechanic not to let the automobile go out of his possession until he was paid for them. *Etchen v. Dennis & Son Garage* (1919) 104 Kan. 241, 178 Pac. 408. The decision in that case appears to have been based both on the extent of the lien under the statute, and the consent of the owner to the making of the repairs. See *infra*, under "Implied consent of seller to repairs."

In New York, by an express provision of the statute relating to liens for the repair of motor vehicles (Lien Law, § 184, 32 McKinney, Consol. Laws, p. 177), a conditional vendee is regarded as an owner within the meaning of the clause creating a lien for repairs made on a motor vehicle at the request of its owner. See *Lloyd v. Kilpatrick* (1911) 71 Misc. 19, 127 N. Y. Supp. 1096. And in *Terminal & Town Taxi Corp. v. O'Rourke* (1922) 117 Misc. 761, 193 N. Y. Supp. 238, it was held that § 184, so far as repairs are concerned, is merely declaratory of common-law rights, and that, irrespective of statute, a repair company's lien for repairs made under contract with one who had acquired the interest of the vendee under a conditional contract is superior to the right of the conditional vendor; and that the section is not unconstitutional as contravening the due process of law

provision of the state and Federal Constitutions. See also a similar Minnesota statute, referred to in *Reed v. Horton* (1916) 135 Minn. 17, 159 N. W. 1080.

In *Crosier v. Cudihee* (1915) 85 Wash. 237, 147 Pac. 1146, the court held to be constitutional a statute giving a lien to any person who expends labor, skill, or material on a chattel at the request of the owner or his authorized agent, providing that a person in possession of a chattel under an agreement for its purchase shall be considered the owner for the purposes of the act, whether he have the legal title or not, and making the lien superior to the right of the holder of the legal title or any previous lien. The court said: "Appellant contends that § 1156, Rem. & Bal. Code (P. C. 309, § 167), is unconstitutional, in that it prefers liens of this character over any prior security held by a vendor, and grants a lien against the interest of the vendor, when, as here, such interest is evidenced by a conditional-sale contract. It is also asserted that the effect of the statute deprives appellant of his property without due process of law. Appellant cites no direct authority supporting his contention, and we find none. We cannot recall any rule of law which would make this statute unconstitutional. Statutes establishing priorities as between liens are not uncommon, and such statutes have never been successfully attacked because liens of this character have been granted priority over vendors,' mortgagors,' and other liens. The fact that appellant is in court seeking the validity of his lien against that of respondents is a sufficient answer to his contention that he has been deprived of his property without due process of law."

Under a statute requiring that a contract of conditional sale must be recorded in order to be valid as against third persons, a lien for repairs made at the instance of the buyer, is superior to the right of a seller who has failed to record the contract reserving title to him. *Winton Co. v. Meister* (1918) 133 Md. 318,

105 Atl. 301. See also *Landreth Machinery Co. v. Rohey* (1914) 185 Mo. App. 474, 171 S. W. 681.

The unusual situation has been presented, in two cases, of a claim of lien for repairs by a conditional seller entitled to resume possession because of defaults in payment. Ordinarily, it would seem that he cannot claim a lien, since he is the holder of the legal title, and the claim of a lien is not consistent with his title. *Alexander v. Mobile Auto Co.* (1917) 200 Ala. 586, 76 So. 944. In that case it appeared that a conditional seller of an automobile bought an action against the buyer for the price, though he had resumed the possession of the machine. The contention of the seller was that he had taken possession because he was entitled to a lien for repairs made by him after the sale. The court held that the seller, having reserved title, could not assert a lien on the chattel sold; that his resuming possession amounted to an election to enforce the condition in the contract of sale, and he could not afterward maintain an action for the price. But in *Gilbert v. Bishop* (1912) 78 Misc. 560, 138 N. Y. Supp. 689, it was held, under a lien act providing that a garage owner or other person keeping a place for the repair of motor vehicles shall have a lien for repairs made at the request, or with the consent of, the owner, whether he is a conditional vendee or a mortgagor remaining in possession, that the seller of an automobile who retained title until the purchase price was paid could take possession of the machine to enforce a lien for repairs made by him, and that, under such circumstances, his act in taking possession did not bar an action by him against the purchaser for the price.

Implied consent of seller to repair.

Where the circumstances of a conditional sale of a chattel are such as to imply a consent by the seller that the buyer may have it repaired when necessary, the lien of the person making the repairs is superior to the rights of the seller. Thus, an understanding of the parties to a con-

tract for the conditional sale of a vehicle, that it is to be used to carry passengers for hire, has been held to imply that the buyer is authorized to subject the vehicle to a lien for repairs, and, therefore, to give to one who repairs it a lien enforceable against the seller. *Weber Implement & Auto. Co. v. Pearson* (1917) 132 Ark. 101, L.R.A.1918D, 327, 200 S. W. 273. In that case it appeared that a conditional sale was made of three automobiles, with the understanding that they were to be used in a livery service, and were to be paid for from the earnings of the business. In holding that the purchaser, in having repairs made, was acting as an agent for the seller, the court said: "Necessary repairs are for the betterment of the property, and, under circumstances like the present case, it will be presumed to have been the intention of the parties that the property should be kept in repair, and the purchaser in possession will be deemed the agent of the conditional vendor to procure the repairs to be made. One corporation sold the three cars to the Avens. They knew that they were to be used in the livery business, and that it would be necessary to make repairs on them from time to time, to keep them in running order."

However, in a Maine case (*Small v. Robinson* (1879) 69 Me. 425, 31 Am. Rep. 299), the court reached an opposite conclusion on substantially the same state of facts. It appeared in that case that the owner of two horses, a set of harness, and a hack parted with their possession under an agreement which was substantially a conditional-sale contract, though not so designated by the court. The buyer, a hack driver, with the knowledge and consent of the seller, had the possession of the hack, using it in his business, though it was stipulated in the note given for the price that title should remain in the seller until the note was paid, with interest. In an action of replevin brought by the seller against a person who had made necessary repairs on the hack, it was held that the buyer had no

authority to subject it to a lien for repairs.

Under a "hire-purchase agreement" which provided that the prospective purchaser of a dogcart should keep and preserve it from injury, it has been held that he had the authority to have necessary repairs made on the cart, and that the lien therefor was enforceable against the owner. *Keene v. Thomas* [1905] 1 K. B. (Eng.) 136, 74 L. J. K. B. N. S. 21, 53 Week. Rep. 336, 92 L. T. N. S. 19, 21 Times L. R. 2.

The recording of a contract providing for the conditional sale of a vehicle, which does not refer to its use for the carriage of passengers for hire, is held in *SCOTT v. MERCER GARAGE & AUTO SALES CO.* (reported herewith) ante, 246, to avoid the effect of an understanding for such use, and to prevent the title of the seller from becoming subject to the lien of one who makes repairs on the vehicle at the instance of the buyer. The defendant company contended that its lien for repairs on an automobile was superior to the right of an unpaid seller under a conditional-sale contract duly recorded, on the ground that the seller knew, at the date of the sale, that the automobile would sometimes be used for carrying passengers, and that there was, therefore, an implied authority granted to the purchaser to have the machine repaired. The court holds that, since nothing in the recorded contract can be construed as an authority for the purchaser to have repairs made, the lien for repairs is subordinate to the seller's right to possession under his reservation of title in the sale agreement. The court distinguishes an analogous case involving the respective rights of a mortgagee and a conditional seller (*Hammond v. Danielson* (1879) 126 Mass. 294), wherein a different result was reached on the ground of an implied authority. It is pointed out that the mortgaged vehicle referred to in that case was described as "let for hire," and "now in use."

In *Baughman Auto. Co. v. Emanuel* (1911) 137 Ga. 354, 38 L.R.A. (N.S.) 97, 73 S. E. 511, knowledge on the part

of a conditional seller of a chattel that the buyer was having repairs made on it was held not to have the effect of an agreement for the making of the repairs, or to subordinate the reserved title of the seller to the lien for the repairs.

In Mississippi, however, the opposite view has been adopted as to the effect of knowledge of the repairs on the part of the conditional seller. *Broom v. Dale* (1915) 109 Miss. 52, L.R.A.1915D, 1146, 67 So. 659. In that case it appeared that the buyer of an automobile under a conditional contract of sale had repairs made on it with the knowledge of the sellers. In holding that the lien for the repairs was superior to the rights of the sellers, the court said: "In the case at bar the automobile was in the possession of Mr. Polk, and being used by him with the knowledge and consent of appellees, which use continued for a long period of time. Appellees not only knew and consented to the general use of the automobile by Mr. Polk, but also had knowledge that, in the course of his use of the property, he was having it repaired. Appellees, with this knowledge, made no objection to the repairs being made. From the sole possession, control, and the use of the automobile by Mr. Polk, by agreement with appellees, from the manner of its use and the necessity of repairing to preserve it and keep it in running order and prevent its deterioration, and from the making of such repairs with the knowledge of appellees, we conclude that there was an implied authority and permission from appellees, as mortgagees, to Mr. Polk, as mortgagor, to have such repairs made, and that appellants have a paramount and superior lien to that of appellees on the property, for the payment of the labor they performed and materials furnished in repairing it."

Apparently, *Etchen v. Dennis & Son Garage* (1919) 104 Kan. 241, 178 Pac. 408, is to the same effect, though the decision is based, in part, on the language of a Kansas statute. See supra, under "In general."

It would seem that the mere fact

that repairs are necessary, if the conditional buyer of a chattel is to continue to use it, is not sufficient to imply a grant of authority to the buyer to subject the reserved title of the seller to a lien for repairs. *Shaw v. Webb* (1914) 131 Tenn. 173, L.R.A. 1915D, 1141, 174 S. W. 273, Ann. Cas. 1916A, 626. In that case the plaintiff sought to enforce a mechanic's lien against a conditional buyer, under the following section of a Tennessee statute: "There shall be a lien upon any vehicle . . . for any repairs or improvements made or fixtures or machinery furnished at the request of the owner or his agent in favor of the mechanic, contractor, founder, or machinist who undertakes the work." It appeared that the conditional buyer who ordered the repairs had given two notes in payment, each of which recited that the seller was to retain title to secure the purchase price. After reviewing the authorities, the court said, with respect to the authority of a conditional buyer to subject the purchased chattel to a lien: "We are of opinion . . . that something more is required than the fact that

a vehicle, which may need repair in order to continue personal use by the vendee, is placed in the possession of the conditional vendee. The vendor in such case should not be considered as consenting in advance to the subordination to that which both parties patently intended to make superior—the title retained for the security of the payment of the purchase money. The intent of the vendor to permit repairs to be made, and a consequent lien to attach to his interest, should have been manifested in the note contract, since, upon a transfer of the note, the transferee is vested with the rights of the conditional vendor. To announce a doctrine such as is contended for by the mechanic in this case would be to deprive a note which contains a reservation of title to personalty, of a no inconsiderable element of marketability. The transferee of such paper should not, we believe, take it subject to the risk of having his right embarrassed or lessened by such act of the vendee-maker, when the note contains nothing to put him on notice."

W. S. R.

RE JOSEPH GREENBERG, Bankrupt.

EX PARTE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

United States Circuit Court of Appeals, Second Circuit—January 14, 1921.

(271 Fed. 258.)

Insurance — change to bankruptcy trustee — right of insurer to refuse.

1. The insurer cannot, under a policy taken for the benefit of the wife of the insured, which provides for a change of beneficiary "with consent of the company," refuse to consent to a change to the bankruptcy trustee of the insured, so as to permit him to realize the surrender value of the policy, although its refusal is based on the attempt to protect the rights of the beneficiary.

[See note on this question beginning on page 256.]

—vested interest of beneficiary.

beneficiary at will has no vested interest.

2. A beneficiary in a life insurance policy which provides for change of

[See 14 R. C. L. 1376; 3 R. C. L. Supp. 392.]

(Ward, Circuit Judge, dissents.)

PETITION by the Insurance Company to revise an order of the District Court of the United States for the Southern District of New York, requiring payment of the admitted surrender value of a policy of life insurance issued by it upon the life of a bankrupt, to the trustee in bankruptcy. *Affirmed.*

Statement by **Hough**, Circuit Judge:

Greenberg became bankrupt while in possession of a policy of life insurance in the Hancock Company. The policy had been obtained some years before petition filed, by the bankrupt himself, and therein his wife was designated as beneficiary. The lower court has found as a fact that Mrs. Greenberg never did, "at any time, take out, own, or pay for the policy" above named.

By the policy terms the insured bankrupt could "change the beneficiary from time to time with the consent of the company, by written notice to said company," provided, however, that "no other than the insured's estate, father, mother, husband, wife, or dependent child will be made beneficiary under this policy."

This proceeding began by the trustee (having the policy in possession) demanding that the insurance company pay him the surrender value of the same. From this we assume that previous demand had been made upon the bankrupt, pursuant to § 70 of the act (Comp. Stat. § 9654, 1 Fed. Stat. Anno. 2d ed. p. 1150), that he pay the trustee such surrender value, that he had declined so to do, and that the policy had, therefore, pursuant to the statute, passed to the trustee as assets. No other assumption is consistent with the form of this proceeding, which is an application to compel the insurance company to pay over said surrender value, pursuant to the trustee's requirement.

The insurance company appeared, has never objected to the jurisdiction, and contended, and still contends, that the policy is vested in the wife, or (if no such vesting has actually taken place) that it, as insurer, may refuse to give its consent to any change of beneficiary,

and thereby defeat the trustee's claim.

The district court, having made the finding of fact above set forth, held that the insurance company's action was unwarranted and "arbitrary." It therefore entered an order requiring the payment of the admitted surrender value. To review such order this petition was filed.

Argued before **Ward**, **Hough**, and **Manton**, Circuit Judges.

Messrs. **Frederick C. Tanner** and **Morris E. Kinnan**, for petitioner:

In construing the Bankruptcy Law as to life insurance, in connection with the statute of exemption in various states, most of the courts have held that no interest in the cash surrender value passes to the trustee in bankruptcy.

Re **Orear**, 111 C. C. A. 150, 189 Fed. 888; Re **Booss**, 154 Fed. 494; Re **Pfaffinger**, 164 Fed. 526; Re **Whelpley**, 169 Fed. 1019; Re **Johnson**, 176 Fed. 591; Re **Young**, 208 Fed. 373; **Frederick v. Metropolitan L. Ins. Co.** 235 Fed. 639; **Young v. Thomason**, 179 Ala. 454, 60 So. 272; **Grems v. Traver**, 87 Misc. 644, 148 N. Y. Supp. 200, affirmed in 164 App. Div. 968, 149 N. Y. Supp. 1085; **Sanders v. Aetna L. Ins. Co.** 95 S. C. 36, 78 S. E. 532, Ann. Cas. 1915B, 1284.

Under the law of the state of New York this policy and its proceeds are exempt.

Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129; **Whitehead v. New York L. Ins. Co.** 102 N. Y. 143, 55 Am. Rep. 787; 6 N. E. 267; **Grems v. Traver**, 87 Misc. 644, 148 N. Y. Supp. 200; **Ruoff v. John Hancock Mut. L. Ins. Co.** 86 App. Div. 447, 83 N. Y. Supp. 758; **Newman v. John Hancock Mut. L. Ins. Co.** 45 Misc. 320, 90 N. Y. Supp. 471.

Mr. Bernard Bernbaum for the trustee in bankruptcy.

Hough, Circuit Judge, delivered the opinion of the court:

The beneficiary of a life insur-

ance policy, who may at any time be removed from the benefited position by the insured, and against the beneficiary's will, cannot have a vested interest. In *Grems v. Traver*, 87 Misc. 644, 148 N. Y. Supp. 200, affirmed in 164 App. Div. 968, 149 N. Y. Supp. 1085, there was one policy considered much like the one at bar; but the court held as a fact that such policy "was taken out for the especial benefit of the wife, under agreement that it should be held for her protection." No such agreement is here shown, and it may be noted that the cases from United States courts, cited and relied on in the *Grems* Case, are from lower courts, and for the most part wholly inconsistent with the subsequent decision in *Cohen v. Samuels*, 245 U. S. 53, 62 L. ed. 143, 38 Sup. Ct. Rep. 36.

This being a petition to revise, we can inquire only into the law; the facts (unless without any evidence to support them) we must take as found by the lower court. That court having declared that the bankrupt's wife never took out, owned, or paid for the policy, there is no ground for asserting that the wife was within the protection of § 52 of the Domestic Relations Law (Consol. Laws, chap. 14) of this state. By "owned," we take it that the district judge meant that the policy had not vested in the wife, which is the meaning in which we used the word in *Re Samuels*, 166 C. C. A. 221, 254 Fed. 776.

This case presents but one point, for, strictly speaking, the wife is not before us at all; she is not making any claim to the policy, or the proceeds thereof; she is not a party to this proceeding, which is against the insurance company alone, and at bar that company substantially takes the position that it can, by refusing consent to a change of beneficiary, secure to the wife the enjoyment of that to which she makes no demand. This raises the question as to the scope of the

phrase which gave to the insured the right of changing his beneficiary "from time to time, with the consent of the company, by written notice to said company."

It is doubtless true that where a specific and formal manner of changing beneficiary, issuing new certificate or policy of insurance, or of assigning the policy itself, is agreed to and plainly expressed when the policy is obtained, no other method of effecting such change or assignment can ordinarily be recognized; at least as between conflicting claimants. The matter is amply discussed in *Freund v. Freund*, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; and see a long list of citations in L.R.A.1915A, 109.

But the contest here is not between the original beneficiary and another person selected for succession by the insured. By force of the bankruptcy statute, the trustee has succeeded by operation of law to all the rights of the bankrupt in the premises. For practical purposes this contest is between the insured bankrupt and his insurer, and the question would be the same if *Greenberg* had attempted to substitute for his wife another beneficiary (within the class limited in the policy), and the company refused consent to the change. Under such circumstances it is to be remembered that this exact provision for the consent of the company to the change is solely for its own protection. *John Hancock Mut. L. Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5. And so the question becomes this: Can the insurer coerce the will of the insured in respect of change of beneficiary, although its own rights are not in any way endangered?

No similar proceeding on the part of an insurer can, we think, be discovered in the books; but, on principle, the matter is covered by the decision of Justice Brown, then district judge, in *Supreme Conclave, R. A. v. Cappella* (C. C.) 41 Fed. 1, and *Lahey v. Lahey*, 174 N. Y. 146, 61 L.

R.A. 791, 95 Am. St. Rep. 554, 66 N. E. 670, to the effect that where the insured is physically unable to comply with the formalities, or where the insurer itself is so physically unable, equity will deem that to be done which ought to have been done, and proceed accordingly. In the present instance there is no physical inability; there is a flat refusal to perform on the part of the insurer, for reasons having no relation to its own security, or, indeed, to its own business. It is avowed at bar that the company prefers to pay the bankrupt's wife the whole of the policy, rather than pay the trustee the surrender value thereof.

Bankruptcy is equity, and just as it will presume on occasion that that has been done which ought to be done, so on other occasions it will compel that to be done which ought to be done. This is one of those occasions.

The order under review is affirmed, with costs.

Ward, Circuit Judge, dissenting:

The question in this case is whether the beneficiary of the policy can be changed without the insurance company's consent. This is a question of law which we can dispose of upon petition to revise. Of the cases cited by the court, *Grems v. Traver*, 87 Misc. 644, 148 N. Y. Supp. 200, involved a policy under which the insured had the right to change the beneficiary at any time, and in *John Hancock Mut.*

L. Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5, the court held that the company was estopped from refusing to consent to the change.

I cannot see how any court can delete this provision of a contract, or say that it will be disregarded because "arbitrary." If the bankrupt were to ask the insurance company to consent to substitute his trustee in bankruptcy in place of his wife as beneficiary, it would be the plain duty of the company to refuse, and the refusal for the protection of the wife could not be regarded as arbitrary. On the contrary, consent would defeat the purpose of the policy, which was to protect the wife. Yet the order of the court below accomplishes this very thing.

The case of *Cohen v. Samuels*, 245 U. S. 53, 62 L. ed. 145, 38 Sup. Ct. Rep. 36, does not control. The ratio decidendi proceeded upon facts not found in this case at all. In it the insured had an absolute right to change the beneficiary, and this right the court held, under § 70 (a) subd. (3) of the Bankruptcy Act (Comp. Stat. § 9654, 1 Fed. Stat. Anno. 2d ed. p. 1169), was vested in the trustee as one of the "powers which he [the bankrupt] might have exercised for his own benefit." And also, under subdivision (5), as "property which prior to the filing of the petition he could have transferred." The bankrupt in this case could have done neither of these things, and his trustee stands in no better position.

I think the order should be reversed.

ANNOTATION.

Refusal of insurer to consent to change of beneficiary in life policy as affecting right of trustee in bankruptcy of insured.

The decision of the majority of the court in the reported case (*RE GREENBERG*, ante, 253), to the effect that an insurance company, issuing a life policy providing for a change of beneficiary "with consent of the company," cannot refuse to consent to a change

to the trustee in bankruptcy of the insured, so as to permit him to realize the surrender value of the policy, although its refusal is based on the ground that it wishes to protect the rights of the beneficiary named in the policy, is clearly in accord with the

better reasoning, especially since, in this case, the original beneficiary was not making any claim, and the company's own rights were not in any way endangered, which facts would make its refusal arbitrary; the provision for consent being, as has often been held, solely for the protection of the insurer.

And support for the conclusion reached in the GREENBERG CASE is also found in *Travelers Ins. Co. v. Middlekamp* (1919) 67 Colo. 162, 185 Pac. 335, where a trustee in bankruptcy brought an action to recover the cash surrender value of a life insurance policy on the life of the bankrupt, which policy entitled the insured to change the beneficiary, which change could take effect only when the "written consent" of the insurer was indorsed upon contract, it having been held, in refuting the argument that the insurance company had not consented to the payment to the trustee, that such refusal of consent could make no difference, since "the rights of the trustee exist by operation of law, which binds equally the insurer and the insured," in view of the provisions of the Bankruptcy Act, giving the trustee in bankruptcy all powers which the bankrupt might have exercised for his own benefit, and all

property which he could by any means have transferred.

And see *Urick v. Western Travelers Acci. Asso.* (1908) 81 Neb. 327, 116 N. W. 48, where, in discussing the effect of a provision in an insurance policy, requiring the consent of the insurer to effect a change of beneficiary, the court said that "undoubtedly the insurance company would have no right to refuse to grant a request unequivocally made in accordance with the statute [requiring consent] and the rules of the company," etc. This, however, was not a bankruptcy case.

With respect to industrial life insurance, which vests a discretion in the insurer to pay the amount of the policy to any person appearing to be equitably entitled thereto, it would seem that such a policy, having a cash surrender value, would not, as against the insistence of the insurer, necessarily pass to the trustee in bankruptcy of the insured, since the insurer, in the reasonable exercise of the discretion vested in it, could, were there such a person or persons, pay the money to any other or others equitably entitled to the same. For a case where it was so held, see *Re Gannon* (1917) 241 Fed. 733, affirmed in (1917) 160 C. C. A. 122, 247 Fed. 932. G. J. C.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Appt.,

v.

JOHN T. BARBEE & COMPANY.

Kentucky Court of Appeals — December 17, 1920.

(190 Ky. 63, 226 S. W. 376.)

Carrier — necessity of exercising care to remove property.

1. A railroad company cannot, although its contract exempts it from liability for loss by mob, escape liability for freight destroyed by fire started by a mob, if there was ample time between the starting of the fire and the destruction of the freight, by the exercise of ordinary care, to have removed it from the danger zone to a place of safety.

[See note on this question beginning on page 262.]

20 A.L.R.—17.

—destruction of freight by mob — liability.

2. A railroad company cannot relieve itself from liability for freight destroyed by a mob, without showing further that the destruction did not result through its negligence.

—failure to remove car to safety.

3. A railroad company is liable for

freight in its cars, destroyed by fire communicated to the cars from buildings in the vicinity of its yard, if for hours it knew that a riot was in progress, and that the fires were being started, without any attempt to remove the cars to a place of safety or to guard them from danger.

APPEAL by defendant from a judgment of the Common Pleas Branch, Fourth Division of the Circuit Court for Jefferson County; in favor of plaintiff in an action brought to recover the value of a shipment of whisky destroyed by fire, which the defendant wrongfully and negligently failed and refused to transport. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Humphrey, Crawford, Middleton, & Humphrey and Louis Seelbach, Jr., for appellant.

Mr. Lawrence S. Leopold, for appellee:

Even though merchandise in the hands of a common carrier is destroyed by the act of God or other excusable occurrence, if the carrier was guilty of negligence in not safeguarding the merchandise so that the act of God, etc., could not intervene, the carrier is libel.

10 C. J. 130; Merchants Transfer Co. v. Kiser, 179 Ky. 324, L.R.A.1917C, 658, 200 S. W. 454; Gressap v. Adams Exp. Co. 1 Ky. Ops. 295; Chesapeake & O. R. Co. v. Williams, 166 Ky. 114, 49 L.R.A.(N.S.) 347, 160 S. W. 769; Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390; Hutchinson, Carr. § 319.

At common law, loss of goods due to a riot or the action of a mob did not exonerate a carrier.

10 C. J. p. 113; Forward v. Pittard, 1 T. R. 27, 99 Eng. Reprint, 953, 1 Revised Rep. 142, 1 Eng. Rul. Cas. 216; Missouri P. R. Co. v. Nevill, 60 Ark. 375, 28 L.R.A. 80, 46 Am. St. Rep. 208, 30 S. W. 425; Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

Where goods are delivered to a carrier, but, through an unreasonable delay in transporting the same, an act of God or some other like casualty intervenes, the delay is the proximate cause of the loss, and the carrier is therefore not relieved of liability.

Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 Ann. Cas. 450, 17 Am. Neg. Rep. 590; Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123,

5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45; Gulf Coast Transp. Co. v. Howell, 70 Fla. 544, L.R.A.1916D, 974, 70 So. 567; Central Georgia R. Co. v. Sigma Lumber Co. 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965; Chicago, R. I. & P. R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; Wald v. Pittsburgh, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; 10 C. J. p. 127, notes 67-69; Hutchinson, Carr. §§ 301-305.

Sampson, J., delivered the opinion of the court:

On June 27, 1917, Barbee & Company shipped a consignment of thirty-nine packages of whisky from Milner, Kentucky, near Louisville, to a point in Texas, and on the next day shipped two barrels of whisky to another point in the state of Texas, in each case taking a bill of lading. Neither of the consignments was delivered by the railway company, and this action was commenced by Barbee & Company, against the Southern Railway Company in Kentucky, initial carrier, to recover the value of the whisky, alleged to be \$634.68, averring that the railway company had wrongfully and negligently failed and refused to safely transport or cause to be transported said whisky from Milner, Kentucky, to the destination in the state of Texas, and then and there safely deliver the same to the consignee, as it had agreed in its bill of lading to do, and had wrongfully failed to account to Barbee &

Company, or to anyone for the plaintiffs, for said whisky, or any part thereof, and had converted the same to its own use. The answer of the railway company traversed the material allegations of the petition. The answer averred that the bill of lading, the contract between the parties, expressly provided that neither the defendant railway company nor any of its connecting carriers transporting said whisky should be liable for any loss, damage, or injury to same, resulting from riots or consequences thereof; that while the said shipment of whisky was in the ordinary course of transportation from Milner, Kentucky, to its destination in Texas, it was destroyed in and by virtue of a riot occurring in East St. Louis, Illinois; that in said riot and as a direct result thereof the said whisky was set on fire, and in this manner was burned and destroyed without negligence of any kind on the part of the defendant railway company; and, further, that the railway company had exercised all possible care to safely transport said whisky and to deliver same to the consignee thereof, and that its destruction was without fault or negligence, or any breach of duty, on the part of the railway company, but came about through causes entirely beyond the control of the defendant. A demurrer to the affirmative part of the answer was overruled, whereupon Barbee & Company filed reply, in which, after traversing the material parts of the answer, it was averred that the railway company negligently delayed the transportation of the whisky after it was delivered to it at Milner, and because of such negligence on the part of the railway company the said whisky failed to arrive in East St. Louis prior to July 2d, the date of its destruction by the riot, if it was so destroyed, and that the delay was caused by negligence of the railway company, and but for said negligence on its part to sooner transport said whisky so that the same could arrive in East St. Louis

and leave East St. Louis prior to July 2, 1917, the said whisky would not have become subject to the riot and fire ensuing therefrom; and it was further averred that the delay in transporting said whisky was a proximate cause and reason for its destruction, and the railway company is liable for said negligence. A general demurrer was sustained to this paragraph of the reply. It was further pleaded by the reply that on July 1, 1917, mobs formed in the city of East St. Louis began committing various excesses and acts of violence and depredations; that hundreds of men began rioting in East St. Louis on July 1, 1917, and in defiance of the public authorities, and that these facts were given great notoriety, and the public had notice thereof, and that the agents and employees of the railway company in charge of the shipment of whisky knew, or by the exercise of ordinary care could and should have known, that the said mobs were committing said excesses and acts of violence and depredations in that city on July 1, 1917; that the mobs had not dispersed on July 2d, and that on that day the mobs were committing acts such as endangered the safety of the consignment of whisky; that the defendant railway company negligently, and in disregard of the safety of the goods, permitted and caused the same to be carried over its line of railroad from the city of Louisville into its yards in the city of East St. Louis while the riots were in progress, and to remain in East St. Louis while the riots were in progress at that time for many hours after the arrival of the consignment in that city, and in doing so the railway company was guilty of such negligence as to make it liable for any damage resulting from any acts committed by said mob or said rioters on that date, including the burning of the whisky. A general demurrer to this paragraph of the answer was overruled.

The rejoinder merely traversed the affirmative allegations of the

reply. A trial before a jury resulted in a verdict for Barbee & Company for the full amount claimed, and the railway company appeals.

The parties filed a stipulation of facts, which was read as evidence to the jury, and is as follows:

"(1) On June 27, 1917, the plaintiff John T. Barbee & Company delivered to the plaintiff Southern Railway Company in Kentucky, at Milner, Kentucky, thirty eight cases and one box of whisky, for shipment to San Benito, Texas, consigned to the order of the plaintiff, with instructions to notify Roberts & Buesing, at destination, and a bill of lading was issued, executed, and delivered by and between the plaintiff and the defendant, and accepted by the plaintiff, as the contract of shipment between the parties, a copy of which is hereto attached as exhibit A.

"(2) The said thirty-eight cases and one box of whisky were of the value of \$424.25.

"(3) On June 28, 1917, the plaintiff delivered to the defendant, at Milner, Kentucky, two barrels of whisky, for shipment to Cameron, Texas, consigned to the order of the plaintiff, with instructions to notify W. J. Hair at destination; and a bill of lading therefor was issued, executed, and delivered by and between the plaintiff and the defendant, and accepted by the plaintiff, as the contract of shipment between the parties, a copy of which is hereto attached as exhibit B.

"(4) The value of said two barrels of whisky was \$210.43.

"(5) The shipment of thirty-eight cases and one box left Milner, Kentucky, on the line of the defendant, on June 27, 1917, and arrived in Louisville the next day (June 28, 1917).

"The shipment of two barrels left Milner, Kentucky, on June 28, 1917, on the line of the defendant, and arrived in Louisville the same day.

"(6) These two shipments were at Louisville, Kentucky, placed in one car (S. F. R. D. 11,250) and left

Louisville at 4:30 A. M. on July 1, 1917, and arrived at the Coapman yards of the Southern Railway Company in East St. Louis at 10:45 A. M. on July 2, 1917.

"At 4:30 P. M., on July 2, the said car, containing the said two shipments, was placed on track No. 4 in the Sixth street yards at East St. Louis.

"(7) About 8 P. M., on July 2, 1917, some houses, to wit, private residences in the vicinity of the Sixth street yards and near the track, and place on said track, where said car was located, were set on fire by the rioters in East St. Louis, and the said car and the two shipments of whisky therein contained were consumed by the said fire about 8:30 P. M. on July 2, 1917, which fire was communicated to said car from said residences, the conflagration having spread from the said residences to the said car.

"(8) The shipments of whisky above referred to are those referred to in the petition."

From the newspapers filed in the record and from the evidence of witnesses it is quite manifest that on July 1, 1917, a race riot of no mean proportions broke out and was raging in East St. Louis, Illinois, and continued throughout that day and the next, resulting in much loss of life and property. Some members of the police force were killed by colored persons, and this provoked the riot. Several hundred white persons joined themselves together and went through the city, killing, and attempting to kill, all colored persons, or to drive them out of the city; later on they engaged themselves at burning and destroying the property of colored people and property in which colored people resided. Fires were started in all colored districts of the city, and practically all of the so-called "black belt" was wiped out by the conflagration. The fury of the mob was intensified by its progress, and towards evening of the 2d day of July a number of fires were started in the negro district alongside

and near the yards of the Southern Railway Company, and hundreds of frantic men were firing guns, fighting and threatening, and otherwise creating a tremendous tumult near the yards of the railroad company in which the consignment of whisky, with much other freight, was situated. Everybody in the city was alarmed by the size and fury of the mob, and much of the property was threatened by destructive fires. The newspapers were full of lurid accounts of the doings of the mob. Notwithstanding this, the railway company seems not to have taken any precaution whatever, at least none out of the ordinary, to protect the consignment of freight which is the subject of this litigation, nor in fact any freight, of which there was a great quantity then in its custody in its yards in the mob-stricken city. While there may have been a few watchmen in their several yards about East St. Louis, no extra precaution commensurate with the fire situation and the imminent danger from the mob was exercised by the railroad company, or its employees in charge of the yards, for the protection of the consignment of freight in litigation, or any freight in the custody of the railroad in said yards. In fact it appears from the evidence that the railroad officials in charge of the yards, and whose duty it was to look after the safety of the freight therein, left their posts of duty early in the evening and went to their homes without having made any special arrangements or effort to inform themselves of the progress of the fires or the threatened danger to the other freight in the yards from the mob, although the rioting, shooting, and burning were going on very near the Sixth street railway yards of the company, in which this particular consignment was at the time, and in which large quantities of other freight were also standing. Some of the houses burned were within a few feet of the railroad tracks on which loaded cars were standing. This district was largely

occupied by colored residents, the object of the mob; and it was common knowledge that the mob was attempting to kill the negroes and to burn and destroy their property, and in fact had been for hours burning their houses and the houses in which they lived.

The railroad employees in charge of the yards were charged with the duty of protecting the freight consigned therein. In fact, the railway company was an insurer, and it could not and cannot relieve itself of liability merely by pleading and showing that a mob was in progress in the city, and that a conflagration, started by the mob, spread to and consumed the freight in question, unless it further shows that such destruction did

not result through its negligence. In other words, if the

Carrier—destruction of freight by mob—liability.

railway company, by the exercise of ordinary care, could have saved the freight consignment from the fire after its danger from the fire was discovered, but failed to do so, it cannot be relieved of responsibility by showing that a mob started the fire. It was charged with the duty of exercising ordinary care to save the freight consignment after the fire which threatened its destruction was discovered. If it failed in its duty in this regard it is liable. The accepted rule is that a railroad company may contract against liability for loss of goods while in transit through mobs or riots, but it cannot contract against its own negligence, and, although a fire may be started by a mob, the railroad company is not relieved of liability by merely showing that the fire was started by a mob, if the facts are sufficient to show, as in this case, that there was ample time

between the starting of the fire and the destruction of the property, in which the freight might, by the exercise of ordinary care on the part of the railroad company, have been removed from the danger zone

—necessity of exercising care to remove property.

to a safe place. For the purposes of this case, we might wholly disregard the fact that the mob started the fire. It is conceded that the fury of the mob was not in any degree directed toward the destruction of freight cars or their contents, but only towards the shacks near the tracks in which negroes lived.

It is also agreed that the fires in the vicinity of the yards, in which the consignment of freight was started about 5 or 5:30 o'clock in the evening. According to some of the evidence, these fires increased very rapidly, starting in different houses in the same district. One witness testifies that as many as ten or twelve fires were going at the same time in the same vicinity. Accompanying all this was a great uproar and much shooting, all of which was calculated to attract attention. There was much flame and smoke, which could be seen for a long distance. Notwithstanding this the railway company did not provide any engine in the Sixth street yards that evening with which to handle the freight cars,

—failure to
remove car to
safety.

and, in case of emergency, to remove them or shift them to avoid the several fires which were in progress near by, and this though some of the houses in which colored people resided, and which were that evening destroyed by fire, stood within a few feet of the tracks of the railroad, on which loaded freight cars were stored. Stranger still is the fact that no sufficient guard was placed in these yards on that wild night to assist in protecting the property of the railroad company and freight in its charge, and

no arrangements even were made by the railway officials to keep informed of the progress of the fires towards the freight yards. In fact, the master of the yards did not call up the conductor in charge of a yard engine to ask that he go to the rescue of the burning freight property until about 8 o'clock, or perhaps a little later. In other words, the fire had been in progress in the district of the freight yards for three hours or more before the railroad company even took the precaution to ask one of its yard crews to take an engine to the Sixth street freight-yard and to try to save the burning freight. After this request was made, it took some twenty or thirty minutes for the engine to go from the place it was situated to the place of the fire. There is much evidence,—in fact, it is practically conceded,—that if an engine had been placed by the railroad company in the Sixth street yards when the fires first originated in that district, the consignment of freight which was lost, and of which complaint is now made, would have been saved. This was the plain duty of the railroad company. Common prudence, it seems, would have suggested the propriety of keeping a lookout where a mob, bent on destruction by fire, was operating in close proximity to valuable property of which the railroad company was the trustee and insurer. These facts, it seems to us, fully warranted the jury in concluding that the railroad company was guilty of negligence, and the verdict finds abundant support in the facts.

Judgment affirmed.

ANNOTATION.

Liability of carrier for loss of, or damage to, freight by acts of mob or strikers.

This annotation does not include cases of loss or damage to freight from delay caused by the refusal of strikers to work, or by the interfer-

ence of a mob or party of strikers with the movement of the cars.

The common-law rule, as stated in 4 R. C. L. 696, is that a carrier is

liable for all loss or damage to freight, except such as is caused by the act of God or the public enemy.

Of course, loss or damage due to acts of a mob or a body of strikers cannot be attributed to an act of God, since, as stated in 4 R. C. L. 709, practically all the definitions of an act of God agree in requiring the entire exclusion of human agency from the cause of the damage or loss.

And that a mob is not a public enemy within the rule exempting carriers from liability for loss or damage caused by public enemies is held in *Missouri P. R. Co. v. Nevill* (1895) 60 Ark. 375, 28 L.R.A. 80, 46 Am. St. Rep. 208, 30 S. W. 425; *Pittsburg, C. C. & St. L. R. Co. v. Chicago* (1909) 242 Ill. 178, 44 L.R.A.(N.S.) 358, 134 Am. St. Rep. 316, 89 N. E. 1022; *Pittsburgh, C. & St. L. R. Co. v. Hollowell* (1879) 65 Ind. 188, 32 Am. Rep. 63; *Lewis v. Ludwick* (1869) 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454; and *Gulf, C. & S. F. R. Co. v. Levi* (1889) — Tex. —, 12 S. W. 677.

Thus, a railroad company is liable for the destruction of freight by the act of a mob of negroes, which the civil authorities were unable to control, in setting fire at night to the railroad station house in which the freight had been deposited on its arrival. *Missouri P. R. Co. v. Nevill* (Ark.) supra.

Carriers have generally sought to relieve themselves from this common-law liability by stipulations in the bill of lading, but even such stipulations fail to relieve them from liability, where the loss or damage is caused by their own negligence; since, according to the great weight of authority, a carrier cannot contract against its own negligence.

Thus, a stipulation in a bill of lading to the effect that the railroad company should not be liable for any loss or damage to freight resulting from riots or consequences thereof was held in the reported case (*SOUTHERN R. CO. v. JOHN T. BARBEE & Co. ante*, 257) not to relieve the railroad from liability for freight in its cars, destroyed by fire communicated to the cars from buildings in

the vicinity of its yard, which had been fired by a mob in a race riot, where the railroad company, for hours, knew that a riot was in progress, and that the fires were being started, and had ample time, between the starting of the fire and the destruction of the freight thereby, by the exercise of ordinary care, to have removed it from the danger zone to a place of safety.

But in *Hall v. Pennsylvania R. Co.* (1880) 1 Fed. 226, 14 Phila. 414, 8 W. N. C. 269, Fed. Cas. No. 12,769, a railroad company was held to be released from liability for goods burned by a lawless mob, by a provision in the bill of lading exempting the carrier from liability for loss or damage by fire or other casualty, where the railroad company was not guilty of any negligence in connection with the burning of such goods. The court held that the evidence showed that the railroad company was not negligent, it appearing that a mob took possession of the railroad property, that the railroad called upon the sheriff for assistance, and that he obtained troops from the governor of the state, that they came into contact with the mob, but failed to retake the railroad property therefrom, and that immediately thereafter the mob set fire to the cars containing the freight in question.

And in *Wertheimer v. Pennsylvania R. Co.* (1880) 17 Blatchf. 421, 1 Fed. 232, involving the destruction of freight by the same mob, and in the same manner, as in the preceding case, the same railroad company was held not liable under a bill of lading containing the condition that the railroad company should not be responsible for loss or damage by fire unless it could be shown that such damage or loss occurred through its negligence. The effect of this condition was held to impose upon the shipper the burden of proving that the loss of the goods by fire arose from the negligence of the railroad company; but the court said that, irrespective of any question concerning the burden of proof, the railroad company could not be said to have been guilty of negligence,

where it appeared that the fire by which the goods were destroyed was the act of a mob engaged in a struggle with the military authorities of the state, without anything to show that the railroad company was bound, from the circumstances, to anticipate such a result.

In *Texas & P. R. Co. v. Coutourie* (1904) 68 C. C. A. 177, 135 Fed. 465, an action to recover for cotton burned while stored on a railroad company's wharf, and in its cars, where the bill of lading exempted it from liability for destruction by fire, testimony in reference to labor riots was held admissible as bearing upon the negligence of the railroad company in failing to increase the number of its watchmen after a prior fire on the wharf.

And in *Lang v. Pennsylvania R. Co.* (1893) 154 Pa. 342, 20 L.R.A. 360, 35 Am. St. Rep. 846, 26 Atl. 370, the

railroad company was held liable, although the bill of lading provided that the company should not be liable for loss or damage by causes beyond its reasonable control, by a riot, or for any other reason not directly traceable to the negligence of its servants, where it appeared that a train containing several carloads of whisky was overtaken by the Johnstown flood, and owing to the destruction of the track was unable to proceed, and the dangerous element in the community began to break open the cars with axes, the trainmen making no effort to protect the train, and leaving the neighborhood; that a volunteer guard of citizens then protected the train during the night and part of the following day, and, when no longer able to protect the property, destroyed the remainder of the whisky to prevent it from falling into the hands of the mob.

G. V. L.

WESTERN PATTERN & MANUFACTURING COMPANY, Respt.,

V.

AMERICAN METAL SHOE COMPANY, Appt.

Wisconsin Supreme Court — December 13, 1921.

(— Wis. —, 185 N. W. 535.)

Corporation — resignation of officer — effect.

1. The resignation of an officer of a private corporation terminates the office and a vacancy is at once created; and service of process on such resigned officer is not service on the corporation, notwithstanding a by-law providing the directors of said corporation shall hold office until their successors are duly elected.

[See note on this question beginning on page 267.]

Judgment — absence of service — nullity.

2. A judgment rendered in the absence of service of process on the defendant should be vacated, set aside, and expunged from the record, and a

motion made for that purpose need not be coupled with a showing that the defendant had a meritorious defense to the cause of action set forth in the complaint.

[See 15 R. C. L. 736.]

Headnotes by OWEN, J.

APPEAL by defendant from an order of the Municipal Court for Racine County (Palmer, J.) denying a motion to vacate and set aside a judgment in an action upon a contract for the recovery of a certain sum of money. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Eugene Wright Lawton, for appellant:

Elholm was not a person who had any connection with the defendant company, as required by the statute for service. Therefore, service on him was not service upon the company.

Carr v. Commercial Bank, 16 Wis. 51; Pallard v. Wegener, 13 Wis. 570; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Toepfer v. Lampert, 102 Wis. 469, 78 N. W. 779; Illinois Steel Co. v. Dettlaff, 116 Wis. 322, 93 N. W. 14; Jordan v. Chicago & N. W. R. Co. 125 Wis. 590, 1 L.R.A.(N.S.) 885, 110 Am. St. Rep. 865, 104 N. W. 803, 4 Ann. Cas. 1113.

An officer may resign at any time; and if he does resign and vacate his office, he thereupon ceases to be an officer of the corporation.

Fletcher, Cyc. Corp. § 1811; McNaughton's Will, 138 Wis. 208, 118 N. W. 997, 120 N. W. 288; Thomp. Corp. 7th ed. § 8460.

Messrs. Gittings & Moyle, for respondent:

A meritorious defense must be shown by defendant.

Stokes v. Knarr, 11 Wis. 389; Thomas v. West, 59 Wis. 103; Milwaukee Mut. Loan & Bldg. Soc. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102; Superior Consol. Land Co. v. Dunphy, 93 Wis. 188, 67 N. W. 428; 15 R. C. L. 737; Tootle v. Ellis, 63 Kan. 422, 88 Am. St. Rep. 246, 65 Pac. 675; Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537; Preston v. Kindrick, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588; Brandt v. Little, 47 Wash. 194, 14 L.R.A.(N.S.) 213, 91 Pac. 765; Janes v. Howell, 37 Neb. 320, 40 Am. St. Rep. 494, 55 N. W. 965; Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Massachusetts Ben. Life Asso. v. Lohmiller, 20 C. C. A. 274, 46 U. S. App. 103, 74 Fed. 23; Jeffery v. Fitch, 46 Conn. 601; Newman v. Taylor, 69 Miss. 670, 13 So. 831; Brandt v. Little, 47 Wash. 194, 14 L.R.A.(N.S.) 213, 91 Pac. 765; Dunklin v. Wilson, 64 Ala. 162.

The service secured was binding on the defendant.

21 R. C. L. 1336, § 85; Colorado Debiture Corp. v. Lombard Invest. Co. 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584.

The burden of proof is on defendant to show from the record that the judgment from which it desires relief is

not only irregular or void, but also that it is unjust and inequitable.

J. V. Farwell Co. v. Hilbert, 91 Wis. 437, 30 L.R.A. 235, 65 N. W. 172.

Owen, J., delivered the opinion of the court:

Plaintiff and defendant are Wisconsin corporations. Service of the summons in this action upon the defendant was attempted by delivering to and leaving a copy thereof with one M. Elholm, on the 12th day of May, 1920, who, at the time of such delivery, was supposed to be the secretary of the defendant corporation. The defendant made default, and judgment was rendered in favor of the plaintiff upon the cause of action set forth in its complaint. Thereafter the defendant procured an order requiring plaintiff to show cause why such judgment should not be set aside for the reason that the court had never obtained jurisdiction of the defendant, which said order to show cause was based upon an affidavit of the president of the defendant corporation to the effect that, at the time of such attempted service, the said M. Elholm was not the secretary of the said defendant corporation, nor was he any other officer thereof upon whom service of summons upon said corporation might have been made; that he was secretary of said defendant corporation prior to the 1st day of October, 1919, but on said latter date he resigned said office, in writing and that he likewise on said date resigned his office as a member of the board of directors of said company. In response to such order to show cause there was filed an affidavit, sworn to by Miller Patterson, president of plaintiff corporation, in which he deposed that he was informed and verily believed that one M. Elholm was secretary and director of the defendant prior to the 1st day of October, 1919; that he had no knowledge of his resigning his office; and that, as he is informed and believes, no successor was either elected or qualified in

his place, either as director or secretary.

There is no denial of the fact that Elholm did resign as secretary of the company on the 31st day of October, 1919, and we regard it as a verity in the case that at the time of the attempted service, May 12, 1920, he was not an officer of the corporation, unless, as contended in this court by respondent, he continued in office until his successor was elected and qualified. Patterson deposes that, as "he is informed and verily believes, the by-laws of the American Metal Shoe Company provide that the directors of said corporation shall hold office until their successors are duly elected." It has been held by this court that such a provision in the by-law of a corporation does not prevent the ex-

**Corporation—
resignation of
officer—effect.**

istence of a vacancy in an office of a private corporation upon the filing of a resignation by one who is then an incumbent of such office. The resignation terminates the office, and a vacancy is at once created. *McNaughton's Will*, 138 Wis. 179, 208, 118 N. W. 997, 120 N. W. 288. It accordingly follows that no summons was ever served upon the defendant, and that the trial court never acquired jurisdiction to render judgment in the action.

It is contended, however, that the judgment rendered should not be vacated or set aside because the motion to that end was not coupled with a showing that the defendant had a meritorious defense to the cause of action set forth in the complaint. While the affidavit filed in support of the order to show cause avers "that the said American Metal Shoe Company has a good and sufficient defense to the cause of action as claimed by the plaintiff in the above-entitled cause," it cannot be said to disclose a meritorious defense under the requirements of our practice.

There seems to be respectable authority in support of the proposition that, even though a judgment

be rendered against a defendant in the absence of any service upon him, yet a court of equity will not set such judgment aside, in the absence of a showing that the defendant has a defense upon the merits to the cause of action. In 15 R. C. L. 737, it is stated that a large preponderance of the authorities hold that, notwithstanding an alleged want of service or notice, a court of equity will not interfere to set aside a judgment until it appears that the result upon a subsequent trial will be other than that already reached; or, in other words, that there was a meritorious defense to the action. A note to the case of *Brandt v. Little*, 14 L.R.A. (N.S.) 213, collates a number of decisions announcing such doctrine.

While this rule has been applied in this state in actions brought to set aside judgments rendered by justices of the peace where jurisdiction was lost by reason of irregularities (*Stokes v. Knarr*, 11 Wis. 389; *Thomas v. West*, 59 Wis. 103, 17 N. W. 684), it has never been applied in cases where a judgment was rendered in the absence of any service upon the defendant.

The idea that a court will not relieve against a judgment rendered in proceedings of which the defendant had no notice is obnoxious to our notions of fundamental justice, even though

**Judgment—
absence of serv-
ice—nullity.**

he have no defense upon the merits. The Constitution of the United States provides that property shall not be taken without due process of law, and to seize a man's property by virtue of a judgment rendered by a court which never acquired any jurisdiction of the judgment debtor, in an action of which he had no notice and was never accorded an opportunity to be heard in defense thereof, would seem to be nothing less than a taking of property without due process of law. It may be that he had no defense to the action, but the fundamental law of the land secures to him the right to be heard in his defense; and, as this right

was deemed sufficiently sacred to be protected by constitutional provision, any action of a court in violation of such right is without vestige or shadow of authority, and its pronouncement under such circumstances is not a judicial pronouncement in any sense of the word. However, it is not necessary for us to discuss at length these fundamental principles which we think demonstrate the unsoundness of the doctrine that a court of equity will not set aside a judgment obtained under such circumstances, as this court has spoken definitely and often upon the very question here presented. It is firmly established in this jurisdiction that where a motion is made in the same case to set aside a judgment void for want of service upon the defendant, no showing in the nature of a meritorious defense is necessary. The judgment is held absolutely void, and the court should expunge it from the record whenever its attention is called to the

fact that jurisdiction of the defendant was not acquired, by reason of a lack of service of process upon him. *Carr v. Commercial Bank*, 16 Wis. 50; *Wendel v. Durbin*, 26 Wis. 390; *Godfrey v. Wright*, 151 Wis. 372, 139 N. W. 193. A perusal of those cases with *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269, and *Pollard v. Wegener*, 13 Wis. 569, fully reveals the attitude of this court upon the question of enforcing a judgment rendered in the absence of service of process. Such a judgment has always been regarded as a mere nullity. It is not a judgment. It is the mere image of a judgment. Its enforcement constitutes a taking of property without due process of law, and will not be tolerated. It was the duty of the trial court to expunge the judgment from the record.

Order appealed from reversed, and cause remanded, with directions to vacate the judgment.

Siebecker, Ch. J., took no part.

ANNOTATION.

When resignation of officer of private corporation becomes effective.

General rule.

As a general rule, in the absence of statutory restrictions or limitations in the by-laws of a corporation, the resignation of a corporate officer, to take effect immediately, becomes complete on its delivery to the proper authority. No action on the part of the corporation is essential, and acceptance thereof by the board of directors or other governing body is not required. *Fearing v. Glenn* (1896) 19 C. C. A. 388, 33 U. S. App. 424, 73 Fed. 116; *International Bank v. Faber* (1898) 30 C. C. A. 178, 57 U. S. App. 153, 86 Fed. 443, writ of certiorari denied in (1899) 172 U. S. 648, 43 L. ed. 1182, 19 Sup. Ct. Rep. 885; *Chandler v. Hoag* (1874) 2 Hun (N. Y.) 613, affirmed in (1875) 63 N. Y. 624; *Blake v. Wheeler* (1879) 18 Hun (N. Y.) 496, affirmed on other grounds in (1880) 80 N. Y. 128; *Smith v. Danzig* (1883) 64 How. Pr. (N. Y.) 320; *Wilson v. Brentwood Hotel Co.*

(1896) 16 Misc. 48, 37 N. Y. Supp. 655; *Noble v. Euler* (1897) 20 App. Div. 548, 47 N. Y. Supp. 302; *Manhattan Co. v. Kaldenberg* (1900) 165 N. Y. 1, 58 N. E. 790; *Zeltner v. Zeltner Brewing Co.* (1903) 174 N. Y. 247, 95 Am. St. Rep. 574, 66 N. E. 810, affirming (1903) 80 App. Div. 631, 80 N. Y. Supp. 1151; *McNaughton's Will* (1909) 138 Wis. 179, 118 N. W. 997, 120 N. W. 288; *Glossop v. Glossop* [1907] 2 Ch. (Eng.) 370, 76 L. J. Ch. N. S. 610, 97 L. T. N. S. 372, 14 Manson, 246, 51 Sol. Jo. 606; *Re Gloucester, A. & S. W. R. Co.* (1853) 4 De G. M. & G. 769, 43 Eng. Reprint, 708; and see the reported case (*WESTERN PATTERN & MFG. CO. v. AMERICAN METAL SHOE CO.* ante, 264). See also *Re Guana Ceir Tunnel Co.* (1912) 119 C. C. A. 554, 201 Fed. 316; *Goodrich Rubber Co. v. Helena Motor Car Co.* (1917) 53 Mont. 526, 165 Pac. 454. Compare *Municipal Freehold Land Co. v. Pollington*

(1890) 59 L. J. Ch. N. S. (Eng.) 734, 63 L. T. N. S. 239, 2 Megone, 307.

In *Zeltner v. Zeltner Brewing Co.* (1903) 174 N. Y. 247, 95 Am. St. Rep. 574, 66 N. E. 810, the court said: "When we come to consider the general right of officers and directors of corporations to resign, . . . we may admit . . . that, as a general rule, such officers may resign at will; and that the validity of such resignations does not depend upon their formal acceptance."

So, a trustee of a corporation may resign and relieve himself from liabilities thereafter incurred by the corporation, although his resignation is not acted on by the board of trustees or entered in the corporate books. *Blake v. Wheeler* (1879) 18 Hun (N. Y.) 496, affirmed on other grounds in (1880) 80 N. Y. 128. See, to the same effect, *Chandler v. Hoag* (1874) 2 Hun (N. Y.) 613, affirmed in (1875) 63 N. Y. 624.

In *Manhattan Co. v. Kaldenberg* (1900) 165 N. Y. 1, 58 N. E. 790, the court said: "There was evidence that Faber tendered his resignation in a letter which he delivered to the president about November 1, 1891. Assuming this to have been done, Faber's resignation was complete when it was tendered. It was not necessary for him to do more. . . . Nor was the validity of his resignation dependent upon its acceptance by the directors." See also *International Bank v. Faber* (1898) 30 C. C. A. 178, 57 U. S. App. 153, 86 Fed. 443.

In *McNaughton's Will* (1909) 138 Wis. 179, 118 N. W. 997, 120 N. W. 288, the court, in disposing of the contention that an officer of a corporation, where the organic law provides that his term of office shall continue until his successor is elected and qualified, remains an officer until such time, notwithstanding his resignation, stated its opinion as follows: "That is not the law. On the contrary, . . . even in case the corporate charter provides that the officer shall hold till his successor is elected and qualified, or appointed and qualified, he, nevertheless, by resignation, without any acceptance, unless acceptance is spec-

ially required by such charter, vacates the office for all general purposes."

It has been held that service of process on a director who has sent in his resignation does not bind the corporation, though the resignation has not been formally accepted, and his withdrawal reduces the number of directors below the minimum allowed by law, if there is no provision in the by-laws to the effect that an officer or director shall continue to hold office until his successor is elected and qualifies. *Wilson v. Brentwood Hotel Co.* (1896) 16 Misc. 48, 37 N. Y. Supp. 655. And in the reported case (*WESTERN PATTERN & MFG. CO. v. AMERICAN METAL SHOE CO.* ante, 264) it is held that, despite the provisions of a by-law to the effect that the directors of the corporation shall hold office until their successors are elected, the service of process on an officer who has filed his resignation will not bind the corporation.

At common law it is sufficient for a corporate officer to deliver his written resignation to the president of the corporation, and thereafter refrain from acting as an officer. *Goodrich Rubber Co. v. Helena Motor Car Co.* (1917) 53 Mont. 526, 165 Pac. 454.

The resignation involved in *Briggs v. Spaulding* (1891) 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, was orally tendered to the president, and inferentially accepted by the performance of certain acts in recognition thereof. The court said: "While the . . . law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective."

In England it has been held that as a director of a corporation is entitled to relinquish his office at any time he sees fit, by proper notice to the company, his resignation depends on his notice, and is not dependent on any acceptance by the company, for the reason that the latter is not in a position to refuse acceptance. *Glossop v. Glossop* [1907] 2 Ch. (Eng.) 370, 76 L. J. Ch. N. S. 610, 97 L. T. N. S. 372, 14 Manson, 246, 51 Sol. Jo. 606. In

the case of *Re Gloucester, A. & S. W. R. Co.* (1853) 4 De G. M. & G. 769, 43 Eng. Reprint, 708, the court said: "It may not be important to consider whether the resignation or retirement of Mr. Maitland, the elder, was complete and effectual or not. I am of opinion, however, that it was not provisional nor conditional, was authorized by the terms of the constitution of the association in question, and was complete and effectual, whether accepted or not accepted by any other person or body of persons, inasmuch as it was duly communicated to the persons to whom, and in the time and manner in which, it was necessary or right that it should be communicated. In *Municipal Freehold Land Co. v. Pollington* (1890) 59 L. J. Ch. N. S. (Eng.) 734, 63 L. T. N. S. 238, 2 Megone, 307, on the other hand, the resignation of a director was held to be ineffective until accepted by the company at a general meeting.

Limitations on rule.

Where the by-laws provide that a corporate officer shall continue to hold office until the election of his successor, the resignation of such an officer does not take effect until the election of his successor. *Timolat v. S. J. Held Co.* (1896) 17 Misc. 556, 40 N. Y. Supp. 962, wherein the court said: "There is no question here of the personal liability of the resigning director to the creditors of the company, but only a question between such creditors and the company, under its own by-laws, and for its own neglect to terminate its official relations with the director by electing his successor. When, by its by-law, it declares that he shall serve until his successor is chosen, it constitutes him its officer until that event, with the same effect, so far as the corporation is concerned, as if he were serving in the term for which he was elected, and had not resigned. It was in the power of the company to terminate his agency at any time by electing a successor, and if it chose rather to continue such agency, he must be treated, in actions against the company, as its duly constituted officer." See also *Colorado Debenture*

Corp. v. Lombard Invest. Co. (1903) 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584. Compare the reported case (*WESTERN PATTERN & MFG. Co. v. AMERICAN METAL SHOE Co.* ante, 264).

So, under such a by-law in a case wherein it appeared that, prior to the date of service of process on a corporate officer, he tendered his resignation to the proper authorities without any action being taken thereon, thereafter continuing in control of the affairs of the corporation, attending meetings of the board of directors, and being recognized by them as such, and no knowledge of such tender of resignation was shown on the part of those in whose behalf process was served, it was held that the corporation could not successfully claim a valid resignation on the part of such officer. *Venner v. Denver Union Water Co.* (1907) 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, wherein the court said: "Whether or not a director or other officer of a corporation has resigned is a question of fact, to be determined from the circumstances of each case, and which, to some extent, it appears may depend upon the parties who raise the question. In the present case Mr. Sullivan tendered his resignation to the proper authorities, but it was never acted upon. He continued in the control of the affairs of the company the same as though his resignation had never been offered. He attended meetings of the board, acted as a director, and was recognized by his codirectors, including Mr. Venner, in that capacity. It does not appear that the parties who commenced the foreclosure suits in which service of summons was had upon Mr. Sullivan, as president or vice president, of the American Water Works Company, had any knowledge that he had ever tendered his resignation to the company. In such circumstances the company will not be permitted to claim that he had resigned prior to the service of process upon him, by merely tendering his resignation. Further, the articles of incorporation . . . provide that its directors shall hold office until their successors are elected. This is not a case where a director

has endeavored to resign, and thereafter taken no part in the management or control of its affairs. Neither does it present a question affecting the liability of Mr. Sullivan, but is only one between parties and the corporation, wherein the latter now seeks to avoid service of summons upon one whom it treated as an official, and who acted as such after he tendered his resignation. By its own failure to observe the provision of its articles of incorporation it has neglected to terminate the official relations of Mr. Sullivan. The company had the power to terminate his relations to it as an official at any time by electing his successor, and where it chose to continue that relationship by failing to act in accordance with the provisions of its articles of incorporation, he must be treated in actions against the company, in so far as service of process is concerned, as its duly constituted agent."

In case the resignation of a corporate officer is offered, to take effect on acceptance, it is essential that action shall be taken thereon, and a formal acceptance recorded. Thus, in *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co.* (1916) 169 Ky. 840, 185 S. W. 156, the attempted resignation of the officers and directors of a corporation by notice addressed to themselves was held to be

ineffectual without acceptance, the court saying: "That the attempted resignation of Riehm, Brock, and Dundon, as officers and directors of the defendant, was of no effect whatever, is perfectly apparent. By our statutes (§ 551) the directors of such corporations continue such 'until their successors are respectively elected and qualified.' The only corporate authority who had a right to act upon these alleged resignations was the board of directors which elected them in the first instance. The three resigners constituted that board, and the communication by which they attempted to resign was, in law, one addressed to themselves; but it seems that, as directors, they were not so anxious to make their resignations effectual by acceptance, as they were as individuals to tender them. At any rate, there was no record made in the books of the corporation as to the tendering of their resignations; nor was there ever any acceptance of them recorded on the corporation books or otherwise. Until there is such an acceptance, they continued to remain directors."

So, in *Seal of Gold Min. Co. v. Slater* (1911) 161 Cal. 621, 120 Pac. 15, it was held that a director who tendered his resignation, to take effect on acceptance, was entitled to participate in meetings of the board until his resignation was accepted. L. F. C.

HANNAH HILL, Plff. in Err.,

v.

FIRST NATIONAL BANK OF MARIANNA et al.

Florida Supreme Court — March 26, 1920.

(79 Fla. 391, 84 So. 190.)

Set-off — judgment against claim for invasion of homestead.

1. B. recovered a judgment against H. and another. Execution issued upon such judgment and was levied upon certain personalty and certain realty of H. The property so levied upon was claimed by H. as exempt from seizure and sale for the purpose of satisfying such judgment upon the ground that it was the homestead of H., and exempt from forced sale under the Constitution and laws of this state. Upon an application to enjoin the sale, the circuit judge held such property not to be exempt; but upon appeal to this court this order was reversed and the property

held to be exempt from forced sale for the satisfaction of such judgment. Thereafter defendant in execution sued the plaintiff in execution to recover certain damages alleged to have been sustained because of the wrongful seizure and sale of such property. In this suit the original judgment was attempted to be set off against plaintiff's claim. Held, that such judgment is not available as a set-off against plaintiff's claim for damages to her exempt property, and that the plea attempting to set off such judgment against plaintiff's claim is not allowable.

[See note on this question beginning on page 276.]

Homestead — liberal construction of statutes.

2. Constitutional and statutory provisions relating to homestead exemptions are liberally construed in the interest of the family home.

[See 13 R. C. L. 547; 3 R. C. L. Supp. 61.]

—scope of right.

3. The "homestead right" is not limited to a mere holding of the legal title to the exempt property "from forced sale." It contemplates and includes the beneficial, peaceful, and uninterrupted use and enjoyment of such property. Such right is superior to the claim of creditors. The policy of the law concerning it is to preserve the home for the family, even at the sacrifice of just demands, and to protect the family from destitution and want.

[See 13 R. C. L. 545; 3 R. C. L. Supp. 61.]

—theory of laws.

4. The theory of the law with relation to homesteads is based upon the idea that, as a matter of public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home where his family may be sheltered and live beyond the reach of

financial misfortune and the demands of creditors, who have given credit under such a law.

[See 13 R. C. L. 543; 3 R. C. L. Supp. 61.]

—set-off in action for invasion of rights.

5. To allow a defendant the benefits of a plea of set-off in an action brought against him to recover the amount of damage sustained because of his wrongful invasion of plaintiff's homestead right would, if defendant's plea prevail, result in the subjection by indirect methods of exempt property to the payment of defendant's demands against the plaintiff, although its subjection thereto directly is not permitted.

[See 24 R. C. L. 815.]

Maxim — indirect action.

6. One cannot accomplish by indirect means what he is prohibited from doing directly.

Exemptions — damages for invasion of homestead.

7. The amount of compensation for actual damage sustained because of an unlawful invasion of plaintiff's homestead rights, which he is entitled to recover, partakes of the nature of the homestead property, and is exempt.

Headnotes by WEST, J.

ERROR to the Circuit Court for Jackson County (Wilson, J.) to review a judgment in favor of defendants in an action brought to recover damages for alleged wrongful seizure and sale of plaintiff's exempt property. **Reversed.**

The facts are stated in the opinion of the court.

Mr. D. L. McKinnon, for plaintiff in error:

To be available as a set-off the claim must be "mutual;" that is, growing out of the dealing between the parties, who either expressly or impliedly recognized the claim.

22 Am. & Eng. Enc. Law, 239, 243; Robinson v. L'Engle, 13 Fla. 482; Matthews v. Lindsay, 20 Fla. 962; 34 Cyc. 658, and notes.

A set-off claim must be against the plaintiff only, and not against the plaintiff and someone else.

34 Cyc. 731-735; 22 Am. & Eng. Enc. Law, 270; Robinson v. L'Engle, 13 Fla. 482.

Judgments may be set off against judgments in a court of equity, when the equities involved may be settled, but not against a claim of trespass, unless specially authorized by the statute.

25 Am. & Eng. Enc. Law, 2d ed. 610 and notes.

Mr. Paul Carter for defendants in error.

West, J., delivered the opinion of the court:

The declaration in this case is, omitting formal parts, as follows:

"The plaintiff, Hannah Hill, sues the defendant First National Bank of Marianna, Florida, a corporation, and H. A. Bowles, as sheriff of Jackson county, Florida, because the said sheriff, by the direction of said bank, levied an attachment and execution in favor of said bank against plaintiff and H. A. Bowles as administrator of John Hill, deceased, on the E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, section 8, township 4, range 10 west, in which plaintiff owned a two-thirds undivided interest, except 1 acre, and sold the same under said execution, both defendants well knowing at the time that she was the head of a family living upon the homestead, that it was exempt from forced sale under the Constitution and laws of Florida, notwithstanding plaintiff claimed said exemption, and duly applied to said sheriff in the manner prescribed by law to have the same exempt as her homestead before said sale. That in consequence of said levies and sales, she failed to make a crop on said land, as she did not know how soon she might be dispossessed, and was put to much expense, trouble, and annoyance to obtain a living for herself and orphan grandchildren that year and the succeeding year, 1917. That she had to employ counsel at great expense to bring suit to have said levies and sales set aside, and to enjoin defendants from making any further sale of said homestead, and said suit was carried to the supreme

court of the state at great expense to her before it was finally decided, and she put to much trouble, loss of time, and expense in attending the circuit court and preparing her case, for which she claims \$150 damages.

"(2) And for second count plaintiff, alleging each and every allegation in the first count, says that said defendants levied said attachment and execution upon one cow and calf, of the value of \$35, belonging to plaintiff, and sold them, notwithstanding she protested against the sale, claiming them as exempt to her. Therefore she claims \$300 damages."

There were pleas of (1) not guilty; (2) no damage to plaintiff as alleged; (3) that the sale of said property was made after a final decree had been entered in the circuit court of Jackson county, in a suit brought by plaintiff to enjoin such sale, in which it was held that the property described in the declaration was not the homestead of the plaintiff, and was not exempt from, but was subject to, sale under the execution levied thereon by the sheriff of the county; (4) denying that defendants knew that plaintiff was, at the time of such sale, the head of a family residing upon said land, and that it was exempt from forced sale under the Constitution and the laws of this state; and (5) denying that plaintiff duly applied to said sheriff, before said sale, to have said land exempt as a homestead.

The sixth plea is as follows: "That at and before the institution of this suit, the plaintiff was indebted to the defendant, the First National Bank of Marianna, Florida, in the sum of \$861.32 and interest thereon at 8 per cent from October 20, 1915, in this, to wit: That the circuit court of Jackson county, Florida, on the 20th day of October, 1915, in the suit of First National Bank of Marianna, Florida, v. Hannah Hill et al., duly rendered a judgment against the said defendants, for the sum of

\$831.15, and also \$30.17, costs of court, and said judgment is of record in Minute Book S; page 42, Minutes of the Circuit Court of Jackson County, Florida, and is wholly unpaid and unsatisfied, and defendants here offer to set off so much of said judgment against plaintiff's claim as may be necessary to cover the same."

The seventh plea is the same in substance as the sixth, pleading the same judgment as a set-off in slightly different form.

Issue was joined on the first and second pleas. All the other pleas were demurred to. The demurrer was sustained as to the third, fourth, and fifth, but overruled as to the sixth and seventh. There was a replication to the sixth and seventh pleas, to which a demurrer was sustained, and the case proceeded to trial.

At the conclusion of the testimony, the court instructed the jury that "the Constitution of the state of Florida exempts from levy and sale a homestead of 160 acres of land without the limits of an incorporated town or city to any head of a family residing in the state. I therefore instruct you that if the sheriff levied the execution on the homestead of the plaintiff, as alleged in the declaration, and sold it under execution in favor of the First National Bank of Marianna, a corporation, it was a trespass, and the plaintiff is entitled to recover all the damages she sustained in consequence of said levy and sale, and also for the value of the cow and calf, if you find from the evidence that the sheriff levied upon and sold them under said execution. You will ascertain from the evidence the amount of damages which the plaintiff sustained, including any attorneys' fees she has paid or contracted to pay in the injunction suit, allowing interest on the amount, from the commencement of this suit. You will then deduct this amount from the judgment of the First National Bank of Marianna,

20 A.L.R.—18.

pleaded as a set-off, and render a verdict in favor of said bank for the balance due upon said judgment."

There was a verdict accordingly, and judgment pursuant thereto, by which it was adjudged that plaintiff take nothing by this action, and that the defendants have and recover from her their costs expended therein. The case is here upon writ of error for review. For convenience we shall in this opinion refer to the parties as plaintiff and defendants.

Several rulings of the trial court are assigned as error, but the principal contentions are that, first, a judgment is not a proper subject of set-off in any case; and, second, that a debt or demand arising under contract is not available as a set-off in an action of tort. There is, however, presented by this record a question more important than either of these. It goes to the right of the defendants to set off the judgment described in defendants' sixth and seventh pleas against the claim for damages described in plaintiff's declaration, and is, we think, the decisive question in the case. If defendants' judgment is not available in any event as a set-off against plaintiff's claim as described in her declaration for damages, a decision of the two questions stated becomes unnecessary.

By § 1 of article 10 it is ordained that "a homestead to the extent of 160 acres of land, or the half of 1 acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists, . . . and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article."

Constitutional and statutory pro-

visions relating to homestead exemptions are liberally construed in the interest of the family home. *Milton v. Milton*, 63 Fla. 533, 58 So. 718; 13 R. C. L. 547.

The property described in the declaration has been held by this court to be the homestead of the plaintiff, and "exempt from forced sale." *Hill v. First Nat. Bank*, 73 Fla. 1092, 75 So. 614.

It is a matter of record and was also stated in the oral argument in this case that the judgment offered to be set off against plaintiff's claim is the identical judgment which this court, reversing the court below, had held was not a lien upon the property described in the declaration, and from which judgment and the execution issued thereon such property was exempt from sale. So that the question is whether this judgment may be available as a set-off in a suit by plaintiff against the defendant bank and the sheriff of the county to recover damages sustained by her because of the unlawful levy upon and sale of her homestead under such judgment. Such homestead itself was exempt from forced sale, and plaintiff could not be lawfully deprived of its use and enjoyment by any coercive process. The actual damage sustained by her because of the injury suffered as a result of the trespass by defendants upon the exempt real property and the conversion by them of the exempt personality, and the judgment recovered therefor, partake

**Exemptions—
damages for
invasion of
homestead.**

of the nature of the homestead property and are also exempt. *Thompson, Homestead & Exemptions*, § 748; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; *Reynolds v. Haines*, 83 Iowa, 342, 13 L.R.A. 719, 32 Am. St. Rep. 311, 49 N. W. 851; *Kaiser v. Seaton*, 62 Iowa, 463, 17 N. W. 664; *Ellis v. Pratt City*, 111 Ala. 629, 33 L.R.A. 264, 56 Am. St. Rep. 76, 20 So. 649.

In the case of *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618, it was held that, when property which may be claimed as exempt from the satisfaction of debts has been sold or converted into money by an administrator, the heirs entitled to such property may claim its value out of funds in the hands of the administrators. By analogy it would seem to follow necessarily that, where injury has been sustained because of an unlawful seizure and sale of exempt property, the amount recovered as compensation for such injury within the constitutional limit would likewise be held exempt. The fallacy in the court's holding was due to a failure to recognize this principle. By such holding defendants were permitted in a measure to do indirectly what they were forbidden to do directly. The homestead of plaintiff is adjudged to "be exempt from forced sale under process of any court," and yet, under the charge of the court in this case, the amount of damage sustained by her because of an unauthorized "forced sale" of such exempt property, and for which damage, under the charge of the court, she was entitled to recover, is taken from her and given to defendants as a part payment on a judgment which the court had adjudged could not be enforced against such property.

The homestead right is not limited to a mere holding of the legal title to the exempt property "from forced sale;" it contemplates and includes the beneficial, peaceful, and uninterrupted use and enjoyment of such property. Such right is superior to the claims of creditors. The policy of the law conferring it is to preserve the home for the family even at the sacrifice of just demands, and to protect the family from destitution and want.

"The whole theory of the law with relation to homesteads is based upon the idea that, as a matter of

**Homestead—
scope of right.**

public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home where his family may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors, who have given credit under such a law." 13 R. C. L. 543; *Carter v. Carter*, supra.

The rights of the wife and family in homestead real estate are such that it "cannot be alienated without the joint consent of husband and wife when that relation exists" (§ 1, art. 10, Constitution of Florida), and an attempted conveyance in which there is not such joinder when such relation exists is ineffectual to convey any title to such property. *Thomas v. Craft*, 55 Fla. 842, 46 So. 594, 15 Ann. Cas. 1118. The benefits of the Homestead Exemption Law may not be waived by a householder in such a way as to deprive his family of its protection. *Carter v. Carter*, supra. Neither does the death of such householder strip property so impressed of its character as a homestead. It descends to his heirs exempt from liability for the indebtedness of the head of the family (§ 2, art. 10, Constitution of Florida), and the right of the heirs to its exemption after it passess to them is not dependent upon a use by them of such property as a homestead. *Miller v. Finegan*, 26 Fla. 29, 6 L.R.A. 813, 7 So. 140; *Raulerson v. Peeples*, 77 Fla. 207, 81 So. 271.

To allow a defendant the benefits of a plea of set-off in an action brought against him to recover the amount of damage sustained because of his wrongful invasion of plaintiff's homestead rights would, if defendant's plea prevailed, result in the subjection by indirect methods of exempt property to the payment of defendant's demands against plaintiff, although its subjection thereto directly is not per-

mitted. The soundness of this assertion is susceptible of demonstration. In the case under consideration, the exempt personal property of plaintiff alleged to have been levied upon and sold by defendants under the judgment in their favor against plaintiff is one cow and calf. This cow and calf were sold and were never returned to plaintiff. Suppose that, instead of one cow and calf taken, there had been taken twenty cows of the aggregate value of \$400, and that such cows had been sold and not returned to plaintiff, just as the one cow and calf were. Plaintiff clearly would have been entitled to recover the value of such cows because of the unwarranted conversion of them, the court having previously held them exempt from forced sale because of their character as homestead property. But, by way of set-off, defendants plead the very judgment that had been held unenforceable against such property, and, upon a trial, the court directs a verdict in favor of plaintiff, but directs further that the amount of such verdict shall be credited on the judgment of the defendant bank against plaintiff which was pleaded as a set-off against plaintiff's claim. It is perfectly clear that such procedure operates to defeat entirely the whole purpose of the Exemption Law by subjecting exempt property to the payment of the debts of the owner, and deprives him of a right secured by organic law. So far as the defendant bank is concerned, it amounts in the end to the same thing as permitting it to proceed directly against such property in the satisfaction of its judgment, and gives to it all the benefits of its unlawful forced sale of plaintiff's exempt homestead property.

It may be said that the Constitution protects homestead property from a "forced sale" only, and that the plea of set-off in this case does not amount to a "forced sale" of plaintiff's exempt property. But such contention would be out of harmony with what the courts al-

—set-off in
action for
invasion of
rights.

most universally hold to be the object and policy of exemption laws. It ignores the rule of liberal construction to which this court and many other courts are committed. In this case it would give to defendants the fruits of a "forced sale," although such sale was illegal and therefore wrongful. It would permit defendants to

Maxim—in-direct action.

do indirectly what they are enjoined from doing directly, and thereby defeat the beneficial purpose of the law. Judicial sanction should not be given to a construction which leads to this result.

We hold, therefore, that a plea of set-off is not allowable in a case of this kind. To hold otherwise would be to destroy the spirit and efficacy of the Homestead Exemption Laws. In so holding we are in accord with the great weight of authority. Thompson, Home-

Set-off—judgment against claim for invasion of homestead.

steads & Exemptions, § 893; Freeman, Executions, § 235; Millington v. Laurer, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; Cleveland v. McCanna, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908; Ex parte Hunt, 62 Ala. 1; Collier v. Murphy, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465; Wilson v. McElroy, 32 Pa. 82; Beckman v. Manlove, 18 Cal. 389; Treat v. Wilson, 65 Kan. 729, 70 Pac. 893; Curlee v. Thomas, 74 N. C. 51; Staggs v. Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Atkinson v. Pittman, 47 Ark. 464, 2 S. W. 114.

Defendants' sixth and seventh pleas set up no defense to the cause of action stated in plaintiff's declaration, and such pleas should have been stricken. There was also error in the court's charge to the jury.

The judgment is reversed.

Browne, Ch. J., and Taylor, Whitfield, and Ellis, JJ., concur.

ANNOTATION.

Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on the wrongful seizure.

In order to accomplish the object of Exemption Laws it is a well-established rule that they should be liberally construed; and by the weight of authority a judgment under which exempt property has been seized is held not available as a set-off or counterclaim in an action based on the wrongful seizure, since the judgment in the action for conversion partakes of the nature of the exempt property, and to allow the judgment under which the property was seized as a set-off would destroy the spirit and efficacy of the Exemption Laws.

Alabama. — Ex parte Hunt (1878) 62 Ala. 1.

California. — Beckman v. Manlove (1861) 18 Cal. 389.

Florida. — HILL v. FIRST NAT. BANK (reported herewith) ante, 270.

Kentucky. — Collett v. Jones (1847) 7 B. Mon. 586.

Nevada. — Elder v. Frevert (1884) 18 Nev. 446, 5 Pac. 69.

Pennsylvania. — Wilson v. McElroy (1858) 32 Pa. 82.

South Dakota. — Long v. Collins (1901) 15 S. D. 259, 88 N. W. 571.

Tennessee. — Duff v. Wells (1871) 7 Heisk. 17.

Texas. — Craddock v. Goodwin (1881) 54 Tex. 578; Wilson v. Manning (1896) — Tex. Civ. App. —, 35 S. W. 1079; Staggs v. Piland (1903) 31 Tex. Civ. App. 245, 71 S. W. 762.

Utah. — Snow v. West (1910) 37 Utah, 528, 110 Pac. 52.

Wisconsin. — Below v. Robbins (1890) 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89, 45 N. W. 416.

In Collett v. Jones (Ky.) supra, where a creditor caused execution to be levied on an exempt horse, it was held that that judgment could not be set off against a judgment recovered

by the debtor for the wrongful taking of the horse, and this was held although the debtor was entirely insolvent. The court said: "To the argument that the statute exempted the horse, and not a judgment for his value or for taking him, and that it would be inequitable to allow an insolvent debtor to draw from his creditor the only means of satisfying the debt, it is a sufficient reply that, but for the illegal act of the complainants, the subject to which the privilege of exemption attached would have been unchanged; and they should derive no advantage from their own wrong; and that, highly as the right of the creditor is regarded, it is by the paramount authority of the legislature expressly postponed to the right of the debtor and his family to the services of an only work beast, and cannot, therefore, be preferred by a court of equity, which would violate its own principles by protecting the creditor in an advantage wrongfully obtained against the superior, and, as we may assume, prior equity of the debtor. Whether other creditors may or may not be entitled in equity to subject to their demands the judgment of Collett for the violation of his right in taking this horse is immaterial to the argument in the present case. So far as they are concerned, it might not be essential to the preservation of the authority of the statute to extend its protection to a judgment against another for the violation of a privilege which they have respected, and, at any rate, they can, with a clear conscience, rely upon the difference between the damages for taking the horse and the horse itself, as the conversion would not have been the consequence of their own unlawful act. The argument that, as the statute secures the right in the specific thing, it should only be understood as protecting the remedy for the recovery of that specific thing, and not the remedy for general damages, is more specious than solid. The debtor might not be able to give the security required for obtaining possession of the property in the action of replevin,

or the property might be eloiigned before he could do so; and he might, in that action or in detinue, have nothing at last but his judgment for damages. Some of the articles which are exempted by the statute might be consumed before they could be reached by any remedy, and the only redress would be in a judgment for damages. But in truth the statute neither provides nor prefers any particular remedy for its violation. In exempting certain articles or species of property from execution, it prohibits a seizure of them by the creditor, and, expecting obedience, it leaves the consequences of disobedience to be determined by the general principles of the law. Of these principles, one of the most important is that the mandate of a statute shall be enforced, and its authority maintained, by discountenancing every violation of its letter or spirit, and especially by withholding the aid of the law from giving effect to any such violation, and, in many cases, by affording a positive remedy for the redress of the injured party, and to deprive the wrongdoer of the fruits of his wrongful act. If a judgment creditor, seizing and appropriating the privileged property for the satisfaction of his debt, in violation of the statute, is entitled to a decree setting off the damages recovered for the seizure, against his debt, his illegal act is in effect sanctioned and legalized, the authority of the statute in the particular instance is prostrated, and a way opened for its successful violation in every case. Upon this principle the creditor would be absolutely secure in the appropriation of the privileged property to his debt, if he could succeed in placing it beyond the reach of a specific remedy. The statute imposes no peculiar duty or burden on the debtor, and no restriction of his right or remedy, but gives unconditional exemption to certain property. And it is the province of the courts to give to it such effect as not to allow, and much less to encourage, either a violation or evasion of its provision."

And it will be observed that in

the reported case (*HILL v. FIRST NAT. BANK*, ante, 270), where the statute provided that a homestead of a certain extent and value should be exempt from forced sale under process of any court, and that no judgment or decree or execution should be a lien upon exempt property, it was held that the judgment recovered in an action for damages because of the wrongful levy and sale of homestead property partook of the nature of the homestead property and was also exempt, and that the judgment to satisfy which the levy was made was not available as a set-off, as the allowance of it would defeat the object of the exemption statute.

And in *Snow v. West* (1910) 37 Utah, 528, 110 Pac. 52, where the statute expressly provided that whenever any exempt personal property is levied upon, seized, or sold by virtue of an execution, or wrongfully and unlawfully taken or detained, the damages sustained by the owner thereof by reason of such levy, seizure, or sale, or unlawful detention or taking, and any judgment recovered therefor, shall be exempt from execution, it was held that the judgment under which exempt property was taken on execution could not be set off against a judgment recovered in an action for the conversion of the property taken.

And in *Ex parte Hunt* (1878) 62 Ala. 1, where the defendant in an action of trover on account of exempt property sought to have the judgment against him reduced by setting off a judgment against the plaintiff, the right of set-off was denied notwithstanding a provision of the statute authorized the court in which judgments were rendered to set off one against the other. It is not entirely clear in this case whether the judgment sought to be set off was that under which the exempt property was taken.

And in *Below v. Robbins* (1890) 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89, 45 N. W. 416, it was held that a judgment for the conversion of exempt property could not be discharged by the defendant paying that

amount to the sheriff, to be applied on a judgment against the plaintiff for the payment of which the property was taken, although a statute provided that, after the issuing of execution, any person indebted to the judgment debtor might pay to the sheriff the amount of his debt.

And in *Howard v. Tandy* (1891) 79 Tex. 450, 15 S. W. 578, where a sheriff claimed the right to apply money in his hands which had been realized upon a judgment rendered for the conversion of exempt property, to the satisfaction of an execution issued on a judgment in favor of the one guilty of the conversion, it was held that this could not be done. The court said: "To permit the money in the hands of the sheriff which had been realized by Tandy from his judgment against Low & Low et al. for damages resulting from their seizure and conversion of his exempt property, to be applied to the satisfaction of an execution held by the same officer against Tandy, and in favor of said Low & Low, as the appellants contend should have been done, would in effect render nugatory the exemption law of our state relating to personal property. It would also, we think, operate practically to make a suit resorted to to secure the benefit and protection of the exemption law by one whose personal property had been illegally seized result in subjecting the proceeds of such suit to execution, thus defeating the very purpose of the suit itself, and indirectly reaching the property which the law says shall not, by judicial process, be made subject to the payment of debts. But it is ingeniously argued that where one whose exempt personal property has been, as in this case, unlawfully seized under legal process, if the owner desires to avail himself of the benefit of the exemption made by the law in favor of such property, he should pursue the property itself, and resort to such judicial process as will give him the possession of it. That if, in lieu of this, he sues for damages for its unauthorized seizure and recovers judgment therefor, the satisfaction or

payment of this judgment operates as a transfer of the property, and vests the title thereto in the defendant. That, this being a voluntary exchange of exempt property for that which is not, the proceeds are liable to execution. We cannot concur in this view. If this position be correct, it follows, we think, that to secure the benefit and full protection of the exemption law in case of the illegal seizure of exempt personal property will depend rather upon the character of suit brought or the nature of the remedy resorted to for that purpose, and not upon the fact that the property is exempt. The fact that the owner of the property so seized may not be able to give bond and avail himself of the more expeditious remedy of suing out such process as will place him in possession of the property, and that instead thereof he sues for damages and obtains judgment, which is paid, should not operate in the latter case to practically deprive him of the results of the suit and the benefit of the exemption."

And in *Moore v. Graham* (1902) 29 Tex. Civ. App. 235, 69 S. W. 200, where a suit was brought to recover on a note, and defendant, whose growing cotton was seized under attachment, claimed that the crop was exempt, and sought damages for its conversion, it was held that judgment in reconvention, recovered by the defendant, was properly entered, with a provision that the amount recovered should not be offset by the judgment recovered against him by the plaintiff, since, if the judgment could be offset by a judgment for a debt recovered by the adverse party in the same suit, the exemption laws would be ineffective.

And it has been held that the costs recovered by one in protecting the exempt property, and preventing the setting off of the judgment on which the execution under which the exempt property was taken issued, against the judgment for conversion of the property, takes the character of the exempt property, and that the judgment under which the property was taken cannot be set off against a

judgment for such costs. *Long v. Collins* (1903) 16 S. D. 625, 102 Am. St. Rep. 724, 94 N. W. 700.

But in *Mallory v. Norton* (1856) 21 Barb. (N. Y.) 424, it was held that where one brought an action to recover the value of exempt property wrongfully seized and sold on execution, and obtained a judgment, that judgment was subject to have set off against it the judgment on which the execution under which the property was taken was issued; the court holding that if the party whose property had been wrongfully taken wished to protect his exemption rights, he should have instituted an action in the nature of replevin for the delivery of his property, and have it restored, and should not have brought suit for its value.

And the same position was taken also in *Temple v. Scott* (1859) 3 Minn. 419, Gil. 306. It is not entirely clear that the judgment which was set off in this case was the one upon which execution issued. The court, in answering the contention that the set-off should be denied, said: "We think there are two valid reasons why this point is untenable. It is the policy of the law of exemptions to protect every debtor in the possession and enjoyment of certain useful articles deemed necessary for the maintenance and comfort of his family. It is the specific articles which are exempted, and not their value as property. The law does not intend that the insolvent debtor shall reserve from his estate an amount certain, to be disposed of and applied as he may prefer, but designated the character and nature of the specific property as best suited to his circumstances; and where an amount in money is mentioned in the statute, it is simply as a limitation upon the quantity of specified articles of property. In no case are moneys in possession, or credits due the debtor, exempted from seizure upon execution. We had occasion to hold, in the case of *Grimes v. Bryne* (1858) 2 Minn. 106, Gil. 72, that statutes of this nature are in derogation of the common law,

and must be strictly construed, and that nothing can be taken by implication. Adhering to this view, we cannot adopt such an interpretation of the statute as would allow the privilege of exemption to leave the specific property of the debtor, and follow and attach itself to all the various representatives of that property during the course of a litigation concerning it, after it has left the possession of the debtor. If the legislature had designed the value of the exempt articles to enjoy the same privilege as the articles themselves, they should have said so; we cannot infer it. It is not in the power of the creditor to deprive the debtor of his

exempt property, because the mere seizure of the articles does not divest their title or destroy their privileged character, and the law furnishes the debtor ample means of reclaiming the specific property, which, if resorted to, will reinstate him in all his rights and compensate him in damages for the attempted infringement of them; but, if the debtor abandons the pursuit of the property itself, and relies upon recovering its value, he cannot claim for the representative of that value, whether it be in money, notes, or a judgment, any higher character than property of the same class is entitled to under ordinary circumstances." J. T. W.

EDWARD H. WATSON, Appt.,
v.
GEORGE T. ODELL et al., Respts.

Utah Supreme Court — May 5, 1921.

(— Utah, —, 198 Pac. 772.)

Broker — right to commission — contract for effecting sale.

1. Actual sale is necessary to entitle a broker to his commission under a contract by which property is to be sold at a specified price for a specified commission, to be paid the broker out of instalments of purchase price as paid, unless the property owner refuses to deal with the customer produced by the broker, who is ready, able, and willing to purchase on the terms stated.

[See note on this question beginning on page 289.]

— effect of naming price.

2. The price named in an undertaking by a broker to sell land for a named price for a specified commission is not merely a basis for future negotiations, but the sale must be for the price named to entitle the broker to his commission.

[See 4 R. C. L. 313, 314.]

— change of terms by owner — effect.

3. A broker contracting to sell real estate for a specified sum for a stated commission is not entitled to a commission upon producing a customer with whom, after negotiation, the owner enters into a contract of sale on different terms, where it is not shown

that he was ready, able, and willing to purchase on the terms stated in the original contract; at least, where the contract between buyer and seller was merely executory, and was never performed, because conditions could not be complied with.

[See 4 R. C. L. 322.]

Contract — subject to approval of attorneys — conditional character.

4. A contract for sale of real estate upon certain conditions, which are to be approved by the purchaser's attorneys, is merely tentative and conditional, and does not become binding upon the parties until carried into effect.

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County (McCarthy, J.) in favor of defendants in an action brought to recover a broker's commission. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Ball, Musser, & Robertson and Ogden Hiles for appellant.

Messrs. Walton & Walton, Ray & Rawlins, and Charles C. Dey, for respondents:

There was no purchaser, and no disposal or sale of the property plaintiff was authorized to deal with.

Close v. Browne, 230 Ill. 228, 13 L.R.A.(N.S.) 634, 82 N. E. 629; Cosgrove v. Leonard Mercantile & Realty Co. 175 Mo. 100, 74 S. W. 986; 2 Bl. Com. 446; Schermerhorn v. Taiman, 14 N. Y. 117; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Five Per Cent Cases, 110 U. S. 471, 28 L. ed. 198, 4 Sup. Ct. Rep. 210; Halprin v. Schachne, 21 Misc. 519, 47 N. Y. Supp. 711, affirmed in 25 Misc. 797, 54 N. Y. Supp. 1103; 4 R. C. L. 315; Kimberly v. Henderson, 29 Md. 512; Ramsey v. West, 31 Mo. App. 676; Tousey v. Etzel, 9 Utah, 329, 34 Pac. 291; Pape v. Romy, 16 Ind. App. 470, 44 N. E. 654, 45 N. E. 671; Warnekros v. Bowman, 14 Ariz. 348, 43 L.R.A.(N.S.) 91, 128 Pac. 49; Rhodes v. Wetherill, 236 Pa. 66, 84 Atl. 660; Ward v. Kennedy, 51 Misc. 422, 101 N. Y. Supp. 524, affirmed in 122 App. Div. 890, 106 N. Y. Supp. 1149; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056; Cameron v. Ayers, 175 Cal. 662, 166 Pac. 801; Sullivan v. Turner, 120 Miss. 481, 82 So. 325; Wilson v. Ellis, — Tex. Civ. App. —, 106 S. W. 1152; Dwyer v. Raborn, 6 Wash. 213, 33 Pac. 350; Aigler v. Carpenter Place Land Co. 51 Kan. 718, 33 Pac. 593.

Whatever may be plaintiff's rights on a quantum meruit, he cannot recover here under the express contract upon which he sues.

Sullivan v. Milliken, 51 C. C. A. 79, 113 Fed. 93; McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; Tousey v. Etzel, 9 Utah, 329, 34 Pac. 291; Little v. Fleishman, 35 Utah, 566, 24 L.R.A.(N.S.) 1182, 101 Pac. 984; Burt v. Stringfellow, 48 Utah, 330, 159 Pac. 527; Hicks v. Christeson, 174 Cal. 712, 164 Pac. 395; Johnson Bros. v. Wright, 124 Iowa, 61, 99 N. W. 103; Beamer v. Stuber, 164 Iowa, 309, 145 N. W. 936; Sanden & Huso v. Ausehus, 185 Iowa, 389, 168 N. W. 801; Karr v. Moffett, 105 Kan. 692, 185 Pac. 890; 4 R. C. L. 297; Schano v. Storch, 56 Misc. 484,

107 N. Y. Supp. 26; Brown v. Adams, — R. I. —, 69 Atl. 601; Williams v. McGraw, 52 Mich. 480, 18 N. W. 227; Childs v. Ptomey, 17 Mont. 502, 43 Pac. 714; Lunney v. Healey, 56 Neb. 313, 44 L.R.A. 611, 76 N. W. 558; Clark v. Asbury, — Tex. Civ. App. —, 134 S. W. 286.

Plaintiff is not in privity with the contract of May 20th. And, since he cannot perform his own contract, or furnish a buyer under the terms of his commission contract, as to him, any agreement to modify the terms of his commission contract would be without consideration.

Sullivan v. Turner, 120 Miss. 481, 82 So. 325; Wilson v. Ellis, — Tex. Civ. App. —, 106 S. W. 1152.

The agreement of May 20th was not for his benefit, and he can maintain no action by reason thereof.

4 Page, Contr. § 2399; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; Brion v. Cahill, 34 Cal. App. 258, 165 Pac. 705; Jennings v. Jordan, 31 Cal. App. 335, 160 Pac. 576.

Where a contract makes the right to commissions depend on consummation, a broker cannot recover commissions unless such contract has been consummated and the money paid.

Walker, Real Estate Agency, § 449; Lindley v. Fay, 119 Cal. 239, 51 Pac. 333; Cremer v. Miller, 56 Minn. 52, 57 N. W. 318; Dorrington v. Powell, 52 Neb. 440, 72 N. W. 587; Munroe v. Taylor, 191 Mass. 483, 78 N. E. 106; Lyle v. University Land & Invest. Co. — Tex. Civ. App. —, 30 S. W. 723.

Weber, J., delivered the opinion of the court:

The averments of the complaint are in substance: (1) That on and prior to June 15, 1915, the Richlands Irrigation Company was a Utah corporation; (2) that the corporation owned certain water rights and real estate, consisting of an option to purchase 20,000 acre-feet of water from the Deseret Irrigation Company, a preference right under the Carey Act of 10,800 acres of land in Millard county, and certain water rights and reservoir sites; (3) that the Richlands

Company represented to plaintiff that it desired to sell its holdings to anyone who would pay \$260,000 for them; (4) that defendants employed plaintiff to find purchasers ready, able, and willing to purchase the same, and promised to pay plaintiff \$30,000 commission for his services; (5) that plaintiff procured certain persons ready, able, and willing to purchase the property defendants had for sale, and brought the sellers and prospective purchasers together, and that the persons so found by plaintiff "offered to purchase from said Richlands Company the property it desired to sell as aforesaid at the price at which it had proposed to sell to the plaintiff;" (6) that after various conferences between the proposed purchasers and defendants these defendants proposed to the purchasers that, instead of conveying the land and water rights and having the consideration therefor paid to the corporation, it would be better to adopt the scheme proposed in the tri-party agreement of May 20, 1916, attached to the complaint as exhibit A; that as part of the transaction embodied in exhibit A, dated May 20, 1916, "in consideration of the contract which he [plaintiff] had theretofore made with said corporation and of his rights thereunder, and of his services in procuring said proposed purchasers," the individual defendants agreed with plaintiff to pay him \$30,000 as a commission; (8) that the proposed purchasers, after making the contract aforesaid, continued at all times ready, able, and willing to comply with the terms of the contract, and to pay defendants the sum of \$260,000, but defendants failed, neglected, and refused to procure the Deseret Irrigation Company to transfer and deliver to the Richlands Company, refused to secure the execution by the State Land Board of a Carey-Act contract, failed to cause the Richlands Company to issue bonds, and was therefore unable to comply with the terms of its contract with the purchasers.

Exhibit A, which is attached to the complaint, and is also found in the bill of exceptions, was executed May 20, 1916, with George T. Odell, D. B. Macintosh, and W. C. Alexander as parties of the first part, the Deseret Irrigation Company, a corporation, party of the second part, and Ernest Shields, George T. Franck, Robert P. Franck, and Thomas C. Hickman, of San Diego, California, the proposed purchasers, parties of the third part. The first parties agree: First, to cause a certain agreement between second parties and the Richlands Company, as modified, to be ratified, adopted, and confirmed by resolution of the board of directors of the Richlands Company; second, to secure within thirty days from date the execution by the State Board of Land Commissioners of Utah a Carey-Act contract between the state of Utah and the Richlands Company in form satisfactory to the legal firm of Story & Steigmeyer, of Salt Lake City, substantially in the form of exhibit B, attached to the agreement, and to cause the Richlands Company's board of directors to adopt a resolution authorizing and directing the proper officers of the corporation to execute said Carey-Act contract on its part, "provided first parties shall not be liable for breach of this covenant if they make an effort in good faith to obtain such a contract from the state, and are unable to accomplish such purpose;" third, to cause said Richlands Company to issue its 6 per cent bonds dated July 1, 1916, in the sum of \$300,000, payable in ten series, one of which shall mature July 1, 1917, and one annually thereafter, and to secure said bonds by mortgage or deed of trust in favor of Columbia Trust Company, of Salt Lake City, Utah, as trustee, upon all the assets and property of the company; fourth, to cause the Richlands Company to purchase all of its outstanding stock except 5,000 shares of preferred stock and 5 qualifying shares of its directors for the consideration of

\$80,000, payable: (a) \$13,300 cash; (b) the promissory note of the Richlands Company payable to W. C. Alexander as trustee, secured by pledge of bonds of said first series, for \$12,600; (c) serial bonds of the Richlands Company to be issued aggregating \$49,100. "Second party agrees to extend each payment on contract of January 10, 1916, and the contract referred to is otherwise changed and modified. Third parties agree that within five days after first parties have fully performed the covenants by them to be kept and performed to the satisfaction of said Story & Steigmeyer, they will purchase and pay for in cash, at par, bonds of the Richlands, in the aggregate principal amount of not less than \$28,000, of which \$25,000 shall be used for making the cash payments to first and second parties."

Attached to the agreement is a form of state land contract, paragraph 16 of which provides that if, within one year from the execution of the contract, the state engineer shall determine and first party (the state of Utah) shall so notify second party (Richlands Company) that a drainage system is necessary for the reclamation of the lands of said segregation, then within the period fixed in the contract for the construction of works second party shall construct such drainage system according to the specifications approved by the state engineer of Utah.

The defendants answered the complaint, and after admitting the matters of inducement, and that certain contracts had been entered into between plaintiff and defendants, denied all other allegations in the complaint.

Upon these issues a trial to the district court, sitting without a jury, resulted in findings against plaintiff's contentions and in favor of defendants, upon which judgment was duly entered, from which plaintiff appeals.

On March 7, 1916, plaintiff and the Richlands Company entered into a written agreement by which all

former agreements and extensions thereof between plaintiff and the Richlands Company, relating to the sale of the project, were canceled. It was stipulated that the following commission contract would be recognized "so long as the Richlands Irrigation Company deals with the late J. D. Mollison's associates under extensions granted said Richlands Irrigation Company by the Deseret Irrigation Company." The sale price of the property and assets of the Richlands Company was fixed at \$260,000, payable as follows: \$25,000 cash; \$40,000, with 6 per cent interest, on or before one year from date of first payment; \$195,000 in nine equal instalments with interest on whole amount unpaid to be paid annually, commission to Watson (plaintiff herein) to be \$30,000, payable \$10,000 out of the first cash payment of \$25,000, \$5,000 out of second payment of \$40,000, \$5,000 out of each of the third, fourth, and fifth instalments, when paid. It was further provided that in event of the sale of the Richlands project (not including contract for purchase of Deseret water) to the late J. D. Mollison's associates the following price and commission would be recognized: Price, \$67,500, with 6 per cent interest on all deferred payments, from which a commission of \$12,500 would be paid from the instalments paid, *pro rata* as made.

On May 10, 1916, the plaintiff and the individual defendants W. C. Alexander, A. L. Hoppaugh, C. L. Cundick, R. E. Mark, D. B. Macintosh, and George T. Odell entered into a written agreement with plaintiff as follows, in substance: "In the event of the closing of the pending sale of the Richlands Irrigation Company's holdings to Mr. Shields and his associates from California, we, the undersigned, stockholders of the Richlands Irrigation Company, hereby agree to pay you as commission the sum of \$30,000, said amount to be paid as follows: \$10,000 out of the first payment of \$25,000, and \$5,000 out of each of the

following four payments as they are respectively made."

The contract of May 20, 1916, being exhibit A of the complaint, was introduced in evidence by plaintiff. The contract referred to was ratified and approved by the board of directors of the Richlands Company and also by the stockholders of that corporation.

On June 23, 1916, Shields and his associates wrote to Moody, Alexander & Watson, saying they had had a conference with Mr. Steigmeyer and understood that the deal was off, and that, as the deal seemed to have fallen down, they demanded reimbursement for the costs and expenses to which they had been put.

A letter dated July 1, 1916, from George T. Odell, one of the defendants, to the secretary of the State Land Board, was introduced, in which he spoke of two plans that had been before the Land Board regarding the Richlands project. He said he had always been in favor of adopting the first plan, which involved an expenditure of \$100,000 or less, while the second plan would mean an expenditure of \$300,000 or \$400,000. He also said that, inasmuch as the delay beyond the 15th of June has "put our San Diego friends" in a peculiar mood, "which, I judge from our correspondence received, has caused them to waver, and so it may be possible that they will call their side of the deal off, which they have a right to do after the 15th of June," and he suggested that no additional work be commenced or expense incurred until officially advised by the Richlands Company.

On this record, together with other evidence that will be referred to hereinafter, plaintiff demanded judgment for \$30,000.

The controlling question in this controversy arises out of the letter of May 10, 1916, signed by the individual defendants, who therein agreed to pay plaintiff \$30,000 out of expected payments "in the event of the closing of the pending sale of the Richlands Irrigation Com-

pany's holdings to Mr. Shields and his associates from California."

What is meant by "pending sale"? The only price at which plaintiff had been authorized to sell was for \$260,000, with a commission of \$30,000, as shown by the company's contract of March 7, 1916, with plaintiff. The record is devoid of any proof that as a part of the scheme of May 20 the individual defendants, by their agreement of ten days before, agreed to pay plaintiff \$30,000. They agreed to pay \$30,000 out of payments when made, and that the money due plaintiff should be paid to a trustee to be named by him. These individual defendants agreed that, at the termination of the pending sale, plaintiff should receive his commission of \$30,000 in the amounts and at the times specified in the sale contract for \$260,000. Appellant insists that the defendants had the tri-party agreement of May 20th in mind when the contract of May 10th was entered into. That is an inference that is not warranted by the evidence. No proof was produced that any sale was pending except the one plaintiff was authorized to negotiate for \$260,000. Nor was there any proof that these individual defendants, or any of them, were then engaged with Shields and his associates in the negotiations which culminated in the agreement of May 20th. Plaintiff himself testifies that he wanted the contract of May 10th for his own protection, and that at the time it was made he thought the sale was for \$260,000.

The fact that a sale for a definite amount of money is mentioned in the agreements of March 7th and May 10th indicates that no such cumbersome, conditional, and unenforceable contract as that of May 20th was in contemplation of the individual defendants when they signed the agreement of May 10, 1916. A sale is ordinarily understood to mean a transfer of property for money. Pope, Legal Definitions, 1437. Ultimately the contract of May 10th, if successfully consummated, would eventuate in the re-

money by the stockholders, nevertheless it is fanciful and need to speak of the agreement as a sale. Assuming that was employed by the defendants by the contract of May 10th, that, nevertheless was not a general employment. Both by the contract of March 7th and the correlation of May 10th his employment was special, on definite terms,—a definite sale price of \$260,000; a definite commission of \$26,000, payable pro rata as the price would be paid. No commission was payable except in case of the consummation of a sale, and no commission was payable except as the purchase price. These contracts required more from the plaintiff than merely purchasers able, willing, and ready to buy. The actual payment of the purchase price was required, and only as the purchase price was paid was the commission installment and payable. The complaint plaintiff alleges that he was employed by the Richlands Company to find a purchaser for the Richlands holdings at \$260,000,—that both the corporation and the individual defendants agreed to pay him a commission of \$26,000. He further pleads that he had persons ready and willing and able to pay \$260,000. His allegation as to having procured purchasers or persons able, willing, and ready to buy has no support in the record unless entered in the contract of May 20th, the statement therein contained that the parties of the third party were ready and willing to purchase the lands and other securities of the Richlands Irrigation Company on the terms hereinafter stated," and that as evidence that the parties were able and willing to purchase the Richlands property for \$260,000. If plaintiff had furnished persons, and defendants had agreed to deal with them, or had agreed upon some other terms, plaintiff might be entitled to pay for

his services. But there is no such evidence.

The contract of March 7th was signed by the corporation alone; that of May 10th by the stockholders; the contract of May 20th by Odell, Macintosh, and Alexander, evidently acting for the company. Under our statute, the plaintiff could recover a commission only by virtue of a contract. He could not recover as upon a quantum meruit. Case v. Ralph, — Utah, —, 188 Pac. 640. Moreover, the \$30,000 was to be paid only out of the proceeds of the sale when received. There never were any proceeds of a sale. Whatever plaintiff's rights to payment for services may be, he cannot, under the evidence in this case, recover on his special contract, because he never complied with the terms of that contract.

Nor does the evidence justify the inference that defendants, or any of them, refused to proceed with the contract of March 7th, or that they preferred the tri-party agreement to a \$260,000 sale.

Plaintiff must therefore rely upon his special contract, not upon a general employment.

The line of demarcation between the principles applying to the rights of a broker under a special contract and to his rights under a general employment is clear and distinct. As stated in *Karr v. Moffett*, 105 Kan. 692, 185 Pac. 890: "The ordinary rule that a real estate agent is entitled to his commission when he procures a purchaser who is ready, willing, and able to buy, or when he brings a buyer and seller together who make a bargain on different terms than those theretofore dictated to the agent, does not apply when the agent's commission is governed by a special contract between him and his principal."

In the opinion on rehearing of *Karr v. Moffett*, 106 Kan. 379, 187 Pac. 683, the supreme court of Kansas said: "Appellee sued for an ordinary real estate dealer's commission, alleging that he had earned it in the usual way. . . . The proof of existence of the special con-

tract was surely an effective way of disproving that the defendants owed the plaintiff for services under an ordinary real estate dealer's contract, such as would entitle the agent to the usual commission when he had brought buyer and seller together, whereby they consummated a sale on terms agreeable to each other, 'when he had been the procuring cause of the sale,' as the stock phrasing in such cases is expressed."

In *Murphy v. W. & W. Live Stock Co.* 26 Wyo. 455, 189 Pac. 857, it is said: "Where, by the contract of employment, the commission is made dependent upon certain conditions or contingencies, as upon the actual consummation of a sale, or the full payment of the purchase money, or a specified part thereof, such as an agreed first payment, or a net price to the owner, these stipulations will govern, and a fulfilment or performance of the prescribed conditions is generally essential to the right to compensation."

In *Lindley v. Fay*, 119 Cal. 239, 51 Pac. 333, it is said: "The evidence . . . tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond."

Under the contract of March 7th the commission was to be paid out of proceeds of sale when received, and unless a payment be made no commission would be due. "It is so nominated in the bond."

In *Clark v. Asbury*, — Tex. Civ. App. —, 134 S. W. 286, a broker sued upon an express contract. He produced a customer able and willing to buy upon different terms. Holding that the broker must recover, if at all, upon the written contract sued upon, the court said: "In *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W. 244, where

the contract with the broker was to sell for cash, and he produced a purchaser who was willing to buy the land and pay one half cash and execute vendors' lien notes for the remainder, and the broker had arranged to sell these notes for cash, it was held that this was not a sale in compliance with his contract to sell for cash.

"In *Thornton v. Stevenson*, — Tex. Civ. App. —, 31 S. W. 233, it was held that, where a broker was to sell property at a certain price, and discussed the sale with a party who afterwards purchased from the owner at a different price, he could not recover his commissions in a suit on his contract. In a suit for commissions on a contract, the recovery must be confined to the contract itself. *Edison v. Saxon*, — Tex. Civ. App. —, 30 S. W. 958, 959. These are sound propositions of law, and a broker who sues upon a contract, and not upon quantum meruit, cannot recover unless he shows compliance with the contract, or unless he was prevented from carrying out the same by the seller. *Owen v. Kuhn, L. & Co.* — Tex. Civ. App. —, 72 S. W. 432. Giving an agent an exclusive agency does not, of itself, preclude the owner from making a sale. *J. I. Case Threshing Mach. Co. v. Wright Hardware Co.* 61 Tex. Civ. App. 481, 130 S. W. 729; *Dole v. Sherwood*, 41 Minn. 535, 5 L.R.A. 720, 16 Am. St. Rep. 731, 43 N. W. 569. And if the owner make a sale upon other and different terms from those set forth in his contract with the agent, it cannot be said that the agent has made a sale in compliance with the terms of said contract; and if in such case he is entitled to any compensation, it must be upon quantum meruit, and not upon contract."

See also *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871; *Edwards v. Baker*, 39 Cal. App. 755, 180 Pac. 33; *Columbia Realty Co. v. Alameda Land Co.* 87 Or. 277, 168 Pac. 64, 440; *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *Van Norman v. Fitchette*, 100 Minn. 145, 110 N. W. 851.

It is argued that the price fixed in the March contract was only a basis for future negotiations between the owner and the purchasers. If the selling price was only a basis for future negotiations, why would not the \$30,000 mentioned as a commission be equally subject to fluctuation? Would a sale for \$30,000 entitle the broker to the whole amount as a commission? But the contract is definite as to the sale price. It plainly says the price is \$260,000, out of which the stipulated commission of \$30,000, not a percentage, shall be paid. *Toulmin v. Millar*, 3 Times L. R. 836, an English case cited by appellant's counsel, seems to uphold their contention, but, as the facts are not stated in the opinion, what seems to be obiter dictum to the effect that "the mention of a specific sum . . . is merely given as the basis for future negotiations, leaving the actual price to be settled in the course of these negotiations," is not persuasive, and if, on authority of that case, it is claimed that, under such a contract as that between plaintiff and the Richlands Company, the price is merely a basis for future negotiations, we do not agree with the proposition thus advanced.

In *George v. Howard*, 5 Alberta L. R. 391, 2 West. Week. Rep. 443, 4 D. L. R. 257, the contract was that Howard, the seller, would sell his hotel, except personal effects and stock, for \$40,000, and pay George, the agent, 5 per cent commission. The court held that, as a matter of interpretation, "in the light of the surrounding circumstances," the contract was not to pay a commission on \$40,000, but on the purchase price," whatever that might ultimately be fixed at, accompanied by a statement that the basis of the negotiation was to be a price of \$40,000. Plaintiff secured a purchaser for \$34,000. This amount was accepted by the owner, the sale completed, and the broker was held

entitled to the 5 per cent commission.

In the case of *Little v. Fleishman*, 35 Utah, 566, 24 L.R.A. (N.S.) 1182, 101 Pac. 984, is announced the general rule that, when the broker procures a purchaser ready, able, and willing to buy for the price and on the terms satisfactory to his employer, he did all that was required of him. The broker's contract in *Little v. Fleishman*, supra, shows the inapplicability of that case to any question involved in this controversy. The proposition that was submitted by Fleishman, the employer, to Little & Little, the brokers, was this: "You are given exclusive authority to sell for me the following described property," situated in Salt Lake City, "for the sum of \$33,000, upon the following terms, to wit: \$25,000 cash, bal. thirty days; and in the event of a sale at any price agreed upon, I agree to pay the regular commission, which is 5 per cent, on amounts up to \$2,500 and 2½ per cent on amounts in excess thereof. This order good for till 5 P. M. to-day."

Within the stipulated time a customer was procured who was ready, able, and willing to purchase on the terms specified, and who entered into a contract with the owner for the purchase of the property. Though the sale was not consummated, because of the owner's inability to furnish a sufficient abstract of title, the broker was held to be entitled to his commission.

Fritsch v. Hess, 49 Utah, 75, 162 Pac. 70, is also not apposite to any issue in the instant case.

As we understand the argument of plaintiff's counsel, it may be summarized: Defendants in writing employed plaintiff, a real estate broker, to procure a purchaser for the Richlands holdings. Purchasers were produced by plaintiff who were ready, willing, and able to purchase same on terms specified. Defendants entered into a binding written agreement of sale with the purchasers, the terms being satisfactory to all parties concerned, and

which contract was substituted for the proposition to sell for \$260,000. By the contract of May 20, 1916, the Richlands holdings were actually sold to the purchasers, and defendants are estopped as against plaintiff to say that the transaction was not a sale of the Richlands holdings. The reasoning is logical. The argument is sound, and it would be unassailable were it not founded upon what to us appears to be a misconception of what the ultimate facts are. The employment of plaintiff was not general. He had a special contract with the Richlands Company and with the individual defendants, if he was employed by the latter

—change of terms by owner —effect.

at all. That the proposed purchasers produced by plaintiff were ready, able, and willing to buy on the terms of the contract of March 7, 1916, is not established by the evidence. The contract of May 20, 1916, was not, in our opinion, a contract of sale. It was not an enforceable contract. It was executory and conditional. It provided that if, within a year, the state engineer should determine a drainage system to be necessary for the reclamation of the segregated lands, the Richlands Company should construct such drainage system according to the specifications approved by the state engineer. As we understand the evidence, the State Land Board would not enter into a contract waiving the drainage clause. Mr. Alexander, the secretary of the Richlands Company, testified that the State Land Board required the drainage provision in the contract; that after May 20, 1916, Story & Steigmeyer, attorneys for Mr. E. J. Shields and his associates, had advised him that they would not approve a contract containing the drainage features. The tri-party contract contained a clause providing that the Carey-Act contract between the state and the Richlands Company must be "in form satisfactory to the legal firm of Story & Steigmeyer, of Salt Lake

City, expressed in writing." How could it be the fault of defendants that a contract satisfactory to Story & Steigmeyer was not obtained from the state when they could not procure a contract with the drainage features omitted, and when Story & Steigmeyer had informed defendants that they would not approve a contract containing the drainage clause? The contract of May 20, 1916, being, therefore, executory and conditional, never having been consummated, not a dollar having been paid thereon, plaintiff was not entitled to the \$30,000 commission that was payable to him in the event only of the purchase price being received by the defendants. Being dependent on the approval of the attorneys for the third parties to the contract, the tri-party agreement was only tentative and conditional. It was not binding on the parties and was not carried into effect. The execution of such a contract does not give to the broker a right to compensation. 9 C. J. 603.

Contract—subject to approval of attorneys—conditional character.

In Halprin v. Schachne, 21 Misc. 519, 47 N. Y. Supp. 711, affirmed in 25 Misc. 797, 54 N. Y. Supp. 1103, it is held that, where a broker for the sale of real property brings parties together, but a contract made by them is, by its terms, conditional upon the subsequent approval of the attorney for one of them, who fails to approve, the broker is not entitled to commission. The court says: "This shows that in law this agreement is made upon a condition, and is dependent upon the performance of that condition; and, if the condition is not complied with, no obligation thereunder arises, and no rights thereunder attach. The rule of law is that a broker is entitled to his commission when the minds of the parties have met on every material particular of the transaction. Here, in this case, however, the minds of the parties in regard to the transaction have never met, because the validity of the contract

was made dependent upon the condition that the defendant's attorney approve of the contract. The defendant's attorney never approved of the contract. In that event the contract and the whole transaction were to be null and void to the same effect as if no transaction whatsoever had been agreed upon and entered into between the parties. For that reason the condition upon which the broker's commission depended, and which entitled him in law to recover, was never fulfilled, and he is not entitled to recover."

Among other cases supporting the doctrine above announced are these: *Hawkins v. Green*, 87 W. Va. 116, 104 S. E. 279; *Merritt v. Lillyblade*, 57 Wash. 159, 106 Pac. 621; *Condict v. Cowdrey*, 139 N. Y.

273, 34 N. E. 781; *Sullivan v. Milliken*, 51 C. C. A. 79, 113 Fed. 93; *Rhodes v. Wetherill*, 236 Pa. 66, 84 Atl. 660; *Ward v. Kennedy*, 51 Misc. 422, 101 N. Y. Supp. 524; *Id.* 122 App. Div. 890, 106 N. Y. Supp. 1149; *Brown v. Keegan*, 32 Colo. 463, 76 Pac. 1056; *Cameron v. Ayers*, 175 Cal. 662, 166 Pac. 801.

We think the findings of fact and conclusions of law of the trial court were right, and that the record contains no errors justifying a reversal.

The judgment is therefore affirmed, with costs.

Corfman, Ch. J., and Gideon, Thurman, and Frick, JJ., concur.

Petition for rehearing denied June 24, 1921.

ANNOTATION,

Right of real estate broker to commissions under a contract providing for payment of commissions out of purchase price.

- I. Introduction, 289.
- II. Purchaser's default:
 - a. View denying right to commission, 290.
 - b. View sustaining right, 292.
 - c. Commissions payable out of first money, 294.
- III. Owner's default:
 - a. Cases sustaining right to commission, 294.
 - b. Cases denying right, 295.

I. Introduction.

It is a general rule that, in the absence of a special contract, a real estate broker is entitled to his commission when he has procured a purchaser ready, able, and willing to purchase the property upon the terms fixed by the owner. 4 R. C. L. pp. 303, 307, §§ 46, 49. The parties may, by special contract, modify this general rule. The present annotation is concerned with contracts making the commissions payable out of the purchase price; it being the purpose to examine into the broker's right to commission under such a contract. It is apparent that if the sale is completed and the purchase price paid, the broker's right to commission, as dis-

tinguished from the time for payment thereof, under an agreement making such commission payable out of the purchase price, stands upon the same footing as under the ordinary contract. It is only when the sale has not been consummated that a distinction exists. There are two general theories upon the broker's right to commissions: one denying such right, the other sustaining it. These two theories appear where the sale has failed because of the owner's default, as well as where the purchaser has defaulted. The tendency, however, seems to be to hold the broker not entitled to commissions where the sale fails because of the purchaser's default, and to sustain the right to commissions where it fails because of the owner's default. Where title has passed to the purchaser, who thereafter defaults in the payment of notes given to evidence the unpaid purchase price, the cases are more evenly divided.

The present annotation does not discuss generally brokers' contracts under which the broker is to have all that he gets over a certain price,

although in some such contracts the wording is very similar to that of the contracts here involved, in that he is to receive this sum out of the price paid, and some such cases have been included; but generally they have been excluded from this discussion. A very excellent discussion of such contracts appears in *Murphy v. W. & W. Live Stock Co.* (1920) 26 Wyo. 455, 189 Pac. 857. The court there states the general rule to be that "where, by the contract of employment, the commission is made dependent upon certain conditions or contingencies, as upon the actual confirmation of a sale or the full payment of the purchase money, or a specified part thereof, such as an agreed first payment, or a net price to the owner, these stipulations will govern, and a fulfilment or performance of the prescribed conditions is generally essential to the right to compensation." It was held in *Seattle Land Co. v. Day* (1891) 2 Wash. 451, 27 Pac. 74, that one holding land under a contract of purchase, who has employed a broker to sell it, and agreed to give the broker all he could obtain after making the principal a profit of \$500, is not liable for commissions where a sale made by the broker failed because of defects in title.

Some contracts expressly provide that the payment of the commission, which is to be a certain per cent of the purchase price, is to be paid the broker at the date of the payment of the purchase price or instalments, according to the payment by such purchaser. Under such a contract, where the purchase price is paid in instalments, the broker is entitled, upon the making of such payments, to his percentage thereof. The payment of his commission is not dependent upon the payment by the purchaser of the entire purchase price. *Frank v. Bonnevie* (1904) 20 Colo. App. 164, 77 Pac. 363.

It is assumed in *Gorham v. Heiman* (1891) 90 Cal. 346, 27 Pac. 289, that a broker who is entitled to receive as his commission a percentage of the amount actually paid by a purchaser is not entitled to his commission except as the purchase price is paid.

II. *Purchaser's default.*

a. *View denying right to commission.*

It is the general doctrine of some cases that where the commissions are payable out of the purchase money, the broker is not entitled to his commission where the purchaser defaults.

Thus, where the owner of the property has given to the broker a contract for the payment of money, containing a provision that it is "to be paid only out of the money to be paid by" the purchaser or his assigns for the purchase price of the land, the broker cannot recover where the purchaser procured by him makes default. *Edwards v. Baker* (1919) 39 Cal. App. 755, 180 Pac. 33.

A broker to whom the owner agreed to pay a commission of a certain percentage of the amount he received is not entitled to his commission where a purchaser procured by him refused to proceed with the purchase of a plantation after a contract was made, and upon discovery that a suit had been filed against the owner which might affect his title to the land. *Lee v. Greenwood Agency Co.* (1920) 123 Miss. 823, 86 So. 449.

A broker whose commissions were to be paid out of the sale price, according to the written agreement, and, according to an oral agreement, were to be paid in the final settlement between the owner and the purchaser procured by the broker, out of the money paid by the purchaser to the owner, was denied the right to recover commissions in *Lowenstein v. McPeak* (1911) 48 Pa. Super. Ct. 280, where the purchaser defaulted after entering into an agreement with the owner and making a cash payment. The broker in this case admitted the default, and said to the owner that he would endeavor to get another purchaser.

A broker who has agreed to procure a purchaser of land at a stated price, of which he was to have a stipulated sum as commissions when the purchase price was paid, cannot recover his commissions upon the mere showing that he procured a purchaser who entered into a contract and made a small payment, it being admitted that

the sale was never completed, and there being no evidence of the owner's unwillingness to complete the same. *Norris v. Walsh* (1922) — Colo. —, 205 Pac. 276. The fact that there was an enforceable contract does not entitle the broker to commissions; the owner's agreement was to pay commissions when the property was sold and the purchase price received.

An owner who has agreed to pay the broker's commission out of the purchase money is not liable for commission where the sale fails because of the inability of the purchaser procured by the broker to complete it. *Fletcher v. Campbell* (1913) 19 Ont. L. Rep. 501, 15 D. L. R. 420.

See *Colvin v. Post Mortg. & Land Co.* (1919) 225 N. Y. 510, 122 N. E. 454, *infra*, III. a. See the reported case (*WATSON v. ODELL*, *ante*, 280).

Some cases denying the right to commissions where the purchaser has defaulted have, however, found in the facts some right in the owner, recognized by the broker, to declare a forfeiture in case of default. Under an agreement between owner and broker that the broker should have the right, in case the land was sold on instalments, to retain a certain percentage of each instalment as paid, and a supplementary agreement regulating the commission on account of a resale of lots declared forfeited, the owner, who has declared a purchase forfeited for default in payments, is not liable for the commissions, so far as they remain unpaid. *Holbrook v. Investment Co.* (1897) 30 Or. 259, 47 Pac. 920. In *Columbia Realty Invest. Co. v. Alameda Land Co.* (1918) 87 Or. 277, 168 Pac. 64, 440, an action on a contract under which the brokers were entitled to a commission out of the selling price of the land, the court said that such a promise to pay is enforceable only on allegation and proof that the fund named was adequate for the payment demanded, and it was held that the brokers cannot recover commissions without proof that enough of the purchase price had been paid to cover the commissions claimed. In this case the contract between the parties recognized that some of the contracts

of purchase and sale of the land might have to be declared forfeited. The dispute in the case was over contracts which had thus been declared forfeited.

Where a principal has entered into an agreement with a broker, who has effected a sale for him, to pay a certain part of the commission out of money deposited by the purchaser and the remaining part out of the final cash payment to be made on the delivery of the deed, failure to allege that this final payment has been made is fatal to a complaint by the broker to recover his commission. *Nekarda v. Presberger* (1908) 123 App. Div. 418, 107 N. Y. Supp. 897.

A broker who had undertaken to secure a contract for the manufacture of munitions for his principal under an agreement that his commissions should become due and payable only as, and when, and in the same proportion as his principal received payment from the purchaser, that is, the commission was only to be paid out of the payments under the contract, was held not entitled to recover commissions where the contract failed for a fault not that of his principal. *Fuller v. Bradley Contracting Co.* (1918) 183 App. Div. 6, 170 N. Y. Supp. 320, affirmed in (1920) 229 N. Y. 605, 129 N. E. 925.

A broker employed to sell a patent right, who, under his contract with his employer, was entitled to a commission of a certain percentage of any kind of consideration received by the employer except in case of forfeiture, was held not entitled to any commission in case of forfeiture nor upon any stocks which should revert to the employer through failure to pay the purchase price of the patent right in cash. *Phelps v. Cable R. Co.* (1890) 122 N. Y. 639, 25 N. E. 394.

Even though the land has been deeded to the purchaser, if he afterwards defaults in the payment of the purchase price, the broker cannot recover his commission. A real estate broker who has effected a sale of land, and to whom the owner has given notes for his commission, containing the provision that they are not to become obligations of the maker

until the notes which have been given to him for the purchase money of the land have been paid, cannot recover his commission where the purchaser of the land has made default, and the owner has been compelled to sell the land under a vendor's lien reserved by him, and has become the purchaser at the sale. *Roach v. McDonald* (1914) 187 Ala. 64, 65 So. 823. According to the court, it was the intent of all the parties by their contract to declare that if the seller was, because of the failure of the buyer to complete his part of the contract of purchase by payment of the purchase-money notes in cash, forced to take his land back, then that he should not be liable to the real estate agent for the commissions which were represented by the notes. But see *Crane v. Eddy* (1901) 191 Ill. 645, 85 Am. St. Rep. 284, 61 N. E. 431, *infra*, II. b. A broker who had an agreement with the landowner that the latter should pay the broker's commission when the purchasers paid to the owner a stipulated sum on account of the price of the sale, and executed to him their notes and mortgage for the balance of the purchase money, cannot recover his commission where the purchasers executed their notes and mortgage, but failed to pay the stipulated sum, although the landowner extended the time of payment, and used all reasonable means to procure the money, but was finally compelled to take back the property. *McPhail v. Buell* (1890) 87 Cal. 115, 25 Pac. 266. An owner of land who has contracted to pay a broker commissions "out of the payments as made," and who, upon the default of the purchaser procured by the broker, accepts a reconveyance after a long period of time, is not liable to the broker for commissions. *Murray v. Rickard* (1904) 103 Va. 132, 48 S. E. 871. The reconveyance of the land and the surrender of the purchase-money bond were in accordance with the terms of the contract entered into by the parties.

Where a broker has procured a purchaser for a mine, who has entered into a contract with the owner

to pay the purchase price out of the gross proceeds of the mine, and in no other way, and the broker has acquiesced in this arrangement, and has agreed to accept as his commission a certain percentage of the gross proceeds of the mine, thus paid on the purchase price, it is held that he has an interest in the contract between the purchaser and the owner which entitles him to recognition, and entitles him to receive, during the lifetime of the contract, his share of the proceeds without interruption from the owner. No very clear statement of his right to recover, however, appears in this case, which was an action by the broker against the owner after the owner had entered into a new contract with the purchaser. It was claimed that this contract was entered into after the purchaser had abandoned his first contract, but there is held to be evidence from which the jury might have arrived at a different conclusion. It is held, further, that the test of the broker's right to recover commissions is not dependent upon whether or not the owner fraudulently entered into the contract, or whether he entered into it in good faith. *Bishop v. Averill* (1897) 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

b. View sustaining right.

In *Pinkerton v. Hudson* (1908) 87 Ark. 506, 113 S. W. 35, a broker, under a contract for commissions out of the proceeds of the sale, was held entitled to his commissions where he procured a purchaser with whom the owner entered into an enforceable contract, although the purchaser afterwards defaulted. In this case the owner had entered into a contract for sale with the purchaser furnished by the broker, and had furnished an abstract in accordance with the contract, but the purchaser refused to accept it, and refused to carry out the contract of purchase by paying over the sum stipulated therein; thereafter the owner brought a suit in chancery against the purchaser for the specific enforcement of the contract, but afterwards, upon a disagreement be-

tween himself and the broker as to the payment of costs, dismissed it. The agreement as to payment out of the proceeds of the sale is regarded as a mere postponement of the time the commission is payable, and not as a condition of the broker's right thereto. It is accordingly held to be the owner's duty to enforce his contract of sale and collect the purchase money. In this case the purchaser's default occurred before deed was made and delivered.

But in this jurisdiction it has been held, where the purchaser is financially unable to respond to the terms of his contract, that the broker whose commissions are payable out of the purchase money is not entitled to his commissions upon the purchaser's default. *Boysen v. Frink* (1906) 80 Ark. 254, 96 S. W. 1056. In this case, under the contract between the broker and the landowner, the broker's commission was to be paid one half when one third of the purchase price had been paid, the other half when one half of the purchase price had been paid; the owner entered into a contract with the purchaser under the terms of which a certain payment was to be made in ten days, evidenced by a note, and two other notes were to be paid for the balance of the purchase price; the purchaser failed to pay any of the notes, and about six months afterwards a compromise was made by the payment of a certain sum and the giving up of the notes by the landowner. The court said that if the payment of the compromised sum was accepted in good faith as a reimbursement of losses for the purchaser's breach of the contract, and the contract, to the extent of the broker's interest, could not have been enforced, the broker could not recover for his commission; but if the sum paid was not in good faith accepted as a settlement of an otherwise uncollectable debt, but was a good business deal, and it was to the advantage of the landowner to accept it and hold the land instead of enforcing a valid sale, he must pay the commission.

Where a deed has been made to

the purchaser procured by the broker, and the purchaser has given back notes secured by a lien on the land, and afterwards defaults in the payment of the notes, and the vendor forecloses his lien and bids in the land, the courts are not agreed as to the owner's liability for the commission. That he is not liable is held in the cases set out *supra*, II. a. On the contrary, the Illinois court holds that he is liable. *Crane v. Eddy* (1901) 191 Ill. 645, 85 Am. St. Rep. 284, 61 N. E. 431. The court here argues that the situation is the same as if a third person had purchased the land and paid the money. There was the additional fact in this case, on which some reliance is placed, that some of the payments had been made by the purchaser, and upon his making payment part of the land had been released without the broker's consent. It is argued that if this part had not been released, it might be that the land would have sold to a stranger for the full amount due the vendor; therefore, he would have received payment in full in money. The agreement to pay commissions in this case was in the form of a duebill stating that there was due the broker so much commission, "the same to be paid out of the purchase money as it is paid to me on the various payments in proportionate amounts with interest at 6 per cent per annum."

In *Bush v. Abraham* (1896) 25 Or. 336, 35 Pac. 1066, where the owner, who had conveyed his property to the purchaser procured by the broker, for a cash payment and notes for the balance, secured by mortgage, gave the broker a note for his commission, payable when the notes of the purchaser were payable, it was held that the acceptance by the owner, in consequence of the insolvency of the purchaser, and to save himself from further loss and expense, of a reconveyance of the property and an order on a third person for a stated sum in satisfaction and discharge of the purchase-price notes, and other consideration named, was a substituted payment, or accord and satisfaction of such purchase-price notes, and that

the owner was liable to the broker for his commission.

It has been held that a broker whose contract with the owner provided that the broker's commission was to be paid out of the payments made by the purchaser on notes given to evidence the unpaid part of the purchase price, and that in the event the purchaser failed to pay and the vendor should foreclose, the broker was not to be entitled to commission, is entitled to commission although there was default in payments and the vendor foreclosed, where upon foreclosure the notes and all costs were paid in full, one of the notes being paid before it would have been paid but for the foreclosure. *White v. Murphy* (1922) — Mo. App. —, 236 S. W. 674.

Although brokers have agreed that no commission should be paid unless the purchases procured by them made a deferred payment, they are entitled to their commission where the purchaser was able to make the payment, but the contract was rescinded by mutual consent of vendor and purchaser. *Brown v. Marty* (1922) — Wis. —, 187 N. W. 181.

A broker employed to sell machinery under a contract for commissions as soon as the purchase price had been collected was held entitled to his commissions, in *Dillon v. Turkey Gap Coal & Coke Co.* (1921) 89 W. Va. 395, 109 S. E. 334, although the entire purchase price had not been collected, it being due, the purchaser being solvent, and the principal having refused to take steps to collect.

c. Commissions payable out of first money.

A broker whose commissions are to be paid out of the first money collected is entitled to his commissions where more than the amount thereof is collected, although the purchaser afterwards defaults, and may be financially unable to complete the transaction. *Moore v. Irwin* (1909) 89 Ark. 289, 20 L.R.A.(N.S.) 1168, 131 Am. St. Rep. 97, 116 S. W. 662.

III. Owner's default.

a. Cases sustaining right to commission.

Where the broker's commissions are payable out of the purchase money, and the owner has refused to accept the purchaser found, or, for some other default on his part, the sale has failed, he cannot defend an action for commissions on the theory that no purchase money was paid. *Fiske v. Soule* (1891) 87 Cal. 313, 25 Pac. 430; *Finch v. Guardian Trust Co.* (1901) 92 Mo. App. 263; *Colvin v. Post Mortg. & Land Co.* (1919) 225 N. Y. 510, 122 N. E. 454; *Cheatham v. Yarbrough* (1890) 90 Tenn. 77, 15 S. W. 1076; *Pederson v. North Yakima & E. S. Irrig. Co.* (1911) 63 Wash. 636, 116 Pac. 279; *Hugill v. Weekly* (1908) 64 W. Va. 210, 15 L.R.A.(N.S.) 1262, 61 S. E. 360.

In *Fiske v. Soule* (Cal.) supra, where the contract of employment of the broker contained a provision that the owner would pay the broker a commission "of all I receive over and above the price above mentioned on amount of said sale or exchange," it was urged that the broker was not entitled to recover commissions until the purchase money was paid. In answer to this contention the court says: "It may be conceded that this would be so if the purchaser had failed to pay the purchase money, but the defendant could hardly defend on this ground when the purchase money was not paid solely because he refused to accept it."

In *Finch v. Guardian Trust Co.* (1901) 92 Mo. App. 263, the owner refused to complete a sale to a purchaser procured by the broker after being advised by his attorney that, if he did so, the broker would be entitled to his commission. The court, in allowing a commission, says: "That clause in plaintiff's contract with the defendant, offered in evidence, 'this commission shall be payable out of the first cash payment of one third of the purchase price,' is not a condition precedent to plaintiff's right of recovery. And the contract by its terms does not require a cash payment of one third of the purchase

price before the agent is to get his fee; it merely provides that his commission shall be payable out of that fund. It was not intended that, unless there was a cash payment of one third of the purchase price, the agent was to get no commission." *Finch v. Guardian Trust Co.* is approved in *Brown v. Russell* (1920) — Mo. App. —, 221 S. W. 791.

In *Colvin v. Post Mortg. & Land Co.* (1919) 225 N. Y. 510, 122 N. E. 454, where it was agreed between the broker and the owner that the broker's commission should be a certain percentage of the purchase price, "payable pro rata from each instalment of the purchase price as and when the same is received" by the owner, the final instalment to be due when the final cash payment and the bond and mortgage securing the balance are turned over, it is held that if the sale fails through the seller's fault, there is no indication of any intention that, in such an event, the broker shall lose what he has earned, although if the sale fails because of the purchaser's default, he is not entitled to commissions. The rule of this case was held applicable in *Traylor v. Crucible Steel Co.* (1920) 192 App. Div. 445, 183 N. Y. Supp. 181, affirmed without opinion in (1922) 232 N. Y. 583, 134 N. E. 581, to a broker's right to recover commissions on war contracts, payable as and when payments were made to his principal, and the broker was held entitled to commission on contracts although no payments were made thereon, because the contract was canceled, due to the principal's default.

A broker to whom the owner has agreed to pay a commission out of the purchase money, who has furnished a purchaser ready, able, and willing to buy on terms satisfactory to the owner, but who refuses to complete the transaction because of a defective title, may recover his commission. According to the court the fact that the broker was to receive his compensation out of the proceeds of the sale did not make his right to compensation dependent at all events on the completion of the sale. If he per-

formed his part of the contract, and the trade was defeated alone by the inability of his principal to make a good title, then he is entitled to receive compensation for his services though it cannot be paid, as agreed, out of the purchase money. *Cheat-ham v. Yarbrough* (1890) 90 Tenn. 77, 15 S. W. 1076.

An owner of land who has contracted to pay a broker commissions of a certain percentage "on the purchase price of said land, and shall be liable only for the portion of each of said purchase-money instalments coming to second party as the same may be collected by the first party, and not otherwise," is liable for commissions where a sale failed because of a default on the part of the owner in furnishing water to the land for irrigation purposes, as he had agreed to do. *Pederson v. North Yakima & E. S. Irrig. Co.* (1911) 63 Wash. 636, 116 Pac. 279.

An owner who has contracted to pay a broker a certain percentage commission out of the first payment is liable for the commission although the sale failed because of alleged misrepresentations by an employee of the owner. *Hugill v. Weekly* (1908) 64 W. Va. 210, 15 L.R.A.(N.S.) 1262, 61 S. E. 360.

A broker employed to secure a loan, who has agreed with his principal that the amount to be paid him should be deducted from the loan, is entitled to his commission where the loan fails because of a defective title to the property which was to be given as security. *Putzel v. Wilson* (1888) 49 Hun, 220, 2 N. Y. Supp. 47.

b. Cases denying right.

Other cases deny the broker's right to commissions even though the sale fails because of the owner's default. *Lindley v. Fay* (1897) 119 Cal. 239, 51 Pac. 333.

The contract involved in *Cremer v. Miller* (1893) 56 Minn. 52, 57 N. W. 318, gave the broker as his commission whatever sum he should obtain over a stipulated price. The testimony left it uncertain whether the commission was payable on the production of a

customer acceptable to the owner, or out of the payments made by such customer in compliance with the contract. The court says: "Under the rule in *Flower v. Davidson* (1890) 44 Minn. 46, 46 N. W. 308, if the contract requires the sale to be consummated, and the plaintiff's compensation depended upon the payment of the purchase money, the plaintiff could not recover unless these conditions should exist, or unless the plaintiff was defeated by the fraud, bad faith, or wrongful act of the defendant. And it is clear that inability to make title within the time specified would not subject the defendant to liability if the contract was not carried out for that cause, nor would the burden of proof rest on defendant to show that the failure of the contract was not due to the acts or omissions of the defendant in the premises." *Cremer v. Miller* (Minn.) *supra*. The sale made in this case was not completed because the owner was unable to give a merchantable title.

One employing a broker to purchase property for him, who has the right to approve or reject any contract for the

purchase of the property which might be agreed on by the broker and the owner, and who has agreed to pay commissions out of the proceeds of the deal, cannot be held liable for commissions where the transaction failed, although it failed because of the refusal of the person thus employing the broker to consummate it. *Kiam v. Turner* (1899) 21 Tex. Civ. App. 417, 52 S. W. 1043.

In *Lindley v. Fay* (1897) 119 Cal. 239, 51 Pac. 333, where the sale failed because the owner refused to go on with it, the brokers were held not entitled to commissions where, under the contract, they were to be paid out of the first money received. The court says: The contract "tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond."

W. A. E.

CITY OIL WORKS et al., Appts.,
v.
HELENA IMPROVEMENT DISTRICT NO. 1.

Arkansas Supreme Court — June 20, 1921.

(149 Ark. 285, 232 S. W. 28.)

Damages — leaving property outside levee.

1. Destruction of value of property by being left outside a levee is not an element of damages to be allowed for condemnation of a right of way across the property for construction of the levee.

[See note on this question beginning on page 302.]

— eminent domain — right of way for levee → depreciation of value of property.

2. The damages to be paid by a levee district for a right of way across mill property for the construction of a levee which depreciates the value of

the property by cutting off switch connections with a railroad in the construction of the levee is not limited to the mere value of the land taken, but includes the injury so caused.

[See 10 R. C. L. 153; 2 R. C. L. Supp. 982.]

— cutting off switch connections —
property not valueless.

3. If property is not rendered valueless by being left outside a levee, the

levee district cannot avoid liability for injury done to it by cutting off its switch connections with a railroad by the construction of the levee.

(Smith, J., dissents.)

APPEAL by defendants from a judgment of the Circuit Court for Phillips County (Jackson, J.) in favor of plaintiff in an action brought to condemn a right of way over property belonging to the defendant oil works for the construction of a levee. *Reversed.*

Statement by Hart, J.:

This action was brought in the circuit court by Helena improvement district No. 1 against the City Oil Works to condemn a right of way over property belonging to the defendant in Helena, Arkansas, for the construction of a levee. Subsequent purchasers of the property from this defendant were also made defendants. They answered, setting up damages by reason of the actual taking of a part of the land and the injury to the remainder.

The board of commissioners for the levee district and the engineers were witnesses for it at the trial of the condemnation proceedings. According to their testimony the levee was first constructed in front of the oil mill of the defendants, and the levee protected the mill from the high waters of the Mississippi river. There was a subsidence in the levee. By this is meant that the levee sank down, and the cause of it was the soft foundation. The subsidence in that part of the levee in front of the mill. The commissioners of the levee district expended about \$20,000 in trying to repair and maintain the levee in front of the oil mill. They were unable to do so, and after the levee had sunk down again and a part of it had caved into the river, it was deemed advisable to construct the levee behind the oil mill. In doing this, they used about six tenths of an acre of the land on which the oil mill was situated and built the levee across an industrial railroad track which had been extended from the main track of the railroad company to the oil mill for the purpose of carrying freight to and from the mill. This left the oil

mill in front of a levee 60 feet high without means of carrying its freight from the mill to the tracks of the railroad company. The value of the land upon which the mill was situated was \$1,000 per acre.

According to the testimony of G. W. Willey, the president and manager of the oil mill, his company was engaged in crushing cottonseed and in the cottonseed oil business. It is impractical to operate an oil mill of that size without an industrial track. After the levee was constructed behind the oil mill it destroyed the industrial track so that the company was unable to move its freight to and from the mill to the railroad. It was impractical to operate the mill after the levee had been constructed across its industrial track so that cars could not be brought from the railroad track to the mill for the purpose of loading and unloading. The value of the plant before the levee was constructed behind it was \$70,000. After that its value was practically destroyed, and it was necessary to sell the machinery piece by piece.

He further stated that this would have been prevented if the old levee had been permitted to remain. According to his testimony also, the construction of the new levee made it impossible to operate the plant. The reason given was that the levee occupied that portion of the ground that had been formerly used for trackage purposes, and the construction of the levee, which was 60 feet high across the industrial track leading into its mill, damaged the property the whole value of the mill. The reason that the taking deprived

them from operating the mill was because it was impossible to maintain thereafter a railroad connection. In short, the taking of the particular piece of land and the building of the levee across the industrial track practically destroyed the value of the mill, and made it impracticable to operate it.

No subsidence has occurred in the old levee in front of the mill since the construction of the new levee behind it. Accretions are forming in the river in front of the mill, and willow trees are growing up there.

The jury returned a verdict for the plaintiff and assessed the value of the land taken by it in the sum of \$60.

From the judgment rendered, the defendants have duly prosecuted an appeal to this court.

Messrs. Moore & Vineyard and W. G. Dinning, for appellants:

The improvement district is liable to the appellants for the damages caused to their property as a whole by the building of the levee across a portion of their lands.

Little Rock, M. R. & T. R. Co. v. Allen, 41 Ark. 431; *Springfield & M. R. Co. v. Henry*, 44 Ark. 360; *Fayetteville & L. R. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418; *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167; *Pine Bluff & W. R. Co. v. Kelly*, 78 Ark. 83, 93 S. W. 562; *Kansas City Southern R. Co. v. Anderson*, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784; *Dickerson v. Okolona*, 98 Ark. 206, 36 L.R.A. (N.S.) 1194, 135 S. W. 863; *Newport Levee Dist. v. Price*, 148 Ark. 122, 229 S. W. 12.

Messrs. P. R. Andrews and J. G. Burke for appellee.

Hart, J., delivered the opinion of the court:

There is no conflict in the testimony that it was necessary to construct the new levee in order to protect the lands within the district from the overflow of the Mississippi river. It is conceded that the commissioners acted in good faith in locating and constructing the new levee, and that this was within the power of the commissioners under the act creating the improvement district.

The evidence shows that the levee as originally constructed was between the oil mill of the defendants and the Mississippi river. So, it may be said that the oil mill was on the inside of the levee. By the construction of the new levee the oil mill was placed outside of the levee; in other words, the oil mill of the defendants is between the new levee and the Mississippi river. There was an industrial track extending from the oil mill of the defendants westward to the main line of a railroad. The levee was constructed across the industrial track on a part of the land of the oil mill. The levee as constructed was 60 feet high and destroyed entirely the use of the industrial track of the oil mill; so that communication from the mill with the railroad by cars operating on the industrial track was entirely cut off.

In instructing the jury at the request of the plaintiff, and in refusing to give instructions asked by the defendants, the court limited the damages to be recovered to the value of the land actually taken in the construction of the levee, and denied the defendants the right to recover on account of the levee being built across the industrial track running from the main line of the railroad to the oil mill of the defendants. This was error. The ruling on this point

Damages—
eminent domain
—right of way
for levee—de-
preciation of
value of prop-
erty.

would have been correct if the uncontradicted evidence had shown that the practical use of the oil mill had been destroyed on account of its being outside of the levee, by the construction of the new levee.

In *McCoy v. Plum Bayou Levee Dist.* 95 Ark. 345, 29 L.R.A. (N.S.) 396, 129 S. W. 1097, the court held that a levee district may rightfully build its levee across depressions, swales, and low places so as to prevent the escape of flood water from a river into surrounding lowlands sought to be protected, though it has the effect of raising the water higher on lands between the levee and

river, without becoming liable to the owner of such intervening lands so damaged.

The court further held that a levee district, which builds a levee so as to protect lands from overflow of the waters of a stream at flood time, will not, under article 2, § 22, of the Constitution of 1874, providing that private property shall not be "taken, appropriated, or damaged for public use, without just compensation therefor," become liable for injuries to land lying between the levee and the river, resulting from the flood water being raised higher between the levee and the river than before the levee was constructed.

In *Jackson v. United States*, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and *Hughes v. United States*, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A. (N.S.) 624, 33 Sup. Ct. Rep. 1019, the court held that the United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi river so as to afford increased protection from increased overflow caused by the levees that were constructed by state and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the 5th Amendment.

Under the rule announced in those cases, the landowner is not entitled to damages because of the failure to so construct the levee as to protect his land from the waters of the Mississippi, or because the levee as constructed may prevent such water from flowing off as it otherwise would, or it may deepen the water in an overflow on the land between the embankment and the river.

The intention of the legislature was to protect the lands in the improvement district against the waters from the Mississippi river by constructing a levee for that purpose, and, if it was necessary to construct the levee so as to leave prop-

erty between it and the river, this would, in the very nature of things, be unavoidable. Hence it has been held that the landowner must submit to the consequent loss resulting to him as his misfortune to be borne for the general good.

Therefore the levee district is not liable for damages inflicted upon the land by the Mississippi river. But it does not follow that the levee district should not be liable for damages produced by independent causes other than being outside of the levee, if these elements of damages are proper in other condemnation proceedings. This rule is supported by the decisions of the supreme court of the state of Mississippi. A section of the Constitution of that state excludes compensation for damages accruing to land "because it is left outside the levee." The court said that the words used in the Constitution present the idea of defenselessness against the ravages of the Mississippi river.

In *Duncan v. Levee Comrs.* 74 Miss. 128, 20 So. 839, the court said: "All damages, therefore, which accrue to lands from the ravages of the river because not protected against it by the levee, are not to be compensated for. But damages produced by independent causes other than being left outside the levee, if, in their nature, allowable within the rules of law, are still recoverable."

Again, in the case of *Richardson v. Levee Comrs.* 68 Miss. 539, 9 So. 351, the court held that the landowner is not entitled to compensation because the construction of the levee renders the land lying between it and the river practically worthless for agriculture, and necessitates the removal of houses to the protected side of the levee, as these are consequential damages. In discussing the question the court said: "The landowner is not entitled to damages because of a failure to so place levees as to protect his land from the water of the Mississippi, or because the levee may prevent such water from flowing off as it otherwise would, and may deepen

-leaving prop-
erty outside
levee.

the water in an overflow on the land between the embankment and the river. These are consequences of the situation, and the authorized effort to promote the general good by the construction of levees, and must be borne, because they are unavoidable in the nature of things. The legislative scheme is to protect against water from the Mississippi river by an embankment sufficient for the purpose, and it is to be put where the board intrusted with the execution of the scheme may determine; and the landowner must submit to any inconvenience or disadvantage or loss resulting to him consequentially, as his misfortune, to be borne for the general good, to which individual convenience must be subordinated, except where it is otherwise provided. *Levee Comrs. v. Harkleroads*, 62 Miss. 807. . . . That damage caused by the success of the scheme in confining the water of the river is excluded seems clear, and has already been announced. That all other damage which is not remote and arises directly from the taking of part for levee purposes, resulting to the owner's adjacent land immediately from the constructing of the levee, is to be compensated for, seems as clear as the denial of damage by the river. This is consonant with natural justice, and it may be assumed that it was the legislative purpose to secure to the owner whose land is taken for a levee indemnity for all damages done him as to the adjacent land he owns, not arising from the accomplishment of the object of the levee, and directly produced by depriving him of so much of his land as is taken from him, and converting it into such a shape as to do harm to his adjacent land. We are not willing to declare a rule more precise than this; for, while there may be a general resemblance in all cases of land near the river, there must be individual differences, and each case must be governed by its own peculiar circumstances, subject to the general rules announced."

It results from these views that,

if the undisputed evidence had shown that the oil mill of the defendants had been rendered practically useless by the construction of the new levee so as to place the mill outside of the levee, and the mill could not thereafter be operated, the owner could not recover damages for the consequent depreciation in the value of his property or the cost of removing the mill and its machinery to another site where the mill could be operated. The reason is that the damages suffered under such a state of the record would follow as an incident to the construction of the levee so as to leave the property outside of its protection.

—cutting off
switch connections—property
not valueless.

The undisputed evidence in the case at bar, however, does not show that the oil mill was rendered valueless as an oil mill because the levee was constructed so as to leave it on the outside of the levee. It is true there is some confusion in the testimony on this point, but, when the evidence is given its strongest probative force in favor of the defendants, it does not appear to us that the oil mill could not be operated at all because the construction of a new levee placed it between the levee and the Mississippi river.

The evidence does show that the oil mill was greatly depreciated in value on this account. According to the testimony of the defendants' witnesses, it was rendered impractical to operate it because the new levee was constructed across the industrial track leading from the railroad to the oil mill, and thus the oil mill company was prevented from carrying cars over the industrial track to and from its mill for the purpose of loading and unloading freight. The evidence for the defendants shows that it was impractical to operate the oil mill without this connection. According to their testimony, however, it was not wholly impractical to operate the oil mill, because it was on the outside of the levee. To sum up, the evidence shows that before the new levee was

constructed the oil mill was worth \$70,000. Suppose the uncontradicted evidence had shown that the construction of the new levee rendered the property valueless as an oil mill, and that it could not be operated as such on account of the ravages of the waters from the Mississippi river; then the defendants would be only entitled to recover the value of the land taken, and the instructions given by the court would have been correct.

It is fairly inferable, however, from all the evidence, that while the oil-mill property was materially injured by being placed outside of the new levee, still it was practical to operate it, if its industrial track had not been destroyed by the construction of the new levee. This shows that the construction of the new levee across the industrial track was an independent cause which rendered the oil-mill property valueless as such and made it impracticable to operate it.

The error in the instructions of the court evidently arose from the fact that it considered the construction of the levee across the industrial track as a mere incident instead of an independent cause producing damages. It is true the only practical way to construct the new levee was to build it across the industrial track. The evidence for the defendants shows that such construction damaged their oil-mill property because it prevented the defendants from carrying cars of freight to and from the oil mill over the industrial track. Manifestly this was not damage accruing because of the oil-mill property being left outside of the levee, but the damage accrued because of the construction of the levee over the industrial track. In short, this damage was caused not because the property of the oil-mill company was unprotected by the levee, but it was caused by the levee itself. Whether inside or outside of the levee, the damage to the oil mill in this respect was caused by the building of the levee itself, and not by reason of the fact that the oil

mill was left outside of the levee. The facilities afforded by the industrial track for the transportation of freight between the railroad and the oil mill were a valuable property right which belonged to the oil-mill company, and its injury by the appropriation of the land on which it was situated and the construction of the levee across it constituted a damage to the remaining property for which the defendants should be compensated. *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *New York, N. H. & H. R. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020.

In the latter case the court, in discussing a similar question, said: "The fact that this land was situated on the line of the railroad, and at a level with it, so that spur tracks could be (as they were) built, running onto it, made it valuable for any business which could be economically carried on by having freight delivered to it directly from the cars without the expense of handling and carting. That was an element which in fact gave, or might have given, value to this land, and which could properly be considered in determining what the fair market value of it was."

The holdings in those cases are in accord with our own decisions. In *Kansas City Southern R. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375, the court held that, although several lots of land sought to be condemned for railway purposes are separated by an alley, they may be treated as parts of a single tract for the purpose of determining the damages if the testimony shows that they are used as a unit.

In *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167, the court held that the elements of damages in condemnation proceedings are not alone the market value of the land actually appropriated, but include also the injury to the owner of the remaining land arising from the increased difficulty of communication between the parts of the several tracts, etc.

It follows that the court erred in not submitting to the jury as an element of damages the loss suffered by the defendants on account of the levee having been constructed across the industrial track so as to cut off connection between the oil mill and

the railroad by means of the industrial track.

For this error the judgment must be reversed, and the cause remanded for a new trial.

Smith, J., dissents.

ANNOTATION.

Right to compensation for damages to land left outside of levee.

As the title indicates, the annotation is confined to damages, whether of a positive or negative character, consequent upon land being left outside of the levee; and the right to compensation for land taken or damaged in other ways is beyond its scope.

The reported case (*CITY OIL WORKS v. HELENA IMPROV. DIST.* ante, 296) is in harmony with the general rule that there is no liability to compensate for injuries to property due to fact that land is left outside of a levee.

So far as the lower Mississippi valley, which may, perhaps, be regarded as governed by the civil law, is concerned, it is now settled by *Cubbins v. Mississippi River Commission* (1916) 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671, that there can be no recovery for raising the height of water in a river by government levees so as to overflow and destroy private property. The opinion, however, deals almost entirely with the Roman law.

[In *Levee Inspectors v. Crittenden* (1899) 36 C. C. A. 418, 94 Fed. 613, which is not within the scope of the present annotation, the court said that even though in the original Louisiana territory there was a servitude upon land bordering upon the Mississippi river as to levees, which justified the taking of land therefor without compensation, that principle was not available to a levee district established under the laws of Arkansas, since that state had never exercised or asserted the right, but, on the contrary, the act under which the levee was constructed provided for awarding to the landowner on whose land the levee is located and built, such damages as

six landowners of the county may deem just and right.]

A levee district may rightfully construct a levee across sloughs, swales, and other low places which help to absorb the flood waters of a river, without liability to a riparian owner whose lands are left between the levee and the river, and which are injured as a result of the levee raising the height of flood waters. *McCoy v. Plum Bayou Levee Dist.* (1910) 95 Ark. 345, 29 L.R.A. (N.S.) 396, 129 S. W. 1097; and see also *Cobbins v. Mississippi R. Commission* (1913) 204 Fed. 299.

Nor is there any liability under a constitutional provision that "private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." *Cobbins v. Mississippi R. Commission* (Fed.) supra. The court stated that where no rights have been violated, there is no injury for which the law affords compensation; that it is a case of an injury without damages.

Levee commissioners have the legal right to protect the lands in the district by leveeing against vagrant flood waters, and thus incidentally throwing them upon the landowners between the levee and the river, when incident to and reasonably necessary to the effective protection of the lands in the levee district, and such damages are within the phrase "damnum absque injuria." *Indian Creek Drainage Dist. v. Garrott* (1920) 123 Miss. 301, 85 So. 312. The court said: "The damages resulting are without legal injury and must be borne for the common good. The act causing the damage is done for protection against the common enemy,—roaming flood wa-

ters. It is similar in principle to the right to protect from violence against an outlaw who runs amuck, even though a neighbor is incidentally hurt in the exercise of the right." The court added that the constitutional provision that private property shall not be damaged for public use except on due compensation does not compensate damages resulting without legal injury, as in the case at bar, and cited the *McCoy Case* (Ark.) *supra*, as being so identical with the case before them that it was referred to as a sound authority upon which to rest.

So, a city may construct a levee to prevent the overflow of a portion of its territory without liability for damage to property outside the levee, due to the levee causing water to stand upon the lot between it and the river in time of flood, which theretofore had passed over the protected part and on into the river, some distance below the city. *Hoard v. Des Moines* (1883) 62 Iowa, 326, 17 N. W. 527. This right, the court said, was the same as every owner of land has to protect himself from overflow by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river.

And the erection by the Federal government, in improving navigation, of a levee behind a plantation, which was thereby placed between the old and the new levee, was not a taking of property for which compensation must be made. *Hughes v. United States* (1913) 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019.

As to compensation to owner for land taken for levee purposes, the court, in *Richardson v. Levee Comrs.* (1891) 68 Miss. 539, 9 So. 351, said: "The landowner is not entitled to damages because of a failure to so place levees as to protect his land from the water of the Mississippi, or because the levee may prevent such water from flowing off as it otherwise would, and may deepen the water in an overflow on the land between the embankment and the river. These are consequences of the situation and the

authorized effort to promote the general good by the construction of levees that must be borne because they are unavoidable in the nature of things. The legislative scheme is to protect against water from the Mississippi river by an embankment sufficient for the purpose, and it is to be put where the board intrusted with the execution of the scheme may determine; and the landowner must submit to any inconvenience, or disadvantage, or loss resulting to him consequentially, as his misfortune, to be borne for the general good, to which individual convenience must be subordinated except where it is otherwise provided. . . .

The Constitution guarantees due compensation to the owner for property taken for public use, and, in observance of this guaranty, the act under which this condemnation was made declares that the 'cash value of the land or material occupied or used . . . for the right of way of said levee or for other purposes, and also the damages caused to the owner's adjacent property by reason of the use of his land or other property for right of way for said levee or for other levee purposes' shall be the measure of due compensation to him. The only place for interpretation is as to what damages are caused to the owner's adjacent property by reason of the use of part of his land for levee purposes within the contemplation of the act. That damage caused by the success of the scheme in confining the water of the river is excluded seems clear and has already been announced. That all other damage which is not remote, and arises directly from the taking of part for levee purposes, resulting to the owner's adjacent land immediately from the construction of the levee, is to be compensated for, seems as clear as the denial of damage by the river. This is consonant with natural justice, and it may be assumed that it was the legislative purpose to secure to the owner whose land is taken for a levee indemnity for all damages done him as to the adjacent land he owns, not arising from the accomplishment of the object of the levee, and directly produced by depriving

him of so much of his land as is taken from him, and converting it into such a shape as to do harm to his adjacent land. We are not willing to declare a rule more precise than this, for while there may be a general resemblance in all cases of land near the river, there must be individual differences, and each case must be governed by its own peculiar circumstances, subject to the general rules announced." And see also, to the same effect, *Levee Comrs. v. Harkle-roads* (1885) 62 Miss. 807, the court in that case stating that the overflowing water of the Mississippi river is the enemy of the public, and the state, in assuming to deal with the danger arising therefrom, has not provided for compensating the owners of land lying along the borders of the river for any injury which may incidentally and possibly arise from the confining of water within the limits fixed by the levee.

But the construction of a levee for the reclamation of land from the flood water of a river will not, although it is for a public use, be permitted to destroy a portion of the water supply system of a municipal corporation. *Ft. Worth Improv. Dist. v. Ft. Worth* (1913) 106 Tex. 148, 48 L.R.A. (N.S.) 994, 158 S. W. 164.

The building of levees along the bank of the Mississippi river, or the closing of breaks therein for the purpose of retaining the water in the river, whereby the levee of riparian owners, built to protect their land, became ineffective because of the resulting increase of the volume of water in the river and the raising of the flood level, would not give a right of action as against an individual for the resulting injury to the land and crops, and much less will support a claim against the United States, where the acts are those of the government, on the theory of taking property for which compensation must be made. *Jackson v. United States* (1912) 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011.

So, also, the raising, strengthening, and extending the line of levees at certain points along the Mississippi

river, and thus temporarily increasing the flood level in time of high water, without building a line of levees along minor stations on the east bank, to afford means of protection from the increased danger of overflow, would not render even an individual liable for the resulting injury to land and crops, and, when the acts are those of the Federal government, do not amount to a taking of property for which compensation must be made. *Ibid.*

Although, in condemnation proceedings for levee purposes, the landowner is not entitled to damages, because a part of his land is left outside the levee, yet such landowner is entitled to damages for an obstruction of drainage on such land. *Duncan v. Levee Comrs.* (1896) 74 Miss. 125, 27 So. 838; *Ham v. Levee Comrs.* (1903) 83 Miss. 534, 35 So. 943. And see also *Richardson v. Mississippi Levee Comrs.* (1899) 77 Miss. 518, 26 So. 963.

And in *Inter-River Drainage Dist. v. Ham* (1918) 275 Mo. 384, 204 S. W. 723, where a contemplated levee was so run as to bisect certain land, leaving a portion of it between the levee and a river, thus causing the water of the river to overflow the land between the levee and the river bank to a greater depth and at more frequent intervals, it was held that the damages were not *damnum absque injuria*, but that the levee district was liable under the constitutional provision that "private property shall not be taken or damaged for public use without just compensation." The court based its decision on the fact that the district was seeking to condemn a right of way for the levee through, and not outside of, the complainant's land, distinguishing *Jackson v. United States* (1912) 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1101, and *Hughes v. United States* (1913) 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A. (N.S.) 624, 33 Sup. Ct. Rep. 1019 (both of which cases are cited in this annotation), stating that in both those cases the levees were not constructed upon the lands of the complainant, but behind them, and that if, in the instant case, the levee was so built

as to leave all of the land between the levee and the river, those two cases would be in point.

And in *Jones v. Mississippi Levee Comrs.* (1914) 108 Miss. 149, L.R.A. 1916F, 1194, 66 So. 413, it was held that the owner of land lying between an inner and outer levee, erected to protect a district from the overflow of a river, is entitled to compensation for property destroyed by the cutting by the levee commissioners of the outer levee in order to use the water covering the space between the two as a cushion to protect the inner one, the result of which is to devastate the land of claimant.

And see the reported case (*CITY OIL WORKS v. HELENA IMPROV. DIST.* ante, 296), which holds that where property left outside of levee is not valueless there will be liability for injury done to it by cutting off switching connections.

Louisiana cases.

In Louisiana the rule, which antedates the purchase of the territory by the United States, is that the riparian owner holds his land subject to a servitude of the right on the part of the public to construct levees upon it without making compensation to him for the land used. See *Eldridge v. Trezevant* (1895) 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345, *infra*.

Wherever the taking or damaging of property is merely the enforcement of the servitude which that property owes or to which it is subject, there is no exercise of the right of eminent domain, and the constitutional limitation making compensation a condition to be previously performed has no application; for if the land or the owner is about to be compelled to submit to only an obligation impressed by the law upon property by the original grant, or by a statute under which it has been acquired or held, and independently of the right of eminent domain, there is no propriety in considering whether a previous compensation has been paid or no compensation of any sort is due. *Hart v. Levee Comrs.* (1893) 54 Fed. 559.

So, in *Zenor v. Concordia Parish* (1852) 7 La. Ann. 150, a riparian owner—20 A.L.R.—20.

er upon whose land a levee had been constructed by the police jury of the parish was held to have no claim for damages, there being no question but that the levee was a necessity, or that it was placed at a reasonable distance from the river, considering the history of that part of its bank and its badly caving character. In the course of its opinion the court said: "In this state, so much exposed to ruinous inundations, the public have the undoubted right on the shores of the Mississippi river, to the use of the space of ground necessary for the making and repairing of the public levees and roads. . . . It was the condition of the ancient grants of land on the Mississippi river, and sufficient depth was always given to each tract to prevent the exercise of the public rights from proving ruinous to the individual. Speculation and other motives have in latter times caused the division and sale of some tracts and entries of others with large fronts and little depth, in opposition to the general policy of the country. Thus, in the present case the plaintiff had scarcely any depth, with a large front, and a deep bend with a caving bank. The policy of the country and the laws of the land, made for the general safety, cannot yield to cases of individual hardship. Those who purchase and own the front on the Mississippi river gain all that is made by alluvion and lose all that is carried away by abrasion. And those who choose to purchase tracts with little depth in caving bends expose themselves knowingly to total loss, and must suffer the consequences when they occur. They suffer *damnum absque injuria*."

And it is the duty of the proprietor of a tract of land to accommodate himself to the change where a levee is necessarily moved back—as much so as if such change had been occasioned by the sudden caving of the banks of the river. *West Baton Rouge v. Bozman* (1856) 11 La. Ann. 94. And so the owner of such a tract was held liable for the expense of a side levee, made necessary by the moving back of a levee.

And so, also, a riparian owner holds

his land subject to the servitude of a new levee, rendered necessary by the caving in of the bank of the river, and has no action for damages for injury to his property, although it is placed out of the protection of the new levee. *Dubose v. Levee Comrs.* (1856) 11 La. Ann. 165. The court said: "The plaintiff in this case has been apparently a sufferer, but we are not prepared to say that the board of levee commissioners acted arbitrarily, or wantonly, or unjustifiably in placing the new levee where they did. To reconcile the controlling interest of the public with the subordinate interest of the individual is ever a delicate problem; when they come in conflict, the latter must yield. In this case, if the plaintiff suffers, it must be attributed to an unfortunate or improvident investment upon a caving bank. He could not expect the state to warrant him against the abrasions of the Mississippi river, or to move the levee back, inch by inch, as the river encroached upon the bank, so as to save him the utmost amount of property. The safety of the public has to be first consulted. When a new and expensive levee is to be built, prudence dictates that it should be so located as to be secure for many years from crumbling into the river. The evidence in this cause shows that such were the views which governed the inspector and commissioners. The facts with reference to the condition and history of the bank opposite the plaintiff's house seemed to have justified their action. . . . The law concerning the expropriation of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purposes presents a question of police or administration to be decided by the local authorities, whose decision should not be revised by this tribunal except for the most cogent reasons, and where there has been manifest oppression or injustice."

Again, in *Bass v. State* (1882) 34 La. Ann. 494, where a levee was constructed in the rear of a plantation, so

that it not only threw the plantation out of its protection, but obstructed the natural flow of the water back into a bayou and swamp in the rear, so causing the water to back up and entirely overflow the plantation, which, from its peculiar position, was not otherwise liable to inundation, it was held that there was no right to compensation either for the property taken or for the injury sustained. The decision, however, was based not on the fact that the land owed a servitude, but that the building of the levee was an exercise of the police power; the court stating that this was very different from the right of eminent domain, which expropriates upon indemnity for public utility. That it is the police power which is inherent in every government under its organic law, and which is exercised without making compensation, the damage or injury occasioned by such exercise of such power being *damnum absque injuria*. This conclusion of the court in the *Bass Case*, that there was no right to compensation because the constructing of the levee was an exercise of the police power, the court, in *Eldridge v. Trezevant* (U. S.) *supra*, in reviewing the *Bass Case*, said was difficult to be reconciled to the provision of the Louisiana state Constitution that private property will not be taken for public use without just and adequate compensation first made, and intimated that the decision would better have been based upon the doctrine of servitude recognized through a long line of Louisiana decisions.

In *Peart v. Meeker* (1893) 45 La. Ann. 421, 12 So. 490, an action to recover for damages caused by the construction of a levee in such manner as to leave property outside of the levee exposed to overflow, and so render it unfit for cultivation by reason not only of such exposure, but also by the consequent obstruction of drainage, in holding that there was no right to compensation, the court stated that, whatever may be the law elsewhere, under the Civil Code riparian property on navigable rivers in this state is subject to the servitude or easement imposed by law for the public

or common utility, authorizing the appropriation by the government, under proper laws, of the space required for the making and repairing of the levees; and that, in locating and building levees the property is not expropriated, but lawfully appropriated to a use to which it is subject under the title itself.

And in *Egan v. Hart* (1893) 45 La. Ann. 1358, 14 So. 244, a private injury resulting from the location of a levee was said to be *damnum absque injuria*.

And that lots which do not front or lie upon the river, and so are not riparian, owe a servitude as to levees so that compensation for land taken or for resulting damages need not be made where a levee is constructed thereon, is the decision in *Hart v. Levee Comrs.* (1893) 54 Fed. 559. The court stated that, under the provision of the Code that on the borders of the Mississippi and other navigable streams, where there are levees established according to law, the levee shall form the bank, it follows that no matter what would be the law in other states, in Louisiana, so far as relates to the Mississippi river, the levees established according to law are the banks. Wherever the levees are located, there are the banks of the river. It is conceded that the proper levee authorities have located this levee upon the complainant's lot. Therefore the proper authorities have determined that the present bounds of the river bring it to the land of the complainant, and it is, in the strictest statutory sense, riparian. In other states the river comes to land only when, by the flow of its water, it touches the soil or earth which composes it. In this state, by law and according to legal intendment, the Mississippi river touches land when its artificial banks or levees touch it. Under the operation of this statute the complainant's land is riparian.

But in *Pontchartrain R. Co. v. Levee Comrs.* (1897) 49 La. Ann. 570, 21 So. 765, it was held that while front proprietors on the Mississippi river or other navigable rivers must yield without compensation the property

for levee and road purposes, land not on the river owes no such servitude, and so a railroad company across whose road a levee was constructed was entitled to compensation for land taken, and the cost of elevating the grade and taking up and relaying the tracks. No reference was made to the *Hart Case* (Fed.) *supra*, or to the Code provision referred to therein. It may be stated that in this case the court, in answer to the contention that the construction of the levee was an exercise of the police power to which all must submit, and in respect to which no compensation for resulting loss can be claimed, said: "Where land is taken, or the use of it is incommoded, or a burden is imposed on the owner to build a levee, or, to take another illustration, to open a street, the right of the owner to compensation is not to be denied because of the supposed exercise of the police power, but the owner's claim for compensation falls within the operation of the principle that secures compensation when private property is taken for the public utility." This sustains the contention of *Eldridge v. Trezevant* (1895) 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345, in reviewing the *Bass Case*.

It is the soil alone which owes the servitude. *Mithoff v. Carrollton* (1857) 12 La. Ann. 185, and so an owner of buildings in the line of a levee, which have to be destroyed, and which were built at a time when the land owed no servitude, is entitled to compensation for their destruction. The court distinguished this from the *Dubose Case* (La.) *supra*, stating that in that case the houses were left standing and the levee was built in the rear of them, while in the instant case the houses were on the line of the new levee, and it was determined that they should be torn down, and an ordinance to that purpose was passed and carried into effect. In holding that the *Dubose Case* is not decisive in the present case, the court stated that "whilst we acknowledge the correctness of the decision in the *Dubose Case*, we think a distinction must be made between the resumption of servitude which the

soil upon the banks of the Mississippi river alone owes to the public and the destruction of building (placed upon the soil before the servitude becomes due) in order to arrive at the use of such servitude. At the time the owners of the lots for which compensation is claimed built upon them, they owed no immediate servitude to the public of any kind. When they erected the buildings upon them they had the undoubted right to build in such form and manner as they pleased, and were at liberty to put up buildings costly or plain, according to their fancy, whatever that fancy might be. When so erected the buildings were theirs in the highest sense of the term, and the property thereof being vested in them as such owners, they were protected from an expropriation in order to arrive at the servitude which the soil alone came to owe by the Constitution, which requires compensation to be made in such cases. . . . By the wearing away of the bank of the river the safety of the public required the houses . . . to be demolished and a levee to be constructed over the ground occupied by their buildings. Their land, therefore, by virtue of its location and vicinity to the river, became bound under the laws which prescribed the obligation of proprietors of lands bordering upon the river to suffer the servitude of the levee, and nothing more. The buildings had not been put up in violation of any law, and they could not be removed from the soil without compensating the owners for them. The town authorities might, as was done in the *Dubose Case*, . . . have run the levee behind these buildings or in front, so as not to obstruct them absolutely, and the proprietors could not complain. But when the public, by its proper authorities, chose to pull down the houses, it took from the owners something more than the mere servitude which was due by the soil,—it took a part of the property itself, for which the defendant owes the plaintiff compensation." In a dissenting opinion, Judges Spofford and Lea considered that the doctrine of the *Dubose Case*

was applicable to the instant case, or, at least, so far as the right to recover for buildings necessarily destroyed, and stated that there was no soundness in the distinction that the buildings were put up when the land owed no servitude to the public because the land was not bought with the front on the river, as it is impossible to confine the Mississippi river to its primitive bed, stating that "the banks of navigable rivers, and especially of the Mississippi in this latitude, are constantly undergoing changes by attrition on one side and accretion on the other. If, in the course of time, they reach the land of a proprietor who did not buy originally with a front on the river, he becomes, by that fact alone, subject to all the servitudes imposed by law upon front proprietors: . . . As well might it be contended that the government is bound to warrant such a proprietor against the action of the elements and the encroachments of the river upon his lands, as that he should be exempted from contributing to the public utility, by yielding his land for levee purposes without compensation, when the advancing tide makes such a protection necessary. And it results, as a logical inference, that when the houses he has built are upon land thus invaded by the stream, and rendered indispensable to be used for levee purposes, they, too, like the land on which they are built and of which they form a part, should be yielded up to the public service, without compensation, for it is not the act of man, but the act of God and the law which causes their demolition. By the location of the new levee (if it be lawfully and properly located), it becomes, under article 448 of the Code, the river bank, and no man's houses shall obstruct the bank. Their destruction is necessary to the exercise of the servitude; or, rather, it becomes a part of the servitude. I am, therefore, of the opinion that, under the general principles of law which were recognized and enforced in the *Dubose Case*, the plaintiffs are entitled to no compensation whatever for their land, nor for such of their houses as stood

directly upon the line of the new levee as located."

A case in decided conflict with the Louisiana decision is *Hollingsworth v. Tensas Parish* (1883) 4 Woods, 280, 17 Fed. 109. This was an action to recover for damages caused by the construction of a levee so as to leave out of its protection certain property, and it was held that the owner of the property was entitled to compensation. The court, after referring to the Louisiana Code provision that the riparian property was subject to servitude as to levees, said that in Louisiana, as well as in all the states, the implied powers are sufficient to warrant the imposition of this service on lands adjacent to navigable rivers, and the imposition of such service may be the offspring of a wise public policy; but the court did not consider that it followed that there was

in the state or Federal system any power outside of and apart from the eminent domain rights lawfully, by direct or implied legislation, to take any private property, or take the use of it, or so damage it as to deprive the owner of its use or profit with or without compensation. The court conceded that there was a line of Louisiana decisions denying the right to compensation in such cases, but stated that it was not bound to follow those decisions, as they were employed in giving effect to general principles of law, and not in giving effect to or in the interpretation or construction of state statutes or local laws.

The court in *Hart v. Levee Comrs.* (1893) 54 Fed. 559, said that in the *Hollingsworth* Case the court dealt with the authority to locate levees as a question relative to an exercise of the right of eminent domain.

J. H. B.

GERTRUDE SICHTERMAN

v.

KENT STORAGE COMPANY et al., Plffs. in Certiorari.

Michigan Supreme Court—February 8, 1922.

(— Mich. —, 186 N. W. 498.)

Workmen's compensation — employee on errand of mercy.

1. Injury to a salesman traveling in his own motor car to make his calls, when he has left his car and gone to the assistance of another person hit by another's automobile on the highway, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 319.]

— injury must have been in the service of the master.

2. To justify an award under the Workmen's Compensation Act the in-

jury must have occurred in the service of the master and by reason thereof.

[See 28 R. C. L. 796 et seq.]

CERTIORARI to the Industrial Accident Board to review its award to claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Award vacated.*

Statement by Fellows, Ch. J.:

Harry Sichterman was a traveling salesman in the employ of defendant Kent Storage Company. His territory, which he covered once a week, surrounded Grand Rapids,

where he lived and where defendant's place of business was located. He made his territory by automobile, leaving Grand Rapids in the morning and returning at night. Either at night or the following

morning he turned in his orders to the company. On November 10, 1920, he made his usual trip for that day, winding up at Freepport. The usually travelled road from that town to Grand Rapids is known as the "Cascade road" and was the one taken by Mr. Sichterman. About 2 miles from Grand Rapids, and after it had grown dark, he came across a peddler, with his wagon at the side of the road. The peddler's wagon had been struck by an automobile about an hour before. Mr. Sichterman drove his car about 25 feet beyond where the peddler was, getting it to the side of the road, and stopped, got out of the machine, and walked back in the road to where the peddler was, and had just asked him if there was anything he could do for him, when he was struck by an automobile and so seriously injured that he shortly after died, leaving a widow, the plaintiff, and a son Robert, only four years old. The defense to the claim for compensation is that the accident did not arise out of and was not received in the course of decedent's employment.

Messrs. Brown & Kelley, for plaintiffs in certiorari:

Accidents to employees in the act of going from their work are not usually regarded as arising out of the employment or in the course thereof. In such cases, it is generally true that the relations of cause and effect between the accident and the duties of the injured employee to his employer in the employment are too vague and incidental to permit the founding of a liability.

Hills v. Blair, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; Draper v. University of Michigan, 195 Mich. 455, 161 N. W. 956.

There was no sudden emergency to a fellow employee, or to any person in any manner associated with the business or affairs of the employer.

Waters v. William J. Taylor Co. 218 N. Y. 248, L.R.A.1917A, 347, 112 N. E. 727; General Acci. F. & L. Assur. Corp. v. Evans, — Tex. Civ. App. —, 201 S. W. 705.

There was in any event no causal relation between the employment and the accidental injury; the death of de-

cedent, Sichterman, was not due to the risk or hazard of the employment.

Clark v. Clark, 189 Mich. 654, 155 N. W. 507; Guastelo v. Michigan C. R. Co. 194 Mich. 382, L.R.A.1917D, 69, 160 N. W. 484; Hopkins v. Michigan Sugar Co. 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325; Buvia v. Oscar Daniels Co. 203 Mich. 76, 7 A.L.R. 1301, 168 N. W. 1009; Marshall v. Baker-Vawter Co. 206 Mich. 466, 173 N. W. 191; Tarpper v. Weston-Mott Co. 200 Mich. 275, L.R.A.1918E, 507, 166 N. W. 857; Di Salvio v. Menihan Co. 225 N. Y. 123, 121 N. E. 766; Rockford's Case, 234 Mass. 93, 124 N. E. 891; O'Toole's Case, 229 Mass. 165, 118 N. E. 303; Borck v. Simon J. Murphy Co. 205 Mich. 472, 171 N. W. 470; Beaudry v. Watkins, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; N. K. Fairbank Co. v. Industrial Commission, 285 Ill. 11, 120 N. E. 457; Erickson v. St. Paul R. Co. 141 Minn. 166, 169 N. W. 532; McMinn v. C. Kern Brewing Co. 202 Mich. 414, 168 N. W. 542; Re Verkamp, Ohio Ind. Comm. No. 39,943, cited in 12 N. C. C. A. 907.

Mr. Martin H. Carmody for defendant in certiorari.

Fellows, Ch. J., delivered the opinion of the court:

This state, like many of our sister states, has followed the English act in providing that compensation shall be paid in industrial accidents where the accident arises out of and in the course of the employment. The English courts and the courts of this country with uniformity have agreed that both requirements must be met to justify an award. Both requirements are indicative of the underlying thought that compensation is to be awarded when and where the accident occurs in the service of the master.

In an exhaustive note found in L.R.A.1916A, 23, following our case of Rayner v. Sligh Furniture Co. 180 Mich. 168, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851, the subject of Workmen's Compensation Acts is fully treated. At page 41 of L.R.A.1916A, the editorial writer lays down the general principle: "It may be stated gen-

erally that the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business."

The courts recognize the general principles which control, but encounter many difficulties in their application in determining whether the conditions justifying compensation have been met. In considering the case before us we shall first consider the authorities from other jurisdictions, reserving the consideration of our own cases until the last.

The case of *Robinson v. State*, 93 Conn. 49, 104 Atl. 491, supports plaintiff's contention. The court, however, cites no authorities to sustain its conclusion, and indulges in no reasoning in support of its holding. The English case of *Corlett v. Lancashire & Y. R. Co.* 120 L. T. N. S. 236, 63 Sol. Jo. 115, and the opinion of the court of appeals of Indiana, in *Re Raynes*, 66 Ind. App. 321, 118 N. E. 387, also have that tendency, although the English case is not fully in accord with *Warren v. Hedley's Collieries Co.* [1913] W. C. & Ins. Cas. 172, and in the Indiana case the employee had gotten out of the taxicab in which he was riding to allow the driver to get some gasoline, an incident of the trip.

In *London & E. Shipping Co. v. Brown*, 42 Scot. L. R. 357; *Dragovich v. Iroquois Iron Co.* 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; and *General Acci. F. & L. Assur. Co. v. Evans*, — Tex. Civ. App. —, 201 S. W. 705, liability was sustained where the accident occurred in attempting to rescue a fellow workman from a perilous position, the Illinois court saying: "Under these authorities it is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and there-

fore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow employee, in the line of his duty to his employer, to attempt to save the life of his fellow employee under the circumstances here shown."

The Texas court, treating the question as a new one to that jurisdiction, said: "The question has not been passed upon by any appellate court of this state, so far as we are aware, and in cases in which the question arose in other states the decisions of the courts are at some variance. In some of them it was held that a workman who goes to the rescue of his master or of another workman, and is thereby injured, is not entitled to compensation. But courts of recognized ability have, on the contrary, held that it is the duty of a workman, when the necessity arises, to do what he can to save the life of his fellow employees when they are at the time working in the line or course of their employment."

The court of appeals of New York went a step further, and in *Waters v. William J. Taylor Co.* 218 N. Y. 248, L.R.A.1917A, 347, 112 N. E. 727, held that there was liability under the New York act where an employee went to the rescue of an employee of another contractor engaged in a common enterprise, and held that liability was not defeated though *Waters* was "technically" working for another employer. But, in concluding the opinion, it was said: "Of course, what we thus say is to be read in the light of the facts presented on this appeal. There is no trouble in outlining a case where an employee, even with the laudable purpose of help-

ing another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment. It is sufficient to say that we do not regard the case now presented to us as being such a one as we have suggested."

That the New York court had gone further in the Waters Case than other courts had gone was recognized by that court in *Di Salvio v. Menihan Co.* 225 N. Y. 123, 121 N. E. 766, where, after reviewing cases from other jurisdictions, it said, referring to the Waters Case: "And this court, perhaps, went farther than any of these cases in extending the benefits of a compensation act."

In the *Di Salvio* Case the workman wished to say good-by to a fellow workman before he went to the front. In doing so he crossed the room and there received the injuries for which compensation was asked. Both New York cases were written by Justice Hiscock. In the *Di Salvio* Case he said, speaking for the court after considering the Waters Case and cases from other jurisdictions:

"In each of these cases an award was sustained because the court was able fairly to say that, between the work for which the employee was engaged and the disputed act which led to the accident, there was, either naturally or as the result of some act of the employer or of custom, a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment.

"But in the present case we search in vain for any such feature or relationship. There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to

perform his work, discharge his duties, or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been, it was neither beneficial to his employer nor to himself in the way of completing and performing his work."

An English case frequently cited both by the courts of England and of this country is *Reed v. Great Western R. Co.* 99 L. T. N. S. 781 (also found reported in 78 L. J. K. B. N. S. 31, [1909] A. C. 31, 25 Times L. R. 36, 53 Sol. Jo. 31, 2 B. W. C. C. 109), decided by the House of Lords in 1908. The workman, an engineer, left his engine when it was standing at rest to get a book from a fellow employee, and was injured so seriously that he died. It was held that the accident did not arise out of and in the course of the employment.

In *Smith v. Lancashire & Y. R. Co.* 79 L. T. N. S. 633, [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 15 Times L. R. 64, a ticket collector collected the tickets from a certain train, but had not completed his day's work. He got on the footboard to speak to a girl he knew, and was injured. It was held that the accident did not arise out of the employment.

In *Murray v. Allan Bros. & Co.* [1913] W. C. & Ins. Rep. 193, the employee was injured while watching laborers at work repairing a vessel. He was returning by the shortest way to his place of employment. It was held that the accident did not arise out of the employment.

The supreme court of Illinois in *N. K. Fairbank Co. v. Industrial Commission*, 285 Ill. 11, 120 N. E. 457, has this to say:

"The Workman's Compensation Act is designed to protect workmen

and compensate them for injuries received while performing any duty necessary to be performed in the course of their employment or incidental to it. It was not intended by this act that the employer who comes within the provisions of the act shall be the insurer of the safety of his employee at all times during the period of the employment. The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it. . . .

"An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act, when it occurs within the period of the employment at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it."

In *O'Toole's Case*, 229 Mass. 165, 118 N. E. 303, the decedent, a city employee, was engaged in spreading cracked stone on the roads. A steam roller was used by the city in the work. Deceased went upon the roller at the invitation of the engineer for personal conversation. While there he was injured. In denying liability, the court said: "There are cases which hold that an employee is protected by the Workmen's Compensation Act, although not at the time actually engaged in the work for which he was hired. If the employee is injured in going to or returning from his work upon the master's premises, or on premises available for the purpose, or if during intervals of leisure which occur in the course of his employment he is injured, he may still be within the scope of his employment and entitled to the benefits of the act. *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616. *Blovelt v. Sawyer*, 6 W. C. C. 16. But the principle of these cases is not applicable where the servant leaves the sphere of his employment for some purpose of his own entirely disconnected

with and not in any way incidental to the employment."

The same court, in *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, had this to say: "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

This court has recognized the principle of this case, as we shall presently see.

Turning now to our own cases, we find that the precise state of facts here involved has not been before the court, although we are persuaded that our former opinions are by analogy controlling. In the recent case of *Sebo v. Libby, McNeil & Libby*, 216 Mich. 351, 185 N. W. 702, the employee was a gardener; he attempted to stop a runaway

team, which was hauling milk consigned to the employer, and received injuries resulting in his death. We held that his act was one to prevent loss to the employer, and was in the furtherance of the employer's business, and sustained liability. But, in *Spooner v. Detroit Saturday Night Co.* 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647, where the employee, as a friendly act, took persons up on an elevator he was not employed to run, and while so doing was injured, this court held the master was not liable. Mr. Justice Stone, who wrote for the court, there said: "At the time of the injury we think that he was engaged in an act outside of, and not in the course of, his employment, and the injuries he received and which caused his death did not arise out of and in the course of his employment. The elevator shaft was in pitch darkness, by the undisputed evidence, and in using it he not only risked his own life, but that of the men he took up on the elevator with him. Had he remained in the place where his duties called him and attended to those duties, he would not have been injured, so far as this record shows. The material question is not what he had done at times, for his own convenience or otherwise, while in the employ of Winn & Hammond Company, but the pertinent question is: What was he employed to do upon this night? Manifestly, to run and care for the engine and dynamo. This injury occurred while he was away from his work, and while he was a voluntary visitor to the employee of the appellant, and the act was for his own pleasure or satisfaction." He then considers a Vermont case (*Miner v. Franklin County Teleph. Co.* 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653) and says: "We think the case readily distinguishable from the instant case. In fact it might be said the plaintiff there was in the performance of and carrying on the very work for which he was employed, to wit, he was assisting his foreman, who undoubt-

edly represented the master. In the instant case Spooner was rendering no service which was either accepted by or known to his superior, but was engaged in a voluntary, friendly act, entirely outside the scope of his employment, upon the night in question."

In *Carnahan v. Mailometer Co.* 201 Mich. 153, 167 N. W. 9, the employee, by direction of the shipping clerk, delivered a heavy case of books to the home of one of the stockholders. He delivered it with safety to himself. At the request of the maid, and prompted by chivalrous motives, he carried the books upstairs. This extra strain produced the injury. After considering whether the delivery of the books was labor in the master's service, Mr. Justice Steere, speaking for the court, said: "But passing these questions, and even conceding that in rendering this casual service, as directed, to a stockholder of the corporation during the noon hour, plaintiff was in the usual course of his employment, because obeying an order emanating from the manager under whom he was employed, his own testimony shows that he had executed the order as given, and fully performed the service directed before the accident occurred. Neither the nature of his employment nor the special order given him by the shipping clerk can be said to contemplate that after he had succeeded in delivering this heavy box, weighing 140 pounds and containing 100 books, as he estimated, at Mr. Hunt's residence, he would then, at the unreasonable request of some woman whom he hated to refuse, undertake to carry it on his back up a winding stair to the second floor,—an undertaking on which he 'wouldn't take a chance even around the factory' with which he was employed. There is no competent evidence in the case to support the finding that an injury resulting from such an undertaking arose out of and in the course of his employment."

These three cases we think clearly show the line of demarcation. In

(— Mich. —, 186 N. W. 498.)

Case the act was one in the interest, for his benefit and prance of his business, and was sustained. In the Case the act was a friendly stranger, not in furtherance of the master's business; in the Case, the act was an act of a stranger, not in furtherance of the master's business; in both these cases the act which caused the injury did not arise out of the employment and liability was denied. This court has constantly kept in mind the provision of the statute that the accident must arise out of the employment will be determined by an examination of the facts, to a few of which we shall refer. In *Clark v. Michigan*, 189 Mich. 652, 155 N. W. 2d, the claimant was injured by a fire caused by a party attacking the master for whom he was at the time. Mr. Justice Bird, speaking for the court, said: "It may have been commendable in him to volunteer to assist his brother against the fire at odds, but that does not properly answer the question whether his acts had with reference to the employment. He was not called upon to protect his master's property on the previous day. He was asked to assist his master's property on the second day. His act was purely a voluntary one, and seems to us no different than if he had discovered the fire while fighting with his brother and afterward ten blocks away. Although claimant had observed the fire going on across the street and had gone there to get a better view while there had been no firing of missile and injured. Claimant remained at his work and did not have been injured. Hence at the place of fighting the fire, there was no demand of payment."

Shall v. Baker-Vawter Co., 189 Mich. 466, 173 N. W. 191, the claimant was foreman of the company, and was shot by the master. The board found that the injury was fired through personal animosity and denied liability. We af-

firmed the award because of the finding of the board on the disputed question of fact, but recognized the doctrine of *McNicol's Case*, supra.

In *Tarpper v. Weston-Mott Co.*, 200 Mich. 275, L.R.A.1918E, 507, 166 N. W. 857, we held that, where the injury resulted from "larking," as our English brethren term it (*Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, L.R.A. 1916D, 968, 156 N. W. 143), there could be no recovery. The injury may occur when the employee is at work for the master, and be produced by a fellow workman, but it does not arise out of the employment, and as we there said: "That the injury suffered by the employee must arise out of the employment as well as in the course of the employment is well settled by our own decisions."

The following cases are of interest: *Bayer v. Bayer*, 191 Mich. 423, 158 N. W. 109; *Bischoff v. American Car & Foundry Co.* 190 Mich. 229, 157 N. W. 34; *Kennelly v. Stearns Salt & Lumber Co.* 190 Mich. 629, 157 N. W. 378; *Borck v. Simon J. Murphy Co.* 205 Mich. 472, 171 N. W. 470; *Buvia v. Oscar Daniels Co.* 203 Mich. 73, 7 A.L.R. 1301, 168 N. W. 1009; *Guastelo v. Michigan C. R. Co.* 194 Mich. 382, L.R.A. 1917D, 69, 160 N. W. 484; *Draper v. University of Michigan*, 195 Mich. 449, 161 N. W. 956; *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 191; *Davies v. Crown Perfumery Co.* 6 B. W. C. C. 649; *Collins v. Collins* [1907] 2 Ir. R. 104; *Aitken v. Finlayson, B. & Co.* [1914] S. C. 770, 51 Scot. L. R. 653, 7 B. W. C. C. 918; *State ex rel. McCarthy Bros. Co. v. District Ct.* 141 Minn. 61, 169 N. W. 275; *Erickson v. St. Paul City R. Co.* 141 Minn. 166, 169 N. W. 533; *State ex rel. London & L. Indemnity Co. v. District Ct.* 141 Minn. 348, 170 N. W. 218; note to *Spooner Case*, 9 N. C. C. A. 647.

This unfortunate accident occurred when deceased was performing an act of humanity, entirely dissociated from the master's work. It did not arise out of the employment.

—employee on errand of mercy.

The award must be vacated.

NOTE.

For death or injury while traveling, as arising out of and in the course of the employment within workmen's compensation acts, see annotation following *STANSBERRY v. MONITOR STOVE Co.* post, 319.

PAULINE STANSBERRY et al., Respts., v.

MONITOR STOVE COMPANY, Appt.

Minnesota Supreme Court—July 15, 1921.

(— Minn. —, 183 N. W. 977.)

Workmen's compensation — right of traveling salesman.

1. A traveling salesman employed in connection with the business localized in this state, is within the Minnesota act, though injured by accident outside of the state.

[See note on this question beginning on page 319.]

— application of statute to foreign corporation.

2. An Ohio corporation whose northwestern business is localized at a Minneapolis branch is, as to employees of that branch, within the Minnesota Compensation Act.

— death in hotel fire — right to compensation.

3. Where a traveling salesman,

obliged to stop at hotels in the course of his travel and to furnish his employer with a list of the cities on his itinerary, the names of the hotels at which he is to stop, and the time he is to be at each hotel, is killed while attempting to escape during a fire in one of such hotels in which he is stopping, compensation may be recovered.

Headnotes by HALLAM, J.

APPEAL by defendant from a judgment of the District Court for Hennepin County (Jelley, J.) to review a judgment in favor of claimants in a proceeding under the Workmen's Compensation Act to recover compensation for the death of their husband and father. *Affirmed.*

The facts are stated in the opinion of the court.

Mr A. A. Tennen, for appellant:

The Minnesota Workmen's Compensation Act has no extraterritorial application to a contract of employment entered into in this state, which is to be wholly and exclusively performed in North Dakota, which state has a compulsory, monopolistic, and mandatory compensation act applicable to every employer and employee operating within its borders.

Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620; *State ex rel. Chambers v. District Ct.* 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185; *State ex rel. Mc-*

Carthy Bros. Co. v. District Ct. 141 Minn. 61, 169 N. W. 274; *Anderson v. Miller Scrap Iron Co.* 169 Wis. 106, 170 N. W. 275, 171 N. W. 935; *Banks v. Albert D. Howlett Co.* 92 Conn. 368, 102 Atl. 822; *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, L.R.A.1917E, 642, 162 Pac. 93; *Perlis v. Lederer*, 189 App. Div. 425, 178 N. Y. Supp. 449; *Thompson v. Foundation*, 188 App. Div. 506, 177 N. Y. Supp. 58; *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; 13 C. J. p. 249.

The death of Frank J. Stansberry

(— Minn. —, 183 N. W. 977.)

due to an accident "arising and in the course of his employment," and therefore is not com-

v. Frissell, 84 N. J. L. 72, 86 N. C. C. A. 585; State ex rel. Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; v. W. G. Clarke & Son, K. B. 796, 77 L. J. K. B. N. S. L. T. N. S. 101, 1 B. W. C. C. v. Manchester Liners C. C. 498, 79 L. J. K. B. N. S. L. T. N. S. 226, 26 Times L. 4 Sol. Jo. 703, 3 B. W. C. C. Am. & Eng. Enc. Law, 2d ed. v. Star Line, 1 B. W. C. C. v. Thompson-Starrett Minn. 113, 158 N. W. 915, 159 5; Craske v. Wigan [1909] 2 78 L. J. K. B. N. S. 994, 101 S. 6, 25 Times L. R. 632, 53 60, 2 B. W. C. C. 35; Kelly v. County Council, 1 B. W. C. C. J. M'Crea v. Renfrew [1914] 51 Scot. L. R. 467, 7 B. W. ; Sheldon v. Needham [1914] Ins. Rep. 274, 111 L. T. N. S. Times L. R. 590, 58 Sol. Jo. 652, C. 471; Forman v. Industrial Commission, 31 Cal. App. 441, 857; Kass v. Hirschberg, S. 1 App. Div. 300, 181 N. Y. D. Ware & Melrin, for respond-

Minnesota Workmen's Compens- act operates extraterritorially permits a recovery for an in- rring in another state, where ces are to be performed ex- and the contract of employ- made in the state of Minne-

City Box Factory v. Adiron- Ins. Co. 114 Minn. 475, 131 97; Kollhier v. Western U. o. 126 Minn. 123, 52 L.R.A. 180, 147 N. W. 961; Askren v. tal Oil Co. 252 U. S. 444, 64 4, 40 Sup. Ct. Rep. 355.

contract of employment did mplate the rendition of serv- Minnesota, and none in fact dered, the right of recovery ntractual, plaintiff may re- ce the business transacted in gn state was referable to the of defendant, localized in the Minnesota.

ex rel. Chambers v. District Minn. 205, 3 A.L.R. 1347, 166 85; State ex rel. Maryland

Casualty Co. v. District Ct. 140 Minn. 427, 168 N. W. 177; State ex rel. Mc- Carthy Bros. Co. v. District Ct. 141 Minn. 61, 169 N. W. 274; 1 Bradbury, Workmen's Comp. 2d ed. p. 56. See also note to 3 A.L.R. 1351.

Death resulted from an injury sus- tained in the course of the employ- ment.

State ex rel. McCarthy Bros. Co. v. District Ct. 141 Minn. 61, 169 N. W. 274; State ex rel. Chambers v. District Ct. supra; State ex rel. Niessen v. Dis- trict Ct. 142 Minn. 335, 172 N. W. 133; Hansen v. Northwestern Fuel Co. 144 Minn. 105, 174 N. W. 726; Wold v. Chevrolet Motor Co. 147 Minn. 17, 179 N. W. 219; State ex rel. Great North- ern Exp. Co. v. District Ct. 142 Minn. 410, 172 N. W. 310; Lawless v. Wigan Coal & I. Co. 1 B. W. C. C. 153; Keenan v. Flemington Coal Co. 5 Sc. Sess. Cas. 5th series 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409; Goodlet v. Caledonian R. Co. 4 Sc. Sess. Cas. 5th series 986, 39 Scot. L. R. 759, 10 Scot. L. T. 203; Kitchenham v. Johannesburg [1910] W. N. 275, 55 Sol. Jo. 124, 27 Times L. R. 124; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 100, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16; Foley v. Home Rubber Co. 39 N. J. L. J. 115; Marshall v. The Wild Rose [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514; Chitty v. Nelson, 2 B. W. C. C. 496; Wray v. Taylor Bros. & Co. [1913] W. C. & Ins. Rep. 446, 109 L. T. N. S. 120, 6 B. W. C. C. 530, 4 N. C. C. A. 935; Re Bollman, — Ind. App. —, 126 N. E. 639.

The accident arose out of the em- ployment.

State ex rel. McCarthy Bros. Co. v. District Ct. 141 Minn. 61, 169 N. W. 274; State ex rel. Rau v. District Ct. 138 Minn. 250, L.R.A.1918F, 918, 164 N. W. 916; Wray v. Taylor Bros. & Co. [1913] W. C. & Ins. Rep. 446, 109 L. T. N. S. 120, 6 B. W. C. C. 530, 4 N. C. C. A. 935; Re Bollman, supra; State ex rel. Virginia & R. L. Co. v. District Ct. 138 Minn. 131, L.R.A.1918C, 116, 164 N. W. 585.

Where the employee, acting in an emergency, even after regular hours, in an attempt to save property of the employer, is injured, a recovery is per- mitted.

Southern Surety Co. v. Stubbs, — Tex. Civ. App. —, 199 S. W. 343; Munn

v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652.

Hallam, J., delivered the opinion of the court:

Frank J. Stansberry was a traveling salesman for defendant company. While in the Frederic Hotel at Grand Forks, North Dakota, a fire broke out at night and Stansberry was killed while attempting to escape. His widow and minor children made claim for compensation under the Minnesota Workmen's Compensation Statute (Gen. Stat. 1913, §§ 8195-8230). The claim was allowed. Defendant appeals.

1. Defendant is an Ohio corporation. It manufactures and sells furnaces. It maintains a permanent branch office, warehouse, and agency in Minneapolis, Minnesota. The sale and distribution of furnaces in the Northwest, including Minnesota and North Dakota, are made through the Minneapolis agency. Stansberry was employed by the Minneapolis branch and worked under its direction. For purposes of this case the situation is the same as though the head office instead of a branch were located in Minnesota. The business in which Stansberry was employed had a situs in this state.

Workmen's compensation—application of statute to foreign corporation.

2. The territory in which Stansberry traveled was for the most part in North Dakota. The business in which he was engaged was localized in this state, and in such a case our Compensation Act applies and compensates for injuries in a service incident to its conduct sustained beyond the borders of the state. State ex rel. Chambers v. District Ct. 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185 (distinguishing Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620); State ex rel. Maryland Casualty Co. v. District Ct. 140 Minn. 427, 168 N. W. 177; State ex rel. McCarthy Bros. Co. v. District Ct. 141 Minn. 61, 169 N. W. 274.

—right of traveling salesman.

3. A more difficult question is whether the death of Stansberry was due to an accident arising out of and in the course of his employment as provided in Gen. Stat. 1913, § 8195. The death of Stansberry was accidental as that term is used in the act. The fact that death resulted from an attempt to escape from the fire puts the case in no different position from what it would have been had he perished in the fire.

The court found that Stansberry lost his life "while in the act of furthering the interests and business of the defendant and while engaged in saving certain property of the defendant, and then and there in his possession, and in attempting to save his life." The property referred to was a portfolio containing advertising matter, a sales order book, report sheet, and advertising samples. We should not predicate liability on the fact of the efforts of Stansberry to save these small items of property.

The important facts are that he was a traveling salesman engaged in the service of his employer. As such he was obliged to stop at hotels in the course of his travels and to furnish the Minneapolis office with a list of the cities on his itinerary and the names of the hotels at which he was to stop and how long he was to be at each hotel, and it was his duty to carry out such schedule. He had given Grand Forks as one of such cities and the Frederic Hotel as his stopping place there. The question is whether such an injury received while stopping there arose out of and in the course of his employment. We think it did.

—death in hotel fire—right to compensation.

In State ex rel. Chambers v. District Ct. supra, it was held that a traveling representative, injured by the overturning of an automobile used by him in the course of his travels, was within the statute.

In State ex rel. McCarthy Bros. Co. v. District Ct. supra, it was held that a traveling representative,

drowned while using a boat to catch a train during a flood was within the statute.

In *Foley v. Home Rubber Co.* 39 N. J. L. J. 115, a salesman who lost his life on the sinking of the *Lusitania* was held within the act.

In *Chitty v. Nelson*, 2 B. W. C. C. 496, a servant in a hotel, occupying a room in a hotel in order to perform her duties as servant, who was suffocated in a fire that broke out in the nighttime, was held within the act.

In *Re Bollman*, — Ind. App. —, 126 N. E. 639, a threshing-machine man, sleeping in a barn on a farm where the machine was operating, injured while asleep by the falling of a wagon box, was held within the act.

In *Marshall v. The Wild Rose* [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514, a sailor left his berth in the night and went on deck, and next day was found missing. No recovery was allowed, but it was said that if it appeared that deceased was washed overboard, even at a time when he was sleeping, recovery would have been permitted.

In *Blovelt v. Sawyer*, 73 L. J. K. B. N. S. 155, [1904] 1 K. B. 271, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16, a bricklayer, while eating dinner on the premises of his employer, injured by the collapse of a wall, was held within the act.

Our decision that the case is with-

in the statute seems to us in harmony with the principle of our former decisions and with the weight of authority elsewhere.

Forman v. Industrial Acci. Commission, 31 Cal. App. 441, 160 Pac. 857, and *Kass v. Herschberg, S. & Co.* 191 App. Div. 300, 181 N. Y. Supp. 35, relied on by counsel for relator, seem to us fairly distinguishable. In the California case the employee was selling real estate on commission, and, for an indefinite time, was located in the town and quartered at the hotel where he was injured. In the New York case it was held that the employer, engaged in the business of "wholesale dress trimmings," was not within the New York Act. Anything further said in the opinion would seem to be obiter.

Gen. Stat. 1913, § 82,301, provides that the act is declared "not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

Relator's counsel argue persuasively that the above language excludes this case. If the question were a new one it would be worthy of grave consideration. But we think the language permits recovery in this case as clearly as in the *Chambers* or *McCarthy* Cases.

Affirmed.

ANNOTATION.

Workmen's compensation: death or injury while traveling as arising out of and in the course of employment.

- I. Introduction, 319.
- II. While at hotel, 320.
- III. While traveling on boat or train, 321.
- IV. While traveling in taxi or automobile, 322.

I. Introduction.

Death of, or injury to, train employees, is not within the scope of the annotation.

- V. While waiting or resting, 322.
- VI. While going toward station, hotel, conveyance, or home, 323.
- VII. While going home for week-end, 325.
- VIII. While performing work, 326.

Attention is called to the fact that the question of the extraterritorial operation of workmen's compensation acts was involved in *STANSBERRY v.*

MONITOR STOVE Co. (reported herewith) ante, 316, and also in State ex rel. McCarthy Bros. Co. v. District Ct. (1918) 141 Minn. 61, 169 N. W. 274, and State ex rel. Chambers v. District Ct. (1918) 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185, which are included in this annotation. The general question as to extraterritorial operation of workmen's compensation statutes and conflict of laws is covered in the annotation in 3 A.L.R. 1351, which is supplemented in the note appended to Crane v. Leonard, Crossette & Riley, 18 A.L.R. 285.

As to injury while riding to or from work in employer's conveyance, as arising out of or in the course of employment within meaning of workmen's compensation acts, see annotation in 10 A.L.R. 169.

As a general rule the phrase "out of and in the course of the employment" embraces only those accidents which happen to an employee while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business. Considerable difficulty is encountered in applying this rule, however, and the decision in each case depends to a great extent upon the facts and circumstances.

II. While at Hotel.

In STANSBERRY v. MONITOR STOVE Co. (reported herewith) ante, 316, it was held that the employee's death was the result of an accident arising out of and in the course of his employment, where it appeared that he was a traveling salesman, obliged to stop at hotels, keep his employer informed of and carry out his schedule, and was killed while attempting to save his life and certain property of his employer from destruction by a fire in the hotel at which he was stopping. The court stated that the fact that the employee's death resulted from an attempt to escape from the fire in the hotel put the case in no different position than it would have been had he perished in the fire.

In two cases involving circumstances somewhat similar to those in STANSBERRY v. MONITOR STOVE Co. (re-

ported herewith), a contrary result has been reached.

Thus, in Forman v. Industrial Acci. Commission (1916) 31 Cal. App. 441, 160 Pac. 857, where one employed to sell real estate on commission, with no regular working hours, was directed to go to a certain town for the purpose of selling real estate and remain indefinitely, and while stopping at a hotel at that place was injured by a fire which occurred in the hotel at night, it was held that his injuries were not sustained by accident arising out of and in the course of the employment. The court in STANSBERRY v. MONITOR STOVE Co. (reported herewith) stated that this case was distinguishable, as the salesman was to be located at the hotel for an indefinite time.

And in Kass v. Hirschberg, S. & Co. (1920) 191 App. Div. 300, 181 N. Y. Supp. 35, the court, after holding that the employer's occupation was not a hazardous one within the act, said in effect that the injury did not arise out of or in the course of the employment where the employee, a traveling salesman who had taken a room at a hotel, gave instructions that he was not to be disturbed on Sunday, and on Monday morning was found asphyxiated, apparently due to the negligence of the management of the hotel. The court said: "But, assuming that the employer was a manufacturer of 'articles from textiles or fabrics,' and that the decedent was away from the plant in the employment of the employer, can it be said that a traveling salesman, retiring to a hotel and injured through the negligence of the management of the hotel, is a legitimate subject for compensation? A hotel, in contemplation of law, is a temporary home (15 Am. & Eng. Enc. Law, 2d ed. 766, and authorities there cited), and it is difficult to understand how an employee of a manufacturing plant, going to his own home and retiring for the night, can be said to have sustained an injury within the definition of the statute. The act provides (§ 3, subd. 7) that "injury" and "personal injury" mean only accidental injuries arising out of and

in the course of employment,' and surely the accident here under consideration did not arise out of the employment. The accident arose out of the negligence not of the master, but of a third party. It was not a whit different than an accident of the same character which might have happened at the decedent's own home after his day's work was done. While the statute, as amended by chapter 622 of the Laws of 1916, has enlarged the liability of employers, it has not had the effect of insuring their employees generally against those accidents which are common to mankind; it is only as to accidents 'arising out of and in the course of employment.' *Dose v. Moehle Lithographic Co.* (1917) 221 N. Y. 405, 117 N. E. 616, 16 N. C. C. A. 633. The act does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person, suffering a misfortune while at work for an employer, is entitled to compensation. The personal injury must be the result of an employment and flow from it as the inducing proximate cause. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by the facts before the right to compensation springs into being. *Mad-den's Case* (1916) 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379; *Alpert v. Powers* (1918) 223 N. Y. 101, 119 N. E. 229. The accident here under consideration had no relation to the employment, the decedent was not doing anything for the employer at the time of the accident, and there is no ground for this award." The court in *STANSBERRY v. MONITOR STOVE CO.* (reported herewith) ante, 316, sought to distinguish this case, stating that the observations on the above point were merely obiter.

III. While traveling on boat or train.

A traveling salesman who lost his life by the torpedoing of the vessel upon which he was sailing in the course of his employment and with the knowledge of the employer, by a

war vessel, may be found to have suffered death from accident arising out of the employment. *Foley v. Home Rubber Co.* (1917) 89 N. J. L. 474, 99 Atl. 624, affirmed without opinion in (1917) 91 N. J. L. 323, 102 Atl. 1053. The court said: "It (the employer) was bound to take notice that a condition of war existed between Great Britain and Germany, and that ships of the enemy were subject to be captured or destroyed by such warring nations. This was a danger reasonably to be apprehended. This danger attached itself to every traveler on an enemy ship, whether engaged in the pursuit of pleasure or in the course of his or her employment."

And in *Nisbet v. Payne* [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268, where a cashier whose regular duty required him to carry large sums of money by train to pay wages was shot while traveling in a train in discharge of this duty, and the money stolen, it was held that he sustained an accident which arose out of and in the course of the employment.

But a clerk in the auditing department of a railroad, who is traveling under orders to check up the accounts of an agent at a station on the road, is not acting within the course of his employment; within the meaning of the Compensation Act, in leaving the train when an injured passenger attempts to board it, even though he intends to aid in caring for the injured man if called upon to do so, so as to be entitled to compensation, if injured when attempting to re-enter the train. *Northwestern P. R. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 297, L.R.A.1918A, 286, 163 Pac. 1000.

And a workman required to travel by train is outside the scope of his employment in attempting to mount a train while in motion, although it was necessary for him to take that particular train in order to keep an appointment made for him by his employers. *Jibb v. Chadwick* [1915] 2 K. B. (Eng.) 94, 31 Times L. R. 185,

[1915] W. N. 52, 84 L. J. K. B. N. S. 1241, 112 L. T. N. S. 878, 8 B. W. C. C. 152. Lord Cozens-Hardy, M. R., and Swinfen Eady, L. J., pointed out that if it was his duty to take that train in order to keep his appointment with his employers, it was also his duty to be at the station in time to take such train in a proper manner; and it was also pointed out that there was nothing in the evidence to show that his employment had prevented him from being at the station in proper time.

IV. While traveling in taxi or automobile.

It will be observed that in *SICHTERMAN v. KENT STORAGE CO.* (reported herewith) ante, 309, where a traveling salesman who covered his territory by automobile stopped his machine while returning at night after having visited his customers, and was struck by another automobile when walking back to assist a traveler, it was held that the injury did not arise out of the employment, but occurred while the employee was performing an act of humanity entirely disassociated from the employer's work.

In *Re Raynes* (1917) 66 Ind. App. 321, 118 N. E. 387, it was held that if an employee who had charge of the collection of accounts went to an adjoining city exclusively to collect accounts, and, in spite of having been diligently engaged in such work, was unable to complete it until the last car had gone, and was injured while on the way home in a taxicab, the accident arose out of and in the course of his employment; but that, if the collecting of accounts was a mere incident of a trip which was taken mainly for his own pleasure, and he missed the car because the sociabilities of the occasion caused him to become oblivious of time, the injury did not arise out of or in the course of the employment.

In *Messer v. Manufacturers Light & Heat Co.* (1919) 263 Pa. 5, 106 Atl. 85, an engineer who was on his vacation with pay, but subject to call, was held to have sustained an injury by accident in the course of his employ-

ment, where the superintendent of the company employing him telephoned him to inspect a certain pumping station, located in another town, to increase his efficiency, and he was injured while driving his automobile, although the accident apparently occurred after he had turned the machine toward home.

So, a millwright whose duties were to assist in the manufacture and assembling of machinery, and who, whenever his employer secured a contract for the installation of machinery in any particular place, was required to go to that place for the purpose of installing it, is entitled to compensation for injuries in an automobile accident which occurred while he was traveling to a place to install machinery. *London & L. Co. v. Industrial Acci. Commission* (1917) 35 Cal. App. 681, 170 Pac. 1074.

V. While waiting or resting.

Attention may also be called to *Re Bollman* (1920) — Ind. App. —, 126 N. E. 639, where one employed as an engineer with a threshing outfit, going from farm to farm, was required to stay with the outfit at night to watch the machinery, and was killed by a wagon body falling on him while he was sleeping in a barn on a farm to which the machinery had been moved for threshing, and it was held that the injury arose out of and in the course of the employment.

A commercial traveler who goes to a town, but makes no attempt to transact business, and becomes intoxicated, and while at the station awaiting the train home is injured by a passing train, does not suffer injury by accident arising out of and in the course of his employment. *R. & J. M'Crae v. Renfrew* (1914) 51 Scot. L. R. 467, 7 B. W. C. C. 898. The lord justice clerk said: "The only statement of fact regarding his being there is that he got himself into such a state of intoxication that when he went to a second public house, his condition was such that he was refused when he asked for a drink because he was intoxicated. He was therefore unfit for business, and was not in the

course of his employment. He had chosen to take a course of conduct which was inconsistent with his actions being in the course of his employment. I cannot for my part accept the idea that, having gone out of the course of his employment, he entered it again that night because he set off in his staggering, drunken state to endeavor to get home. To me it appears just to say that a man, the course of whose ordinary employment would cover his return home after a journey, may break off from the course of his employment, and that it is entirely a question of circumstances whether he can be held to have taken up the course of his employment again merely because he later proceeds to make his way home."

VI. While going toward station, hotel, conveyance, or home.

In *Re Harraden* (1917) 66 Ind. App. 298, 118 N. E. 142, it was held that an insurance agent suffered an injury arising out of his employment, when he slipped on an icy sidewalk in going from the station to a hotel, in a town to which the insurance company had sent him. The court said: "In the case at bar the duties of the employee required him to visit towns and cities at a considerable distance from the home office, without regard to conditions of the weather. The localities to which he was sent in the discharge of the duties of his employment constituted the place or places in which he was required to work. By reason of his employment he was at the place where he was injured. He was where his employment took him, and the hazard of the icy street was incidental to such employment. This proposition is not changed by the fact that the public, generally, in that vicinity, was exposed to the hazards of the icy street. The facts show that Harraden's employment exposed him to increased hazards, generally, among which was the one which caused his injury. The admitted facts compel the inference that the injury of Harraden resulted from conditions produced by the weather, and likewise because he was in the particular locality at the time in question. The lat-

ter fact is due to his employment. The facts admit of no other inference but that for his employment he would not have been in that locality at the time of his injury. His employment was, therefore, a contributing proximate cause of his injury. By reason of it, he was exposed to a hazard which, in all reasonable probability, he would not otherwise have encountered. The work he was employed to do required travel and made him particularly subject to hazards, to an extent far greater than like hazards encountered by the general public."

And in *Bachman v. Waterman* (1918) 68 Ind. App. 580, 121 N. E. 8, where a salesman was employed to sell flour in Indianapolis and surrounding territory, the evidence was held to justify a finding that the injury arose out of and in the course of his employment, there being testimony that he was struck by an automobile about 5 o'clock in the afternoon while crossing the street, going in the direction of prospective customers' places of business, and also proceeding toward a street car which would have taken him to his home, from which it was his custom to telephone the orders he had taken to the office.

And in *J. E. Porter Co. v. Industrial Commission* (1921) 301 Ill. 76, 133 N. E. 652, it was held that the injury to a traveling salesman arose out of and in the course of his employment, where, on his return from a trip, he went to his home for his lunch, and as he was about to board a street car to go from his home to his employer's factory to settle up for the week, turn in his expense account, and collect his salary, he was struck by an automobile.

And in *Haddock v. Edgewater Steel Co.* (1919) 263 Pa. 120, 106 Atl. 196, where an engineer employed on a salary, with no fixed hours of service, was instructed by the president of the company for which he worked to go to a certain city and inspect a plant for the purpose of obtaining information to be used by the company, it was held that he was injured by accident during the course of his employment, upon it appearing that he went to the

place in question, examined the plant, and returned by train to his home city, where he arrived at night, and that while on the way to his residence to spend the night he was struck by an automobile. The court said: "This is not the case of an employee injured, after regular working hours, on the way to his home; and we agree with the court below that there is nothing upon the record to show Haddock had, at the time of the accident, 'ceased to be active in the furtherance of his employer's business.' True, the facts as found indicate that plaintiff's husband intended stopping at his own residence, to sleep for the night, before reporting the results of his trip of investigation to the president of the defendant corporation; but, none the less, he was still upon his employer's errand, and, in that sense, actually engaged in the furtherance of the latter's business or affairs. Since deceased was compelled to return to the city at an hour when he could not at once communicate with his superior, and had to stay somewhere until he could report, he cannot be charged with a departure from his employer's service because, when hurt, he was going to his home for a lodging, rather than to a hotel; hence the findings of the referee are ample to sustain the ultimate conclusion upon which the award of compensation rests, to the effect that plaintiff's husband met his death by accident during the course of his employment with the defendant company."

And a salesman engaged in selling the wares of his employer in any territory to which he was sent, who was paid by commission on the amount of his sales, and who, by the direction of the employer, used a horse and conveyance which belonged to another employee, and who was injured while being driven back to the stable after the day's work was done, suffered injury by accident arising out of his employment. *Duffield v. Peers* (1916) 37 Ont. L. Rep. 652, 32 D. L. R. 339.

And in *Chase v. Emery Mfg. Co.* (1921) 271 Pa. 265, 113 Atl. 840, an injury to a traveling salesman, grow-

ing out of courtesy extended to a customer, was held to have been within the course of his employment, where it appeared that his duties required him to be attentive in securing orders, and also courteous and obliging, and frequently, to aid in making sales, to perform services not strictly relating to sales.

But an employee of a sugar company whose duty required him to inspect plants in different places is not, after his return from a tour of inspection to his own city, within his employment when injured by slipping upon the ice while running to get a street car to return to his home, so as to render his employers liable to compensation, the danger of slipping upon the street not being a hazard incidental to the employment of those who are called upon to make journeys between towns on business missions. *Hopkins v. Michigan Sugar Co.* (1915) 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325.

And it has been held that a traveling salesman, who, after completing his business with a customer in a town away from the employer's place of business, slipped on the ice and received an injury while on his way to an electric car to go to another place where he was to transact business, did not suffer an injury arising out of the employment, the court holding that the risk of slipping upon the icy pavement was common to the public who had occasion to pass over it on foot. *Donahue's Case* (1917) 226 Mass. 595, L.R.A.1918A, 215, 116 N. E. 226, 14 N. C. C. A. 491. The court said: "An injury arises out of the employment when there is a causal connection between the conditions under which the work is to be performed and the resulting injury. An injury cannot be found to have arisen out of the employment unless the employment was a distributing proximate cause. If the risk of injury to the employee was one to which he would have been equally exposed apart from his employment, then the injury does not arise out of it." This seems to be an extreme decision. It is to be noted that the place where the employee re-

ceived his injury was not the place of the employee's business, nor in the vicinity of his own home. He was required to be in this place solely because of the employment, and the evidence showed that the sidewalks were very slippery from the ice, and he was obliged to walk in the street because of the condition of the sidewalks. It would appear that the decisions of the Indiana and California courts are more reasonable in their construction of the acts."

And in *Wilson v. H. C. Frick Coke Co.* (1920) 268 Pa. 256, 110 Atl. 723, it was held that the injury was not due to an accident while in the course of his employment, where a day laborer, ordered by his foreman to go on a certain night to another place to be examined by a physician, did not go until the following night, and, when returning and crossing a river, was drowned.

And in *Continental Casualty Co. v. Industrial Acci. Commission* (1920) — Cal. App. —, 190 Pac. 849, it was held that an injury to a sales manager did not arise out of his employment where he was spending his vacation on a ranch 5 miles from a railroad station, and went to the postoffice on horseback, filled out his questionnaire and finished a reply to a business letter to his employer, and, after mailing these, mounted his horse to return to the ranch, and was thrown therefrom and injured. The court stated that he was no more entitled to claim compensation from his employer for such injury than he would have been while he was traveling from his home to the place where his vacation was to be spent.

VII. While going home for week-end.

In *State ex rel. McCarthy Bros. Co. v. District Ct.* (1918) 141 Minn. 61, 169 N. W. 274, where a salesman for a Minnesota grain brokerage concern who received a salary and traveling expenses, excepting board and lodging, resided in North Dakota, and transacted business on Saturday across the Missouri river from his home, and was drowned while attempt-

ing to go home on Sunday by crossing the river, which flooded the railroad track, it was held that the injury arose out of and in the course of the employment. The court said: "It is urged that decedent was not within the protection of the Minnesota Workmen's Compensation Act at the time of his death, because it appears that he did not come to his death by reason of an accident arising out of and in the course of his employment; that at the time of the accident he had been through with his work since the preceding day; that there was no necessity for his getting home on Sunday; that in order to do so he undertook an extremely hazardous trip for his own purposes, and not in connection with the business of his employers. We are unable to agree with these contentions. Decedent's duties required his traveling from place to place in his territory, which was several hundred miles from his employer's place of business. It was proper that he have some regular or fixed place for communicating with his employers. His home was near his field of labor. He made it his headquarters as well as his retreat for over Sunday, as he properly would, and as his employers must naturally have expected and intended he should do. Indeed all of the correspondence between them so indicates. We see no reason why he might not properly, and without stepping outside the scope of his employment, return to his home from his field of labor on the Sabbath day."

In *International Harvester Co. v. Industrial Bd.* (1918) 282 Ill. 489, 118 N. E. 711, where the deceased workman was employed to go to places within a radius of about 8 miles of Detroit to assemble agricultural machinery, and was expected to stay on each job until it was finished unless he received orders to the contrary, it was held that the accident resulting in his death did not arise out of and in the course of his employment, there being testimony showing that he was sent to a certain place to set up three machines, and that, while working on the last one, without instructions or

authority, he started the middle of Saturday afternoon for Detroit to spend Sunday, and was killed when the jitney bus in which he was riding to the station was struck by a train, the trip being unauthorized and unnecessary so far as the company was concerned.

VIII. While performing work.

In *Larke v. John Hancock Mut. L. Ins. Co.* (1916) 90 Conn. 303, L.R.A. 1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308, the injury was held to have arisen out of and in the course of the employment where one employed as a soliciting and collecting agent for an insurance company left home early on a cold winter morning, and drove 15 or 20 miles in the regular course of his business, going in and out of heated buildings while making calls, and suffered frostbites, which developed into erysipelas and death. The court said: "An attempt to frame an all-embracing definition so as to include all injuries arising in the course of one's employment would probably prove its inadequacy under the changing conditions of time. In a general way, sufficient for this case, and perhaps helpful in the consideration of other cases, we may say that an injury to an employee is said to arise in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it. 'In the course of' points to the place and circumstances under which the accident takes place and the time when it occurred. . . . The period of employment has sometimes been held to cover a period other than that for which wages are paid. The place of employment in some cases has been held to include the places upon the master's premises traversed by the employee in going to and from his work, and the places used by the employee with the master's consent. The duty ancillary or incident to the employment has, in some instances, been held to include the doing of something pri-

marily for the benefit of the employee, but ultimately, it is assumed, for the master, as the preparation of a noon-hour lunch, or the doing of something by the employee which he reasonably believes is for the master's interest. These distinctions and their application to given cases furnish difficult questions for decision. The circumstances surrounding the case of Mr. Larke are free from these difficulties. He contracted frostbite while driving from place to place upon his master's business in the customary way and in a way known to the master, and therefore he suffered his injury, as the trial court found, in the course of his employment. Passing the claim for a correction of the finding, the most seriously contested question is whether the injury of the decedent arose 'out of' his employment. An injury which occurs in the course of the employment will ordinarily arise out of the employment; but not necessarily so, for the injury might occur out of an act or omission for the exclusive benefit of the employee, or of another than the master, while the employee is engaged in the course of his employment. In order to restrict, beyond the reach of question, the words 'in the course of the employment,' the words 'arising out of' were added, so that the proof of the one without the other will not bring a case within the act. The term 'arising out of' in this act points to the origin or cause of the injury. *Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. (Eng.) 799, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197. It presupposes a causal connection between the employment and the injury. Speaking generally, an injury 'arises out of' an employment when it occurs in the course of the employment and as a proximate cause of it. An injury which is a natural and necessary incident or consequence of the employment, though not foreseen or expected, arises out of it. . . . If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury it entails, or the doing of something incidental to the employment, was a proximate cause of

injury, it arises out of the employment. An injury of this description is one of the risks of the employment for it is due to it and arises from it, either directly or as incident to the conditions and exposure attending it. And the proximate cause of the injury is not necessarily that which immediately arises out of the employment, but may be that which is reasonably incidental to it. The conditions of employment which expose the employee to an injury which arises out of the employment are such as are peculiar to this employment, and not such exposures to which an ordinary person is subjected. It is therefore immaterial where the exposure originates, whether from the employment or outside of it. In the case the conditions of danger are the conduct of the employment itself: in the other the conditions of danger which arise outside the employment, but are peculiar to it, as in *Amys v. Barton* [1912] 1 K. (Eng.) 40, 105 L. T. N. S. 619, 110 W. N. 205, 81 L. J. K. B. N. S. 101, 10 Times L. R. 29, 5 B. W. C. C. 101. *Mann v. Glastonbury Knitting Co.* [1916] 90 Conn. 116, L.R.A. 1916D, 110 Atl. 368, 12 N. C. C. A. 891. But where the injury results from something which the employment neither required nor expected in a place where his employment exposed him to, it cannot be said to be out of the employment. Under the conditions under which Larke was employed his employment exposed him to the danger of frostbite, and this danger was peculiar to his employment and not shared by the ordinary workman. No causal connection between frostbite and the employment can be found. If the employment brings about no greater exposure to injury than results from natural causes, it neither contributes to produce nor to aggravate their effect, as lightning, or severe heat or cold, to which persons generally in that locality, whether so employed or not, are equally exposed, there is

no causal connection between the employment and the injury; but where 'the employment brings with it greater exposure and injury results,' the injury does arise out of the employment. Turning to the finding, we think it presents a clear case of an employee injured as a result of a greater exposure to the elements than persons in that locality are ordinarily subjected. Mr. Larke's employment, which compelled him to drive 15 or 20 miles on a very cold day, going in and out of heated houses, in making upward of fifty calls, exposed him to the severity of the weather and to the danger of frostbite very much more than the ordinary person in that locality was exposed. The risk of frostbite to Mr. Larke was either created or greatly aggravated by his employment, which subjected him to open-air work in severe cold." And in *State ex rel. Chambers v. District Ct.* (1918) 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185, where one was employed by a grain brokerage firm to solicit business in Minnesota and other states, and was killed by the overturning of an automobile, furnished by the employer, while he was using it in the course of his employment in North Dakota, the court stated that the accident arose out of and in the course of his employment. The point at issue in the case, however, was as to whether compensation could be awarded for an accident occurring outside the state of Minnesota.

And where a workman was employed to travel and inspect scrap iron consigned to his employees at various railroad stations, it was held that his injury arose out of and in the course of his employment, upon its appearing that, in returning from an inspection to a warehouse and crossing the lines of the railroad while shunting operations were in progress, contrary to rules, he was killed. *Sanderson v. Henry Wright* (1914) 110 L. T. N. S. (Eng.) 517, 30 Times L. R. 279, [1914] W. C. & Ins. Rep. 177, 7 B. W. C. C. 141. J. T. W.

STATE OF SOUTH CAROLINA, Appt.,

v.

CARLOS CORBETT, Respt.

South Carolina Supreme Court — October 10, 1921.

(— S. C. —, 109 S. E. 133.)

Judgment — bar to subsequent prosecution — separate killing by single act.

1. The shooting of three men by separate shots as fast as they could be fired, in an attempt to protect the habitation and person of the one doing the shooting from their aggression, is not a single act within the rule that acquittal upon trial of an indictment for shooting one is a bar to a prosecution for shooting another by the same act.

[See note on this question beginning on page 341.]

Pleading — effect of demurrer.

2. A demurrer to a plea admits the allegations of fact contained in it.

Appeal — exceptions to properly striking testimony from record.

3. Exceptions to the striking out of testimony improperly incorporated in a transcript for appeal will be dismissed.

Pleading — demurrer — admission of inference drawn from facts.

4. A demurrer does not admit an inference drawn by the pleader from the facts stated.

Judgment — separate offenses from single act.

5. Even though the killing of sev-

eral men in rapid succession in an attempt to defend the person and habitation of the one doing the killing from their attacks could be regarded as but a single act, the result may constitute more than one offense, so that acquittal on a trial for killing one will not prevent a prosecution for killing another.

Pleading — right to answer over after overruling of demurrer.

6. The state may, upon overruling of its demurrer to a plea in a criminal case, be accorded the privilege of answering over.

APPEAL by the state from an order of the General Sessions Circuit Court for Orangeburg County (Shipp, J.) overruling a demurrer to a plea of former acquittal and sustaining the plea to an indictment charging defendant with murder. *Reversed.*

The facts are stated in the opinion of the court.

The ruling of Shipp, Circuit Judge, on motion to direct a verdict on the ground of previous acquittal, was as follows:

The defendant in this case sets up the plea of former acquittal, *autrefois acquit*; he alleges substantially in his plea that he was indicted on March 27, 1920; that heretofore in September, 1920, he was arraigned, and pleaded not guilty to the indictment found against him by the grand jury of Orangeburg county, charging him with the murder of Bryan Salley on the 27th of March, 1920; that the jury was

impaneled and that he was duly acquitted on that charge. He further states that he is now called at the bar of the court to answer to an indictment charging him with the murder of one Julian Cooper on the 27th of March, 1920; he alleges that he was in former jeopardy in the trial for the murder of Bryan Salley, because he alleges the evidence necessary to prove the charge against him for the murder of Julian Cooper would be the same evidence as was used against him in the case charging him with the murder of Bryan Salley. He goes on in

his plea to state that at his former trial it was in evidence that at his home, in his front yard, on the night of March 27, 1920, he fired several shots in quick succession at three men, mentioning them, Bryan Salley, Julian Cooper, and Hugh Fanning; that these three parties were making an attack upon him jointly in his own yard, and that he shot from the necessity of defending and protecting his life and home. He further alleges that the act of shooting at these three men, alleged aggressors, constituted one act and one volition; that he shot at no particular one, but was endeavoring to protect himself and his home against aggression; that he killed all three of these men at one time, and that it was in pursuance of one act and one volition.

The defendant further alleges that all of these facts came out in the trial for his killing Bryan Salley, and that at that trial three issues were submitted to the jury who tried the case; that three theories were presented to the jury. The three theories that he sets up in his plea are: (1) That the defendant purposely fired at and killed Bryan Salley with malice; (2) that the defendant fired at Julian Cooper and Hugh Fanning, and, missing them, killed Salley; (3) that with a reckless disregard of human life the defendant fired at the three men, killing them. He says that those three issues were submitted to the jury, and that he was duly acquitted by the jury, and he alleges that the action of the jury in acquitting him is the equivalent to finding that he was excusable in the act that he committed on that occasion. That is substantially what he alleges.

When a defendant puts in a special plea of former acquittal or former conviction, two courses are open to the state—the state may traverse the plea by denying the allegations thereof, and the question would then be one of fact to be tried by a jury, or the state may demur to the plea, and then it becomes a question of law; not a fact for the

consideration of the jury, but a question of law for the court. When the defendant demurs to a paper, that is an admission of the facts stated in the paper; it is not an admission of any legal conclusions, but it is an admission of the truth of any fact pleaded in the paper that is properly pleaded. That is held in the case of *State v. De Wees*, 76 S. C. 74, 56 S. E. 674, 11 Ann. Cas. 991.

In considering a question of former acquittal it involves a consideration of the record. Two indictments involved in the case are made a part of the plea and a part of the demurrer; that is for the consideration of the court. The court considers the record, the indictments, and it also considers partially in a question of fact, where there is the allegation in the plea that it is the same act, the same transaction, and the same volition; that is a question of fact. If the indictment shows that the offenses charged are so distinct and separate that, notwithstanding the demurrer on the part of the state, if the indictment shows that the charges were so separate and distinct, notwithstanding the admissions, the court comes to the conclusion that they are separate and distinct, the court would have to sustain the demurrer. That involves a question of fact; still, if the indictment shows on its face that it could not result from the same act, the state would lose nothing by the demurrer. If, on the other hand, there can be shown, or if they might have been the result of the same act, that is an admission on the part of the state.

It is unfortunate that in South Carolina the supreme court of this state has never ruled on the precise question in this case in any similar case. The state relies on the case of *State v. Thurston*, 27 S. C. L. (2 McMull.) 382, in which it was held that the indictments in the *Thurston Case* were so separate and distinct, that notwithstanding the admissions by the demurrer, the court was justified in holding that

the offenses charged were not the same act. An examination of the Thurston Case shows—and I have not had as much time to examine these cases as I would like to have had, because I have to rule promptly—an examination of the Thurston Case shows that the indictment in that case involved the question of larceny; where a person is charged with the stealing of goods belonging to A, he cannot be convicted for the stealing of goods belonging to B. That is true, of course, because, to convict of larceny, you have to prove the owner is not a different person, the very nature of the ownership or the possession of the property, and where the case could not be the result of one act. It remains to be seen that where a person kills two persons, that may be shown to be the result of the same act.

Counsel for the state has cited the case of *State v. Evans*, 33 W. Va. 417, 10 S. E. 792, a West Virginia case. An examination of the *Evans Case* shows that the plea was not set out in that case, and I have not the benefit of knowing exactly what was alleged in the special plea set up. The court held in that case that it could not be one act, because the circumstances alleged showed that there was aggravation from one separate and distinct from the other. The judge who rendered the opinion stated that he could conceive of a case in which the principle might apply, and he cited the case referred to by Mr. Raysor, where an engineer was charged with killing a number of people through the negligent running of a train, and the plea interposed was that it was accidental; he was charged with the murder of one of the passengers, and the jury rendered the verdict of acquittal, and it was held that that was an adjudication, and no further criminal liability attached, and he could not be held for the death of other passengers resulting from the same act.

It is recognized by the court that there may be cases where a person may kill more than one person as

the result of the same act. That is one case. I can conceive of another case; a sheriff is charged with the custody and with the safety of the prisoners in jail; he stands there for the purpose of protecting those prisoners; an attack is made on him, and he kills ten men, and he is called for trial for the killing of one of the ten men; he sets up the defense that he killed the ten men in the discharge of his official duty; that a mob came there for the purpose of taking the prisoners from the jail, and in defense of their lives he took the lives of ten men who were killed. He is tried for killing one of those men, and that question is submitted to the jury, and the jury say he is not guilty; that he was excusable in taking life. There is one act and one purpose to protect the prisoner; that is an adjudication the sheriff acted within the law. There is an instance where the sheriff shot repeatedly, but it was from one design and one purpose, and an adjudication in one case would be an adjudication in all.

No one can testify as to the intent of a person. I cannot testify as to what is in the mind of any other man, but I can testify as to my own intent, and the only person who can testify as to the intent of any person is that person himself. We have in this paper here, admitted by the demurrer, the declaration of the defendant under oath that he had one purpose and one intent, and that was to defend himself against his aggressors. It has been held in a number of cases that the defendant may testify as to his purpose and intent. That is the only evidence we have in the case, and that is admitted by the demurrer.

I am sorry that the state admitted these facts in the demurrer. I am called on to rule on this paper with an admission on behalf of the state; it becomes a question of law, and I am bound; I could not rule otherwise with this admission of intent, the admission of one purpose and one act, I could not rule other-

that the demurrer must be overruled in the case, and therefore becomes a question of law, being admitted that the killing of the three men was the result of impulse, and it being alleged that it was done in defense of the defendant's home and person, I cannot say that that does not state a defense.

It is necessary to overrule the demurrer, for the reasons stated above. The demurrer is overruled.

T. M. Rayson, A. H. Moss, and J. Hydrick for the State.

Wolfe & Berry, Cole L. M. L. Smith, J. L. Dukes, J. Fanning, and B. J. Wingard for the defendant.

Justice J. J. delivered the opinion of the court:

At the May term of the court of appeals for Orangeburg County, upon separate indictments, were returned against the defendant, charging him with the murder, respectively, of Bryan Julian Cooper, and Hugh Fanning, on March 27, 1920. At the September term he was tried on the indictment charging him with the murder of Bryan Salley, and was acquitted. At the following January term he was called for on the indictment charging him with the murder of Julian Cooper. He thereupon filed a plea of not guilty, based upon the ground that the three homicides resulting from a single act, of impulse, and volition, constituted but one offense, and that, having been acquitted of any criminal connection therewith, as shown by his acquittal as stated, he was entitled to be discharged.

His plea the state demurred. The ground that the indictment was defective in that the acquittal was in a case in which the acquittal was in a case and that in the case at bar that the offenses charged in the indictments are distinct and require proof of different facts.

The circuit judge heard argument on the plea and the demurrer, and announced his ruling (which

is incorporated in the record and should also be in the report) overruling the demurrer. He then passed a formal order, reciting the fact that he had overruled the demurrer, and adjudging that the plea of former acquittal be sustained. From said ruling and order the state appeals.

Upon the presentation of the plea two courses were open to the state: To traverse the plea, or to demur.

The state adopted the latter course, **Pleading—effect of demurrer.** and the legal effect

thereof was to admit the allegations of fact contained in the plea. State v. De Wees, 76 S. C. 74, 56 S. E. 674, 11 Ann. Cas. 991.

The question at issue must therefore be decided upon the plea, the demurrer, and the two indictments, without reference to the testimony taken upon the trial which has been had. It was unnecessary and improper that this testimony be incorporated in the record for this appeal. The exceptions of the state to the order of the circuit judge striking out this testimony, in settling the case for appeal, are therefore dismissed.

Appeal—exceptions to properly striking testimony from record.

The main facts, pertinent to the present inquiry, alleged in the plea and admitted by the demurrer, are the following, omitting those already stated herein and certain argumentative statements therein:

On the night of March 27, 1920, while the defendant was in his front yard, several men, among whom were Bryan Salley, Julian Cooper, and Hugh Fanning, advanced upon him; that in self-defense, to protect his person and habitation from their joint and confederated attack, the defendant fired at them several times with an automatic revolver, firing as rapidly as the pistol would fire, not aiming particularly at any one of them, but shooting at them one and all, whereby the three men named were instantly killed; that in said shooting the defendant was actuated and moved by the same

and identical impulse, a single act of volition to do anything and everything against said three men to protect his person and habitation against their joint and confederated aggression.

The validity of the defendant's plea of former acquittal depends upon a solution of the following questions, battle ground upon which the defendant has pitched this controversy:

(1) Were the three homicides a single act on the part of the defendant?

(2) If the three homicides were a single act on the part of the defendant, is he entitled to claim that the act constituted but one offense?

It is apparent that if each homicide was a separate act, then necessarily each act constituted a distinct and separate offense; or, if the three homicides were a single act from which distinct and separate results flowed, each homicide was a separate offense.

1. Were the three homicides a single act on the part of the defendant?

The defendant so alleges in his plea, and now contends, that the state by its demurrer had admitted that to be a fact. We do not so regard the demurrer. The allegation in the plea is nothing more than a characterization, in the interest of

Pleading—demurrer—admission of inference drawn from facts.

the defendant—an inference favorable to him, which he draws from certain alleged facts; the issue is one of law, therefore, not of fact; and a demurrer admits only facts.

As is declared by the court in *State v. De Wees*, 76 S. C. 75, 56 S. E. 675, 11 Ann. Cas. 991: "If the two indictments charged offenses which in their nature are so separate and distinct as to be incapable of legal identity, then defendant's allegation that they charged the same offense would not make it so, since the demurrer only admits the facts properly pleaded."

So here, when the defendant al-

leges the circumstances of the affray; that the three men and another were advancing upon him; that he shot them down, inferentially, one at a time; that he fired his pistol as rapidly as it would turn the cylinder; that he was determined to do anything and everything to stop their confederated aggression, which, of course, included as many shots and reloadings as might be necessary,—it is not for him to decide or for the state to admit by its demurrer, that such intense, determined, continuous, and effective warfare, defensive though it may have been, was a single act.

Assume, as we must, that the defendant acted not in malice or in the hot blood of aggravation and exasperation, but in defense of his home and person, a circumstance which goes to the merits of his defense, and not to the discussion of the question whether or not his shooting down three men with separate shots was a single act, the circumstances cry out against his favorable interpretation. His purpose, as he states, was to halt this confederated aggression; at least four men were advancing upon him; he had a pistol as his weapon of defense; he knew that it fired only one shot at a time, he could not possibly kill all four at one shot; he necessarily, therefore, predetermined to fire at least four times, each firing being a separate act, and each, as events developed, followed by the fall of a man. The admitted facts, aside from the argumentative characterization of the shooting as a single act, show a predetermined and pursued series of acts, to shoot, and shoot, and shoot; to do "anything and everything against the three men . . . to protect his person and habitation." We are concerned here with what he did, not with the purpose; and in the attempted justification of his conduct he reveals the character of his conduct as a series of acts, and not a single act.

The authorities are simply overwhelming that under the circum-

stances stated the defendant was guilty of a separate crime (if a crime) against each one of his victims, and that the acquittal of one charge is not a bar to a further prosecution.

"But where one assaults or kills two persons by separate shots or strokes, although in the same riot or affray, an acquittal or conviction of one assault or homicide is no bar to an indictment for the other, as they are distinct acts." 12 Cyc. 289.

In *Gunter v. State*, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17, the court declared: "If, in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another, in such case the two results—the killing of the one and the wounding of the other, by different acts of shooting,—cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately for each."

In *Bell v. State*, 120 Ark. 530, 180 S. W. 186, the defendant was incensed with the sister of his wife, her husband, her father, and her brother, on account of their alleged participation in the separation of himself and wife. He determined to exterminate the entire family; armed with a repeating shotgun he went to their home, and in turn killed each one. It was one intent, one volition, one transaction, one impulse. He was convicted of the murder of the husband and sentenced to life imprisonment. Upon the trial for the killing of his wife's sister, he pleaded former conviction. The court said: "The court did not err in overruling appellant's plea of former conviction. The conviction of appellant at a former term of the court for the crime of murdering Eard Bearden was a conviction for an entirely separate offense than that of the murder of Abbie Beard-

en. The proof shows that the killings were not simultaneous; that they were not the result of one shot, but were the result of entirely separate acts. The question as to whether the murder of two persons by the same act would constitute but one offense is not presented. Therefore a conviction in one of the cases could not be set up in bar of a prosecution for the other."

In *Morris v. Territory*, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111, the defendant claimed to have been attacked by father and son, and that in self-defense he killed them both, shooting as fast as he could with a shotgun and a pistol. The father was killed by shots from the gun; the son, from the pistol, not more than thirty seconds later; the transaction was one; the intent, purpose, volition, impulse, were one. The defendant was acquitted of the murder of the father, and pleaded that acquittal as a bar to the indictment for killing the son. The court, upon full discussion of the subject, ruled, quoting from the syllabus: "If in the same affray a person shoots and kills one person, and by a second shot kills another person, he may be separately prosecuted for killing each of them, and may be properly acquitted in one case and convicted in the other."

In *Com. v. Anderson*, 169 Ky. 372, 183 S. W. 898, the defendant, in an alleged effort to defend himself against a confederated attack by two brothers, rapidly firing, killed one of them and wounded the other. He was acquitted of murder in the one case, and, to a separate indictment for assault upon the other brother, pleaded former acquittal. The court refused to sustain the plea, holding: "But we have been unable to find any case holding that where, by two separate and distinct acts of the defendant, two separate and distinct offenses were committed, they could in any sense be called 'the same offense' as is required to successfully invoke the constitutional provision. The,

fact that these two distinct offenses were committed in close proximity as to time, and while engaged in one affray, cannot be allowed to unify the two offenses, when as a matter of fact they are not so. The time intervening between the commission of the two offenses can have no effect on the case whatever,"—citing 12 Cyc. 289, and many cases from Kentucky; *Keeton v. Com.* 92 Ky. 522, 18 S. W. 359; *Com. v. Browning*, 146 Ky. 770, 143 S. W. 407.

The case of *Com. v. Browning*, *supra*, cited in the *Anderson Case*, is stronger for the defendant than the *Anderson Case* or the case at bar, and while we are not called upon to approve its conclusions, the facts are interesting in this connection and its reasoning instructive. In that case the defendant, with one shot from a pistol, wounded two men with whom he was engaged in a fight. Defendant was convicted of assault upon one of the men, and to a separate indictment for assault upon the other he pleaded former conviction. The court overruled the plea, saying:

"Manifestly, appellee, if first tried for the shooting and wounding of Caywood, could not be convicted on proof that he shot Stewart, though both Caywood and Stewart were wounded by one and the same shot. As well might it be argued that, in the killing of several of the same family by putting poison in the food eaten by them, conviction of the poisoner for the death of one of them would bar a prosecution for the killing of the others. . . .

"The offenses committed by appellee were not included within one another, though resulting from the same act, but were separate and distinct offenses. Therefore he was not protected by § 13, Bill of Rights, against a prosecution for either by a conviction or acquittal for one of them."

In *Keeton v. Com.* 92 Ky. 522, 18 S. W. 359, it was held, quoting from the syllabus: "Presenting a pistol at two persons at the same time, coupled with a demand of their

property, and compelling a surrender thereof by both at the same time, constitutes distinct offenses against them,—an assault on and robbery of each."

In *Kelley v. State*, 43 Tex. Crim. Rep. 40, 62 S. W. 915, the defendant and the two De Walt brothers were working in adjoining fields, a wire fence separating them; one of the De Walts accused defendant of sending a valentine reflecting upon their sister; hot words ensued, and the two De Walts made for the defendant, and as they were in the act of breaking down the strands of wire to cross the fence to attack the defendant, he fired, killing one and wounding the other. He was tried for the murder of the one killed, and acquitted; upon the trial for assaulting the other, he pleaded former acquittal. The court held that the plea was insufficient.

In *Augustine v. State*, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77, the defendant was one of a mob which fired at and killed two men, they being killed by different shots from different members of the mob. The defendant was acquitted of the murder of the one whom he had not shot, and upon trial for the murder of the other, whom he had shot, he pleaded former acquittal. The court overruled the plea, saying: "But here the testimony shows that the parties were killed by distinct acts. Mr. Bishop says: 'Obviously, there is a difference between one volition and one transaction, and on the view of our combined authorities there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each.'"

In *State v. Robinson*, 12 Wash. 491, 41 Pac. 884, the defendant in an affray killed two men, Schultz and Smith; he was acquitted of the murder of Schultz, and then, upon trial for the murder of Smith, he pleaded former acquittal. We quote at length from the interesting opinion of the court: "It follows that, if the killing of each of the men

constituted a distinct crime, there was no proof tending to show that the appellant had been formerly acquitted of the crime alleged to have been committed in the killing of Smith. The fact that the same line of proof was introduced for the purpose of showing that he was guilty of the killing of Schultz as that introduced to show his guilt in the killing of Smith would in no manner tend to show that an acquittal for the killing of the former would constitute an acquittal for the killing of the latter, if the killing of each was a distinct crime. That such proofs in reference to two prosecutions for the commission of a single offense would be proper to go to a jury upon the question of former acquittal or conviction is beyond question, but to us it seems equally clear that proof which was necessary and competent to convict of one crime would have no weight upon such question in the prosecution for another, even although the same criminating circumstances were relied upon in the latter as in the former case. Was the killing of each of these men a distinct crime? They were killed in a single affray, and the connection of the appellant was substantially the same in his relations to such affray, as it related to each of such men. If the result of the meeting at which the two were killed had been the death of only one of them, a prosecution for murder could have been founded upon his death, and under the circumstances of this case this would have been true whether the one so killed had been Schultz or Smith; and there can be no good reason why that which would have warranted a prosecution for murder should lose force by reason of the fact that another circumstance, which in itself would warrant such a prosecution, occurred at the same time and place. If the prosecution had been founded upon the killing of the two, and the case had gone to trial upon a plea of not guilty, proof of the killing of either of them would have warranted a con-

viction. It follows that the killing of each was, so far as the homicide was concerned, a distinct transaction. The taking of a human life with certain intent constitutes murder, and neither law nor public policy will justify a holding that each life is of less value when taken with another than it would be if taken alone. If a person without justification intends to kill A and does so, he will be guilty of a crime; if he intends to kill B, he will be guilty of another and a different crime; and the fact that he entertains the intent to kill both, and carries such intent into effect at the same time and place, should not be held to make of that which would otherwise be a foundation for two distinct prosecutions a foundation for only one. In our opinion, the undisputed proofs, when interpreted in the light of the law which it was the duty of the court to find, clearly showed that the appellant had never been on trial for the killing of Smith."

In *Winn v. State*, 82 Wis. 571, 52 N. W. 775, the defendant had an altercation with one De Foy in a saloon, and was assaulted by him; he went home, secured a pistol, and returned; De Foy was on the sidewalk with others, including one Coates; the defendant snapped his pistol at De Foy, and in the struggle to disarm him the pistol was discharged, killing Coates; the defendant was acquitted of the murder of Coates, and was then indicted for the assault on De Foy; he pleaded former acquittal. The court disallowed the plea, holding: "The rule is that the offenses charged in two indictments are not identical unless they concur both in law and in fact, and that the plea of *autrefois acquit* or *convict* is bad if the offenses charged in the two indictments be distinct in law, no matter how closely they are connected in fact. In order to determine whether there is a concurrence in law, that is, whether a conviction or acquittal on one indictment is a good bar to a prosecution on another, the true inquiry is whether the first indictment was

such that the accused might have been convicted under it by proof of the facts alleged in the other indictment. If he could not, the conviction or acquittal under the first indictment is no bar. The result of an application of this test to the present inquiry is obvious. Winn could not have been convicted of the murder of Coates merely upon proof that he made a felonious assault upon De Foy. Proof that he killed Coates would also be required. Hence an acquittal on the information charging the murder of Coates is no bar to this information for a felonious assault on De Foy, and the special plea was properly overruled."

In a note to *Roberts v. State*, 58 Am. Dec. 540, Judge Freeman says: "When same act constitutes two or more distinct offenses, each is separately indictable. The defendant may be separately punished for each offense, and an acquittal or conviction or pardon of one of these distinct offenses is no bar to the prosecution of the others. [Citing cases.] And the test will here apply. In each case the plea of autrefois acquit or convict is bad, because the facts of the two offenses are different. The proof of the allegations of the second indictment would not secure a legal conviction under the allegations of the first. A well-settled example of this, of two offenses distinct from each other, arising from the same act occurs when the criminal act affects two different persons"—citing *State v. Fife*, 17 S. C. L. (1 Bail.) 1.

Further the learned annotator observes: "So, where the defendant, by his act, injures in fact two or more persons, though it be accomplished in the same transaction, yet as many distinct offenses are committed. The facts of one are materially variant from those of the other. Such is the case where two or more persons are shot at the same time."

We conclude, therefore, that the killing of Bryan Salley physically could not have been the same act as

that which took the life of Julian Cooper, and that the law, so far from compelling a disregard of what we know the fact to have been, is in harmony with the dictates of reason, physical laws, and common sense.

2. If the three homicides were a single act on the part of the defendant, is he entitled to claim that the act constituted but one offense?

Assuming, however, for the sake of argument that the defendant's contention in this regard may be sustained, it by no means follows necessarily that but a single offense has been committed. On the contrary, the rule in this state is that under certain cir-

cumstances more ^{separate offenses from} than one offense ^{single act.} may follow from a single act.

In *State ex rel. Burton v. Williams*, 11 S. C. 292, the court declared: "And of the other result—that of subjecting an offender to two punishments for the same act, not the same offense—it may be said that it is not so monstrous as might at first be supposed, inasmuch as we find that our own courts have decided that for the same act a man may be twice punished, because by the one act he has violated two distinct statutes of the state, committed two distinct offenses, and is therefore liable to two distinct punishments."

In *State v. Switzer*, 65 S. C. 187, 43 S. E. 513, the court says: "It is not sound to say unqualifiedly that more than one criminal offense cannot be predicated upon a single act; for when a single act combines the requisite ingredients of two distinct offenses, the defendant may be separately indicted and punished for each, as shown in *State v. Taylor*, 18 S. C. L. (2 Bail.) 49, and *State v. Thurston*, 27 S. C. L. (2 McMull.) 395."

In *State v. Thurston*, 27 S. C. L. (2 McMull.) 382, the defendant was charged in three separate indictments with having stolen at the same time cotton belonging to three separate individuals. The act, in-

tent, and volition were one and the same. The court held (quoting from syllabus) "that the cotton so stolen by the defendant belonged to three different individuals, and he was very properly indicted in three cases, and a conviction in one case was no bar to a conviction in the two others. The stealing of the goods of different persons is always a distinct larceny."

In *State v. Sonnerkalb*, 11 S. C. L. (2 Nott & M'C.) 280, the defendant raised the question of being liable to two indictments for separate offenses, both growing out of a single act. The court said: "But let it be admitted that the defendant committed physically but one act; two offenses may be committed by one act, even at the common law; a person fires a gun, kills one, and wounds another; if he escapes for the homicide (that is, if his life be not taken), he may be indicted for the assault on the other; or suppose he severely wounded two, he may be indicted for two assaults."

In *Hellams v. Switzer*, 24 S. C. 39, the action was brought by several plaintiffs severally owning land, claiming damages on account of a dam of the defendant. The court held that they could not maintain a joint action; that their injuries were several. The opinion contains this statement pertinent to the pending issue: "The principle underlying is that it is not the act, but the consequences, which are looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequences of that act, and not the act itself, which is redressed; and therefore the injury is several."

In a full note by Judge Freeman to *People v. McDaniels*, 92 Am. St. Rep. 120, he points out the two lines of decisions in reference to a single act causing death to two or more persons, placing this state in line with others holding that two offenses have been committed, though rather leaning to the opposite holding. He points out very clearly, however, that whatever doubt may

exist upon that proposition there is none where more than one act has been committed. He says: "If one shot is fired and injures two people, there is, as we have seen, a conflict of authority as to the possibility of separate and successive prosecutions. But where several shots are fired, each injuring one person, the mere propinquity, in point of time or action, of the two assaults, does not make them a single assault, and all the authorities agree in holding that there may, in such a case, be as many prosecutions as there were assaults."

A familiar illustration of the rule is where the single act is a separate and distinct offense under municipal, state, and Federal statutes, or where the single act is a distinct infraction of more than one state statute. Surely, if a single sale of liquor may constitute three statutory offenses, or if a single act of theft may constitute more than one offense, a single murderous shot may constitute a separate offense as to each human being whose life is cut short. If a malpractising physician, in producing an abortion, should cause the death of the mother and of the child breathing after its forced birth, can there be a question that from his single act, actuated and moved by a single intent, impulse, and volition, there would spring three separate offenses?

If, the act being single, only one offense has been committed, the rule should apply to civil actions as well as to criminal prosecutions; and yet we do not apprehend that, if the defendant should have prevailed in an action by the administrator of Bryan Salley for damages on account of his alleged wrongful death, he could defeat a similar action by the administrator of Julian Cooper upon the ground of former adjudication; or that that rule would apply in the case of a negligent collision at a railroad crossing by which the lives of several persons were lost. It would, indeed, be anomalous to hold in the criminal prosecution that the act was single, and only one offense

was committed, and in the civil actions the act was single and several offenses (civil) were committed; the plea of former adjudication being sustained in the one case and denied in the other upon opposite conclusions from the identical state of facts.

Mr. Van Fleet in his work on *Former Adjudication*, vol. 3, ¶ 622, states that the rule that, if several persons are injured in person or property by the same act, there is but one offense, is maintained in the courts of several states named, but that the contrary is held in Arkansas, California, Kentucky, New York, South Carolina, and Virginia.

There is another view of this question which, however, it is really not necessary to discuss, in view of the foregoing conclusions, but which is equally fatal to the defendant's plea. The constitutional provision invoked is: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty." Const. art. 1, § 17.

Note that the identity of the offense, and not of the act, is referred to. Hence, in order to claim the benefit of this protection it must be made to appear that the latter indictment contains a charge of the same offense of which the defendant may have previously been acquitted or convicted.

From a common-sense, layman's view there could be no hesitation in saying that the first indictment charges the murder of Bryan Salley, one distinct crime; the second, of Julian Cooper, another distinct crime. But we are expected to throw to the winds this chart and compass, and be guided by a strained technicality of the law. The law does not compel this conclusion. In determining the question of the identity of the offenses, the law prescribes the following test:

In *State v. Glasgow*, 23 S. C. L. (Dud.) 40, the court declares: "The test by which the question is to be determined, whether a former conviction is a bar to another pros-

ecution, is this: Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction on the first?"

The same test is applied in the case of *State v. Thurston*, 27 S. C. L. (2 McMull.) 382, and in *State v. Risher*, 30 S. C. L. (1 Rich.) 219, in practically the identical terms. In *State v. Parish*, 42 S. C. L. (8 Rich.) 322, the court declared (referring to former conviction): "To constitute this a good defense the offense must be identical or necessarily included the one within the other."

In *State v. Jenkins*, 20 S. C. 351, the court lays this down as the test: "Could the accused have been convicted at the first trial and under the first indictment of the offense charged in either of the other two? . . . If, then, the accused could not, under any circumstances, have been convicted of the present offense in the former trial, how then can it be said that upon the present trial he has been put in jeopardy twice for the same offense?"

In *State v. Switzer*, 65 S. C. 187, 43 S. E. 513, the court says: "In determining whether both indictments charged the same offense, the test generally applied is 'whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.'"

In *State v. Switzer*, 65 S. C. 191, 43 S. E. 513, it is held that the plea of former acquittal must be sustained when it appears that the offense charged in the second indictment is not legally distinct from that in the first.

In *State v. Van Buren*, 86 S. C. 297, 68 S. E. 568, the court declares: "The test laid down as useful and generally adequate, though not infallible, by which it may be decided whether two indictments charge the same offense, is: 'Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first?'"

In *State v. Rodgers*, 100 S. C. 77, 84 S. E. 304, the same test was applied as in the case of *State v. Jenkins*, 20 S. C. 351.

In *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, it is said: "A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. Com. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact."

In *Ebeling v. Morgan*, 237 U. S. 625, 59 L. ed. 1151, 35 Sup. Ct. Rep. 710, it is said: "The principle applied in *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421, is applicable, where this court held that, when in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the supreme judicial court of Massachusetts in *Morey v. Com.* 108 Mass. 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact."

In *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 Sup. Ct. Rep. 712, it is said, quoting from Bishop: "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be."

In *Blair v. State*, 81 Ga. 629, 7 S. E. 855, the rule is thus stated: "If

the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second indictment, then the former conviction or acquittal could not be pleaded in bar of the second indictment."

In a note to *Com. v. Vaughn*, 45 L.R.A. 858, it is said: "For this reason, therefore, a conviction of one offense will not bar a prosecution for the other, or entitle the defendant to the plea of former jeopardy, *autrefois convict*, or *autrefois acquit*, as such plea can only avail a defendant who has already been convicted or acquitted upon the same charge or offense for which he is charged the second time, or, in other words, when the two offenses are identically the same."

In *Morey v. Com.* supra, cited with approval in *Gavieres v. United States*, 220 U. S. 342, 55 L. ed. 490, 31 Sup. Ct. Rep. 422, it is said: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

The Massachusetts case was also cited with approval in *Carter v. McClaughry*, 183 U. S. 394, 46 L. ed. 250, 22 Sup. Ct. Rep. 193, where the court said: "The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both

charges related to and grew out of one transaction made no difference."

In *Kelly v. United States*, 169 C. C. A. 408, 258 Fed. 392, it is said: "This was in effect a plea of autrefois acquit. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea; thus, as Mr. Justice Harlan said (*Burton v. United States*, 202 U. S. 344, 380, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 698, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.'"

In *Bens v. United States* (C. C. A.) 266 Fed. 152, it is said: "The prohibition of the Constitution is against a second jeopardy for the 'same offense;' that is, for the identical crime. The offenses charged in the two prosecutions must be the same in law and in fact. *Burton v. United States*, supra; *Thomas v. United States*, 17 L.R.A. (N.S.) 720, 34 C. C. A. 477, 156 Fed. 897, 16 C. J. 263. If the facts which would convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction."

In *United States v. Farhat* (D. C.) 269 Fed. 33, it is said: "The test of identity of offenses, when double jeopardy is claimed, is whether the same evidence is required to sustain them. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense, where two are defined by the statutes."

In *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486, the defendant had counseled and advised another to

rob a certain man at his home; the emissary took with him a confederate; they found unexpectedly a friend at the home of the man to be robbed: in the attempt to carry out the design of robbery both the man to be robbed and his friend were killed at the same time by the emissary and his confederate. The defendant was convicted of murder in the case of the man who was to have been robbed, and to an indictment in the case of his friend he pleaded former conviction. The court overruled the plea, saying (quoting from syllabus): "The murder of two persons constitutes two separate crimes; for each of which a defendant is liable to a separate prosecution and trial, though the killing be by the same act; and a conviction or acquittal in one case does not bar a prosecution in the other on the plea of once in jeopardy."

Applying this test, it must be apparent that the plea must fail. In the first case, the defendant was charged with the murder of Bryan Salley. The state was required to make good the allegation that the defendant took the life of Bryan Salley; it was compelled to prove the corpus delicti. In the second, the same burden was upon it with reference to Julian Cooper, necessarily a difference in the proof. The proof of Cooper's death would not have answered the obligation resting upon the state in the first case to prove the death of Salley, and, conversely, the same could be said of the second case.

In *People v. Alibez*, 49 Cal. 452, 1 Am. Crim. Rep. 345, an indictment charged the defendant with the murder of three persons by the administering of strychnine at the same time. The court arrested the judgment upon the ground that three distinct offenses had been charged in one indictment.

We take occasion to say that it did not necessarily follow from the order overruling the demurrer that the defendant was entitled to an order sustaining his plea of former acquittal. Assimilated to demur-

ers in civil actions, the demurrant is usually accorded the privilege of answering over; and doubtless this privilege, that of traversing the plea, would have been allowed the state if it had been applied for. In the absence of such a request the defendant was entitled to and the circuit judge was authorized to pass the order in question, subject, of course, to review on appeal.

Pleading—right to answer over after overruling of demurrer.

The judgment of this court is that the order appealed from be reversed, and that the case be remanded to the Court of General Sessions for Orangeburg County for trial.

Eugene B. Gary, Ch. J., Fraser, J., and Prince, Wilson, Sease, Frank B. Gary, Moore, Bowman, Townsend, and Peurifoy, Circuit Judges, concur in the opinion of Cothran, J.

De Vore and Rice, Circuit Judges, concur in the result.

Eugene B. Gary, Ch. J., concurring:

The defendant was charged in three separate indictments for the murder of Bryan Salley, Julian Cooper, and Hugh Fanning. He was tried under the indictment charging him with the murder of

Bryan Salley, and the jury rendered a verdict of not guilty. At the next term of the court, he was called upon to answer to an indictment charging him with the murder of Julian Cooper, and set up the plea of former jeopardy. It does not appear that a motion was made to consolidate the cases and try them together. If they had been tried at the same time, and the jury had rendered a verdict of not guilty as to the homicide of Bryan Salley alone, the defendant could not again have been placed in jeopardy. But those were not the facts. Having failed to make such motion, he was not in jeopardy for the killing of Julian Cooper when he was only tried for the murder of Bryan Salley.

It would be an anomaly to allow a plea of former acquittal, unless there had been a former trial for the homicide of Julian Cooper.

Watts, J., concurring:

For the reasons assigned by Judge Shipp, I think the exceptions should be overruled and the judgment affirmed.

Writ of error dismissed by the Supreme Court of the United States, March 20, 1922 (U. S. Adv. Ops. 1921–22, p. 365) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 315.

ANNOTATION.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time.

- I. General rule, 341.
- II. Application of rule, 342.
- III. Exceptions to rule, 346.

Cases in which the defendant unintentionally assaults or kills one person while assaulting or killing another person are excluded from this annotation, since they will be found in the note in 2 A.L.R. 606, upon the subject of acquittal on charge as to one as bar to charge as to another, where one person is killed or assaulted by acts directed at another.

I. General rule.

The general rule is that the conviction or acquittal of one charged with the murder of, or an assault upon, one person, is not a bar to his subsequent prosecution for the murder of, or an assault upon, another person at the same time.

United States. — *Hotema v. United States* (1902) 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895; *Flemister v. United States* (1907) 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129.

Alabama. — *State v. Standifer* (1837) 5 Port. 523; *Gunter v. State* (1895) 111. Ala. 23, 56 Am. St. Rep. 17, 20 So. 632.

Arkansas. — *McCoy v. State* (1885) 46 Ark. 141; *Jones v. State* (1895) 61 Ark. 88, 32 S. W. 81; *Bell v. State* (1915) 120 Ark. 530, 180 S. W. 186.

California. — *People v. Majors* (1884) 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486.

Colorado. — *Seiwald v. People* (1919) 66 Colo. 332, 182 Pac. 20.

Florida. — *McNish v. State* (1904) 47 Fla. 66, 36 So. 175.

Georgia. — *Crocker v. State* (1873) 47 Ga. 568; *Johnson v. State* (1880) 65 Ga. 94; *Fews v. State* (1907) 1 Ga. App. 122, 58 S. E. 64.

Illinois. — *People v. Stephens* (1921) 297 Ill. 91, 130 N. E. 459.

Indiana. — *Greenwood v. State* (1878) 64 Ind. 250, 3 Am. Crim. Rep. 154.

Kentucky. — *Keeton v. Com.* (1892) 92 Ky. 522, 18 S. W. 359; *Baker v. Com.* (1898) 20 Ky. L. Rep. 879, 47 S. W. 864; *Com. v. Browning* (1912) 146 Ky. 770, 143 S. W. 407; *Com. v. Anderson* (1916) 169 Ky. 372, 183 S. W. 898.

Louisiana. — *State v. Vines* (1882) 34 La. Ann. 1079, 4 Am. Crim. Rep. 296.

Michigan. — *People v. Ochotski* (1898) 115 Mich. 601, 73 N. W. 889.

Mississippi. — *Teat v. State* (1876) 53 Miss. 439, 24 Am. Rep. 708.

Missouri. — *State v. Temple* (1906) 194 Mo. 228, 92 S. W. 494.

New Jersey. — *State v. Rosa* (1905) 72 N. J. L. 462, 62 Atl. 696.

New York. — *People v. Warren* (1852) 1 Park. Crim. Rep. 338.

North Carolina. — *State v. Nash* (1882) 86 N. C. 650, 41 Am. Rep. 472.

Oklahoma. — *Morris v. Territory* (1909) 1 Okla. Crim. Rep. 617, 99 Pac. 750, 101 Pac. 111.

South Carolina. — *STATE v. CORBETT* (reported herewith) ante, 328.

Texas. — *Ashton v. State* (1893) 31 Tex. Crim. Rep. 482, 21 S. W. 48; *Augustine v. State* (1899) 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; *Taylor v. State* (1900) 41 Tex. Crim. Rep. 564, 55 S. W. 961; *Keaton v. State* (1900) 41 Tex. Crim.

Rep. 621, 57 S. W. 1125; *Kelley v. State* (1901) 43 Tex. Crim. Rep. 40, 62 S. W. 915; *Lillie v. State* (1916) 79 Tex. Crim. Rep. 615, 187 S. W. 482.

Virginia. — *Vaughan v. Com.* (1821) 2 Va. Cas. 273.

Washington. — *State v. Robinson* (1895) 12 Wash. 491, 41 Pac. 884.

West Virginia. — *State v. Evans* (1890) 33 W. Va. 417, 10 S. E. 792.

The plea of former jeopardy where more than one person is assaulted or murdered at the same time by the same person rests upon the idea of identity of the two or more offenses, that each offense occurred during or in the same transaction or difficulty, and as the result of it. It is an ancient right which has been incorporated into all American constitutions, that no person shall, for the same offense, be twice put in jeopardy of his life or limb. In order, however, to entitle one to the benefit of, and to successfully invoke the protection of, this constitutional right, the facts in the case wherein the plea is interposed must be the same as in the charge wherein the defendant was placed in jeopardy. If no identity of offense exist, the plea will not be allowed. *Com. v. Anderson* (Ky.) *supra*.

II. Application of rule.

Murder of two persons.

The fact that the killing of two persons was so closely connected in point of time that it is impossible to separate the evidence relating to each of them would not necessarily make the killing of the two one act or one offense, and therefore a plea of former conviction of the murder of one person is not good as against a demurrer upon a prosecution for the murder of another person at the same time, although the testimony in the subsequent case will be the same as in the former case, and the same facts, circumstances, and matters urged against the defendant in the former trial will, in every respect, be the same that will be urged against him in the subsequent trial, the plea being defective because of its failure to state that the two persons were killed by

the same act and volition. *Jones v. State* (1895) 61 Ark. 88, 32 S. W. 81.

A plea of former acquittal of murder of one person upon a subsequent indictment for the murder of another person at the same time is demurrable, where it fails to allege that both homicides were produced by the same act of the person indicted. *State v. Rosa* (1905) 72 N. J. L. 462, 62 Atl. 696.

And in *State v. Evans* (1890) 33 W. Va. 417, 10 S. E. 792, the court held demurrable a similar plea which alleged that the crime charged against the defendant in the present indictment was the same felonious act charged against him in a former indictment for the murder of another person at the same time, and that the evidence whereby the state can or will attempt to prove the present indictment will be the same as that produced against him on the trial of a former indictment, where the facts, as stated in the plea, clearly establish that the offenses charged in the respective indictments were separate and distinct.

A plea of former jeopardy to an indictment for murder cannot be based upon the fact that, upon the trial of two consolidated indictments for two other murders, committed by defendant on the same day as the one charged in the indictment in question, he was found not guilty on the issue of insanity, which is the defense set up to such indictment. *Hotema v. United States* (1901) 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895.

In the following cases a conviction of the murder of one person was held not to be a bar to a prosecution for the murder of another person at the same time:

—where the killings were not simultaneous, and were not the result of one shot, but were the result of entirely different acts, *Bell v. State* (1915) 120 Ark. 530, 180 S. W. 186;

—where the defendant counseled and advised a man, who took another man with him, to commit robbery, and, in attempting to commit the

robbery, they killed two persons; and the court said that on the trial of the defendant for the murder of one of such persons, he could not have been convicted of the murder of the other, and that the two crimes, although committed at one time and by the same act, were entirely different in their elements, and the evidence required to convict in the one case was very different from that essential to a conviction in the other, *People v. Majors* (1884) 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486;

—where a father and son, in execution of a conspiracy to kill another, lay in wait for him, and, upon his approach with his father-in-law, the father shot and killed the father-in-law, and the son shot and killed the son-in-law, and both father and son were indicted for the murder of the father-in-law, resulting in the conviction of the father and the acquittal of the son, *State v. Vines* (1882) 34 La. Ann. 1079, 4 Am. Crim. Rep. 296. The court said that while the conspiracy and a malicious intent may have been common elements of both crimes, that was not sufficient to constitute identity of the crimes themselves, which comprised not only those elements, but also objective acts; and, further, that the two killings were distinct and different offenses, although both were done in execution of the same conspiracy.

In the following cases an acquittal of the charge of murdering one person was held no bar to a prosecution for murdering another at the same time:

—where two persons were shot and killed by separate shots in the same affray, *Com. v. Anderson* (1916) 169 Ky. 372, 183 S. W. 898;

—where the defendant and his brother-in-law lay in ambush, each armed with a gun, and shot and killed, by two distinct, but almost simultaneous, shots, two men riding along the highway, *Teat v. State* (1876) 53 Miss. 439, 24 Am. Rep. 708;

—where in the same affray a person shot and killed one person, and

by a second shot killed another person, *Morris v. Territory* (1909) 1 Okla. Crim. Rep. 617, 99 Pac. 750, 101 Pac. 111 (in this case it was contended that, as not more than thirty seconds elapsed between the killing of the two persons, the two killings constituted one transaction, and therefore an acquittal of the former was a bar to the prosecution for the latter; but it appeared that it was not the same shot that killed both parties, but that one was killed by the first or second shot fired by the defendant with a shotgun, while the second was killed by a shot fired by the defendant with a pistol, and the court said that the two killings were two separate offenses committed with different weapons);

—where two men were killed at the same time by a body of armed men, the defendant killing one of the decedents, while the other was killed by another member of the defendant's party, *Augustine v. State* (1899) 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77.

Assault upon two persons.

Treating as two different offenses assaults on two different individuals does not place the accused twice in jeopardy for the same offense, within the meaning of the Act of July 1, 1902 (32 Stat. at L. 692, chap. 1369, 7 Fed. Stat. Anno. 2d ed. p. 1141) § 5, even if these assaults occurred very near each other in one continuing attempt to defy the law. *Flemister v. United States* (1907) 207 U. S. 372, 52 L. ed. 252, 28 Sup. Ct. Rep. 129.

The acquittal of assault with intent to murder one person is not a bar to a prosecution for an assault with intent to murder another person, although both assaults were committed at the same time, since they constitute different offenses. *McNish v. State* (1904) 47 Fla. 66, 36 So. 175.

Nor is a conviction of an assault with intent to murder one person a bar to a prosecution for assault with intent to murder another person, although the two assaults grew out of the same difficulty between the parties. *Crocker v. State* (1873) 47 Ga. 568.

And in *Ashton v. State* (1893) 31 Tex. Crim. Rep. 482, 21 S. W. 48, holding the same, where a railroad porter successively struck, with an iron poker, two men outside a depot, after an altercation with them within it, the true test was stated to be that if the intent to kill the one was an intention formed and existing distinct from and independent of the intention to kill the other, the two assaults could not constitute a single offense, and there were held to be two separate assaults in the case at bar under such test.

And in *Fews v. State* (1907) 1 Ga. App. 122, 58 S. E. 64, where the counsel for the prisoner contended that, under the recognized construction of the provision of the Constitution that no person shall be put in jeopardy more than once for the same offense, the "same-transaction test" should be applied to the prisoner's plea of former jeopardy, with which contention the counsel for the state agreed, the court held that under such test the successive shooting of two different men was not the same transaction, so that the conviction of the assault with intent to murder in the case of the first was not a bar to the prosecution for a like offense against the second, saying that the assault upon each of them was separate, that they made no joint attack upon him, and that the intent to kill was directly against them individually, and that the fact that the interval between the two shootings was slight did not make the transactions identical.

A conviction of an assault and battery upon one person is not a bar to a prosecution for an assault and battery upon another person, committed during the same evening, at the same ball, during a period of excitement. *Greenwood v. State* (1878) 64 Ind. 250, 3 Am. Crim. Rep. 154.

An acquittal of assault upon, assault with intent to rob, and robbery of, one person is not a bar to a prosecution for similar offenses in relation to another person, although the offenses were committed at the same time, and the robbery was of the same

property which was in the charge of both of the persons assaulted. *Novak v. State* (1921) 139 Md. 538, 115 Atl. 853.

Likewise, an acquittal of an assault and battery upon one person is not a bar to a prosecution for assault upon another participant in the same affray, with intent to do great bodily harm less than murder. *People v. Ochotski* (1898) 115 Mich. 601, 73 N. W. 889.

And where a number of persons went to another's house with guns, horns, and pans, and marched around the house and, when about to leave, fired off the guns, and the latter thereupon fired a shot at them, and in the direction of the crowd, twice, in rapid succession, and two of them were shot, an acquittal of an assault and battery upon one of them is not a bar to a prosecution for an assault and battery upon the other, since to support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense—the same, both in fact and in law. *State v. Nash* (1882) 86 N. C. 650, 41 Am. Rep. 472.

The pointing of a pistol at two persons at the same time, with a demand for their property, constitutes a separate assault upon each and a separate robbery upon the person of each, for which an indictment in both cases can be maintained. *Keeton v. Com.* (1892) 92 Ky. 522, 18 S. W. 359.

A conviction of malicious shooting and wounding one person is not a bar to a prosecution for malicious shooting at, without wounding, another person at the same time and in the same difficulty or quarrel. *Baker v. Com.* (1898) 20 Ky. L. Rep. 879, 47 S. W. 864.

And this is so, although the defendant shot at both persons in the same difficulty, and wounded both by the same bullet, since the offenses were not included within one another, though resulting from the same act, but were separate and distinct offenses. *Com. v. Browning* (1912) 146 Ky. 770, 143 S. W. 407.

Two separate and distinct offenses are committed by one who shoots another and immediately thereafter points his revolver at a third person, so that his conviction of an assault upon the first is no bar to a prosecution for assault upon the second. *State v. Temple* (1905) 194 Mo. 228, 92 S. W. 494, 5 Ann. Cas. 954. In this case the court said that the test was that if, upon the trial of defendant for assaulting the first person, he could not have been convicted of the crime charged in a second information, though the jury were satisfied that the defendant assaulted the second person as charged, his former conviction for assaulting the first person is no bar to his prosecution for assaulting the second person.

The acquittal of the crime of mixing poison with flour, and causing it to be administered to one person with intent to kill him, is not a bar to a subsequent prosecution for mixing poison with flour and causing it to be administered to another person, with intent to kill him. *People v. Warren* (1852) 1 Park. Crim. Rep. (N. Y.) 338.

And where two persons are shot by the same discharge of a shotgun, the acquittal of the charge of shooting one of them is not a bar to a prosecution for shooting the other. *Vaughan v. Com.* (1821) 2 Va. Cas. 273.

Murder of one and assault upon another.

The acquittal of the murder of one person is not a bar to a prosecution for assaulting with intent to murder another person in the same affray. *State v. Standifer* (1837) 5 Port. (Ala.) 523.

And a plea to that effect, which alleges that the murder of which the defendant was formerly acquitted and the assault with intent to commit murder for which he was subsequently indicted were one and the same assault, and committed at one and the same time, is demurrable because of its failure to allege that both were committed by the same act, the allegation that the assaults were one and the same assault being merely a conclusion of law, rather than of a

fact. *Gunter v. State* (1895) 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632.

A plea of former acquittal of an assault with intent to kill a woman was adjudged bad upon demurrer in *McCoy v. State* (1885) 46 Ark. 141, upon a prosecution for the murder of the woman's husband in the same transaction or conflict, although the defense was the same in both prosecutions, namely, an alibi, the court saying that it was not by the same shot that the wife was wounded and the husband killed, and that there was no identity of accusation, that the injured persons were not the same, that the grade of punishment of the two offenses were different, that the indictments were not founded on the same physical act, and that their legal effect was different.

And in holding an acquittal of murder of the mother as no bar to a prosecution for an assault with intent to murder the daughter, the court in *Johnson v. State* (1880) 65 Ga. 94, said that even if the mother had been killed at the very time and place when and where the daughter was assaulted, it would not have been the same offense, and the plea of former jeopardy would hardly be held good; but the mother was killed at the house, and the daughter was assaulted at some distance therefrom, which put the case beyond doubt.

The acquittal of murder of one person is not a bar to a prosecution for assault with intent to murder, committed upon another person, whom the defendant shot at the same time as the other. *Kelley v. State* (1901) 43 Tex. Crim. Rep. 40, 62 S. W. 915.

And an acquittal of murder of one policeman is not a bar to a prosecution for an assault with intent to murder another policeman at one and the same time, where the offenses were accomplished by separate shots in quick succession, with a formed design as to each man. *People v. Stephens* (1921) 297 Ill. 91, 130 N. E. 459.

A conviction for assault with intent to rob the express messenger on a train is not a bar to a prosecution

for the murder of the fireman, in connection with the same train robbery. *Taylor v. State* (1900) 41 Tex. Crim. Rep. 564, 55 S. W. 961. In this case the court said that while the offenses were committed in the same transaction, that is, in the offense of robbing the train, they were so distinct in point of time and action as to constitute separate offenses.

And the same holding as in the preceding case was made in the companion case of *Keaton v. State* (1900) 41 Tex. Crim. Rep. 631, 57 S. W. 1125, involving the prosecution of another of the robbers engaged in the same train robbery.

III. Exceptions to rule.

An exception to the rule is made in some jurisdictions in cases where the assault upon, or the murder of, two or more persons, is committed by one and the same act; as, for example, by the single discharge of a firearm, or by one stroke of a knife or other similar weapon.

Thus, in *Clem v. State* (1873) 42 Ind. 420, 13 Am. Rep. 369, the court held good as against demurrer to an indictment for murder in the first degree for the killing of one person, a plea of former jeopardy alleging that the defendant had been indicted for murder in the first degree for killing another person at the same time, and had been convicted of murder in the second degree, thereby acquitting him of the crime of murder in the first degree, and that the crime charged against the defendant in the first indictment, of which he was tried and acquitted, was identical in all its parts, incidents, and circumstances with the crime charged in the second indictment, and that the evidence whereby alone the state can or will attempt to support and prove the second indictment is the same and in no wise different from that employed and produced against the defendant upon the trial of the first indictment. This plea was held to state in effect that the same act caused the death of both persons for whose killing the defendant was separately indicted, and was sustained

under the rule, held to have been established by the authorities, that the killing of two or more persons by the same act constitutes but one crime, and that the state cannot indict the guilty party for killing one of the persons, and, after a conviction or acquittal, indict him for the killing of the other, because it cannot divide that which constitutes but one crime and make the different parts of it the bases of separate prosecutions. The court said that where, by the discharge of a firearm (the case in question), or a stroke of the same instrument, an injury is inflicted upon two or more persons, or death is produced, there is but one crime committed.

And in *Sadberry v. State* (1898) 39 Tex. Crim. Rep. 466, 46 S. W. 639, where it appeared that the defendant, on account of some indignities heaped upon him during the day by some fishermen, approached their tent at night with a loaded shotgun while they were seated around the camp fire, and fired one shot at them, wounding four of them, it was held that the defendant's conviction of assault with intent to murder, committed by shooting one of them, was a bar to a prosecution for the same offense in relation to another of them. This case, unlike the great majority of the cases, makes a distinction between a plea of former conviction and former acquittal, and the opinion states that the doctrine followed in the case at bar is the well-settled rule in Texas, and cites in support of its holding the cases of *Simco v. State* (1880) 9 Tex. App. 338, and *Wright v. State* (1884) 17 Tex. App. 152. The first case cited states the difference between the defense of former conviction and former acquittal as follows: "There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict*, notwithstanding the immense amount of dictum and loose expression to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are suscep-

tible of, and must be sustained by, the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it, be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A, B, and C, taken at the same time or in one transaction, and he be tried on the first for the theft of A's horse, and the state fails from misnomer, or the defendant, by proving A's consent, should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases would not convict in the former. . . . But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to conviction on the other two indictments? Clearly so. And why? Because the transaction—the taking of the three horses at the same time—would constitute but one offense in law, . . . and the plea would be good upon the strength of, and by virtue of, another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once. . . . Here is where the doctrine of carving would come in and support the plea." The second case sets out this distinction in practically the same words.

And in the case of *Taylor v. State* (1900) 41 Tex. Crim. Rep. 564, 55 S. W. 961, where a former conviction was held no bar, because the offenses, though committed in the same transaction, that is, in robbing a train, were so distinct in point of time and action as to constitute separate offenses, the court said: "It is conceded that there is a distinction made in our authorities between a former acquittal and a former conviction growing out of the same transaction; that the principle of carving applies with more force to a former conviction

than to an acquittal,—as, where a number of cattle belonging to different owners are stolen at one and the same time and place, a party may be charged by distinct indictments for thefts of the cattle from various owners, and an acquittal as to one will not bar a prosecution alleging theft from another owner, but a conviction for theft from one owner will bar a prosecution for theft from another owner, committed at the same time and place.”

It would appear from the report of *Lillie v. State* (1916) 79 Tex. Crim. Rep. 615, 187 S. W. 482, that the court in that case was of the opinion that if two persons were killed or injured by the same shot, a conviction of the murder or assault of one of them would be a bar to a prosecution for the murder or assault of the other. In this case the defendant shot three distinct times and wounded his wife and killed a little girl, and was convicted of an assault with intent to murder his wife, and pleaded such former conviction upon being indicted for murdering the girl. The trial court refused a request to charge that if the jury believed from the evidence that the girl was shot in the same transaction in which the defendant's wife was shot, they should acquit him. This request was held to be properly refused. But the court, in response to another request, charged that unless the jury believed beyond a reasonable doubt that the shot that killed the girl was a separate and distinct shot from that which wounded the wife, that they should acquit the defendant. The appellate court said that the fact that the defendant killed the girl on the same occasion on which he shot at his wife would not make it the same transaction, as the shot that killed the girl was a separate and distinct shot from that which struck the wife, and held that the requested charge given by the trial court submitted the defendant's plea of former conviction, and that he got the benefit of such plea by such charge, and affirmed the conviction.

Where one wounds two persons in

the same affray at the same instant of time, with the same knife, and with the same stroke thereof, a conviction of assault and battery on one of them is a bar to a prosecution for assault and battery upon the other. *State v. Damon* (1803) 2 Tyler (Vt.) 387. The court said that this was not a question between either of the persons injured by the assault and battery and their assailant,—redress has been or may be obtained by them by private actions,—but it is a question between the government and its subjects, and the defendant, having committed but one offense against the government by the single act of wounding two of its citizens, cannot, after being convicted of the assault as to one of them, be held again to answer the assault as to the other.

And in *Com. v. Veley* (1916) 63 Pa. Super. Ct. 489, the former acquittal of the defendant of the charge of involuntary manslaughter in causing the death of two women by drowning, upon the breaking of a dam, by reason of his gross negligence in the management and control of such dam, was held a bar to a prosecution of the defendant for the crime of involuntary manslaughter in causing the death of another woman likewise drowned at the same time, and the defendant, being under arrest under the second charge, was held to be entitled to be released on habeas corpus upon such plea of *autrefois acquit*. The court said: “There is identity of person, causal act, evidence, and time in regard to the cases in which the defendant was acquitted, and the one which he is again called to answer. . . . When the record shows that, as here, the alleged facts are identical in each case, and on the whole record, the trial judge would be obliged to direct a verdict of acquittal, the defendant should not be again subjected to the expense of another trial for the same cause, when the result is made certain by our decisions. . . . Where a party is accused of a crime, and acquitted by the verdict of a jury, such acquittal will be a complete protection against any subsequent prosecution for the

same offense, provided the first indictment was such that he could have been lawfully found guilty upon it. This well-settled rule, while it shields the citizen against the peril of repeated prosecutions, is broad enough for all the purposes of public justice.

. . . The records present the case of several persons losing their lives through the same disaster, . . . which, in each of these prosecutions, is alleged to have been caused by the negligence of the relator through defective construction of the dam. The negligent act, if any, which caused the breaking of the dam, was the act which caused the deaths of the three women named. There was but one causal effect, though the result affected many parties. . . . The criminal prosecution is for the injury done the commonwealth, and not for the injury done to the individual, who may, if entitled, obtain redress through a civil action. Where there is but one act of cause of injury, or death of a number of persons, there is but one injury to the commonwealth, but where the acts or causes are separate, they are separate injuries to the peace and dignity of the commonwealth."

In *Gunter v. State* (1895) 111 Ala. 23, 56 Am. St. Rep. 17, 20 So. 632, holding a plea of former acquittal demurrable because of its failure to allege that both assaults were committed by the same act, the court said: "It is the settled rule of this court that a defendant cannot be lawfully punished for two distinct felonies growing out of the same identical act, and where one is a necessary ingredient of the other; that a series of charges cannot be based upon the same offense, and subdivided into two or more indictable crimes. So, it has been held that, where the same act of unlawful shooting resulted in the death of two persons, an acquittal or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other, for the reason that the killing constituted but one crime, which could not be subdivided and made the basis of two prosecutions. . . . And

again, where one blow produces two separate assaults and batteries on two different persons, a conviction of one may be pleaded in bar to an indictment for the other, for the reason that the defendant cannot be punished for two distinct assaults growing out of the same identical act. . . . It must not be overlooked, however, that the same individual may, at the time and in the same transaction, commit two or more distinct criminal offenses, and the acquittal of one will not bar punishment for the other, as if, in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another. In such case, the two results, the killing of the one and the wounding of the other by different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately for each."

Some of the previously cited cases, holding that under the particular circumstances the former conviction or acquittal was no bar, employ language from which the inference may be drawn that where the two assaults or homicides are committed by the same shot, or by one stroke of the same weapon, a conviction or acquittal of one is a bar to a prosecution for the other.

So, in holding a plea of former acquittal bad, the court, in *McCoy v. State* (1885) 46 Ark. 141, said that the two persons were not wounded and killed by the same shot, and that the indictments were not founded upon the same physical act.

And a plea of former conviction was held defective in *Jones v. State* (1895) 61 Ark. 88, 32 S. W. 8, because of its failure to allege that the two persons were killed by the same act and volition.

And a former conviction was held no bar in *Bell v. State* (1915) 120 Ark. 530, 180 S. W. 186, because the killings were not the result of one shot.

The court said in the case of

People v. Ochotski (1898) 115 Mich. 601, 73 N. W. 889, that the prosecution was not for the same offense within the meaning of the constitutional provision against trying a person for the same offense after acquittal upon the merits; that while the two offenses grew out of the same affray, no claim was made that the two persons were injured by the same blows; that it was the same transaction, but not the same volition; that there is a difference between one volition and one transaction.

And, in denying the contention that a former acquittal was a bar, the court, in *Morris v. Territory* (1909) 1 Okla. Crim. Rep. 617, 99 Pac. 750, 101 Pac. 111, stated that it was not the same shot that killed both parties.

And in *Augustine v. State* (1899) 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77, the court said that the contention that a former acquittal was a bar might be urged with some force if the killing of both parties was done by one and the same act; that is, if the proof showed that but one shot was fired and it caused the double death, then it might be a good plea in bar.

The court said in *Keaton v. State* (1900) 41 Tex. Crim. Rep. 621, 57 S. W. 1125, that "the true criterion in pleas of this character is, if the act for which defendant is being prosecuted is the same violence or act relied upon in the case wherein he was previously convicted, or if the two offenses constituted but one continuous transaction, in which appellant was the actor, this prosecution could not stand; but if the acts were distinct and separate transactions, and the prosecution is maintained to conviction against defendant in one, this fact cannot be pleaded in bar of a subsequent prosecution for a different offense by sheer force of the fact that the last offense occurred at one and the same time."

And in *State v. Evans* (1890) 33 W. Va. 417, 10 S. E. 792, holding a plea of former acquittal demurrable, the court said: "A case can be conceived where such a plea might be held good. For example, the engineer

of a railway train might be charged with negligently and feloniously causing the death of one passenger in a wreck, and, being tried and found by the jury entirely blameless for the accident, such acquittal might, perhaps, constitute a perfect defense to a subsequent indictment for killing another passenger, who was on the same train. But this case presents no such question. The killing was the result of a separate act in each case, committed under degrees of provocation not necessarily identical, accompanied by apprehensions not necessarily the same. In fine, every element to constitute two separate offenses appears on the face of the plea to exist in this case, and therefore the demurrer was properly sustained."

But in *Com. v. Browning* (1912) 146 Ky. 770, 143 S. W. 407, the former conviction was held no bar although the two assaults were committed by the same shot. And see *Keeton v. Com.* (1892) 92 Ky. 522, 18 S. W. 359, *supra*. And in *Vaughan v. Com.* (1821) 2 Va. Cas. 273, it was held that, assuming that it was a shot by the same discharge of a shotgun, the acquittal of the charge of shooting one of them is not a bar to a prosecution for shooting the other.

And in the reported case (*STATE v. CORBETT*, ante, 328), where the defendant fired several shots in quick succession at three men who were making a joint attack upon him, it is held that, assuming that it was a single act, the killing of the three constitutes three separate offenses, and the court says that a single murderous shot may constitute a separate offense as to each human being whose life is cut short. Another view of this question is held to lead to the same result, that is, the view that the constitutional protection from being put twice in jeopardy makes the test the identity of the offense, and not of the act.

And in *People v. Warren* (1852) 1 Park. Crim. Rep. (N. Y.) 338, holding the acquittal of poisoning one person no bar to a prosecution for poisoning another, the court said that, assuming that the defendant by the

v. Castle, 76 Conn. 447, 56 Atl. 854; Keniston v. Mayhew, 169 Mass. 166, 47 N. E. 612; Stewart's Estate, 147 Pa. 383, 23 Atl. 599; Clark v. Mack, 161 Mich. 545, 28 L.R.A.(N.S.) 479, 126 N. W. 632; Welsh v. Crater, 32 N. J. Eq. 177; Jones v. Oliver, 38 N. C. (3 Ired. Eq.) 369; Holloway v. Holloway, 5 Ves. Jr. 399, 5 Revised Rep. 81, 25 Eng. Rul. Cas. 687; Bullock v. Downes, 9 H. L. Cas. 1, 11 Eng. Reprint, 627; Re Bowers, 109 App. Div. 566, 96 N. Y. Supp. 562; Fargo v. Miller, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003; Rand v. Butler, 48 Conn. 293; Tingier v. Woodruff, 84 Conn. 684, 81 Atl. 967.

The term "next of kin" as used in the will should be construed as the persons entitled to take under the Statute of Distributions of the state of Connecticut.

Hinckley v. Maclarens, 1 Myl. & K. 27, 39 Eng. Reprint, 591; Swasey v. Jaques, 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758; Fargo v. Miller, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003; Keniston v. Mayhew, 169 Mass. 166, 47 N. E. 612; May v. Lewis, 132 N. C. 115, 43 S. E. 550; Pinkham v. Blair, 57 N. H. 226; Schouler, Wills, 5th ed. § 543; L. T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411; Bolinger v. Beacham, 81 Kan. 746, 106 Pac. 1094; Davies v. Davies, 55 Conn. 319, 11 Atl. 500; Heath v. Bancroft, 49 Conn. 220; Raymond v. Hillhouse, 45 Conn. 467, 29 Am. Rep. 688; Nichols v. Haviland, 1 Kay & J. 504, 69 Eng. Reprint, 558, 1 Jur. N. S. 891.

So far as the ultimate rights of the litigants are concerned, it makes no essential difference whether the will be construed so as to vest in Lizzie Benham one third of the trust fund held for her benefit, or whether she is excluded, because the same beneficiaries would inherit through her as would take in the event that she is excluded.

Rand v. Butler, 48 Conn. 293; Thomas v. Castle, 76 Conn. 447, 56 Atl. 854; Nicoll v. Irby, 83 Conn. 530, 77 Atl. 957.

Mr. William H. Comley, Jr., for defendant Close.

Mr. Edward J. McManus for defendant administrator of estate of Lizzie Benham.

Wheeler, Ch. J., delivered the opinion of the court:

Those provisions of the will of Junius N. Benham which we are

asked to construe gave two thirds of his estate in trust to pay the net income therefrom equally to his daughters, Mary B. Close and Lizzie Benham, during their lives. Upon the decease of either, one half of the two thirds was given to the issue of the deceased daughter, equally and per stirpes; and, in case the deceased daughter left no issue, this share was given to the testator's "next of kin," to be divided among them equally per stirpes. Lizzie Benham died without issue, and the share whose income she had enjoyed vested in the next of kin of the testator.

The first question for our decision is: When did the title to this share vest—at the testator's death, or at the death of the life tenant? The second: Who are the next of kin, the nearest blood relatives, or those entitled to take under the statutory distribution of intestate estates? And the third: Is the estate of Lizzie Benham entitled to a one-third part of this share?

1. The gift to the "next of kin" was one to a class. We have uniformly held that, unless the will sufficiently expresses a contrary intent, a limitation over, after a life estate, to the issue of the life tenant, and, failing issue, to the heirs, or heirs at law, or to the children or grandchildren of the testator, or to children of another than the testator, are gifts to a class, and vest in point of right upon the testator's death, although their right of possession is postponed until the termination of the life estate.

Will-remainder to next of kin—when vests.

We have adopted this rule in the belief that it leads to the early vesting of estates, and will carry out the probable intent of the testator, where the will indicates no contrary intent.

Norton v. Mortensen, 88 Conn. 28, 89 Atl. 882; Allen v. Almy, 87 Conn. 517, 89 Atl. 205, Ann. Cas. 1917B, 112; Bartram v. Powell, 88 Conn. 86, 89 Atl. 885; Wilde v. Bell, 86 Conn. 610, 87 Atl. 8; Nicoll v. Irby, 83 Conn. 530, 77 Atl. 957. This ruling is equally applicable to

every class gift, and hence to the gift to "next of kin." Authorities elsewhere so hold with marked unanimity. Note to Tatham's Estate, Ann. Cas. 1917A, 855, 859.

This will, read in the light of the circumstances surrounding the testator, does not indicate in any particular an intention of the testator to postpone the vesting of the estate until the termination of the life estate. And we have expressly held that the creation of the life estate is insufficient to base thereon an implication that the testator intended such postponement. *Thomas v. Castle*, 76 Conn. 452, 56 Atl. 854.

If "next of kin" designates a class, and the title to this share vests in the class at the death of the testator, our next question is: What persons are included within this term? It is used in the law with two meanings: (1) The nearest blood relations according to the law of consanguinity; and (2) those entitled to take under the statutory distribution of intestate estates. We are to ascertain in which sense it is used in this will. Of course, the intention of the testator, adequately expressed, will determine. Where this is not manifest, some courts adopt the first, and some the second, meaning. The greater number of the cases attribute to this term, when used without qualifying words, the meaning of nearest blood relatives. This is the construction now adopted by the courts of Great Britain, Massachusetts, and Michigan. *Elmsley v. Young*, 2 Myl. & K. 780, 39 Eng. Reprint, 1142; *Swasey v. Jaques*, 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758; *Clark v. Mack*, 161 Mich. 545, 28 L.R.A. (N.S.) 479, 126 N. W. 632. While in Ohio, New Hampshire, and North Carolina the term is held to designate those entitled to take under the Statute of Distributions.

In *Godfrey v. Eppele*, 100 Ohio St. 447, 11 A.L.R. 317, 126 N. E. 886, a life estate was given to the wife, and after her death the estate remaining was directed to be "equally divided between my and

my wife's nearest kin." The court held that nearest of kin meant those entitled to take under their Statute of Distribution. Nearest of kin and next of kin are synonymous. The opinion of Chief Justice Nichols expresses our thought as to the meaning of "next of kin" in a will where there are no qualifying words: "In a primary sense, some authors say these expressions indicate the nearest degree of consanguinity. . . .

If it were followed, it would mean that, if a married man by his last will should provide simply that his property should pass to his nearest of kin, his wife, should she elect to take under the will, would be barred from all participation in the estate; and yet it is indisputable that, if the married man in whose home domestic felicity reigned were asked as to his conception of the personnel of his nearest of kin, his certain reply would be, 'My wife.' The primary sense, it is therefore fair to say, is not by any means the universal, or even popular, sense of the term.

. . . . There is a primary rule, applicable to the construction of wills, that the heir-at law shall not be disinherited by conjecture, but only by express words, or necessary implication. . . . We do not feel inclined to favor a construction unless it be a necessary one, against all principles of natural justice and against the well-settled policy of inheritance as provided by our law. We believe that the children of a testator's deceased brothers and sisters have just as much claim on his bounty as his living brother and sister would have. . . . Having the choice, therefore, of construction, we are disposed to adopt the interpretation that appears to us to be most consonant with the principles of natural justice, and which conforms to the well-settled legislative policy of the state, as well as the later judicial construction given the same phrase when found in our statutes." *Ibid.*; *Pinkham v. Blair*, 57 N. H. 245; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550.

If "next of kin" be construed to

mean nearest blood relatives, then the right of representation is denied, and children take to the exclusion of wife or husband. In common speech and general understanding, next of kin would include the children of a deceased child and the wife and husband. We are persuaded that it will carry out the testator's intent more often if we hold that this term, in the absence of qualifying words, was intended by the testator to include those who fall within the designation in the general speech and understanding of men, rather than in their primary and original sense as the nearest in blood. If we construe this term in connection with the other clauses of the will, as read in the light of the circumstances surrounding the testator, we find strong corroboration of his intention not to exclude the child of his deceased son. The will gives one third in fee simple to an only son, Frank N. Benham, who died February 13, 1918; the use for life of two thirds to two daughters equally, with remainder to their issue, and upon the decease of either to the testator's next of kin.

Here is the manifest intent of the testator to give his property to his blood, one third to his son outright and one third to the issue of each daughter after the mother's life use. And there is also the manifest intent to give equal shares to the son and the issue of the two daughters. If the right of representation is denied, and Lizzie is held to be one of the next of kin of the testator at his death, she may give her interest to whomsoever she will, and the intention of the testator will thus be defeated. If Frank N. Benham survived the testator's daughters, he would thus have had a two-thirds share of this estate; and if Mrs. Close survived both Frank and Lizzie, she would have had a two-thirds share of this estate, and if Lizzie survived Frank and Mrs. Close, she would take a one-third share of this estate. This would destroy the scheme of equality of the will.

Would it be natural for him to intend to make it possible for Lizzie to exclude his grandchildren from one third of his estate? The testator must be presumed to have known our Statute of Distributions and to have made his will with reference to that law. Its division must be regarded as the policy of our law. The gift to the issue and to the next of kin, equally and per stirpes, is significant of the intention of the testator to recognize the right of representation in his only grandson.

In *Heath v. Bancroft*, 49 Conn. 220, we expressed the view that, in the absence of words indicating a contrary intent, a will is to be interpreted as intending to distribute an estate per stirpes, and in accordance with the Statute of Distributions: "A further consideration in favor of the per stirpes rule is that this rule has for two centuries commended itself to the judgment of the community as one of justice, and has been and is the rule applied by the law in case of intestate estate. In these circumstances, this rule will be applied in the construction of a will, where the language of the will leaves the intent of the testator in serious doubt."

In the absence of an indicated intent, the policy of the law requires that the distribution to the next of kin should follow the statutory rule of distribution. We have not heretofore decided the point; the better reason appears to us to construe "next ^{-who are next} of kin" to mean ^{of kin.}

those who would be entitled to take under our Statute of Distributions.

The next of kin having been determined to be those who would take under the Statute of Distributions at the death of the testator, it remains to ascertain who the next of kin were. Mrs. Close, who survived her sister Lizzie, and Frank N. Benham, who was her brother and left issue in his son, F. Nelson Benham, admittedly were of the next of kin. Whether Lizzie Benham,

the testator's daughter, was included in this class depends upon whether or not the testator so intended. In view of the relationship of Frank N. Benham and of Mrs. Close to Lizzie, and of the fact that she died intestate, it will make no practical difference to them or their issue, as to the share in the one third of which Lizzie enjoyed the life estate, whether she is included in or excluded from this class of the next of kin, since the same beneficiaries would inherit through her as would take if she were excluded.

The question, however, is one which we must determine. When the testator gave to Lizzie a life use, with remainder to her issue, he indicated his intention that she should have no share in or disposition of the remainder; and the subsequent provision that, in the event of her decease, the next of kin should take, was not intended to include her among the next of kin, and so to

take a share of this interest upon the death of the testator should not be presumed to have made her a beneficiary in the share of which she had the life use upon failure of her issue to take, when at the very time he gave to her issue the remainder after her life estate. The language of the will gives to the next of kin on Lizzie's death, and this assumes that they shall be those living at her death. The testator should not be assumed to have made a disposition so unnatural; for, if he had intended that Lizzie should be one of the next of kin, he might have accomplished this, as we pointed out in *Nicoll v. Irby*, 83 Conn. 535, 77 Atl. 957, by a direct devise, or to such persons as Lizzie should by will appoint.

Wherever a life use is given, with remainder over to his issue, and, failing such, to the testator's children, heirs, or next of kin, or other class, we think it must be presumed that the testator intended to exclude the life tenant from this class, unless a contrary intent is manifest in the language of the will. In this

case we do not have to rest this question upon this presumption. The language of the will discloses a plain purpose on the part of the testator, as we have observed before, to keep his estate in his own blood. If Lizzie be held to be one of the next of kin, she could at any time have transmitted it by will or descent; but she could not herself enjoy it. And her power of transmission might be exercised in favor of strangers to the exclusion of the blood of the testator.

The testator, as we hold, intended by the gift over to his next of kin to exclude Lizzie from that class. Practically the same question arose in *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957, where a life estate was given to a brother, W., who was next of kin to the testator, and the remainder to any children begotten of W. who might survive him, and if he died without children the remainder should go to "my own heirs" in equal shares. We held that the testator's own heirs were to be determined as of the testator's death, and that by his own heirs he intended to designate those persons who should take at W.'s death, and that he intended to exclude from this class the life tenant, W. The case is of controlling authority upon this question, because its facts are so similar to the facts of this case.

The administrator on Lizzie Benham's estate relies upon *Rand v. Butler*, 48 Conn. 293, and *Thomas v. Castle*, 76 Conn. 447, 56 Atl. 864. The distinction between these cases and *Nicoll v. Irby*, supra, was definitely pointed out by Mr. Justice Thayer in *Nicoll v. Irby*, supra, and this difference was further illustrated in *Wilde v. Bell*, 86 Conn. 610, 87 Atl. 8. Unless a contrary intention is found in the will, when read in the light of its circumstances, this construction of similar language in these two cases must be regarded as of binding authority.

The Superior Court is advised that the plaintiff trustee should deliver the share of which Lizzie Ben-

—child life
tenant as next
of kin.

ham enjoyed the life use to the persons and in the proportion as follows: To Mrs. Mary B. Close a one half, and to F. Nelson Benham, administrator on the estate of Frank N. Benham, the remaining one half,

thus answering question 2 in the affirmative.

No costs will be taxed in this court.

In this opinion the other Judges concur.

ANNOTATION.

Right of devisee of precedent estate to take under limitation over to heirs or next of kin of the testator.

- I. Introduction, 356.
- II. Time for ascertaining membership of class, 356.
- III. Exclusion of first taker from class, 357.

I. Introduction.

This annotation supplements an earlier one on the same point in 13 A.L.R. 615, which discusses the questions: First, whether the circumstance that the devisee of the particular estate is an heir or next of kin supports the inference of an intention that the members of the class to take under the gift over are to be ascertained upon the termination of the particular estate, rather than at the time of testator's death; and second, whether, where the class is to be ascertained at the death of the testator, the first taker is to be excluded from taking as a member of the class.

II. Time for ascertaining membership of class.

(Supplementing annotation in 13 A.L.R. 616.)

The rule, which in the earlier annotation is stated to be generally recognized, that the circumstance that the first taker is one of the class to whom the limitation over is made, or that the first takers are the sole members of such class, is not of itself sufficient to vary the rule that a class described as testator's heirs or next of kin, to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator, is also supported by the reported case (*CLOSE v. BENHAM*, ante, 351), *Buzby's Estate* (1922) — N. J. Eq. —, 115 Atl. 909, and *Baugham v. Trust*

Co. of Washington (1921) 181 N. C. 406, 107 S. E. 431.

Although not of itself sufficient to overcome the prima facie meaning of the words of limitation, the fact that the first taker is among the members of the class or the sole member thereof at the time of testator's decease may be taken into consideration in ascertaining the testator's real intention. See, in addition to the decisions cited to this point in 13 A.L.R. 620, *Lee v. Roberson* (1921) 297 Ill. 321, 130 N. E. 774, and *American Builder's Corp. v. Galligan* (1921) — N. J. Eq. —, 114 Atl. 329.

In *Lee v. Roberson* (1921) 297 Ill. 321, 130 N. E. 774, where testator, after a devise to his son Nathaniel, further provided that, should such son "die without heirs, the estate which I have willed to him as above stated, it is my will shall be equally divided with my living heirs," it was held that, it being apparent that the testator did not use the word "heirs" in its technical sense, because it would not be possible for Nathaniel to die without heirs if the testator died leaving "living heirs," as his heirs might also be the heirs of Nathaniel, the term "living heirs" must be taken as meaning "living descendants;" that it was clear that the testator did not intend to include his son Nathaniel within the designation; and that it referred to descendants living at the death of Nathaniel.

In *American Builder's Corp. v. Galligan* (N. J.) supra, where testator gave his residuary estate to his brothers and sisters during the natural life of each and of the survivor of them, and after the decease of the last survivor "to such persons

as would by law inherit the same," it was held that the natural deduction from the language used was that the remaindermen were to be ascertained at the termination of the precedent estate, rather than at the death of the testator, as it could not reasonably have meant that those for whom he had expressly provided for life were to be the remaindermen as well, such inference being also supported by testator's use of the word "would," importing futurity or contingency, and the fact that the testator used the phrase "such persons as would by law inherit," instead of the technical legal words "heirs at law," or "next of kin."

The foregoing decision was held controlling in *Buzby's Estate* (1922) — N. J. Eq. —, 115 Atl. 909, in which the form of gift was substantially the same.

III. Exclusion of first taker from class.

(Supplementing annotation in 13 A.L.R. 620.

The statement made in the reported case (*CLOSE v. BENHAM*, ante, 351),

that wherever a life use is given with remainder over to the life tenant's issue, and, failing such, to the testator's children, heirs, or next of kin, or other class, it must be presumed that the testator intended to exclude the life tenant from this class unless a contrary intent is manifest from the language of the will, seems to be at variance with the holding of the cases reviewed in the earlier annotation, that the circumstance that one who is a member, or the sole member, of the class to which the limitation over is made, is the first taker, is not of itself sufficient to prevent the first taker from participating.

It is to be noted, however, that the decision in *CLOSE v. BENHAM* is not rested upon this presumption, but upon an intention disclosed by the will to keep the testator's estate in his own blood, which would have been defeated by giving the life tenant the power to transmit by will or descent a remainder which she could not herself enjoy. E. S. O.

MRS. CORA J. HARPER

v.

MRS. AMANDA LEE BATTLE.

North Carolina Supreme Court—November 17, 1920.

(180 N. C. 375, 104 S. E. 658.)

Real property — parol purchase — acceptance of check — Statute of Frauds.

1. The receipt and collection by indorsement of a check tendered in payment of real estate purchased by parol and which identifies the property bought, is sufficient to take the transaction out of the Statute of Frauds.

[See note on this question beginning on page 363.]

— effect of execution of deed.

2. The preparation and execution of a deed to convey property contracted for by parol, and leaving it with the grantor's attorney for delivery, is suf-

ficient to take the transaction out of the Statute of Frauds.

[See 25 R. C. L. 643.]

Trial — abandonment of contract — question for jury.

3. The question of abandonment of

contracts is, on conflicting evidence, for the jury.

Rescission — contract for sale of real estate — disagreement as to payment of taxes.

4. A disagreement between the parties to a contract for purchase and sale of real estate, as to which shall pay the taxes for a certain year, does

not affect the existence or validity of the contract.

Specific performance — delay in enforcing — effect on right to rents and profits.

5. Mere delay of purchaser to enforce specific performance of a contract to sell real estate does not deprive him of the right to rents and profits from the time the contract required the conveyance to be made.

CROSS APPEALS from a judgment of the Superior Court for Durham County (Calvert, J.) in favor of plaintiff in an action brought to compel specific performance of a contract for sale of a house and lot; defendant appealing from the judgment in favor of plaintiff; and plaintiff appealing from so much of the judgment as refused to allow rents claimed by her. *Affirmed on defendant's appeal. Modified on plaintiff's appeal.*

Statement by Hoke, J.:

The action is for specific performance of a contract of sale of a house and lot in Durham, North Carolina, and there was evidence on the part of plaintiff tending to show a definite contract in writing on part of defendant to sell and convey this house and lot on Watts street in Durham, North Carolina, at the price of \$8,650, the papers to be formally prepared and take effect as of June 1, 1918, and breach of same by defendant.

There was denial of any valid contract, defendant contending that no sufficient writing had been given, and defendant alleged further and offered evidence tending to show an abandonment by the parties of any contract they may have made concerning the property before action instituted. On issue submitted there was verdict for plaintiff.

Mr. James S. Manning, for defendant:

The evidence was incompetent until after a written memorandum sufficient under the Statute of Frauds was offered.

Gulley v. Macy, 84 N. C. 434; Winders v. Hill, 144 N. C. 617, 57 S. E. 456; Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910; Wade v. Newbern, 77 N. C. 460; Jordan v. Greensboro Furnace Co. 126 N. C. 143, 78 Am. St. Rep. 644, 35 S. E. 247.

The check given in part payment of the property was not a sufficient memorandum, nor was the property

sufficiently described to be aided by parol.

Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1; Murdock v. Anderson, 57 N. C. (4 Jones Eq.) 77; Modlin v. Roanoke R. & Nav. Co. 145 N. C. 218, 58 S. E. 1075; Carson v. Ray, 52 N. C. (7 Jones L.) 609, 78 Am. Dec. 267; Speed v. Perry, 167 N. C. 122, 83 S. E. 176.

Mr. W. J. Brogden also for defendant.

Messrs. McLendon & Hedrick and R. P. Reade for plaintiff.

Hoke, J., delivered the opinion of the court:

It is chiefly urged for error on the part of the defendant, that there was no sufficient evidence of a written contract to convey on her part within the effect and meaning of the Statute of Frauds; and, second, that on the entire evidence, if believed, there was an abandonment of the contract, and the court should have so instructed the jury. But, in our opinion, neither position can be sustained on the record presented. In reference to the first objection the pertinent facts in evidence tended to show:

That in early part of 1918 defendant had agreed by parol to sell to plaintiff her house and lot in the city of Durham at the price of \$8,650, \$1,000 to be paid in cash, and the remainder evidenced and secured by notes and deed of trust on the property, the papers to be prepared and to take effect as of June 1 of said year. That on March

plaintiff drew a check in favor of
defendant for \$50 in terms as fol-

Durham, N. C., March 7, 1918.
The Fidelity Bank:
to the order of Mrs. Lee
\$50, fifty and no/100 dollars.
on Watts street house.
[Signed] Mrs. J. E. Harper.

This check was collected by
defendant, her written indorsement,
"Lee Battle," having been
presented and entered on the check for
its purpose.

Defendant further appeared by the ad-
vocate of defendant's answer, put
in evidence, that, after making the
agreement to sell the house
in question, "defendant, on
about June 1, 1918, executed
a deed for the property described
in the complaint, and delivered the
deed to her attorney at Durham,

North Carolina, and at the same
time defendant had her attorney
execute a deed of trust describing
the property and notes, all bearing
date June 1, 1918, for plaintiff and
defendant to execute," etc. On
these facts our decisions are to the
effect that either the check given
in part payment on
the bargain, col-
lected by defend-
ant through her
written indorse-
ment thereon in which the
property is described as the "Watts
house," or the written deed,
conveying the property, formally
prepared by de-
fendant, and left
with her attorney
for delivery, on receipt of the
check as agreed upon, is a suffi-
cient memorandum in writing with-
out the intent and meaning of the
Statute of Frauds, and this excep-
tion of defendant must be overruled.

See *McPhail*, 173 N. C. 238, 91
S. E. 947; *Vinson v. Pugh*, 173 N.
C. 91, 91 S. E. 888; *Flowe v. Hart-*
man, 167 N. C. 448, 83 S. E. 841;
Smith v. Smith, 179 N. C. 553, 103

S. E. 14; *Lewis v. Murray*, 177 N.
C. 17, 97 S. E. 750; *Bateman v.*
Hopkins, 157 N. C. 470, 73 S. E.
133, Ann. Cas. 1913C, 642. In
reference to the deed, it was held
in *Vinson v. Pugh*, 173 N. C. 190, 91
S. E. 838, that "where a vendor
of lands has executed a deed recit-
ing the consideration and expressed
in conformity with a parol contract
of sale theretofore made, and has
given the deed to his agent to be
delivered up on payment of the
agreed purchase price, it is a suffi-
cient writing within the meaning of
the Statute of Frauds."

And on the sufficiency of the de-
scription as contained in the check
the cases of *Norton v. Smith* and
Lewis v. Murray, and the numerous
authorities therein cited, show that
the same is a full compliance with
the statutory requirements on the
subject.

The second objection is without
merit. While there is much evi-
dence on the part of the defendant
tending to show an abandonment of
the contract by the parties, there is
evidence for the plaintiff to the con-
trary, and these opposing views
were submitted to the jury on the
issue as to aban-
donment, and they
have determined the
matter for the
plaintiff. Trial—abandon-
ment of contract
—question for
jury.

The clear and correct
charge of his Honor is in full ac-
cord with our decisions on the sub-
ject, and we find no reason for dis-
turbing the verdict of the jury on
the issue. *Robinett v. Hamby*, 132
N. C. 353-356, 43 S. E. 907, citing
Miller v. Pierce, 104 N. C. 389, 10
S. E. 554, and *Faw v. Whittington*,
72 N. C. 321. True, that after mak-
ing the parol contract of sale, the
parties seem to have had consider-
able discussion as to which of them
should pay the taxes for 1918. The
agreement being silent on that ques-
tion, the position taken by plaintiff
would seem to be correct, as the
taxes became a lien on the property
on June 1. Consol. Stat. § 7987;

Revisal, § 2864. But, however that may be, the difference referred to was only as to the effect and meaning of the contract the parties had made, and in no way involved or affected its existence or validity.

We find no error in the record in defendant's appeal, and the judgment for plaintiff is affirmed.

Plaintiff's Appeal.

Plaintiff excepts and appeals for the reason that the court declined to allow plaintiff for the rents of the property from June 1, 1918, the date when the contract was to take effect, the portion of the judgment which embodied the ruling being as follows: "In making the above calculation as to the amounts due by the respective parties, and in considering the suggestion of the defendant that specific performance should not be decreed in this case, the court took into consideration the testimony in respect to the laches of the plaintiff, the increase in the value of the property, and all the other facts and circumstances testified to, and, in passing upon the right to specific performance of the contract, considered in its discretion that, if specific performance were granted, the defendant should not be required to account for the rents from June 1, 1918, until demand was made for the deed in July, 1919, and said rents are not included in the amounts above set forth."

It is the accepted position with us that a vendee is entitled to specific performance of a binding contract to convey land (*Combes v. Adams*, 150 N. C. 64, 63 S. E. 186, citing in illustration *Rudisill v. Whitener*, 146 N. C. 403, 15 L.R.A. (N.S.) 81, 59 S. E. 995; *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141), and, when such right is properly established, it must be enforced as the parties have made it or as far as practicable under existent circumstances. This is a legal or recognized equitable right, and may

not be modified or withheld in the discretion of the court merely because of some delay of the claimant to move in the matter, unless such delay be of a kind and extent as to create an abandonment or some recognized legal or equitable modification of the right under the contract or the remedy to enforce the same. On the facts presented, the jury have established a breach of defendant's contract to convey her house and lot to plaintiff, the papers to be drawn and take effect as of June 1, 1918, and in the judgment plaintiff has been held to account for interest from that date on the contract price. On an issue submitted, and under a correct charge, the jury have found that there has been no abandonment of the contract by the parties, and the right to specific performance has been established by the verdict as of June 1, 1918. In such case and under the rules ordinarily prevailing, plaintiff is entitled to the rents from the time when, by the term of the contract, the deed should have been made. We find nothing on the record to justify a modification of plaintiff's rights in the premises. *Combes v. Adams*, supra; *Miller v. Jones*, 68 W. Va. 526, 36 L.R.A. (N.S.) 408, 71 S. E. 248; 36 Cyc. p. 789; 25 R. C. L. p. 341; Fry, Spec. Perf. 5th ed. § 1147.

In the citation to Cyc., the principle applicable is stated as follows: "The decree should conform to the contract. It cannot add to the contract a promise not made. The court will not make a contract for the parties, but, where exact enforcement of the contract is impracticable, plaintiff may sometimes have approximate relief in some other form which will secure to him the substantial advantages of his contract."

On the facts presented, we are of opinion that the judgment should be reformed so as to allow plaintiff for the rents from June 1, 1918, the day when the deed should have been

Rescission—contract for sale of real estate—disagreement as to payment of taxes.

Specific performance—delay in enforcing—effect on right to rents and profits.

made, and plaintiff charged with interest from that date on the contract price.

Defendant's appeal: No error.

Plaintiff's appeal: Modified.

Plaintiff allowed rents from June 1, 1918.

NOTE.

The effect of a check or note as a memorandum which will satisfy the Statute of Frauds is the subject of the annotation following DUTEIL v. MULLINS, post, 363.

C. F. DUTEIL, Appt.,

v.

T. G. MULLINS.

Kentucky Court of Appeals — October 25, 1921.

(192 Ky. 616, 234 S. W. 192.)

Contract — Statute of Frauds — sale of land — check as memorandum.

1. A check given by purchaser to vendor, and reciting that it is "as payment on land," is not a sufficient memorandum to take the contract out of the Statute of Frauds. ✓

[See note on this question beginning on page 363.]

Vendor and purchaser — parol contract — effect of tender of deed.

2. The tender of a deed by the vendor is not sufficient to take a contract for sale of real estate out of the Statute of Frauds.

Contract — to sell real estate and personal property — right to divide.

3. A parol contract to sell land and

personal property cannot be divided so as to uphold the portion relating to the personalty when that relating to the realty fails because not in writing.

[See 25 R. C. L. 704.]

APPEAL by plaintiff from a judgment of the Circuit Court for Pike County in favor of defendant in an action brought to enforce specific performance of a contract for the sale of land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. H. Cooper and Childers & Childers for appellant.

Mr. Roscoe Vanover for appellee.

Hurt, Ch. J., delivered the opinion of the court:

The judgment in this action was for the defendant, who is the appellee here, and the plaintiff, who is the appellant here, has appealed. It is gathered from the pleadings, and from a stipulation of facts, upon which the action was tried, that on the 12th day of March, 1919, the plaintiff by a verbal contract sold a tract of land and a number of articles of personal property to the defendant, and, presumably in consideration of plaintiff's promise to

convey the land to defendant and to deliver to him the personal property, the defendant promised, as a partial and first payment on the land and personalty, to pay the plaintiff the sum of \$1,000, and pursuant thereto executed and delivered to plaintiff a check on a bank at Pikeville for that sum. Becoming dissatisfied with the contract, or for some other reason, the defendant notified the bank not to pay the check, and accordingly payment was refused. The plaintiff remained in possession of the land and personalty, and is yet in possession of same. There was no writing signed by the plaintiff evidencing the contract for

the sale of the land, nor was there any written memorandum relating to the sale except the check, which defendant executed and delivered to the plaintiff. The check was in the usual form, and requested the bank to pay to plaintiff the sum of \$1,000, and in the space upon the check where a blank usually is, in which the person giving the check may write for what it was given, was inserted the words, "as payment on land." The defendant, as a defense to the promise on his part evidenced by the check, interposed the plea that it was without consideration, because it was given in part payment for land, which was sold by a verbal contract to him, and that such a contract was not obligatory, either upon him or the plaintiff, and for that reason he had received nothing, nor had the plaintiff parted with anything, in consideration of the check.

The plaintiff insists that the check was a sufficient memorandum in writing to take the contract out of the Statute of Frauds. The statute (Ky. Stat. § 470), so far as is necessary to be here considered, is as follows: "No action shall be brought to charge any person . . . upon any contract for the sale of real estate, . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent. . . ."

There must, in every transaction for the sale of land, be a writing signed by the vendor, as he has been held to be the party "to be charged therewith." *Evans v. Stratton*, 142 Ky. 615, 34 L.R.A. (N.S.) 393, 134 S.W. 1154; *Murray v. Crawford*, 138 Ky. 25, 28 L.R.A. (N.S.) 680, 127 S.W. 494. A writing evidencing a sale of land makes an obligatory contract when signed by both parties, or when signed by the vendor alone and is accepted by the vendee. In this case the check is signed only by the vendee, so far as the record demonstrates. Assuming that it was in-

dorsed by the signature of the vendor, the words "as payment for land" in such a writing would not be a sufficient description of the thing sold to take

Contract—
Statute of
Frauds—sale of
land—check as
memorandum.

the transaction out of the Statute of Frauds. The memorandum required by the Statute of Frauds to constitute evidence of a sale of land is such a written declaration of the parties that the court will be relieved from relying on parol evidence to ascertain the subject of the contract. The words in the check would afford no means by which the property sold could be designated. Nor would it identify the property. In such case the writing has invariably been held to be insufficient to take the transaction out of the Statute of Frauds. *Campbell v. Preece*, 133 Ky. 572, 118 S.W. 373; *Tyler v. Onzts*, 93 Ky. 331, 20 S.W. 256; *Ellis v. Deadman*, 4 Bibb, 466; *Fugate v. Hansford*, 3 Litt. (Ky.) 262; *Henderson v. Perkins*, 94 Ky. 207, 21 S.W. 1035.

The plaintiff, by a pleading filed nearly six months after the date of the transaction, offers to convey the land by a general warranty deed, and to deliver the personal property to defendant, and avers his ability to convey a good title, and further avers that he tenders a deed, but the record does not contain the deed which was said to be tendered. This, however, would be unavailing, as a deed alone, to take the transaction out of the statute, would not only have to be signed by the vendor, but would have to be accepted by the vendee. A

Vendor and
purchaser—parol
contract—effect
of tender of
deed.

verbal contract for the sale of land is not obligatory upon either the vendor or vendee, until a writing evidencing the sale, sufficient to satisfy the statute, has been executed by the vendor and accepted by the vendee. *Curnutt v. Roberts*, 11 B. Mon. 42; *M'Dowel v. Delap*, 2 A. K. Marsh. 33; *Murray v. Pate*, 6 Dana, 335; *Lewis v. Grimes*, 7 J. J. Marsh. 336; *Fite v. Orr*, 8 Ky. L. Rep. 349;

1 S. W. 582; Allen v. Stailey, — Ky. —, 119 S. W. 755; Todd v. Finley, 166 Ky. 546, 179 S. W. 455; Newburger v. Adams, 92 Ky. 26, 17 S. W. 162; Asher v. Brock, 95 Ky. 270, 24 S. W. 1070. If a vendor who is not obligated to perform a contract, because it is not in writing and signed by him, could make it obligatory upon a vendee by tendering him a deed a great time afterward, it would certainly be unfair. No legal obligation resting upon him to perform the contract, it should not be obligatory upon the vendee either. A contract which is not obligatory upon either party should not be made obligatory upon both, by the wish of one of the parties alone. The obligation must be mutual. Of course, it is not meant to be held that a verbal contract for the sale of land shall not be executed by the parties, but it is void because there is no such evidence in existence as the statute requires to be made in order to prove it.

It is contended that, the promise to pay the \$1,000, evidenced by the check, being in part a promise to pay for personalty, it was not with-

out consideration—in part, at least—as the sale of personal property was not affected by the Statute of Frauds. The contract, as alleged, was an entire contract; that is, the land and personal property were sold by one and the same contract. The contract was entire and indivisible. There was no sum fixed as the price of the personalty, separately from the price of the land, so that the sale of one could be held valid and the other invalid. The contract for the sale of the land being indivisible, the contract for the sale of the personalty must also fail, as the two cannot be separated. An entire contract which is not divisible and part of it is within the Statute of Frauds,

all of it must share the same fate. *Contract—to sell real estate and personal property—right to divide.*

Holloway v. Hampton, 4 B. Mon. 415; Grant v. Grant, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15; Pond v. Sheean, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; Mauck v. Melton, 64 Ind. 414.

The judgment is therefore affirmed.

ANNOTATION.

Check or note as memorandum satisfying Statute of Frauds.

- I. Contract for sale of land:
 - a. Where check or note refers to contract, 363.
 - b. Where check or note does not refer to contract, 367.
- II. Contract other than for sale of land, 368.

I. Contract for sale of land.

a. Where check or note refers to contract.

As to whether a note or a check given for the purchase price of land, and referring expressly to the contract, is sufficient to take the contract out of the Statute of Frauds, the decisions are not altogether in harmony. In several cases it has been held that where the check or note contains the essential terms of the contract, expressed with such certainty that they may be understood from the writing

itself, the instrument is a sufficient memorandum. Reynolds v. Kirk (1894) 105 Ala. 446, 17 So. 95 (note); Little v. Pearson (1828) 7 Pick. (Mass.) 301, 19 Am. Dec. 289 (note); HARPER v. BATTLE (reported herewith) ante, 357 (check). And see Work v. Cowhick (1876) 81 Ill. 317 (note); Purtell v. Bell (1918) 179 Ky. 356, 200 S. W. 644 (check); Mizell v. Burnett (1857) 49 N. C. (4 Jones, L.) 249, 69 Am. Dec. 744 (note); Neaves v. North State Min. Co. (1884) 90 N. C. 412, 47 Am. Rep. 529 (draft).

Thus, in Reynolds v. Kirk (Ala.) supra, wherein it appeared that a note recited the consideration as being the purchase of the land on which the maker then lived, and also contained a complete description of the property, the court said: "This was sufficient

to take it out of the Statute of Frauds. It contains the essential terms of the contract—describes the land sold, the price to be paid, and the date of the payment—all expressed with such certainty as that they may be understood from the writing itself, which was signed by the purchaser, the complainant. It was, on the payment or tender of the purchase money, capable of specific enforcement."

So, in *Little v. Pearson* (Mass.) supra, a note for the purchase price of land, to which was subjoined a signed memorandum stating the obligation of the vendor, was held to be sufficient.

In *Work v. Cowhick* (1876) 81 Ill. 317, it was held that a note signed by the purchaser at an administrator's sale, reciting that it was "for land purchased by Elizabeth Work, this day, at administrator's sale, the sum of \$480, etc., was a sufficient compliance with the statute.

In *HARPER v. BATTLE* (reported herewith) ante, 357, a check signed by the purchaser and indorsed by the vendor, which recited that it was given as a "payment on Watts street house," was held to be a sufficient memorandum. The court said: "The check given in part payment on the bargain collected by defendant through her written indorsement made thereon, in which the property is described as the 'Watts street house,' . . . is a sufficient memorandum in writing within the intent and meaning of the Statute of Frauds."

In *Purtell v. Bell* (1918) 179 Ky. 356, 200 S. W. 644, it was held that a check taken in connection with a letter stating the terms of the sale was sufficient where it not only contained in its body a statement showing it to be a "payment on the Bell property," but also a statement written on the back of it by the agent of the seller showing his acceptance of it "for delivery to Geo. G. Bell," the seller, and the application of the proceeds as a cash payment "on residence Bath avenue, Ashland, Ky." which was the property sold. The court said: "If, as argued by counsel for appellees, the evidence thus furnished

by the check should not be held sufficient to satisfy the Statute of Frauds, the letter shortly thereafter written appellees by their agent, informing them of all the terms of the contract, describing more fully the property sold, and directing their early compliance with the terms of sale, together with the check, presents such a memorandum of the contract as should be held to substantially conform to the requirements of the statute, and such is our conclusion. The facts that the indorsement upon the check, showing the purpose of its acceptance and the application made of the proceeds, and that the latter [was] signed by the agent of appellees, constitutes as much a signing of these writings by the person to be charged as if both had been signed by the latter, and the two together furnish all the means necessary, not only to an understanding of the terms of the contract, but also to the designation and identification of the real estate constituting the subject thereof."

On the other hand, it has been held that a check or note given for the purchase price of land or an interest therein is insufficient to satisfy the Statute of Frauds where, though it recites the consideration, the recital does not state the essential terms of the contract. *Thompson v. New South Coal Co.* (1902) 135 Ala. 630, 62 L.R.A. 551, 93 Am. St. Rep. 49, 34 So. 31 (check); *Hibernian Petroleum Co. v. Davies* (1919) 41 Cal. App. 59, 181 Pac. 836 (check); *Swisher v. Conrad* (1919) 76 Fla. 644, 80 So. 564 (check); *Second Nat. Bank v. Rouse* (1911) 142 Ky. 612, 134 S. W. 1121 (note); *Davis v. Dilbeck* (1921) — Tex. Civ. App. —, 232 S. W. 927 (note). And see the reported case *DUTEIL v. MULLINS*, ante, 361).

Thus, in *Swisher v. Conrad* (1919) 76 Fla. 644, 80 So. 564, it was held that a check bearing an indorsement, "For 1st payment Conrad property Foot of Waddell St.," did not disclose the essential elements of an enforceable contract for the sale of lands. The court said: "If the agreement or the promise, or the note or memorandum

thereof that is in writing, does not of itself, or by permissible and proper reference, disclose the essential terms of the contract to which the signed agreement or promise, or the note or memorandum thereof, refers, no action can be brought thereon, since the statute is designed to prescribe the only mode by which an otherwise enforceable contract may be evidenced. In other words, a note or memorandum in writing duly signed will not satisfy our Statute of Frauds unless such writing contains the essential elements of an enforceable contract. In this case a check drawn by plaintiff to the order of defendant's alleged agent bears an indorsement, 'For 1st payment Conrad property Foot of Waddell St.,' and the indorsement of the alleged agent of the defendant, with perforations showing payment. This check, with its indorsements, obviously does not disclose the essential elements of an enforceable contract for the sale of lands. The indorsement as to the check, being the first payment on property, does not show the existence of an enforceable contract for the sale of lands."

So, a check given for earnest money which contained the words, "part payment on coal lands," was held, in *Thompson v. New South Coal Co. (Ala.)* supra, not to be sufficiently specific to ascertain the lands meant without resort to parol evidence, and hence not a memorandum satisfying the Statute of Frauds. The court said: "One theory seems to be that the indorsement of the check was a sufficient subscription by the coal company of the contract, within the purview of the statute. Of course, if this be sound, the retention by the defendant of the money collected upon it is of no consequence. If it be true that the indorsement by the company of its name across the back of the check was the equivalent of its subscription of the contract under the statute, this made the contract its in fact—just as though it had affixed its name at the bottom of it—and there would be no need for the invocation of the doctrine of estoppel. But we do not think that the check was any

part of the contract itself, although it may have been attached to it. They are not only separate and distinct pieces of paper, but separate and distinct obligations. The check was a sequence to the contract, and constituted no part of it. It was nothing more than the payment of a part of the purchase money after the terms of the contract had been fully agreed upon, reduced to writing, and signed by Montgomery. It came into existence necessarily after the contract had become a completed executory one. Indeed, the dates of the two papers show this to be so. The fact that the check was attached to the contract did not make it a writing containing any part of the negotiations leading up to and resulting in the contract, and, therefore, does not bring the case in that category of cases in which several writings containing the negotiations between the parties culminate in an agreement of sale. . . . There is nothing on its face that shows it was given in part payment for the particular lands described in the alleged contract. It is true it does contain the words 'part payment on coal lands,' but what lands are there referred to would have to be ascertained by resort to parol evidence, which, of course, could not be done. It is, therefore, not in and of itself a sufficient memorandum of the sale of the lands within the requisites of the statute, if it be conceded that the indorsement by the coal company of the check is a subscription within the meaning of the statute."

It was alleged in *Hibernian Petroleum Co. v. Davies* (1919) 41 Cal. App. 59, 181 Pac. 836, that the defendant entered into a contract with the plaintiff corporation whereby he agreed that on the payment to him of a bonus of \$10,000, he would execute and deliver to the plaintiff a lease of certain land for oil and gas purposes. It appeared that the first payment on the bonus was made by a check on which was written the following memorandum: "Hibernian Petroleum Company \$1,000, to J. F. Davies, Dr. Bakersfield, Cal., May 15th—first instalment of bonus on lease in Sunset

Field, northwest quarter and west half of northeast quarter of the northeast quarter of sec. 4, township 11 north, range 23 W., S. B. & M. sixty acres more or less." The check also contained the following indorsement: "In full settlement of within account. [Signed] J. F. Davies." A second check in the sum of \$4,000 was in the same form except as to the date and amount. When the balance of the amount was tendered the defendant refused to execute the lease. The court said: "The principal question on this appeal arises on this point: Did the acceptance of these checks, with the recitals therein that they were from the Hibernian Petroleum Company, and on account of bonus on the lease that Sinclair had contracted for, and the fact that they were approved by Sinclair as president and countersigned by the secretary of the company, create any liability on the part of the defendant, Davies, to the plaintiff company? Plaintiff's counsel contend that these checks, either or both of them, with defendant's indorsement and signature thereon, constitute a memorandum in writing, signed by the party to be charged, sufficient to evidence a contract to execute a lease to the plaintiff company of the lands in question, and within the Statute of Frauds. No justification in law is shown in support of such a conclusion. The memorandum indorsed on the checks does not indicate to whom the lease was to be executed, and it was not signed by the defendant, the party to be charged. His signature on the back of the check was an acknowledgment of receipt of the payments 'in settlement of the account,' referring, we must assume, to the instalments on the bonus agreement he had entered into with H. E. Sinclair personally. The evidence justifies the conclusion that he accepted these checks as payment of the obligation of Sinclair, and in pursuance of his agreement to execute a lease to Sinclair, but there is nothing in the transaction to indicate that Sinclair, or the defendant, or the plaintiff company itself, understood as intended by this memorandum any-

thing more than a direction of the payment of this money on account of the agreement previously made between Sinclair and the defendant. It is true, as appellant sets forth in its brief, that defendant was notified by the contents of these checks that Sinclair and the secretary of the corporation had drawn them on the Hibernian Petroleum Company, and that they had no implied authority to use the corporation's funds for Sinclair's personal contracts; but he might properly assume, what doubtless is a fact, that the corporation was acquiring an interest in this lease through and in the name of Sinclair, as it legitimately could have done."

The reported case (*DUTEL v. MUL-LINS*, ante, 361) holds that the words "as payment for land" indorsed on a check are not a sufficient description of the thing sold to take the transaction out of the Statute of Frauds. The court states the rule which is supported by all the cases in this subdivision, viz., that the memorandum required by the Statute of Frauds to constitute evidence of a sale of land is such a written declaration of the parties that the court will be relieved from relying on parol evidence to ascertain the subject of the contract.

Likewise, in *Davis v. Dilbeck* (1921) — Tex. Civ. App. — 232 S. W. 927, the court held to be an insufficient memorandum a note which contained the following memorandum: "This note is given as a forfeit on 331½ acres land, and in case I give perfect title thereto in a reasonable time, then this note is null and void, and as soon as I deliver deed to 331½ acres of land out of J. Burns's survey to J. W. Dilbeck. L. F. Davis." The court said: "The instrument of writing relied on as taking the case out of the Statute of Frauds is insufficient, because it does not describe the land referred to with that degree of certainty which the authorities hold to be requisite."

In *Second Nat. Bank v. Rouse* (1911) 142 Ky. 612, 134 S. W. 1121, a promissory note which recited that it was given "for all the timber on 486 acres of land on George's creek,

from 18 inches at the ground up, and the privilege to remove it," was held to be insufficient on the ground that it did not bind the vendor, and it was also held that a subsequent indorsement of the note by him did not make it sufficient. The court said: "This note was signed by J. B. Preston, the buyer, not the seller of the timber. It is a promise to pay \$400, with 6 per cent interest, one year from the date thereof. It was not intended to evidence the contract of sale, was not to be held by the purchaser as a protection to him, or to guarantee to him any rights, and when indorsed by S. G. Preston it was not his intention, in indorsing it, to give it vitality as a contract representing the sale of this timber. His purpose was to invest the bank with the title to the note. This his indorsement did, and beyond this it had no effect whatever. The purchaser of the timber, J. B. Preston, had nothing whatever to show that he had bought it. S. G. Preston had signed nothing to show that he had sold it. A contract, to be binding, must be mutual. One party cannot be bound while the other has the option to accept or reject its terms. The minds must have met, and the contract, to be binding upon one, must be such that the other is likewise bound. The execution of the note bound J. B. Preston to pay the \$400, with interest at the date of its maturity. This was the extent to which he was bound. If it took the indorsement of S. G. Preston to complete the contract, then it was never completed, but remained open until he indorsed the note to the bank, and might never have been closed unless he had elected to indorse it. The note cannot be accepted as an evidence of the contract of sale within the meaning of the statute, which contemplates that some memorandum, at least, evidencing the contract, must be signed by the seller and delivered by him to the buyer or to someone representing him, as was expressly decided in *Murray v. Pate* (1838) 6 Dana (Ky.) 335. The note, even when indorsed by S. G. Preston, fails to meet the requirements of the statute, and

the contract for the sale of this timber must be treated as a verbal contract."

So, the indorsement of the name of the owner on a check given for the earnest money has been held not to be a sufficient memorandum to comply with the Statute of Frauds, where the agreement of sale was entered into by an agent without authority to make the sale. *Thompson v. New South Coal Co.* (1902) 135 Ala. 630, 62 L.R.A. 551, 93 Am. St. Rep. 49, 34 So. 31 (check); *Koenig v. Dohm* (1904) 209 Ill. 468, 70 N. E. 1061 (check). Thus, it appeared in the case first cited that an agent of the defendant corporation entered into an unauthorized agreement for the sale of certain coal lands belonging to the corporation, signing the agreement as an individual, and not as agent. The agreement, to which was attached a check of the purchasers reciting that it was given in "part payment on coal lands," was forwarded to the corporation. It also appeared that the check was indorsed by it and the money retained, but that no formal consummation of the contract was ever made. It was held that the indorsement of the check was not a sufficient subscription of the contract under the statute.

b. Where check or note does not refer to contract.

A check or note given in connection with the sale of lands or an interest therein, which is in the ordinary form and contains no reference to the essential terms of the contract of sale, does not constitute a sufficient memorandum within the Statute of Frauds. *McKinnon v. Mixon* (1900) 128 Ala. 612, 29 So. 690 (note); *Allen v. Stailey* (1909) — Ky. —, 119 S. W. 755 (check); *Hefford v. Lichtman* (1921) 116 Misc. 692, 190 N. Y. Supp. 554; *Burris v. Starr* (1914) 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D, 71 (note); *Moore v. Powell* (1894) 6 Tex. Civ. App. 43, 25 S. W. 472 (check).

Thus, in *Allen v. Stailey* (1909) — Ky. —, 119 S. W. 755, wherein it appeared that a check, which contained

no recital as to the consideration, was claimed to have been given in payment for a passageway over the lands of the defendant, the court said: "The check is unavailing to take the contract out of the Statute of Frauds and perjuries. In the first place, it did not identify or describe the passway which was the subject of the contract. In the second place, it was not 'signed by the party to be charged.' While a written memorandum that will satisfy the statute may be an undelivered writing, or a writing other than the contract which rests upon it, it still is necessary for the parties to have entered into a contract respecting the land. In this case there was not a contract, for the minds of the parties never met. One supposed he was granting a passway for foot passengers, and nothing more. The other supposed he was obtaining a passway for vehicles, horses, and foot passengers, and nothing less. We have not the words of the agreement before us. The proof does not disclose them. So, we are unable to say that the contract was entered into between the parties. The check, aside from the deficiencies already indicated, was not a contract, as it was not accepted." To the same effect, see *Moore v. Powell* (Tex.) *supra*.

Likewise, in *McKinnon v. Mixon* (Ala.) *supra*, it appeared that a vendor accepted the note of the purchaser in payment of the purchase money, and agreed to deliver a deed to the premises on the payment of the note. The note was paid in part and credit was given, but the note was never paid in full and no deed was ever delivered. The proof was held to show no operative contract for the sale of lands, the court saying: "The validity of the contract relied on to estop the defendant being so put in issue, the plaintiff held the affirmative upon that issue, and the burden was on him to show a sale was made to Leslie in such way as to escape condemnation by the Statute of Frauds. . . . By the evidence it was not shown that in the attempt to sell, any writing was made other than the note referred to, and that fails as a note

or memorandum of the sale in that it contains no reference to a sale of lands; and though part of the price was paid it does not appear that Leslie was put in possession of the lands by the plaintiff. Possession must concur with payment, and, to uphold the contract under the exception made by the statute, must be yielded and taken under and in pursuance of the agreement to sell." In that case it did not appear that any writing was signed by the vendor other than the undelivered deed.

In *Burriss v. Starr* (1914) 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D, 71, the court said: "A signature to a paper imposes no obligation unless there is in its language sufficient for that purpose; and where there is such language, the signature of the party binds him, though it is not subscribed to the instrument, but appears in some other part of it, if the intention is that it should be his contract. It must be remembered that the requirement of the statute is not that the party shall sign a written memorandum merely, but that all contracts to sell or convey any lands, or any interest in or concerning them, shall be void, 'unless said contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.' Revisal, § 976 (italics ours). It is, therefore, a contract to sell or convey the land that should be in the memorandum or writing to be signed. There is no such contract here. The note of the defendant, although written by the plaintiff, contained only a promise on his part to pay the money, but no reciprocal promise of the defendant to convey the land; that is, the dower tract. The court was, therefore, right in holding that plaintiff was not entitled to specific performance of any contract to convey land, or to damages for a breach thereof, and for the simple reason that there was no such contract."

II. Contract other than for sale of land.

It will be noted that the effect of a check or note as a part payment

will satisfy the statute is not the scope of the annotation.

Giving of a note to secure the debt of another has been held to be a memorandum of a promise for the debt. *McLanahan v. Berlin* (1910) 85 Neb. 850, 17 W. 684; *Saunders v. Bank of Newburg* (1911) 112 Va. 443, 114 W. 714, Ann. Cas. 1913B, 982. *Holmes v. Durkee* (1883) 111 N. H. (Eng.) 23.

A note given for the purchase of chattels is a sufficient memorandum of the contract of purchase. *v. Ocmulgee Mills* (1876) 55 Ga. 88. *Rachal v. Normand* (1843) 1 La. 88.

Phillips v. Ocmulgee Mills (Ga.) the court said: "The trade, at the time it was made, was in parol, and it was urged that it is within the Statute of Frauds, and therefore void. The trade was made and the note was burned, and before this was brought, the defendant gave a receipt for the cotton, and dated it at the time of the trade. We should act on his part takes the note out of the operation of the statute—the contract be reduced to writing, signed by the party to be bound, any time before suit is brought, it is enough; especially if the note at the time of the contract relates back and becomes part of the contract, and it does not matter that it was written and signed after the thing sold was destroyed, if there is no fraud in procuring the note, and if the party charging himself with the destruction of what he destroyed. He should be commended for what, in honor and justice, he should have done, to wit, to put in

writing the truth about the trade he had fairly made, though, without fault on the part of the seller, it had been of no profit at all to him. Such conduct approaches the rectitude of the man commended in Scripture, who 'sweareth to his own hurt,' and is all the more admirable in these times when such virtue is so rarely exhibited. The giving of the note, then, if it be not strictly in legal parlance a ratification of the parol contract, operates so to bind the defendant as to take the note out of the Statute of Frauds."

Likewise, in *Rachal v. Normand* (La.) supra, a promissory note reciting that it was given for the price of a slave was held to be a sufficient memorandum satisfying a statute requiring a contract for the sale of a slave to be in writing.

The note involved in *Re Neff* (1907) 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57, appeal dismissed for want of jurisdiction and writ of certiorari denied in (1908) 212 U. S. 562, 53 L. ed. 652, 29 Sup. Ct. Rep. 688, was in the following terms: "Two years after date, I, we, or either of us promise to pay to the order of Miss Emily M. Nichols twenty-five hundred and no 100 dollars at the office of the Avery-Caldwell Mfg. Co., upon surrender of certificate No. 38 for 2,500 shares of preferred stock of said company, value received interest 7 per cent per annum." It was held that this was a written agreement to take and pay for the shares named, signed by the parties to be charged, and was not invalid under the Statute of Frauds because not signed by the claimants also.

A. S. M.

WILLIAM H. ADAMS et al., Appts.,

v.

GEORGE H. BLUMENSHINE.

New Mexico Supreme Court — January 13, 1922.

(— N. M. —, 204 Pac. 66.)

and wife — community property — partnership real estate.
Estate acquired by two husbands by deed to them as individuals,
10 A.L.R.—24.

but who are at the time engaged in a partnership business in which the real estate is used, is nevertheless community property and subject to the rights of their respective wives therein, in the absence of evidence that the real estate was acquired as a firm asset, and that the same was required to pay off firm debts or to adjust equities between the partners. A contract to convey such land by the two husbands alone, and in which the two wives did not join, will not be specifically enforced.

[See note on this question beginning on page 374.]

Headnote by PARKER, J.

APPEAL by defendants from a decree of the District Court for Bernalillo County (Hickey, J.) in favor of plaintiff in a suit brought to compel specific performance of a contract for the sale of real estate. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Thomas J. Mabry, for appellants:

A contract for the conveyance of community property, in which the wife does not join, cannot be specifically enforced.

21 Cyc. 1666; Hoover v. Chambers, 3 Wash. Terr. 26, 13 Pac. 547; Holyoke v. Jackson, 3 Wash. Terr. 235, 3 Pac. 841; Meek v. Lange, 65 Neb. 783, 91 N. W. 695; Barnett v. Mendenhall, 42 Iowa, 296; Barbour v. Hickey, 2 App. D. C. 207, 24 L.R.A. 763; Leonard v. Crane, 147 Ill. 52, 35 N. E. 474; Yost v. Devault, 9 Iowa, 60; Bird v. Logan, 35 Kan. 228, 10 Pac. 564; Richmond v. Robinson, 12 Mich. 193; Kelsey v. Crowther, 7 Utah, 519, 27 Pac. 695; Hennessey v. Woolworth, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. Rep. 109; Rogers v. Brooks, 30 Ark. 612; Beaver v. Trittipo, 24 Ind. 41; Watrous v. Chalker, 7 Conn. 224; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Blythe v. Dargin, 68 Ala. 370; Stevens v. Paris, 29 Ind. 260, 95 Am. Dec. 636.

Mr. A. B. Stroup, for appellee:

The property in question was the partnership property of the copartnership of Curd & Adams.

Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20 L. ed. 83.

It is not necessary for the wives of partners to join in a conveyance of partnership real estate.

Mechem, Partn. ¶ 109; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 508, 59 N. W. 1010; Moore v. Wood, 171 Pa. 365, 33 Atl. 63.

Parker, J., delivered the opinion of the court:

This is a suit for specific performance of a contract for the sale

of real estate. The facts are all stipulated, and may be briefly stated as follows: W. H. Adams and Mrs. W. H. Adams were husband and wife on April 15, 1916. James L. Curd and Annie B. Curd were husband and wife on said April 15th 1916. In the year 1910 Curd and Adams began the operation of a dairy business as copartners under the firm name of Curd & Adams. There was no written partnership agreement, but they divided the profits and shared the losses equally. In 1912 the property involved was conveyed by one Ferguson and wife to the said James L. Curd and W. H. Adams as individuals, \$600 of the purchase price of the land being paid; each of the said vendees contributing one half thereof. They thereupon borrowed \$2,000, with which they completed the payment of the purchase price, and this loan was afterwards paid in due course out of the income of the dairy business. From the time of the purchase of this property until the 15th day of April, 1916, the firm of Curd & Adams operated their dairy business on the premises, and the two Adamses and the two Curds used the premises for their homes, neither family having any other homestead during all that time. On April 15, 1916, Curd and Adams, "doing business as Curd & Adams," leased to one Miller and one Blumen-shine a partnership under the name

of Miller & Blumenshine, the premises involved for a period of five years from that date, and covenanted with said Miller & Blumenshine that, upon the payment of \$3,000 at any time within the term of the lease, they would execute and deliver a warranty deed for the premises. This lease and contract to sell was not signed by the wives of said Curd and said Adams, and the women protested against the making of the said lease, and especially as to giving the option to buy the property, but no notice of said protest was ever brought home to said lessees. About April 1, 1916, the said Curd & Adams negotiated with said Miller & Blumenshine to sell their partnership dairy business, cows, equipment, and all personal property connected with said business, and also to leave the premises with an option to buy as heretofore mentioned. Curd & Adams remained in possession of all of said personal property and said real estate until April 15, 1916, when the lease was executed and possession delivered to the said Miller & Blumenshine. On said date the firm of Curd & Adams ceased to exist, except for the purpose of collecting the accounts due it. The rent under said lease was thereafter paid and divided between the said Adams & Curd until the time of Curd's death in 1919, since which time Curd's share has been paid to his widow, the said Annie B. Curd. The said sale of the partnership property and the lease and covenant to sell the real estate in question was not made for the purpose of paying partnership debts, but was done simply in the course and at the time of closing out the partnership business.

It is stipulated by counsel that there is but one question to be considered, and that is whether the real estate in question was partnership property, or whether it was the community property of the two families mentioned. The judgment of the court below was for specific performance of the contract to sell

and convey, and the correctness of this judgment will turn upon the question, among other things, as to whether this real estate was partnership property or was community property.

In determining the question involved some general considerations will be first stated.

It may be said generally that a partnership, unaided by statute, cannot hold title to real estate. It is said by Mr. Parsons and others that the reason for this is that a partnership is not a person, and is consequently incapable of taking by deed. Parsons, Partn. 2d ed. p. 370.

Partners ordinarily hold real estate as tenants in common under a conveyance to them by name. 20 R. C. L. Partnership, § 56; Rowley, Partn. § 283.

The presumption is always against the inclusion in the firm assets of real estate held by the partners as tenants in common, and the presumption is that the ownership is where the muniments of title place it. 20 R. C. L. § 61; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L.R.A. 161, 48 Am. St. Rep. 56, and note.

Real estate, however, may in equity be considered firm property, and will be so considered when such is the intention and agreement of the partners at the time of its acquisition. 20 R. C. L. § 61; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788, and note; Goldthwaite v. Janney, *supra*.

There need be no express agreement to that effect; it may be implied; but in every case there must be such an agreement. The intention or agreement of the partners may be evidenced by parol proof, and need not be in writing. 20 R. C. L. § 62; Goldthwaite v. Janney, *supra*; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L.R.A. 449, 46 Am. St. Rep. 883, and notes; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L.R.A. (N.S.) 889, and note.

Evidence of various kinds of facts is admissible to show such intention

or agreement, such as the use to which the property is put, or the manner in which the accounts of the firm, in regard to the purchase price, are kept, and showing whether or not each partner's share of the purchase price is charged to him, or whether the item is carried as a firm item; whether the property was purchased with firm money, whether it was purchased for firm purposes, and perhaps other similar facts. 20 R. C. L. §§ 62-65.

Where real estate the title whereof is held by the partners as tenants in common is in fact acquired as, and intended by the partners to be, partnership property, that result is effectuated by means of the doctrine of equitable conversion, whereby the land is treated as personalty for the purpose of paying the firm debts, and adjusting accounts and equities between the partners. The basis of the application of this doctrine is that a trust is implied for the benefit of the partnership. 20 R. C. L. § 74; *Adams v. Church*, 42 Or. 270, 70 Pac. 1037, 59 L.R.A. 782, 95 Am. St. Rep. 740, and notes.

In England the doctrine of "out and out" equitable conversion—that is, that the real estate will be treated as partnership personalty for all purposes, even as against the right of dower and inheritance—is recognized both by decisions and later by statute. 20 R. C. L. § 75.

In America, however, the doctrine of equitable conversion is recognized only so far as is necessary to effectuate the payment of the partnership debts and the adjustment of the equities between the partners; and when this has been done, all real estate, remaining in specie, assumes all of its characteristics as such, and is subject to dower or other rights of the wife, and descends to the heirs as in ordinary cases. 20 R. C. L. §§ 76, 77, 79; *Adams v. Church*, 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61, 48 L.R.A. 299, 61 Am. St. Rep. 637, and note; *Sieg v.*

Greene, 141 C. C. A. 79, 225 Fed. 955, Ann. Cas. 1917C, 1006.

The doctrine does not exclude the right of the partners to agree upon an "out and out" conversion of the real estate into personalty, but in the absence of such agreement the doctrine prevails without exception.

This doctrine is necessarily sound. A partnership can really own no property. The property of the firm is owned by the members thereof. It is charged in their hands with an implied trust for the payment of the partnership debts and the adjustment of the equities between the partners. When these things have been accomplished, the partners own the property discharged of the trust, in the absence of an agreement to the contrary.

Applying some of these considerations to the facts in this case, it becomes apparent that the appellee, plaintiff below, cannot recover. The real estate in question was purchased by the two partners in their individual capacity, each paying at the time \$300 out of his individual funds. There is no evidence in the record that the partners at this time agreed or understood that the purchase was made for the partnership, or otherwise than as tenants in common. The partners gave a mortgage on the property in their individual capacities, and the mortgage was afterwards paid out of the profits of the dairy business in which the partners were engaged. There is no evidence in the record that these moneys were treated as firm moneys, or that they were not paid out as the individual moneys of the parties, share and share alike. It appears that the premises were used in carrying on the operations of the dairy business by the partners, but it likewise appears that each partner, with his wife, resided upon the premises, and used the same as his home, and that neither had any other home during the existence of the partnership.

The use of the premises was as much for a home-
 Husband and wife—community property—partnership real estate.
 stead for these parties as for the conducting of the dairy business, and such use for said last-mentioned purpose cannot, under the circumstances, be said to be controlling. The mere use of the property for firm business is only a slight circumstance tending to show that the premises were intended to be partnership property. 20 R. C. L. § 62. The partnership was free from debt. There were no equities requiring adjustment between the partners when they determined to sell out their dairy business to the appellee and his then partner. They sold out the dairy business, and at the same time executed the lease and the covenant to sell and convey. The real estate had served all of its purposes as a trust estate for the payment of debts and the adjustment of equities, if any there should be, and it was then released from said trust, and assumed all of its characteristics as real estate. So, even if it did appear from the evidence, which as we have shown it does not, that the partners intended and agreed, at the time they bought the land, that it should be partnership property, when the business of the partnership was closed up, it was released from the trust, and was reconverted into real estate to take its course as such and to be subjected to community property rights, descent, and distribution as in other cases. The only direct words in the record hinting at the fact that the real estate was considered by the partners as partnership property is in the recital in the lease and covenant that it was executed by "Curd and Adams, 'doing business as Curd & Adams.'" This recital cannot be deemed as sufficient evidence to show that

these two partners had, at the time they purchased this property, agreed or understood that it was to be partnership property, or that they intended at the time of the making of the lease and covenant to then agree that it was to be considered partnership property, and to be converted into personalty for distribution as such, if, indeed, this could be done without the consent of the wives. The recital is to be held more properly to be merely a description of persons.

It follows that this real estate was not partnership property when acquired, and never became such, and, even if it had become such, it was reconverted into real estate by the winding up of the affairs of the partnership, and that the right of the respective wives of the partners attached to the same as community property.

If the premises were community property, then it became necessary for both husband and wife to join in any deed conveying the same under the provisions of chapter 84, Laws 1915; and any transfer or conveyance of the same attempted to be made by the husband alone was void and of no effect. If a transfer or conveyance of the property by these husbands without their wives joining would be void and of no effect, then a contract to make such a transfer or conveyance would likewise be void and of no effect, at least, so far as specific performance of the contract is concerned.

It follows from the foregoing that there is error in the decree, and that the cause should be reversed and remanded, with directions to set aside the decree for specific performance, and to enter a decree in favor of the appellants and against the appellee; and it is so ordered.

Raynolds, Ch. J., and Parker, J., concur.

ANNOTATION.

Community character of interest of a partner in partnership real property.

Seemingly the reported case (*ADAMS v. BLUMENSHINE*, ante, 369) is the only one to have squarely held that real estate acquired by husbands in carrying on a partnership business and used by them in such business, title being in them as individuals, constitutes community property so as to subject it to the rights of their respective wives therein, at least, in the absence of proof that it was acquired as a firm asset, and that it is required to pay off firm debts or to adjust equities between the partners. This, it will be recalled, was upon the theory that the partners held as tenants in

common, and that the doctrine of equitable conversion applies only so far as is necessary to settle partnership affairs, and that, when this has been done, all real estate remaining in specie assumes all its characteristics as such so as to be subject to the rights of the wives of the partners. This, as is stated in the *ADAMS CASE*, is the generally accepted theory in the United States, whereas in England and Canada, partnership real estate is regarded as personalty for all purposes, rather than as real estate owned by the partners jointly or as tenants in common. G. J. C.

NICK PELTOLA, Respt.,

v.

WESTERN WORKMAN'S PUBLISHING SOCIETY, Appt.

Washington Supreme Court (Dept. No. 2) — November 30, 1920.

(113 Wash. 283, 193 Pac. 691.)

Bailment — admixture of funds — liability for loss.

1. A bailee who accepts money for safe-keeping, places it in a private safe mixed with his own funds, or deposits it in his private account at a bank, is guilty of conversion, which renders him absolutely liable in case the money is stolen or embezzled even without his fault.

[See note on this question beginning on page 378.]

Principal and agent — authority of agent — assumption by patrons.

2. Patrons of a corporation which receive money on deposit at a branch office may assume that the agent in charge of such branch has authority to receive money for such purpose, and that money left with him was left with the corporation, although the account books and receipts were in his individual name, and the corporation did not regard the money as in its possession until it reached its home

office and permanent receipts were given for it.

[See 21 R. C. L. 867; 3 R. C. L. Supp. 1198.]

— liability for money deposited with agent.

3. A corporation is accountable for money deposited with its agent, who has authority to receive the deposit, although he may never have delivered the money to it.

[See 21 R. C. L. 19; 3 R. C. L. Supp. 1132.]

APPEAL by defendant from a judgment of the Superior Court for King County (Allen, J.) in favor of plaintiff in an action brought to recover money alleged to have been deposited with defendant for safe-keeping. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Meyers & Conden for appellant.

Mr. James B. Murphy, for respondent:

This is not a case of a bailee for the sole benefit of the bailor, but a case of debtor and creditor, and the transaction inured to the benefit principally of the defendant.

6 C. J. 1116; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Talladega Ins. Co. v. Landers, 48 Ala. 115; Pregent v. Mills, 51 Wash. 187, 98 Pac. 328; Colburn v. Washington State Art Asso. 80 Wash. 662, L.R.A.1915A, 594, 141 Pac. 1153.

Where a corporation has received and retained the benefits of a contract or transaction executed by one of its representatives, it is then estopped from declaring that act as ultra vires.

Allen v. Olympia Light & P. Co. 13 Wash. 307, 43 Pac. 55; Tootle v. First Nat. Bank, 6 Wash. 181, 33 Pac. 345; Wheeler, O. & Co. v. Everett Land Co. 14 Wash. 630, 45 Pac. 316; United States Fidelity & G. Co. v. Cascade Constr. Co. 106 Wash. 478, 180 Pac. 463; Flanagan v. American Minerals Producing Co. 108 Wash. 569, 185 Pac. 609.

Mount, J., delivered the opinion of the court:

This action was brought to recover money alleged to have been deposited with the defendant for safe-keeping. The defense was that the money was not deposited with the defendant; that if any money was deposited it was deposited with defendant's manager personally, and the defendant is not liable. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for \$1,613.50. The defendant has appealed.

The facts may be briefly stated as follows: The defendant is a corporation organized under the laws of the state of Oregon, with its principal place of business in Astoria, Oregon. At its home office it published a daily newspaper in the Finnish language, called the "Toveri." Sometime prior to March, 1917, it had established a branch of its main office in Seattle, where it did business. At this place of business it conducted a large storeroom, or

hall, where it kept for sale a stock of books, newspapers, magazines, cigars, tobaccos, pipes, and articles usually kept in a cigar store. It also maintained a lunch counter, sold soft drinks, kept billiard and pool tables, card rooms, etc., for the trade, which depended upon the Finnish people. This store was commonly called the "Toveri," or Toveri Hall. At this place the appellant maintained a safe and two cash registers, which were used by employees who attended the store. All the corporate officers of the appellant were residents of Astoria, Oregon. The place of business in Seattle in this state was conducted by an official called a "branch manager," who was selected by the board of trustees to act as manager of the appellant's business at Seattle. On the 1st of March, 1917, one F. E. Kangas was appointed to the position as branch manager, and assumed the duties of handling the business in Seattle. He opened a checking account in a Seattle bank in the name of the appellant, but no one could check out funds from the bank except Mr. Kangas. The only way that funds could be drawn from the bank was by a check signed, "Western Workman's Publishing Society, by F. E. Kangas." As a part of his duties Mr. Kangas was required by the appellant to keep a cashbook, wherein was entered all of the receipts and expenditures made in the ordinary course of business of the Seattle branch. He purchased all the goods used in the store, paid all the expenses from the receipts of the store, and at the end of each month would send his cashbook to the Astoria offices to be audited. He also kept a ledger, in which money which was left with him for safe-keeping was entered. It was his custom to receive deposits for safe-keeping by Finnish customers of the place, and when money was left with him it would not be put in the cash register, but would be put in the safe, and from the safe taken to the bank for deposit. When money

was deposited he would issue an ordinary receipt therefor in his own name. When depositors desired to withdraw money he would take money from the safe or from money which he had on hand, and pay the amount demanded, and would indorse the same upon the back of the receipt which he had given for the deposit. He also made small loans, without interest, to customers. This ledger book was not sent to the Astoria offices to be audited. In the year 1919 it was discovered that Mr. Kangas was short in his accounts with the store, and on the 1st of March of that year he was discharged. Shortly thereafter this action was begun by the respondent upon several claims assigned to him by persons who had deposited money with Mr. Kangas, who, it is claimed, was the agent of the appellant to receive money.

The principal and controlling question in the case, as we read the record, is whether Mr. Kangas was the agent of the appellant authorized to receive money on deposit, or whether the deposits which were left with him were left with him personally. The trial court, after hearing the evidence, concluded that the money deposited with Mr. Kangas during the time he was manager of the store was left with him as agent of the appellant, and not in his personal capacity. The appellant vigorously argues that Mr. Kangas was not authorized by the appellant to receive money on deposit for safe-keeping, and also that when money was left with Mr. Kangas for safe-keeping it was left with him personally for that purpose, and that he alone is responsible for the money. We shall notice these two contentions briefly.

Mr. Kangas testified as a witness for the respondent. He testified, in substance, that he was authorized to receive money; that the agents of the appellant company knew that he was receiving money on deposit, and that he did not take the money to be accounted for by him personally, but that he took the money as

agent for the appellant; that the money so deposited with him was used in the business, and what was not used in the business was deposited in the bank and mixed with the funds belonging to the respondent. The persons who deposited the money and who had assigned their claims to the respondent also testified that when they deposited the money they intended to deposit it with the respondent company; that they had read advertisements in the newspaper published by appellant at Astoria, to the effect that the company received money on deposit for safe-keeping, and for that reason made the deposits with Mr. Kangas, who was the agent here of the appellant. The officers of the appellant company in Astoria denied that they received money at the Seattle branch office for safe-keeping or for deposit, and denied that they knew that Mr. Kangas was accepting money in their behalf for safe-keeping.

The general manager of the appellant admitted that an advertisement was carried in their paper, which was circulated in Seattle and sold at the Toveri Hall, which, translated into English, is as follows:

Seattle. Book Store, 116 Fourth Avenue South, Telephone Main 4367. Copies on hand of all kinds of literature (that means Socialist literature and other merchandise; that would not exactly be merchandise, but other things people need), as well as tickets to Finland and vice versa by best lines—to Finland and return on the best lines—transfers—acts as agent—on money loans and savings and so on. Every party comrade should do all of his business of such nature in their own store."

He also testified, as quoted in the abstract, as follows:

"The word 'deposit' as used there means deposits in our business in Astoria. The Seattle branch company take money to be sent to Astoria, but not for savings in Seattle. That is what the advertisement

means, that he can take money and send it to Astoria, but he cannot take money and keep it in Seattle. We have that understanding with our members, that all deposits must go to Astoria, and we give certificates on Astoria in Seattle for deposits.

"Our company sometimes took money for safe-keeping, but whatever the Seattle manager took for the business he would send to Astoria. He had authority to take money to send to Astoria, but not to keep it here, and when he took the money he was authorized to give a temporary receipt for it and send the money to Astoria and get a permanent receipt. All receipts were made out in the name of the company. That is the custom of the company. Such money as was taken for safe-keeping was kept at the company's account in the bank at Astoria. Such money went into the general banking account of the company in Astoria."

So it is apparent from this testimony of the general manager that the appellant did receive money for safe-keeping, and we think it is also apparent that the customers of the store, who were Finlanders, understood from the advertisement that money could be deposited for safe-keeping in the Seattle branch, and that the manager of the Seattle branch was authorized to take it and receipt therefor. It is true that the ledger in which these accounts were kept was headed "Moneys Left with F. E. Kangas," and "Moneys Paid Out by F. E. Kangas;" and it is also true that receipts which were issued by Mr. Kangas for deposits left with him were signed by him personally, but, according to the testimony of the general manager at Astoria, when moneys were deposited in Seattle, temporary receipts were to be given therefor, and permanent receipts were not given until the money was received in Astoria. But it is apparent from this evidence that the appellant was accustomed to receive money from its customers, and that this was a part

of the business. The fact that the ledger in which these deposits were entered by Mr. Kangas seemed to be a personal ledger, and the fact that receipts issued by him are personal receipts, are explained by the fact that moneys received in this way were first to be received upon temporary receipts. But this fact would not relieve the appellant from accounting for the money before a permanent receipt would issue. If it was the custom of the appellant to receive money on safe deposit, the patrons of the appellant had a right to assume that Mr.

Kangas was agent for the purpose of receiving moneys, and that moneys left with him were moneys left with the appellant.

We are satisfied from the evidence of the general manager himself that Mr. Kangas was authorized to receive money on behalf of the appellant, and, having so received it, the appellant is liable, even though Mr. Kangas may never have accounted to appellant for money so received.

We are also of the opinion that the evidence shows that Mr. Kangas was the agent of the company in receiving these deposits for safe-keeping. The trial court therefore properly found that Mr. Kangas was the agent of the appellant and was authorized to receive money in the way he did. And we are also satisfied that there is no sufficient proof to overcome the finding of the court to the effect that Mr. Kangas received these moneys for the company, and not for himself personally. The rule is elementary that if a bailee accepts money and places it in a private safe, mixed with his own money, or deposits it with his bankers upon his own private account, such treatment of the funds is a conversion, and renders the bailee absolutely liable, even though the money is stolen or embezzled

Principal and agent—authority of agent—assumption by patrons.

—liability for money deposited with agent.

Bailment—admixture of funds—liability for loss.

without his fault. 6 C. J. 1116. Mr. Kangas testified the moneys he received upon these deposits were sometimes loaned to customers of the store for short periods of time, part of it was placed in the bank to the credit of the appellant and mixed, but all of it was mixed with other moneys that belonged to the appellant. The appellant, it appears, never examined the bank account which was kept in its name in a Seattle bank, never examined the ledger in which the accounts of depositors were kept, and never audited this ledger. But even under the testimony of the general manager of the appellant, who lived at Astoria, we think it was the duty of the

appellant to examine all these accounts and books, and to keep track of them, and to know what money was deposited in the Seattle branch, and that if the money so deposited was lost, then under the rule above stated the appellant was clearly liable, even though the money was lost by embezzlement of its local branch manager.

Upon the points discussed, we are satisfied the trial court was right in its conclusion, and the judgment must be affirmed. It is unnecessary to notice other points in the appellant's brief.

Holcomb, Ch. J., and Mitchell, Main, and Tolman, JJ., concur.

ANNOTATION.

Liability of a bailee of money who commingles it with his own funds.

The question of care and negligence of a bailee of money is presented in many of the decisions in the note in 4 A. L. R. 1196, on the subject of the duty and liability of a gratuitous bailee or mandatary.

The rule laid down in the reported case (*PELTOLA v. WESTERN WORKMAN'S PUB. SOC.* ante, 374) that a bailee who accepts money for safe-keeping, and places it in a private safe mixed with his own money, or deposits it with his bankers upon his own private account, is guilty of conversion, and liable for the money even though it is stolen or embezzled without his fault appears to be sound, and is supported by the cases cited in the note, although the authorities on the question are not numerous. It seems well settled that trover will lie for the conversion by a bailee of money intrusted to him for safe-keeping, where he is under obligation to redeliver to the bailor on demand the specific money received. See, for example, *Royce v. Oakes* (1897) 20 R. I. 252, 38 Atl. 371. In other words, there is nothing in the nature of money which makes it an improper subject of an action of trover so long as it is capable of identification. But it should be observed that trover lies

for the conversion of money only when there is an obligation resting on the defendant not to convert to his own use the specific coin or notes. See 26 R. C. L. p. 1106. The question whether there is a loan creating the relationship of debtor and creditor, or a bailment, is often a difficult one in a particular case. It is assumed, of course, for the purposes of this note, that the relationship is that of bailor and bailee; and on this assumption there seems to be little doubt that the mingling of the subject-matter of the bailment with the bailee's own fund so that identification is impossible, is such a violation of the bailee's obligation as will render him liable for conversion, or entitle the bailor, at his election, to maintain an action against him as a debtor; and the bailee could not defend the action on the ground that the money was lost or stolen without his fault. Several cases are cited where the person who received the money appears to have been an agent or trustee rather than a bailee, strictly speaking. The note, however, does not cover that class of cases, the authorities of that kind which are cited being those which have distinguished between that class and bailment cases, or have regarded

the case as in effect one of bailment, or which have a value for illustrative purposes.

In discussing the question whether a state manager of an insurance company could maintain an action of trover to recover from an agent insurance premiums collected by the latter, the court in *Hazelton v. Locke* (1908) 104 Me. 164, 20 L.R.A. (N.S.) 35, 71 Atl. 661, 15 Ann. Cas. 1009, said: In determining, from the circumstances and relation of the parties, whether trover or assumpsit is the proper remedy, it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title thereto passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission. An agent, unless restricted by the terms of his contract, would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be a technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit."

The rule was laid down in *Anderson v. Foresman* (1834) Wright (Ohio) 598, 1 Am. Neg. Cas. 813, that if a gratuitous bailee uses the money intrusted to him and substitutes other money therefor, which is stolen, the money which he received becomes a debt for which he is liable.

And it has been held that a gratuitous bailee or agent who uses for his own purpose money intrusted to him is liable for it at all events, though he subsequently undertakes to replace it out of funds of his own, which was stolen from his pocket. *Ulmer v. Ulmer* (1820) 11 S. C. L. (2 Mott & M'C. 489. In this case, the defendant, who was about to make a trip to Charleston, received money from the

plaintiff to purchase articles for her, and used the money, with other money of his own, to redeem cotton which had been levied upon, but sold the cotton on reaching the city, and started with the proceeds to purchase the articles, when the money was stolen from him. It was held that, having used it for his own purpose, he became a debtor and was liable notwithstanding the theft.

The secretary of a corporation whose duty it is to receive money for the corporation and turn it over to its treasurer, who places the money so received in his own private safe in the office, and sets up as a defense to an action for failure to deliver the money that the safe and its contents were robbed, must show, in order to avoid liability, that the funds of the company were kept separate and distinct from his own, and that the company's money was actually in the safe at the time of the robbery; if he treats money received as his own and his liability as that of a debtor for the amount received, this constitutes a conversion, and the loss will be his own; and unpaid checks of others, or his own unpaid checks substituted for money used, of which payment could be and was stopped, could not be regarded as lost. *Fidelity Invest. Co. v. Carico* (1892) 1 Colo. App. 292, 28 Pac. 1131. To the same effect is a later appeal in (1894) 5 Colo. App. 56, 37 Pac. 29, in which the court said that the defendant's evidence showed a mingling and confusion of the money in question with his own, which amounted to a conversion; and that, at the time of the alleged robbery, he was not a bailee, but the debtor of the company for the amount received by him.

One who receives money for safe-keeping may be held liable for a conversion thereof, if, in violation of his trust, without the bailor's consent, he deposits the money to his own account in a bank which fails, even though he is a gratuitous bailee and is without negligence; the material question is whether the deposit is made with the bailor's consent, either expressly given or fairly to be im-

plied, since if such consent is given the gratuitous bailee is liable only for gross negligence. *Cicalla v. Rossi* (1872) 10 Heisk. (Tenn.) 67. In this case there was evidence that the bailee did not have any other funds in the bank at the time of the deposit, so that the question is not strictly one in commingling of money, but a violation of the trust reposed in the bailee.

And a cattle owner who accepted as a part of his herd which he was taking to market an animal of another for sale, and deposited the entire sum received from the sale of the herd, including that received from the sale of the animal not his own, to his credit in a bank which failed, was held liable to the owner of the animal, as a debtor, in *Coleman v. Lipscomb* (1885) 18 Mo. App. 443, the contention being overruled that the transaction constituted a mere gratuitous bailment. In this case it will be observed that as regards the money received from the sale the one receiving it was, as is pointed out, a trustee rather than a bailee, so that the decision should be regarded as representative of that class of cases wherein a trustee deposits trust funds in a bank to his own account, instead of the separate account of the trust estate.

So, as illustrating cases of trustees or agents who mingled trust money with their own, see also *Young v. Noble* (1859) 2 Disney (Ohio) 485, where an agent for the collection of a bill of exchange deposited in a bank, to his own account, the proceeds collected, and was held liable on the failure of the bank.

See also *Robinson v. Ward* (1825) 2 Car. & P. (Eng.) 59, *Ryan & M.* 274, among possibly other cases of a similar nature, where an attorney who had received a sum of money from the sale of his client's estate deposited it to his own credit in a bank which failed, and it was held that the client could recover the sum from him in an action of assumpsit, even though the attorney acted bona fide and had on deposit at the time of the failure a large sum of his own money.

And where by, or at least with, the consent of the president of an insol-

vent corporation which was engaged in loaning money, the proceeds of a loan, which had been made for a client and repaid, was placed in the corporation's safe, commingled with its own funds and deposited to its bank account, the client being kept in ignorance that the loan had been paid, it was held that such officer was guilty of a conversion. *Milbrath v. State* (1909) 138 (Wis.) 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

Another case of gratuitous agent or trustee who was held liable for money which he collected for another, and placed to his own credit in a bank which failed, is *Massey v. Banner* (1819) 4 Madd. Ch. 413, 56 Eng. Reprint, 757, 20 Revised Rep. 317.

Apparently opposed to the general rule requiring the contemplation of the return of specific property in order to constitute a bailment is *Knapp v. Knapp* (1906) 118 Mo. App. 685, 96 S. W. 295, where the view was taken that although it was not the intention of the party that the identical money should be returned to the owner, the one receiving it may be a bailee if it was the intention of the parties to create a bailment, and that the relationship of bailor and bailee continued, even though the bailee deposited the money to his own account in a bank. In this case the defendant received from her mother \$2,000, which was part of the proceeds of a draft sent to the mother by the defendant's brother. The defendant deposited the money to her individual credit as part of her own bank account. It was held that the defendant was liable as bailee to the administratrix of her brother for the amount so received. The court applied the doctrine of the cases involving the commingling of grain by a warehouseman. It was said: "In respect to the proposition that to constitute a bailment, the parties must have intended that there should be a return or delivery of the identical thing, it is well settled in law, and the nature of some transactions is such that the rule can only be sufficiently answered by returning other property of like value and kind. As said by the supreme court of Penn-

sylvania, in *Repplier v. Jacobs* (1892) 149 Pa. 167, 24 Atl. 194, and as said by Judge Bland, in the opinion of the court in this case: 'For all ordinary purposes in law, as in the business of life, the same sum of money is the same money, whether it is represented by the identical coin or not.' This is certainly reasonable and we do not understand that it necessarily infringes upon the doctrine that a deposit in bank constitutes the bank the owner of the money; or, in other words, ipso facto, transfers the title of the money to the bank and creates the relation of debtor with respect to such bank in favor of the depositor, who is thereby constituted a creditor; for, in the very nature of things, when one in such circumstances has clearly indicated that no intention is present to create the relation of creditor and debtor, but, on the contrary, it is manifest that the parties intended to create the relation of bailor and bailee, we are unable to see why the court should not enforce such intention even though the bailee has employed in business, or transferred, the actual amount deposited to another, and was thereby rendered unable to make restitution of the identical subject of bailment. The question with which the court has to deal is the intention of the parties in creating the relation, rather than the manual possession of the subject of bailment; and we know no reason why, when it is apparent that a bailment was intended by the parties, that the bailor shall be precluded of his rights herein because, forsooth, the identical thing is incapable of being returned to the owner because of no fault on his part. We are persuaded that the authorities holding that the same sum of money in bailment, for the purpose of the law of bailment, is the same money when found to be in possession of the bailee under an arrangement whereby the parties intended such bailment, are sound."

The last case apparently conflicts with such statements of the rule as that for instance, in *Larson v. Dawson* (1902) 24 R. L. 317, 96 Am. St.

Rep. 716, 53 Atl. 93, that "the question whether money can be the subject-matter of an action of trover generally depends upon whether there is an obligation on the part of the defendant to deliver specific money to the plaintiff."

That the commingling by a bailee of the money received, with his own, is a conversion, may perhaps be inferred from such decisions as that in *Price v. Brown* (1886) 41 Hun, 645, 5 N. Y. S. R. 7, to the effect that where money is given to another for safe-keeping the bailor cannot recover interest unless the bailee has mingled the bailor's money with his own.

The fact that one who had received money commingled it with that received from other sources was referred to in *Brewster v. Bates* (1894) 81 Hun, 294, 30 N. Y. Supp. 780, as a circumstance aiding the construction of the transaction as a loan, where a written instrument was given as follows: "Received of Gilbert Brewster \$2,541.36, to operate with in buying and selling crude oil for him, and we are to pay said Brewster the principal and proceeds over and above the cost and trouble of buying and selling, use of tanks, etc."

So, in *Rankin v. Craft* (1870) 1 Heisk. (Tenn.) 711, the fact that the complainant did not allege that the money which he had received from the defendant was kept separate from his own funds was regarded as tending to negative his contention that the case was one of special deposit, instead of, as the defendant contended, a loan.

And it was held that a general deposit or loan was created, and not a bailment requiring the return of specific money, and that therefore the one receiving the money was liable for its loss even without his negligence, where a servant gave his employer \$40 to keep for him, and the employer placed the same, with other money of his own, in his wallet, from which it was stolen after the employer had taken out a small amount for use and added other money of his own. *Shoemaker v. Hinze* (1881) 53 Wis. 116, 10 N. W. 86. The court said: "We

think the evidence shows conclusively that the parties did not contemplate or understand that the same identical money received by the defendant was to be kept for and returned to the plaintiff on demand, but only that a like sum of money should be repaid by the defendant. The transaction is not, therefore a bailment or special deposit, but rather what, in commercial language is termed a general deposit, which is not a bailment, but is in the nature of a loan. . . . So, we think the liability of the defendant in this case is precisely the same as the liability of a bank for a general deposit made with it; that is, he is not liable in tort for the money, but is liable in assumpsit for a sum equal to the sum deposited. His liability is absolute, and it is immaterial that the money was lost without his fault."

It will be observed that in the case last above cited the defendant was held liable, not because of his wrongful commingling of the money with his own, but on the ground that he was not a bailee, but a debtor. The commingling of the money seems to be regarded merely as evidence tending to show the intention of the parties on the question whether the identical money should be returned. And of course, apart from the question of commingling of money, if it can be shown that there was a general deposit or loan, the one receiving the money would be liable irrespective of negligence. As before suggested the note does not cover the question of distinction between a bailment and a loan, arising independently of that of commingling of money.

The decisions in several cases in which the bailor was denied recovery do not seem to be in conflict with these supporting the rule laid down in the reported case (*PELTOLA v. WESTERN WORKMAN'S PUE. SOC.* ante, 374), but appear distinguishable on the ground that there was in fact no commingling of funds so as to destroy the identity of the money received.

Thus, it was contended in *Bissell v.*

Harris (1901) 1 Neb. (Unof.) 535, 95 N. W. 779, that a bailee of money had son commingled it with his own money that he was liable therefor to the bailor even though it was stolen. But the evidence was held not to sustain the contention that the money had been commingled, although the bailee, a merchant who had received from a firm of grain buyers currency to be used in cashing checks issued by them, changed portions of the currency into silver whenever checks called for money of smaller denominations than those furnished, and put the silver with his own funds (the book account showing at all times how much belonged to the grain buyers). The theft in this case was only of currency which had been left in its original condition and it was only necessary to hold that as to such currency, kept separate and intact, the defendant's obligation remained that of bailee.

And where a gratuitous bailee or agent received money collected by him for rent, and placed it in his money drawer in his stateroom, where it was destroyed by fire which destroyed the building, it was held that the bailor could not recover; but the court does not discuss the question of the effect of commingling of money, which may not have occurred in this case, although it is said that evidence was properly admitted that the money collected "was placed in the money drawer, among the money and accounts of the defendant." *Bronnenburg v. Charman* (1881) 80 Ind. 475.

Another case in which a gratuitous bailee of money was held not liable where it was lost by theft, there being apparently no commingling of it with his own funds, although it was placed in a safe in which he kept his own valuables, is *Johnson v. Reynolds* (1865) 8 Kan. 257.

And where money intrusted to an agent for a specific purpose was stolen without his fault, it was held that it was not necessarily a conversion thereof, so as to render the agent liable, that the money was kept in the same safe drawer with his own

money, it appearing that the fund was kept intact. *Furber v. Barnes* (1884) 32 Minn. 105, 19 N. W. 728.

So, it was held in *Bissell v. Harris* Neb. *supra*, that the fact that a bailee of money put a bag containing the money in a safe with some of his own money as a precaution, was not a conversion, since it did not destroy the identity of the deposit.

Also in *Caldwell v. Hall* (1882) 60 Miss. 330, 45 Am. Rep. 410, 1 Am. Neg. Cas. 803, it was held that a depository of money was not liable where it was stolen without his fault, although he had permission to use it in his business, it appearing that he had not exercised this right, except that his bookkeeper had sometimes used small portions of the deposit in making change, dropping into the box in which it was kept a slip showing the amount of money withdrawn, which he always replaced within a few days.

In an action against the executrix of a bailee for special deposits, the court in *Stevens v. Stevens* (1908) 132 Mo. App. 624, 112 S. W. 35, said that as the money could not be identified, the plaintiff (the bailor) adopted the only remedy available to him, which was in the nature of an action for conversion. It does not appear, however, in this case that there was a commingling of the money, at least by the bailee, although he had made change out of the special deposit,

which was kept in an envelop; but the court regarded the conversion, if any, as being by the executrix.

In *Hunnicutt v. Higginbotham* (1903) 138 Ala. 472, 100 Am. St. Rep. 45, 35 So. 469, where an executor was held liable in an action of trover for damages for the conversion of money delivered in a package by the plaintiff to the intestate, his wife, to keep for him, the commingling of his money, if any, was by the executor, as the decision appears to be on the ground that the intestate kept the money separate, and that for this reason the case was within the rule that trover will lie for the conversion of money where there is an obligation on the part of the defendant to return specific coin intrusted to him. If the decedent had commingled the money, this would apparently have precluded the plaintiff from maintaining trover on the theory that such commingling constituted an act of ownership by the decedent, and the plaintiff had elected to take under the will.

The right of the bailor to follow and recover funds which the bailee has converted by depositing in a bank to his own credit money which he has received for safe-keeping, on the theory of following trust funds, is beyond the scope of the note. As sustaining this right, see, for example, *Beamish v. Lawlor* (1915) 43 N. B. 426, 23 D. L. R. 141. R. E. H.

FRANK SINKE et al.

v.

CARRIE MUNCIE et al., Appts.

Kansas Supreme Court—January 7, 1922.

(— Kan. —, 203 Pac. 1102.)

Will — construction — power of disposition.

1. By his last will, probated in 1896, the testator devised all his property to his wife "to have and to hold the same during her natural life, and at her death to dispose of all the remainder of the property among the children and their heirs as she may deem best." In 1918 the widow exe-

Headnotes by PORTER, J.

cuted deeds conveying some of the real estate to certain of the children in consideration of "\$1 and love and affection," and reserving to herself the use of the property during her life. In an action to set aside the conveyances, held, that the power to dispose of the estate is not limited to a will, either by implication or express terms, and therefore may be executed either by will or by deed, and that in this case the deeds, so far as they may operate simply in execution of the power, take effect only from the death of the widow, the words "and at her death" merely denoting the period when the disposition should take effect.

[See note on this question beginning on page 388.]

Powers — execution by will.

2. To the extent that a deed would be inoperative except as an execution of a power of appointment, it will exe-

cute the power, though no reference is made thereto.

[See 21 R. C. L. 798.]

APPEAL by defendants from a judgment of the District Court for Doniphan County (Stuart, J.) in favor of plaintiffs and from an order denying a motion for new trial, in an action brought to set aside certain deeds alleged to have been procured by false and fraudulent representations by defendants. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Bennett R. Wheeler, S. M. Brewster, and John L. Hunt, for appellants:

Under the terms of the will of Frederick Sinke, Sr., the power of appointment given to his widow was properly exercised by deed.

Sugden, Powers, 319, * 270; Tomlinson v. Dighton, 1 P. Wms. 149, 24 Eng. Reprint, 335; Cueman v. Broadnax, 37 N. J. L. 509; Fairman v. Beal, 14 Ill. 244; Christy v. Pulliam, 17 Ill. 59; Burbank v. Sweeney, 161 Mass. 490, 37 N. E. 669; Doe ex dem. Thorley v. Thorley, 10 East, 438, 103 Eng. Reprint, 842; Loosing v. Loosing, 85 Neb. 66, 25 L.R.A.(N.S.) 920, 122 N. W. 707; Benesch v. Clark, 49 Md. 497; Humble v. Bowman, 47 L. J. Ch. N. S. 62; Ex parte Williams, 1 Jac. & W. 89, 37 Eng. Reprint, 309; Forsythe v. Forsythe, 108 Pa. 129; Wead v. Gray, 78 Mo. 59; 21 R. C. L. 798, ¶ 30; Warner v. Connecticut Mut. L. Ins. Co. 109 U. S. 357, 27 L. ed. 962, 3 Sup. Ct. Rep. 221; Willier v. Cummings, 91 Neb. 571, 136 N. W. 559, Ann. Cas. 1913D, 287; 31 Cyc. 1122; Walters v. Bristow, 77 Ark. 182, 113 Am. St. Rep. 136, 91 S. W. 305; Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 90 Am. St. Rep. 22, 30 So. 466; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420, 5 S. E. 38; McCreary v. Bomberger, 151 Pa. 323, 31 Am. St. Rep. 760, 24 Atl. 1066; Hassam v. Hazen, 156 Mass. 93, 30 N. E. 469.

Messrs. J. J. Baker and Eastin & McNeely, for appellees:

The express provision that the wife shall have but a life estate controls.

Pearson v. Orcutt, 106 Kan. 610, 189 Pac. 160; Williams v. McKinney, 34 Kan. 514, 9 Pac. 265; Markham v. Waterman, 105 Kan. 93, 181 Pac. 621.

The remainder was not disposed of by the will. It is intestate property, and is vested in the heir by descent, subject to be divested by the exercise of the power conferred upon the life tenant by the will.

Ernst v. Foster, 58 Kan. 438, 49 Pac. 527; Fairman v. Beal, 14 Ill. 244; Fogler v. Titcomb, 92 Me. 184, 42 Atl. 360; Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365; Long v. Waldraven, 113 N. C. 337, 18 S. E. 251; Hare v. Congregational Soc. 76 Vt. 362, 57 Atl. 964; Ketchin v. Rion, 68 S. C. 260, 47 S. E. 376.

Where an express life estate is created by a will, an added power of disposition does not convert such life estate into one in fee simple.

Lewis v. Pitman, 101 Mo. 281, 14 S. W. 52; Jackson v. Robins, 16 Johns. 537; Tomlinson v. Dighton, 1 P. Wms. 149, 24 Eng. Reprint, 335; Burwell v. Anderson, 3 Leigh, 356; Rubey v. Barnett, 12 Mo. 8, 49 Am. Dec. 112.

Porter, J., delivered the opinion of the court:

Frederick Sinke, a resident of

Doniphan county, died in January, 1896, leaving surviving him Frederica Sinke, widow, and nine children, seven of whom are the plaintiffs; two, with the widow, are defendants. Frederick Sinke disposed of all of his property by a last will, which contained the following provision: "I give, devise, and bequeath all of my property, both real and personal and mixed of whatever kind and nature and wherever the same may be situated, to my beloved wife, Frederica Sinke, to have and to hold the same during her natural life, and at her death to dispose of all the remainder of the property among the children and their heirs, as she may deem best. And I hereby authorize her to have complete control of all of said property, with authority to sell and dispose of all or any part thereof and use and invest the proceeds of any such sale as she may need it or any and all of said property with the rents and profits thereof."

Since the probate of the will, the widow has been in possession of all the property, collecting the income, has purchased additional real estate, and has accumulated several thousand dollars, which she has invested in notes and mortgages. In the latter part of 1918 she executed deeds to her daughter Carrie, one of the defendants, conveying certain lots in the town of Wathena and a quarter section of land, the stated consideration in each deed being \$1 and love and affection. She reserved to herself the use and profits of the property during her life. About the same time she conveyed to Frederick Sinke, Jr., a quarter section of land in Doniphan county for the same consideration, and with the same reservation of the use and control during her life.

This action was brought by the seven children to set aside the conveyances. The petition alleged that Mrs. Sinke, who is now past eighty-four years of age, has become enfeebled and weakened in her mind, and is under the influence of certain of the defendants, and that the

deeds were procured by false and fraudulent representations of the grantees and by means of their control over her mind and will; that by similar false and fraudulent representations the defendants have procured possession of notes, money, and securities belonging to the estate.

The plaintiffs asked that the conveyances be canceled, that defendants be required to account for money and securities procured by them from their mother, that Frederica Sinke be adjudged incompetent to longer manage and control the estate, and that a receiver and trustee be appointed to take charge of all the property, and control the same under orders of the court, using so much of the income as was necessary for the support and maintenance of the widow, and to hold the remainder, "having regard to the wishes and directions contained in the will."

Issues being joined, the court tried the case, and found all the facts against plaintiffs, and held that when the deeds were executed Frederica Sinke was of sound mind and mentally capable, and that none of the conveyances were procured by undue influence; that no reason appeared why she should be deprived of the control of the estate. The court found that, in executing the deeds, she was attempting to exercise the power of appointment conferred upon her by the will; but the court held, as a conclusion of law, that Frederica Sinke could not exercise the power of appointment by deed, but could only exercise it by making and publishing a will and testament. As a further conclusion of law it was held that the deeds should be set aside because of lack of power in the grantor to execute them, and judgment was rendered accordingly. A motion for a new trial was overruled, and the defendants appeal.

The point upon which the judgment turned, although not suggested by plaintiffs in their petition, is the only one for determination here.

The question is whether the power of appointment given to Frederica Sinke by the last will of her husband can be exercised by will only, and not by deed. The will gives all the property to her "to have and to hold the same during her natural life, and at her death to dispose of all the remainder of the property among the children and their heirs, as she may deem best." The same paragraph declares: "And I hereby authorize her to have complete control of all of said property, with authority to sell and dispose of all or any part thereof and use and invest the proceeds of any such sales as she may need it, or any and all of said property with the rents and profits thereof."

The question, very ably briefed by both parties, is by no means a novel one. The courts have frequently been called upon to construe substantially the same provision where the testator had devised property with a power of disposition to be exercised "at the death" of the devisee, as the devisee may deem best. A leading case cited in the brief is *Tomlinson v. Dighton*, 1 P. Wms. 149, 24 Eng. Reprint, 335, where the devise was to the testator's wife "for life and then to be at her disposal," provided it be to any of testator's children. It was held that she took an estate for life, with power to dispose of the fee. The widow remarried, and afterwards conveyed the property to a trustee and his heirs for her use for life. The conveyance was held a good execution of the power.

In *Sugden on Powers*, it is said: "A power to dispose of the estate to such persons and uses as the party should think fit would enable him to appoint the fee by will or act *inter vivos*." Page 319.

In an early case, the question was considered by the supreme court of Illinois in *Fairman v. Beal*, 14 Ill. 244. In the opinion it was said: "Where a power is conferred to dispose of an estate, without defining the mode in which the power must

be executed, it may be exercised either by deed or will. But if it is required to be executed by deed, it cannot be done by will; and if a will is required, a deed will not suffice. Although courts cannot dispense with the form prescribed, for the execution of a power, yet they generally incline to put a liberal construction on the words of the power. *Sugden, Powers*, chap. 6, §§ 2, 3. In this case, a general power was given to the tenant for life, to dispose of the reversion. The mode in which it was to be exercised was not prescribed, unless it is to be implied, from the phrase 'at her death,' that a will was intended. These words do not restrict the execution of the power to a testamentary disposition. *Sugden*, in his valuable treatise on *Powers*, in chapter 6, § 3, says: 'But the mere circumstance of the estate being limited to A for life, and "after his death," or "then," to be at his disposal, will not, by implication, restrain the execution of the power to a will;' and the authorities referred to by him fully sustain his position. In *Tomlinson v. Dighton*, 1 P. Wms. 149, 24 Eng. Reprint, 335, land was devised to the wife for life, 'and then to be at her disposal.' The wife conveyed the inheritance by deed, and the court held it to be an effectual execution of the power. In a case reported in 3 *Leonard*, 71, the devise was of lands to the wife for life, 'and after her decease she to give the same to whom she will.' She made a grant of the reversion, and it was held to be a good execution of the power. Our opinion is that Mrs. Belch took a life estate under the will of her husband, with power to dispose of the inheritance; and that her deed to Waddle was a valid execution of the power. Under the will and deed, Waddle succeeded to all the title which the testator had at the time of his decease." 14 Ill. 246, 247.

The case was followed by *Christy v. Pulliam*, 17 Ill. 59, where "a husband made certain bequests to his wife, among others, certain lands,

"to dispose of at her death to any person she may think best to live with her, and take care of her." It was said: "The power conferred on the wife by the will may be executed by deed or will, or other simple writing, if sufficient to convey the subject-matter of it; the intention of the devisor, by the power conferred on the wife, is too plain to admit of restriction." Syl.

In *Burbank v. Sweeney*, 161 Mass. 490, 37 N. E. 669, the testator left property to his wife "to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of above to my heirs at law." The court held that the wife was given a power of disposal by will as well as by deed during her life. To the same effect see the following authorities: 4 Kent, Com. 330; 2 Hilliard, Real Prop. 559, § 12; 1 Sugden, Powers, chap. 6, § 3, cls. 9, 13; Tiffany, Real Prop. 2d ed. § 323.

In 21 R. C. L. 792, it is said: "Where a general power to dispose of property is given, without specifying the manner of execution, the power may be executed either by deed or will."

In *Loosing v. Loosing*, 85 Neb. 66. 25 L.R.A. (N.S.) 920, 122 N. W. 707, the provision was "that my beloved wife . . . shall have the use and disposition of all my personal property, also the income as long as she lives." The will also contained this provision: "I want my wife to dispose or distribute this property which I have not devised, as she sees fit, or deems best in her judgment."

Also a provision as follows: "The remaining children which I have not mentioned in this will, I will leave it to my wife, to give them as she sees fit out of the property I left for her to dispose of."

It was said in the opinion: "The testator did not specifically designate in his will the methods to be pursued by his widow in executing the power vested in her by him, and

she therefore is at liberty to indulge her judgment or fancy by executing a deed or a will." 85 Neb. 72.

It is, in our opinion, thoroughly well established by the cases and text-writers that this rule obtains notwithstanding the appointment of the powers contains the words "at his" or "at her death," or, when the testator, after referring to the devisee's lifetime, employs the words, "and then" or "then." In most of the cases we have examined, the opinion refers to the rule stated by Sugden on Powers, supra, that "the mere circumstance of the estate being limited to A for life, and 'after his death,' or 'then,' to be at his disposal, will not, by implication, restrain the execution of the power to a will."

In *Benesch v. Clark*, 49 Md. 497, the provision read, "To be disposed with as my said wife sees fit, at her decease." She conveyed by deed of assignment, and the contention was that the power could not be exercised except by a last will and testament, stress being laid upon the use of the words "at her decease" as the time when the property was to be disposed of by the life tenant. There the court held that the power could be exercised either by deed or will, quoting Sugden on Powers, supra. In the opinion the court said further: "Such deed, so far as it may operate simply in execution of the power, could be operative only from the death of Mrs. Bramble, and in the event that she remained and died the widow of the testator; and therefore the words 'at her decease' only denote the period when the disposition should take effect." 49 Md. 506.

The plaintiffs cite the following extract from *Perry on Trusts*, 3d ed. § 254: "The general rule is that the power given must be strictly executed as given, or it will remain as a trust for the person or class in whose favor it is given; thus, if the donee is to dispose of the property to such person of a particular class as she shall select in a last will and testament, and the disposition is

made by a deed, the power is not executed, and it will be construed into a trust for the whole class, or will go over, if there is a gift over in default of an appointment or execution of the power."

This is a mere statement of the general rule that the power must be strictly executed as given. In the present case, as we have seen, the power is not limited to a will

Will—construction—power of disposition.

either by implication or express terms; and where there is no limitation the power may be executed either by will or by deed.

The plaintiffs place some reliance upon the decision in *Pearson v. Orcutt*, 106 Kan. 610, 189 Pac. 160. In the brief it is said that in that case "there was no power of appointment, . . . but the donee exercised one and gave the property away by deed," and that in the present case "there is a power of appointment by will, but the donee gave the property away by deed. In both cases the donees, by these gifts, deprived themselves of the property, contrary to the intention of the testator. In each will the estate was intended for the benefit of the widow." We cannot agree with the contention that the will now under consideration contains a power of appointment by will only. Nor do we think that anything can be found in the four corners of the will calling for such construction. Nothing decided in *Pearson v. Orcutt*, *supra*, controls the present case.

It is argued, however, that the intention of the donor would be defeated by any other instrument than a will; it is insisted that it could not have been the intention of the tes-

tator to authorize the widow to execute the power by an irrevocable and absolute deed; that he must have intended that his wife should not execute the power except by will, in order that she might have the opportunity of changing her mind at any time before her death. We think the provisions of the will show that the testator imposed implicit confidence in the discretion and judgment of his wife to dispose of the property as she might see fit, so long as she retained the use of the property until her death.

There is a suggestion that the deeds cannot be construed to be an attempt to exercise the power of appointment, because no reference is made in them to the

Powers—execution by will.

will of Frederick Sinke. The weight of authority seems to be that there is no necessity for a reference to the power in the instrument by which it is executed. 4 Kent, Com. 334. In 21 R. C. L. 798, it is said: "In any event it is clear that where a deed would be inoperative except as an execution of the power, it will execute the power though no reference is made thereto."

See *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 357, 27 L. ed. 962, 3 Sup. Ct. Rep. 221; also 31 Cyc. 1131.

It is clear that the court erred in holding that the power of appointment conferred upon the widow by the will of Frederick Sinke could not be exercised by deed; and since the court has found all the issues of fact against the plaintiffs, the judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendants.

All the Justices concur.

ANNOTATION.

Will as exclusive means of exercising power conferred by will to dispose of property.

This annotation is essentially narrow in its scope, and includes only such cases as discuss the precise ques-

tion whether a general power of disposition conferred by a will, which does not designate the mode or man-

ner of its execution, must be exercised by will or may be exercised by other means. Accordingly, cases are excluded which hold merely that, where the language used in a will creating a power is broad enough to indicate that the donee should have the absolute power of disposal, including a disposition by will, the donee may execute the power by will. And, of course, cases which hold that where the execution of a power is restricted by the terms of the will to a particular instrument, such as either a deed or a will, such restriction must be observed, and the power cannot be validly executed in any other way, do not fall within the scope of the annotation.

A power to dispose of property given by will, without specifying the manner or mode of execution, may be exercised by deed as well as by will, and the latter mode is not exclusive, although the power is to be exercised "at the death" or "decease" of the donee thereof.

Georgia. — Compare *Porter v. Thomas* (1857) 23 Ga. 467.

Illinois. — *Fairman v. Beal* (1852) 14 Ill. 244; *Christy v. Pulliam* (1855) 17 Ill. 59.

Kansas. — See the reported case (*SINKE v. MUNCIE*, ante, 383).

Kentucky. — See *Sherill v. Overbacker* (1918) 182 Ky. 626, 206 S. W. 876.

Maryland. — *Benesch v. Clark* (1878) 49 Md. 497.

Massachusetts.—*Kimball v. Sullivan* (1873) 113 Mass. 345.

New Jersey. — *Cueman v. Broadnax* (1874) 37 N. J. L. 508.

New York. — See *Re Gardner* (1893) 140 N. Y. 122, 35 N. E. 439.

North Carolina.—*Tillett v. Nixon* (1920) 180 N. C. 195, 104 S. E. 352.

Texas. — Compare *Weir v. Smith* (1884) 62 Tex. 1.

Thus, in an early case, *Fairman v. Beal* (Ill.) supra, the court said: "Where a power is conferred to dispose of an estate, without defining the mode in which the power must be executed, it may be exercised either by deed or will. . . . In this case, a general power was given to

the tenant for life to dispose of the reversion. The mode in which it was to be exercised was not prescribed, unless it is to be implied from the phrase 'at her death' that a will was intended. These words do not restrict the execution of the power to a testamentary disposition."

So, in *Christy v. Pulliam* (Ill.) supra, wherein it appeared that a testator had devised certain lands to his wife "to dispose of at her death to any person she may think best to live with her, and take care of her," the court held that the power might be executed by deed as well as by will, saying: "When the mode of executing the power is not defined, it may be executed by deed or will, or other simple writing, if sufficient to convey the subject-matter of it."

It appeared in *Benesch v. Clark* (1878) 49 Md. 497, that a testator devised to his wife real estate "to be disposed with as my wife sees fit, at her decease." She conveyed by deed of assignment, and the contention was that the power could not be exercised except by will, stress being laid on the use of the words "at her decease" as the time when the property was to be disposed of. The court held that the power could be exercised by deed as well as by will, saying: "Authorities are ample for holding that it was competent to Mrs. Bramble to execute the power by deed of assignment, and that she was not restricted to last will, as contended by the appellees. Such deed, so far as it may operate simply in execution of the power, could be operative only from the death of Mrs. Bramble, and in the event that she remained and died the widow of the testator; and therefore the words 'at her decease' only denote the period when the disposition should take effect."

In *Tillett v. Nixon* (N. C.) supra, the court construed a will which, after creating a life estate in land, provided that the beneficiary should "have the power to devise, or bestow, after her death, unto or upon whomsoever she will, all my estate not hereinbefore devised." The court held that the power of disposition so con-

ferred might be exercised by deed as well as by will, saying: "No reason appears why the testator, having devised to his daughter a life estate, and having then the intention to give her the power of disposition for her own benefit exclusively, should have limited the exercise of this power to an appointment by will, which could not benefit the donee, thus nullifying his very purpose in creating the power. The contention of the defendants that the power can only be exercised through the form of a will by Mrs. Alice A. Tillett is further negatived, as plaintiffs contend, by the language of the power itself."

Similarly, it has been held that under a will creating a life estate in several devisees of land "to be disposed of by them at their deaths as they may think proper," the disposing clause did not limit the exercise of the power to a disposition by will, but it might be exercised as well by the execution and delivery of a deed. *Goodloe v. Woods* (1913) 115 Va. 540, 80 S. E. 108, wherein the court said: "It is not controverted that Samuel F. Woods took a life estate in the land assigned to him under the will of James Woods, deceased, with a power of appointment as to the remainder, but the appellants contend that whilst the deed to Paul, trustee, made in pursuance of the marriage contract, conveyed the life estate, it was unauthorized as to the remainder, because the power of appointment could only be exercised by will. The will of James Woods prescribes no method by which the power is to be exercised, nor is there anything to indicate that the testator intended that any particular method should be adopted, unless the language, 'to be disposed of by them at their deaths as they may think proper,' can be construed as an intimation that the power is to be exercised by will. In our opinion that expression is not sufficient to limit the exercise of the power to a will."

Likewise, where a testator devised real property to his wife "to have and to hold the same forever," with a remainder over to certain benevolent societies in the event that she, "at

her decease, should make no disposal of the property," it was held that the full power of disposition thereby created might be exercised by deed as well as by will. *Kimball v. Sullivan* (1873) 113 Mass. 345, wherein the court said: "The proviso that if his wife, 'at her decease, should make no disposal of the property herein willed and bequeathed to her, and leave no child or children to heir the estate,' then the estate shall go to the three benevolent societies named, necessarily implies that she is to have the power of disposing of it by will. . . . And we are of opinion that the reasonable inference from the proviso, construed in connection with the prior devise giving her a fee, is that the testator intended to give her a full power of disposal by will or deed, and, . . . as she had an absolute power of disposal, her deed conveyed a fee."

A fortiori, where a will gives a power of disposition, and does not refer to the death of the donee as the time when it shall be exercised, it may be exercised by either deed or will. *Cannon v. Laing* (1922) — Ga. —, 111 S. E. 565; *Hale v. Marsh* (1868) 100 Mass. 468; *Loosing v. Loosing* (1909) 85 Neb. 66, 25 L.R.A. (N.S.) 920, 122 N. W. 709; *Forsythe v. Forsythe* (1885) 108 Pa. 129.

In *Loosing v. Loosing* (1909) 85 Neb. 66, 25 L.R.A. (N.S.) 920, 122 N. W. 709, supra, under the will of a testator providing that "my beloved wife . . . shall have the use and disposition of all my personal property, also the income as long as she lives off of the . . . land," a disposition by deed was held to be authorized by the following disposing clauses: "I want my wife to dispose or distribute this property which I have not devised, as she sees fit, or deems best in her judgment," and, "The remaining children which I have not mentioned in this will, I will leave it to my wife, to give them as she sees fit out of the property I left her to dispose of."

Under a will giving the testator's wife, who was also sole executrix, a life estate in the residue of the property, and providing that she might

dispose of any piece of property, or any part of the estate that she thought to the best interest of the estate, it was held in *Cannon v. Laing* (Ga.) supra, that a lease for a definite term of five years, for a valuable consideration which on its face was a fair rental value, was a good execution of the power, and not terminable on the death of the life tenant.

So, in *Forsythe v. Forsythe* (Pa.) supra, it was held with regard to the general power of a devisee to dispose of property "as she may think best," without any reference to the time of disposition, that it was unlimited as to the mode, and therefore included any kind of disposition.

In *Hale v. Marsh* (Mass.) supra, it appears that a will devised and bequeathed to the testator's wife all his property, both real and personal, "with full and absolute power and authority to sell and dispose of the whole or any part or portion of the same, whether real or personal, at her own pleasure." The court held that the gift was of a life estate, with a full power of disposition, both by deed and by will, and the widow might convey in fee simple a portion of the real estate during her lifetime.

Also, where the power provides for disposition "during the lifetime" of the donee, it has been held that either a deed or a will is a valid execution. *Burbank v. Sweeney* (1894) 161 Mass. 490, 37 N. E. 669; *Wead v. Gray* (1883) 78 Mo. 59.

Thus, in *Burbank v. Sweeney* (Mass.) supra, wherein it appeared that the testator gave all his estate to his wife "to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of above to my heirs at law," the court held that the wife was given a power of disposition by either will or deed executed during her lifetime, saying: "The natural signification of the words 'during her lifetime,' as they are . . . used by this testator, is . . . to make it sure that she [the devisee] should have all her life in which to execute the power, by will

or otherwise, as she might deem expedient."

So, in *Wead v. Gray* (Mo.) supra, the devisee of a life estate was given the following power of disposition: "I give and bequeath to my only child, Rachel, . . . all my property, real, personal, and mixed, . . . wishing my said daughter to have, use and dispose of the same absolutely in any way that may seem to her best, . . . it being the intention and meaning of this, my last will and testament, that my said daughter Rachel . . . have and dispose of all my property in her own right as absolute owner . . . and that the same, and its proceeds and increase, if not disposed of and expended by her in her lifetime, shall descend at her death to her children." The court held that "the absolute power of disposition given by the will . . . included the power to dispose of the property as well by will as by deeds to real estate or bills of sale of personal property."

However, it has been held in two jurisdictions that where property is given by will, with power of disposition at the beneficiary's death, the power cannot be exercised by deed, but only by will. *Porter v. Thomas* (1857) 23 Ga. 467; *Weir v. Smith* (1884) 62 Tex. 1. In the case last cited, the court said: "The fifth clause of the will gave to the wife the power, at the time of her death, to make a final disposition of such parts of the original estate, and of the increase and profits arising therefrom, as might then be undisposed of, as she, in her discretion, might think proper and right. This gave to the wife a very broad power, a power subject alone to her own discretion, through which she might pretermitt some of the children. This power, as it could only be exercised 'at the time of her death,' it would seem, in the nature of things, could only be executed by her will."

And a power to "leave" property has been construed as requiring execution by will. *Doe ex dem. Thorley v. Thorley* (1809) 10 East, 438, 103 Eng. Reprint, 842; *Moore v. Ffolliot* (1887) Ir. L. R. 19 Eq. 499. L. F. C.

RE ESTATE OF CECELIA DONOHUE.

RICHARD DONOHUE et al., Appts.

Pennsylvania Supreme Court — January 3, 1922.

(271 Pa. 554, 115 Atl. 878.)

Bills and notes — place of signature — materiality.

1. That the signature to a note appears in its body instead of at the end of the writing is unimportant if the maker intended to obligate himself for its payment.

[See note on this question beginning on page 394.]

— consideration — repayment of gift.

2. A sealed note intended to repay money given to the maker of the note, and perfected by delivery, is valid.

[See 3 R. C. L. 922.]

Evidence — proof of execution of note.

3. The execution of a note may be established by admissions of the maker and proof of his signature.

Contract — to repay money — sufficiency.

4. Loose declarations of the recipient of a gift of money, that it is to be repaid at her death, are not suf-

ficient to obligate her estate to repay it.

Trust — gift — how established.

5. The recipient of money intended as a gift cannot be treated as a trustee for the donor, in the absence of any agreement or declaration of trust.

Appeal — rejection of evidence — when not error.

6. It is not error to refuse to permit the writer of a letter which is perfectly clear and capable of but one construction, to testify as to what he meant by it.

[See 10 R. C. L. 1070.]

APPEALS by claimant and others from orders of the Orphans' Court for Westmoreland County (Beacom, President J.) allowing a note presented by claimant against the estate of his deceased mother, and rejecting his other claim, in a proceeding for the settlement of decedent's estate. *Appeals dismissed.*

The facts are stated in the opinion of the court.

Mr. James L. Kennedy for appellant Richard Donohue.

Mr. Robert W. Smith for appellants Ewing et al.

Walling, J., delivered the opinion of the court:

Cecelia Donohue died testate in 1919, leaving eight children, whose father had died in 1899. Reverend Richard Donohue, one of the children, here called "the claimant," received from his father's estate an annual income of about \$1,500, in the form of checks for dividends, interest, etc. He was engaged in educational work as college president, without need of the income, and delivered the checks therefor properly indorsed to his mother, who mingled the same with her oth-

er funds, all of which she used as her own and for her own purposes. The claimant's understanding of the transaction is shown by a letter written by him July 7, 1920, to the attorney of other legatees, wherein he states, inter alia: "Permit me to say here that any and all moneys I have ever received since father's death in 1899, I turned over to mother . . . as a free gift, not expecting any return. However, in a letter under date of January 16, 1909, mother wrote to me, 'Lately I have been thinking of the disposal of my belongings, of course you are to receive back, with interest, all you have given me.' I still have this letter in my possession."

The mother's estate amounted to

over \$200,000, and at the audit thereof claimant presented a note as follows, omitting the judgment clause, viz.:

\$13,070.86. August 30th, 1910.

I, *Cecelia W. Donohoe*, after date, August 30th, promise to pay to the order of *Richard Donohoe*, thirteen thousand and seventy dollars and 86/100 dollars without defalcation, value received, with interest at 6%.

Witness my hand and seal.

[Seal.] Hester Johnson,
Notary Public.

The note was on a printed form, and the words underscored above were in the handwriting of Mrs. Donohoe, as were also the words "I" and "me" written in the judgment clause. The notary public, who signed at the end of the note, was a resident of Maryland. The evidence is that Mrs. Donohoe said she had given the note to her son, and justifies the conclusion that it was done because of the income checks theretofore received by her, as above stated.

Between the date of the note and the decedent's death, claimant continued to turn the income checks over to her as before, amounting in all during that time to \$14,896; for which sum, with interest, he also presented a claim at the audit. The mother, however, gave no acknowledgment of indebtedness for funds received after the date of the note, but did not say to other sons, in effect, that the amounts so received belonged to claimant and were to be returned to him at her death, or that such was her desire. There is, however, no pretense of an agreement on her part to return the funds to claimant. His statement that the money was a "free gift, not expecting any return," negatives any inference of such an agreement. Decedent's will, made two or three years after the date of the note, makes no reference to the funds in question. The orphans' court entered a decree allowing the note and rejecting the other claim, from which each side appealed.

Notwithstanding the son intended the money as a gift, the mother had the right to repay it, and her sealed note, given for that purpose, is valid. That Mrs.

Donohoe's signature appears in the body of the note, and not at the end, is unimportant, so long as she intended thereby to obligate herself for its payment. There is no law requiring a note to be signed at the end thereof, as in the case of a will; hence, whenever it can be found that the signature, wherever it appears, was intended as an execution of the note it is sufficient. For example, to write, "On demand, I John Smith, promise to pay Thomas Brown, one hundred dollars," is, in form, a good obligation, and that is essentially this case.

Bills and notes—
consideration—
repayment of
gift.

—place of signature—materiality.

"It is not necessary that the signature of a party to a contract should appear at the end thereof. If his name is written by him in any part of the contract, or at the top, or the right or left hand, with intention to sign for the purpose of authenticating the instrument, it is sufficient to bind him." 9 Cyc. 301.

"When a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end of the instrument. If the name of the party whose signature is required is written by him in any part of the instrument, for the purpose of authenticating it, it is a sufficient signature." 36 Cyc. 449.

The same rule applies to commercial paper. 7 Cyc. 614; and see *Smith v. Howell*, 11 N. J. Eq. 349. The fact that for greater solemnity Mrs. Donohoe called in a notary public, who was a stranger to the instrument and mistakenly wrote her name in the wrong place, is unimportant; the obligation remained that of Cecelia W. Donohoe, and, being perfected by delivery, is unsailable.

It was competent to establish the

execution of the note by proof of the admissions of the maker (Williams v. Floyd, 11 Pa. 499; American Underwriter's Asso. v. George, 97 Pa. 238, 241; Stewart v. Gleason, 23 Pa. Super. Ct. 325), and also by proof of her handwriting (Clark v. Freeman, 25 Pa. 133).

The \$14,896, like that for which the note was given, was, according to claimant's own statement, "a free gift, not expecting any return," which, when completed by delivery and used by decedent as her own, became her property. An acceptance of the gift will be implied where, as here, it operates entirely for the donee's benefit. 12 R. C. L. p. 934, § 10; Bryce's Estate, 194 Pa. 135, 44 Atl. 1076. Mrs. Donohoe might have obligated herself to repay this money, as she did that represented by the note, but failed to do so. Her loose declarations to third parties that the money was

**Contract—to re-
pay money—
sufficiency.**

to be returned at her death fall far short of constituting a contract on her part to that effect. Claims against decedents' estates cannot be established by proof of such declarations. Gilbraith's Estate, 270 Pa. 288, 113 Atl. 361; Hertzog v. Hertzog, 29 Pa. 465. Mrs. Donohoe's letter, above referred to, was written in 1909, and her therein expressed intention of returning to claimant what he had given her is confined to funds theretofore received, and, while it may tend to support the note, has no bearing on the \$14,896 claim. True, decedent probably intended that the funds received from her son should

be repaid to him at her death, but unfortunately she made no provision, testamentary or otherwise, to that effect; and, in the absence thereof, her estate is not liable.

The transaction being intended by claimant as a gift, the mother cannot be treated as a trustee of the fund, in the absence of an agreement or declaration of trust.

**Trust—gift—
how established.**

See Robinson v. Powell, 210 Pa. 232, 59 Atl. 1078. The fact that she mingled this money with her own, and used it for her own purposes, is not consistent with the theory that she regarded it as a trust, although she may have intended to repay it.

Referring to the letter from claimant, in part above quoted, his attorney made the following offer, viz.: "I propose to call Reverend Richard Donohoe, who wrote this letter, to explain any seeming ambiguity in the language of the letter, and to make it clear just what he meant by the letter."

This was properly rejected. There is no seeming ambiguity in the language of the letter, nor aught that requires explanation. When a letter or other writing is perfectly clear and capable of but one construction, it is not error to refuse to permit the writer to testify as to what he meant thereby. Of course Reverend Donohoe could not testify as to matters occurring prior to his mother's death.

**Appeal—rejection of evidence
—when not error.**

The assignments of error are all overruled, and the appeals are dismissed, at the costs of the respective appellants.

ANNOTATION.

Place of maker's signature on bill or note.

- I. In general, 394.
- II. Signature in body, 395.
- III. Signature on back, 396.
- IV. Effect of signature in unusual places, 397.

I. In general.

The cases uniformly agree with the

decision in the reported case (RE DONOHOE, ante, 392) that the maker's or drawer's signature to a bill or note need be at no particular part of the instrument. Lampkin v. State (1894) 105 Ala. 1, 16 So. 575; Eudora Min. & Development Co. v. Barclay

(1898) 122 Ala. 506, 26 So. 113; Knox v. Rivers Bros. (1920) 17 Ala. App. 630, 88 So. 33; Palmer v. Grant (1822) 4 Conn. 389; Quin v. Sterne (1858) 26 Ga. 223, 71 Am. Dec. 204; Camden v. McKoy (1842) 4 Ill. 437, 38 Am. Dec. 91; Lincoln v. Hinzey (1869) 51 Ill. 435; Kistner v. Peters (1906) 223 Ill. 607, 7 L.R.A.(N.S.) 400, 114 Am. St. Rep. 362, 79 N. E. 311; Miers v. Coates (1895) 57 Ill. App. 216; Steininger v. Hoch (1861) 39 Pa. 263, 80 Am. Dec. 521; Taylor v. Dobbins (1720) 1 Strange, 399, 93 Eng. Reprint, 592.

In Tevis v. Young (1858) 1 Met. (Ky.) 197, 71 Am. Dec. 474, the court, in denying the validity of a draft in which the drawer's name does not appear at all, says obiter that the name of the drawer is usually written or subscribed at the bottom of the bill, but this does not seem to be absolutely indispensable; for if the bill is written by him and his name is inserted in the body thereof or is otherwise signed to it, so that it clearly appears that he is the drawer, it will be sufficient.

It is stated in Clason v. Bailey (1817) 14 Johns (N. Y.) 484, in a case involving a contract other than a bill or note, that "it is a point settled that if the name of the party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appeared, whether at the top, in the middle, or at the bottom."

A note containing a warrant of attorney to confess judgment is not defectively executed because the signature of the maker was not attached to the note proper, but only to the warrant of attorney at the foot of the same sheet of paper, upon which both the note and warrant of attorney were written. Heslip v. Anderson (1907) 134 Ill. App. 8.

In Armstrong v. Kirkpatrick (1881) 79 Ind. 527, an action on a note signed by several persons who were designated as the directors of an agricultural association, against the signers individually, it was urged that

in order to bind the principal and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument. In answer to this contention the court states that it is not a universal or general rule that the name of the maker must be both inserted in, and signed to, the instrument.

A note in the usual form, signed by the principal, and under whose signature is written the words, "I acknowledge myself holden as surety for the payment of the demand in the above note," followed by the signature of the surety, was held to be the joint and several promise of the maker and surety in Hunt v. Adams (1809) 5 Mass. 358, 4 Am. Dec. 68. The court states that the legal effect of the note in this form is not different from a note signed by the principal, with that word annexed to his name, followed by the signature of the surety, with that word annexed.

An action on a draft signed by the drawer across the face of the paper was sustained in Patillo v. Mayer (1883) 70 Ga. 715, but there was no point made of the place of signature.

II. Signature in body.

In the application of the foregoing general rule, it is held immaterial that the signature forms part of the body of the writing, instead of being written at the foot or end thereof. Lampkin v. State (1894) 105 Ala. 1, 16 So. 575; Knox v. Rivers Bros. (1920) 17 Ala. App. 630, 88 So. 33; RE DONOHUE (reported herewith), ante, 392; Taylor v. Dobbins (1720) 1 Strange, 399, 93 Eng. Reprint, 592.

Notes in which the maker signed above a line designating the place of payment were sustained, with obligations of the maker, in Turnbull v. Thomas (1875) 1 Hughes, 172, Fed. Cas. No. 14,243.

A prosecution for the forgery of a writing in the form of a draft upon a person, requesting him to let the

payee have a certain sum "and charge it to John Driver," was sustained in *Lampkin v. State* (Ala.) *supra*. The allegation of the indictment that the meaning of the writing was that it was "signed John Driver" was unnecessary, but was held to be, as a matter of fact and law, proved by the writing given in evidence.

An action upon a bill of exchange in the following form: "Pay to the order of L. J. Knox, \$800, eight hundred dollars, for Rivers Bros., value received and charged to account of ———," was sustained in favor of Knox and against Rivers Brothers, upon an allegation of presentment to the drawee and the refusal of payment, in *Knox v. Rivers Bros.* (1920) 17 Ala. App. 630, 88 So. 33. It was alleged in the complaint that the bill of exchange was drawn by the defendant. The court says that when a bill of exchange is drawn it means not only the body of the writing, but the signing as well, and, further, the court says: "The makers or drawers may place their names on any part of the instrument where they may prefer to write them, and thus bind themselves as makers; as to whether they so signed is a matter of proof."

III. Signature on back.

It has been held in a number of cases that the signature of a joint maker may be on the back of the instrument. *Eudora Min. & Development Co. v. Barclay* (1898) 122 Ala. 506, 26 So. 113; *Palmer v. Grant* (1822) 4 Conn. 389; *Quin v. Sterne* (1858) 26 Ga. 223, 71 Am. Dec. 204; *Lincoln v. Huinzey* (1869) 51 Ill. 435; *Kistner v. Peters* (1906) 223 Ill. 607, 7 L.R.A. (N.S.) 400, 114 Am. St. Rep. 362, 79 N. E. 311; *Pearl v. Cortright* (1902) 81 Miss. 300, 33 So. 72; *Schmidt v. Schmaelter* (1870) 45 Mo. 502.

There are still other cases in which one who signed on the back of a note was held to be an original promisor. *Rodocanachi v. Buttrick* (1878) 125 Mass. 134; *Dow Law Bank v. Godfrey* (1901) 126 Mich. 521, 86 Am. St. Rep. 559, 85 N. W. 1075; *McGraw v. Union Trust Co.* (1904)

136 Mich. 521, 99 N. W. 758; *Olansky v. Berlin* (1902) 37 Misc. 775, 76 N. Y. Supp. 945; *Miller v. Clendenin* (1896) 42 W. Va. 416, 26 S. E. 512.

Of the class illustrated by the last above list of cases this note is, of course, not exhaustive. There are a large number of cases in which one who signed on the back of the instrument was held to be a joint maker, without any point being made of the power of one to bind himself as maker by a signature there placed. The question whether one who signs his name on the back of a bill or note before delivery to the payee is an indorser or joint maker is beyond the scope of the annotation.

A variety of facts have been involved in the cases involving signature on the back of the instrument. A note signed by one person in the usual place for the signature of a maker, and by three others upon the back thereof, was sustained as the joint note of four persons, in *Eudora Min. & Development Co. v. Barclay* (1898) 122 Ala. 506, 26 S. E. 113. An action was sustained on a note signed by two persons upon the face, in the usual place for the signature, and a third person on the back, of the note, by the payee against the three persons as joint makers, in *Lincoln v. Hinzey* (1869) 51 Ill. 435, the court saying that one may become liable as joint maker without reference to the position of his signature, or whether it be found upon the face or back of the note, if it is shown by satisfactory evidence that the party signing did so as joint maker. A note reading: "We, Grant and Wattles, as principal, and Daniel Carr and William Grant, as surety, promise to pay," etc., signed by Grant and Wattles as makers, but by Carr and William Grant on the back of the note,—was held to import one original entire transaction, by which Carr and William Grant described themselves as sureties and joint promisors with their principal. *Palmer v. Grant* (1822) 4 Conn. 389. A note containing a promise as follows: "We, A as principal and B and C as surety,

promise to pay to the order of ourselves," signed by A and indorsed by A, B, and C,—creates a liability against C of surety and joint promisor in a note payable to the order of the principals and by them indorsed. *National Pemberton Bank v. Lougee* (1871) 108 Mass. 371, 11 Am. Rep. 367. One who signed his name before delivery, upon the back of a note which contained a promise that "we, the signers, indorsers, sureties, and all of us, in solido, promise to pay," etc., binds himself by an unconditional promise to pay, and thereby waives notice of dishonor which otherwise would be required to bind an indorser. *Hibernia Bank & T. Co. v. Dresser* (1912) 132 La. 532, 61 So. 561. It is stated in *Palmer v. Grant* (Conn.) supra, that to bind a party by his signature to a contract it is perfectly immaterial where it is placed, "if it appears from the instrument to have been made by him, with an intention to obligate himself."

In *Quin v. Sterne* (1858) 26 Ga. 223, 71 Am. Dec. 204, an action on a note signed by two persons in the usual place for the signature of makers, and by another person on the back of the note, the plaintiff charged all three of the persons with having made and delivered to him his note, that is, alleged that all three signed the note before it was delivered to the payee; this declaration was demurred to on account of a misjoinder of parties, as after the note was read the defendant moved to nonsuit the plaintiff; upon denial of the motion, the defendant excepted. Upon appeal the court says it is immaterial upon what part of the note the name of the maker is written. The declaration averred that all the parties to this note signed it before it was delivered to the plaintiff, the demurrer to the declaration admits this fact, which is no doubt true, and the note as written sustains the declaration, and it is concluded that the party who signed on the back may be made chargeable as maker under the case as it then stood.

A note in the usual form, containing on the back thereof an indorse-

ment reading: "For value received, we, jointly and severally, undertake to pay the money within mentioned to the said" payee, signed by two persons, was held to bind each of the persons as an original promisor, in *White v. Howland* (1812) 9 Mass. 314, 6 Am. Dec. 71.

IV. *Effect of signature in unusual places.*

The only effect that signing in unusual places seem to have is as to the proof of the instrument. Where the signature is in the usual place for the signature of the maker or drawer, there is a presumption that the signature is in that capacity. *Camden v. McKoy* (1842) 4 Ill. 437, 38 Am. Dec. 91; *Kripner v. Lincoln* (1894) 54 Ill. App. 675. But where the signature is in some unusual place, proof that the party sought to be held as maker or drawer signed in that capacity seems necessary. *Knox v. Rivers Bros.* (1920) 17 Ala. App. 630, 88 So. 33; *Lincoln v. Hinzey* (1869) 51 Ill. 435; *Kripner v. Lincoln* (Ill.) supra; *Miers v. Coates* (1894) 57 Ill. App. 216.

Where a note in form the note of one person only is signed by one person in the proper place and sealed, the signature of another to the left of the signature of the first name in about the place usually occupied by the signature of attaching witnesses does not create a prima facie liability against the last-subscribed signer, his liability is equivocal. *Steininger v. Hoch* (1861) 39 Pa. 263, 80 Am. Dec. 521.

The indorsement upon a note by the payee, of a statement that he acknowledges himself as part maker of the note with one of the parties whose names are signed to the note, is not sufficient to render him a joint maker. *Kistner v. Peters* (1906) 223 Ill. 607, 7 L.R.A.(N.S.) 400, 114 Am. St. Rep. 362, 79 N. E. 311.

Because of the state of the pleadings in *Lincoln v. Hinzey* (1869) 51 Ill. 435, the presumption was held to exist that the party signing on the back signed as a joint maker, and the burden was on him to prove otherwise.

The court in *Palmer v. Grant*

(1822) 4 Conn. 389, in a case involving a signature by those who were denominated in the body of the note as sureties, upon the back thereof, the court says that it is incumbent on the plaintiff, in a suit on the note, to convince the court that the sureties are makers of the note in question, and to accomplish this he must support, at least, one of three propositions: (1) He must either show that the defendants had actually become

makers by signing the note in the usual manner; or (2) that they put their names on the back of it, thereby intending to become makers and not indorsers; or (3) finally, he must satisfy us that, although the defendants have not actually signed the note as makers, and there is no proof derivable from any source that they had the intention of doing it, they notwithstanding are such by construction of law. W. A. E.

ROBERT V. MUNDY, Plff. in Err.,

v.

JOHN S. McDONALD.

Michigan Supreme Court — December 21, 1921.

(216 Mich. 444, 185 N. W. 877.)

Libel — liability of judge — malicious charge against public officer.

1. A judge is not answerable for a malicious libel in placing upon the public records charges of delinquency in office of a mayor of a city, an examination into whose conduct in respect to the enforcement of the criminal laws he had made under statutory authority.

[See note on this question beginning on page 407.]

Attorney general — power to defend libel suit.

2. The attorney general may defend a judge sued for libel in a matter pertaining to the duties of his office, under a statute making it his duty to defend cases in which the people of the state may be interested.

[See 2 R. C. L. 916, 919.]

Pleading — motion to dismiss complaint — propriety of procedure.

3. A motion to dismiss a complaint to hold a judge liable in damages for placing a libel on the files of the court, in connection with his duties as judge in a proceeding pending before him, is proper.

Libel — by judge — allegation of malice — effect.

4. An allegation of malice in a complaint to recover damages from a judge for a libel in connection with the duties of his office does not destroy the right to raise the question of privilege.

[See 17 R. C. L. 334.]

Judge — official act — finding of charges against mayor.

5. A judge, with statutory authority to conduct examinations in criminal cases, acts in his judicial capacity in hearing charges against the mayor of a city, and placing on record findings charging him with misfeasance in office, to be transmitted to the tribunals having jurisdiction of the ouster of public officials.

ERROR to the Circuit Court for Kent County (Lamb, J.) to review a judgment sustaining a motion in the nature of a demurrer, to dismiss an action brought to recover damages for an alleged libel. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Collins & Thompson, for plaintiff in error:

Unless the matters set up in the mo-

tion to dismiss are matters which might have been raised by demurrer, plea in abatement, or plea to the

jurisdiction, under the former practice they cannot be made the basis of a motion to dismiss.

Pagenkoff v. Patrons' Mut. F. Ins. Co. 197 Mich. 171, 163 N. W. 1000; *Sayre v. Detroit, G. H. & M. R. Co.* 199 Mich. 414, 165 N. W. 859; *Vyse v. Richards*, 208 Mich. 383, 175 N. W. 392; *Green*, Pr. 2d ed. 198; *Abbott*, Pr. & Forms, § 562; 25 Cyc. 468; *Eviston v. Cramer*, 47 Wis. 659, 3 N. W. 392.

Messrs. Merlin Wiley, Attorney General, and Ernest C. Smith, Assistant Attorney General, for defendant in error:

The authority of the attorney general to appear for the defendant is based upon a discretion vested in him by the terms of the statute defining his duties and by the common-law origin of the office.

6 C. J. p. 809; Atty. Gen. ex rel. *Cook v. Detroit*, 26 Mich. 262; Atty. Gen. v. *Evart Boom Co.* 34 Mich. 462.

Under the pleaded and admitted facts of the declaration no cause of action is set up.

Newell, Slander & Libel, § 520; *Yates v. Lansing*, 5 Johns. 282; *Hart v. Baxter*, 47 Mich. 201, 10 N. W. 198; *McLaughlin v. Cowley*, 127 Mass. 316; *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646; *Lange v. Benedict*, 73 N. Y. 28, 29 Am. Rep. 80; *Childs v. Voris*, 6 Ohio S. & C. P. Dec. 75, 4 Ohio N. P. 67; *Valesh v. Prince*, 94 Misc. 479, 159 N. Y. Supp. 598; *Aylesworth v. St. John*, 25 Hun. 156; *Marsh v. Ellsworth*, 50 N. Y. 309; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Dunham v. Powers*, 42 Vt. 1; *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631; *Flynn v. Boglarsky*, 16 Mich. 513, 32 L.R.A. (N.S.) 740, 129 N. W. 674; *Wells v. Toogood*, 165 Mich. 677, 131 N. W. 124.

Stone, J., delivered the opinion of the court:

This case is in this court upon writ of error, sued out by the plaintiff, to review an order and judgment of the circuit court for the county of Kent sustaining a motion, in the nature of a demurrer, to dismiss the suit. At and before the time of the commencement of this suit, plaintiff was and had been for some time the mayor of Bay City, and he was at the time of the committing of the acts complained of, a

candidate for the office of commissioner of that city. Some time prior to March 26, 1921, Lewis J. Weadock, assistant prosecuting attorney for Bay county, had filed in the circuit court for said county a complaint under Act No. 196, Public Acts of 1917, entitled: "An Act to Authorize Proceedings for the Discovery of Crime, and to Provide Penalties for a Violation of Such Procedure."

The defendant was at and before the time alleged, and still is, one of the judges of the circuit court for the county of Kent. He was, as such judge, regularly called to sit and hear and conduct said proceedings. It appears that testimony was taken before him, and no formal complaint was filed or warrants issued. At the termination of the proceedings, the defendant, as such circuit judge, on March 26, 1921, filed in the office of the clerk of the circuit court of Bay county the statement or report found in the record, the publication of which is complained of in the declaration herein, as follows: That the defendant "on, to wit, the 26th day of March, A. D. 1921, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the said plaintiff a certain false, scandalous, malicious, and defamatory libel; did falsely, wickedly, and maliciously procure said false, scandalous, malicious, and defamatory libel to be placed in the files of the circuit court for the county of Bay; said false, scandalous, malicious, and defamatory libel being in the following form."

Here follows the statement or document complained of, which is too lengthy to be inserted in full. We make the following extracts from the document:

Charges against mayor.

The specific charges upon which Mayor Mundy should be tried are:

First, that he had knowledge of the fact that the liquor laws were being openly violated in Bay City

and made no reasonable effort to prevent it.

Second, that he had knowledge of the fact that gambling in various forms was being carried on and that houses of prostitution were being conducted and took no action toward the suppression of such violations.

Third, that he violated the provisions of Act No. 338 of the Public Acts of Michigan for the year 1917, because of his failure to strictly enforce the provisions therein contained for the suppression of the use and sale of liquor.

Fourth, that he knew the police officers were neglecting their duty in the matter of the enforcement of the laws against gambling, prostitution, and the use and sale of liquor, and did not proceed against them as he was required to do under §§ 45 and 49 of chapter 4 of the Bay City charter.

Fifth, that he was not at all times vigilant and active in the enforcement of the laws as required by § 45, chapter 4 of the charter.

Sixth, that he did not summon meetings of the council of Bay City, or its police committee, to assist in the suppression of crime, and took no other action to properly enforce the law and discharge the duties imposed on him by the charter of Bay City and the laws of this state.

Seventh, that as mayor of Bay City he adopted a policy of liberality toward the commission of the crimes above mentioned, and encouraged the police officials in their neglect to enforce the law.

My determination of the facts brought out on this investigation furnish no reason for the issuance of criminal process against any of the parties involved. The said Robert Mundy, Chief of Police Davis, and Captain Ripsky being guilty only of a wilful neglect in the duties of their respective offices, I therefore do not return any indictments or presentments to this court, but submit these findings that they may be transmitted to the only tribunal

having jurisdiction in the ouster of city officials.

Dated March 26, 1921.

John S. McDonald,
Circuit Judge.

On April 6, 1921, this action was begun in the Kent circuit court. On April 21, 1921, the attorney general of this state, as such, and one of his assistants in his official capacity, filed in said court a motion to dismiss this action, for the reason that the declaration of the plaintiff was not sufficient in law because the declaration shows that the defendant was acting as circuit judge of Bay county, Michigan, at the time of the alleged libel, and then and there published the matter alleged as libelous in the plaintiff's declaration in the exercise of his functions as a circuit judge.

On April 22, 1921, the attorneys for plaintiff filed a motion to strike the above motion of the attorney general from the files of the court. Thereupon the attorney general made and filed an affidavit in said cause, setting forth that as such officer he was requested by Samuel G. Houghton, circuit judge of Bay county, to appear for and on behalf of the people of the state of Michigan in a certain proceeding to be conducted in Bay county under said Act No. 196; that on account of such request by Judge Houghton, and in the exercise of the discretion vested in him as attorney general in such matter, he did, on or about March 7, 1921, undertake to conduct such proceedings in Bay county on behalf of the people of said state; that the defendant circuit judge of Kent county was sent by the presiding judge to sit as the circuit judge in such proceeding, and that deponent was represented in such proceedings by his assistant, Ernest C. Smith; that such proceedings terminated in Bay county on or about March 21, at which time the defendant, as circuit judge, returned certain findings directing removal proceedings against the plaintiff and other officers by reason of their alleged

neglect to enforce the criminal laws of this state; that the said findings had to do with the lack of proper enforcement of the criminal laws, and charged a wilful neglect of duty upon certain officers, including the plaintiff; that the aforesaid findings are set forth in the declaration in this cause and are the basis of plaintiff's cause of action; that deponent had tendered his services to the defendant in this case, deeming it to be a matter of vital interest to the people of this state and a matter in which the public is vitally interested, viz., the legitimate protection and defense of all public officers in their legitimate acts in the enforcement of the criminal laws of the state, and deeming it also a matter of vital importance to the people of the state that proper proceedings should be taken against public officers who wilfully fail and neglect their duties in the enforcement of the criminal laws. As the plaintiff's declaration sets up an alleged cause of action arising out of proceedings officially conducted by the deponent, and as the subject-matter of the case is inseparably connected with the acts of a state officer engaged in proceedings to discover crime, and likewise involves matters pertaining to the neglect of public officers to enforce laws against crime, deponent had deemed this to be a proceeding in which the public was interested to such an extent as not only to warrant, but to require, the exercise of not alone a discretion, but a duty to protect the public interests involved or threatened; and that therefore he had appeared officially in this proceeding and had directed his assistant to take full charge of the same on behalf of the defendant herein.

The case came on to be heard on the two motions referred to; and on May 10, 1921, the court below filed its order denying plaintiff's motion to strike the motion of the attorney general from the files, and on the same day filed its order and judgment

20 A.L.R.—26.

dismissing plaintiff's declaration. Counsel for appellant say that the assignments of error present the three following questions:

(1) "Can the attorney general of the state of Michigan, as such, defend a case of this character?"

(2) "Is the motion to dismiss, under the circumstances of this case, a proper procedure authorized by our rules and practice?"

(3) "Is the defendant amenable to a case for libel under the circumstances of this case?"

1. It is urged by appellant's counsel, after reference to the statute pertaining to the duties of the attorney general, that there is no statutory duty devolving upon that officer to justify his appearing in this case. It is urged that the authority for the intervention of the attorney general, as such in this case must be found either in the statutes of this state or in the broad domain of public policy, and that under neither of said heads can the practice be sustained. We do not agree with counsel in this contention. A reference to the statute (§ 132, Comp. Laws 1915) and Act No. 232, Pub. Acts 1919, make it a duty of the attorney general to both prosecute and defend cases pertaining to the public interest of the state; the language of the statute being: "In any cause or matter, civil or criminal, in which the people of this state may be a party or interested."

A broad discretion is vested in this officer in determining what matters may, or may not, be of interest to the people generally. We must recognize the fact that the office of attorney general is ancient in its origin and history, and it is generally held by the states of the Union that the attorney general has a wide range of powers at common law. These are in addition to his statutory powers. See Corp. Juris, vol. 6, p. 809, and cases cited 2 R. C. L. 916. It is too narrow a view of the case to say that the people of this state are not interested in the

defense in a case of this nature, which involves the purely legal question of the regularity of the criminal proceeding conducted in the circuit court wherein the attorney general was acting on behalf of the people. Certainly if the people of the state can be said to be interested in a criminal proceeding, they are, we think, equally interested in this action growing out of it, depending as it does entirely upon whether the acts of the defendant complained of were judicial acts.

Attorney general—power to defend libel suit.

We do not think the court erred in denying plaintiff's motion to strike the motion of the attorney general from the files. It will be noted that the motion is entitled in the cause using the words: "Comes now said defendant and moves the court," etc. We fail to see wherein appellant was prejudiced by the ruling of the court in this regard.

2. It is the contention of plaintiff's counsel that the motion to dismiss was not the proper procedure under our practice. We cannot agree with this contention. In our opinion the declaration affirmatively alleges all the facts necessary to present the question of a demurrer. It alleges: "And whereas, the defendant at the time of the committing of the grievances hereinafter set forth, was conducting a grand jury inquiry under the provisions of Act No. 196 of the Public Acts of 1917 in the circuit court for the county of Bay, etc., . . . did falsely, wickedly, and maliciously procure said false, scandalous, malicious, and defamatory libel to be placed in the files of the circuit court for the county of Bay; said false, scandalous, malicious, and defamatory libel being in the following form."

The entire matter thus complained of as libelous is therein fully set forth, and is signed by "John S. McDonald, Circuit Judge." It is idle to claim that there is nothing in the record to show that the circuit judge of Bay county was not

present and presiding over his court. Manifestly, there can be no need of extrinsic evidence to establish the situation, viz., that the defendant was a circuit judge sitting in the circuit court for the county of Bay, and conducting the inquiry alleged, and that in what he did he did acting as a circuit judge. The motion is to all intents and purposes a demurrer, and is authorized by our practice.

Pleading—motion to dismiss complaint—propriety of procedure.

It is further contended that "where the complaint contains an averment that the plaintiff acted maliciously, the demurrer admits this allegation, and thus prohibits the raising of the questions of privilege, as privilege is inconsistent with express malice;" and *Eviston v. Cramer*, 47 Wis. 659, 3 N. W. 392, is cited.

A reference to that case will show that the court was speaking of a qualified privilege, and the case is readily distinguished. In case of an absolute privilege the weight of authority is to the effect

Libel—by judge—allegation of malice—effect.

that the qualifying words do not change the rule or take away the right to demur. The following cases are decisive of the question:

In *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631, the question discussed arose on demurrer. Mr. Justice Harlan, in the course of his opinion, said: "If, as we hold to be the case, the circular issued by the Postmaster General to claimants under the acts of Congress in question was not unauthorized by law, nor beyond the scope of his official duties, can this action be maintained because of the allegation that what the officer did was done maliciously?"

Referring to the case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646,

"Which was an action against a justice of the supreme court of the District of Columbia to recover damages alleged to have been sustained by the plaintiff 'by reason of

the wilful, malicious, oppressive, and tyrannical acts and conduct' of the defendant, whereby the plaintiff was deprived of his right to practise as an attorney in that court,—it was said that the qualifying words above quoted were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction were not liable to civil suits for their judicial acts, even when such acts were in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.

"The same principle was announced in England in the case of *Fray v. Blackburn*, 3 Best & S. 576, 122 Eng. Reprint, 217, in which Mr. Justice Crompton said: 'It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions.'"

In *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80, the question arose on demurrer to the complaint. The court said: "We have seen, too, that the test is not that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority. *Bradley v. Fisher*, supra."

In *Valesh v. Prince*, 94 Misc. 479, 159 N. Y. Supp. 598, there was a demurrer to the complaint in an action brought against a judge of the municipal court of New York city, to recover damages for an alleged libel, and in the course of the opinion, which sustained the demurrer, the court said: "It would seem, therefore, that these statements

were absolutely privileged, irrespective even of allegations charging malice, truth, or relevancy."

We do not think that there is any merit in this claim.

3. Is the defendant amenable to a case for libel, under the circumstances of this case? This brings us to the main question in the case. The statute under which the defendant was proceeding gives a "judge of a court of record" power to act, and it provides that the "proceedings to summon such witness and compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony." The power given "to the several circuit judges" to conduct examinations in criminal cases is of long standing. Comp. Laws 1915, §§ 15,665 et seq.

That defendant acted in a judicial capacity cannot, we think, be questioned. What he did, he did as a circuit judge. The statute gave him power to conduct the proceedings. The principle that judges and courts of superior jurisdiction are immune from actions based upon judicial acts may be said to be as old as the beginning of the English common law.

Judge—official act—finding of charges against mayor.

Libel—liability of judge—malicious charge against public officer.

In *Newell on Slander & Libel* 3d ed. at § 520, the rule is stated as follows: "In England, and generally in the United States, a judge of a court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence."

In the recent case of *Thomas v. Rosecrantz*, 193 Mich. 357, 159 N. W. 514, in speaking of the power and jurisdiction of a circuit judge, we pointed out the distinction between the effect of an order to admit

to bail in a *capias* action, made by a circuit judge, and one made by a circuit court commissioner. Referring to the case of *Johnson v. Morton*, 94 Mich. 1, 53 N. W. 816, Mr. Justice Steere said: "It was held, even though the writ had been vacated and proceedings quashed, the order to hold to bail made by the circuit judge protected the party applying for the writ. Of the affidavit this court said: . . . 'It is evident that this affidavit lacks in detail and in certainty, and for that reason it is insufficient; but it cannot be said that it sets forth no facts or circumstances indicating fraud or breach of trust,'—which was the tort charged. Holding that the affidavit had a legal tendency to make out a case inasmuch as the facts and circumstances indicated fraud and breach of trust, the court said in conclusion: 'The determination of the judge must be held to have all the qualities of a judicial decision, and as such protects the judge, the officer, and the party.'"

In the *Thomas Case*, Mr. Justice Steere later referred to the early case of *Ward v. Cozzens*, 3 Mich. 252. There the order was made by a judge of the United States circuit court for the district of Michigan. Of such courts it was said: They "are courts of limited but not inferior jurisdiction. Their limitation applies to the persons of the parties and the subject-matter of the action. When, therefore, these come within their jurisdiction, they stand upon the same footing of all other superior courts of general common-law jurisdiction. . . . A *capias ad respondendum* is a process of that court. But it is insisted that the affidavit did not disclose such a state of facts as authorized the making of the order. If that be so, the judge erred. It was a matter submitted to his judgment, he acted upon it, and made the order."

In concluding the opinion in the *Ward Case* the following general rule was stated: "All the authorities are very clear, that a judge of a court of record cannot be held re-

sponsible for any acts done by him in his official capacity, and they are equally clear, that in no instance can his orders, judgments, or decrees be treated as nullities. [Citing many cases.] The foregoing authorities establish this proposition, that in all cases where the parties act within the power and scope of an order of the superior court, without reference to their jurisdiction, and of an inferior court when having jurisdiction, they are protected. The same immunities that are extended to the members of the respective courts, are extended to the parties."

See also *Schultz v. Huebner*, 108 Mich. 274, 66 N. W. 57; *Hall v. Munger*, 5 Lans. 100.

In the early case of *Hart v. Baxter*, 47 Mich. 198, 10 N. W. 198, Mr. Justice Cooley refers to the case of *McLaughlin v. Cowley*, 127 Mass. 316, for a clear statement of the general rule. It is there stated: "It was stated in the opinion of this court in the recent case of *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, that it seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case."

The case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, is a leading case upon this question. There the plaintiff, an attorney at law, threatened the defendant, a judge of the criminal court of the District of Columbia, with personal chastisement on account of his rulings in a case wherein the plaintiff was an attorney and the defendant was presiding judge. This occurred outside the court. The defendant, without notice to the plaintiff, and without any hearing in the matter, entered

an order striking plaintiff's name from the roll of attorneys. For this act plaintiff sued defendant in tort, alleging the act to be unlawful, malicious, and corrupt. It was held that the action was not maintainable, although it was expressly conceded that the court had no jurisdiction to make such an order without notice to plaintiff and hearing thereon. The general subject-matter of striking an attorney's name from the rolls was within the jurisdiction of the court, and defendant's act in so striking was in excess of jurisdiction and not entirely without jurisdiction.

In that case Mr. Justice Field, in the course of the opinion, said:

"In other words, it [the plea] sets up that the order for the entry of which the suit was brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. *Taaffe v. Downes*, 3 Moore, P. C. C. 41, note, 13 Eng. Reprint, 19, note.

"The principle, therefore, which exempts judges of courts of superior or general authority from li-

ability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.' *Yates v. Lansing*, 5 Johns. 291.

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot, in this way, be the subject of judicial inquiry."

Many English and American cases are discussed. We invoke a careful reading of the remainder of this able opinion. It is too lengthy to be copied here. It is there further held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdictions. A distinction is pointed out between excess of jurisdiction, and the clear absence of all jurisdiction over the subject-matter.

One of the early leading cases in this country is that of *Yates v. Lansing*, 5 Johns. 282. Chief Justice Kent delivered the opinion. We invite perusal of the case.

A comparatively late case is that of *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631. The opinion was written by Mr. Justice Harlan, and it is worthy of examination as covering the entire subject here involved, and especially holding that judges of courts of superior or general jurisdiction are not liable to civil suit for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. The following additional cases bear upon the main question: *Flynn v. Boglarsky*, 164 Mich. 513, 32 L.R.A. (N.S.) 740, 129 N. W. 674; *Wells v. Toogood*, 165

Mich. 677, 131 N. W. 124; *Lange v. Benedict*, 73 N. Y. 12-28, 29 Am. Rep. 80; *Aylesworth v. St. John*, 25 Hun, 156; *Marsh v. Ellsworth*, 50 N. Y. 309; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Dunham v. Powers*, 42 Vt. 1; 17 R. C. L. pp. 333 et seq.

Under the foregoing authorities, it must be held that the composing of and filing in the clerk's office of the findings complained of as libelous were judicial acts requiring a decision on the part of the judge as to the proper course to be pursued. To hold that the acts were in excess of jurisdiction, and therefore for that reason subject the judge to private liability, is to say that courts and judges must decide questions of jurisdiction at their peril. Such a doctrine would, in a large measure, destroy the independence of the judiciary, and take away the immunity and privilege considered so essential and necessary to the proper and just administration of law.

But it is urged by plaintiff's counsel that the case is ruled and controlled by the cases of *Bennett v. Kalamazoo Circuit Judge*, 183 Mich. 200, 150 N. W. 141, Ann. Cas. 1916E, 223; *Bennett v. Stockwell*, 197 Mich. 50, L.R.A.1917F, 761, 163 N. W. 482; Ann. Cas. 1918E, 1193, and *Oakman v. Recorder*, 207 Mich. 15, 173 N. W. 346. We cannot agree with this contention. Upon that subject, the learned circuit judge, in his opinion in the instant case, said: "Neither of these cases is any assistance to us in the determination of the questions involved herein. In the *Bennett-Stockwell* Case the defendants (grand jurors) made a report to the court under which they were acting upon a matter which had not been referred to them by anyone, and upon which no proofs were taken by anyone. In the *Oakman-Recorder* Case, the

findings of the recorder as filed in his court were stricken from the files, the filing of the same being without authority of law, and upon which no action in which the plaintiff could have had his day in court was taken thereon. There is nothing in that case that can possibly give us any light upon whether the recorder had laid himself liable to an action for libel by so doing, or whether he would be protected by the immunity which public policy throws around the acts, and the exercise of judgments of the judges."

The *Bennett* Cases are so readily distinguished that no argument is necessary. In the *Oakman* Case attention was called to the long time which elapsed between the filing of the so-called "presentment" and the issuing of warrants, and this court said: "We believe that the subsequent, though tardy, issuance of warrants, does not validate an act which at the time of its performance was unwarranted."

In the instant case the findings complained of were filed on March 26, and the instant suit was begun April 6, 1921. As stated by the attorney general: The defendant was "administering the provisions of a statutory enactment, and the findings are made not as a conclusion and end of a course of proceedings, but as the foundation and commencement of proceedings for removal from office for violation of the penal laws of the state, and the necessary steps are taken to commence the proceeding by filing of the complaint in the only proper tribunal, the common council, for the trial and adjudication of plaintiff's alleged offenses, subjecting him to removal from office."

For the reasons stated, the order and judgment of the court below should be and are affirmed.

Petition for rehearing denied February 8, 1922.

ANNOTATION.

Findings or the like of judge or person acting in judicial capacity as privileged within law of libel.

This annotation, dealing as it does with the right of action for libel where the statements charged to be defamatory are part of a report or finding by a judicial officer, discusses but one phase of the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice.

As was said in *Scott v. Stansfield* (1868) L. R. 3 Exch. 220, 15 Eng. Rul. Cas. 42, a case not exactly within the scope of this annotation: "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

The general rule deducible from the cases hereinafter cited is that one who acts in a judicial capacity may not be held responsible, in an action for libel, for statements made in a report or findings composed by him. The occasion is considered to be protected by a privilege sometimes spoken of as absolute and sometimes as qualified.

The reason for the rule was well stated in the case of *Valesh v. Prince* (1916) 94 Misc. 479, 159 N. Y. Supp. 598, affirmed without opinion in (1917) 177 App. Div. 891, 163 N. Y. Supp. 1133, which is affirmed without opinion in (1918) 224 N. Y. 613, 121 N. E. 985, wherein it was said: "It is my view that the doctrine of absolute privilege in affording protection to justices of our courts is based upon reason and a sound public policy. It is of supreme importance in the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without intimidation or the fear of being liable to prosecution in a civil action." An excellent statement of the prin-

ciple was made in *Bottomley v. Brougham* (1908) 99 L. T. N. S. (Eng.) 111, as follows: "The doctrine of privilege, as I understand it, means, in the ordinary way, a private right. There is really no private right of a judge, or a witness, or an advocate to be malicious; it would be wrong of him to be so, and if it could be proved I am by no means sure that it is not actionable. The real doctrine is that in the public interest it is not desirable to inquire whether the acts or the words of certain persons are malicious or not. That is really the true doctrine of what is called absolute privilege. It is not that there is any privilege to be malicious; but that, so far as it is a privilege of the individual,—I call it rather a right of the public,—the privilege is not to be malicious, but not to have his conduct inquired into to see whether it is malicious or not. The reason is that it is desirable that persons who occupy certain positions as judges, as advocates, as litigants, should be perfectly free and independent; and, in order to secure their independence, that their acts should not be brought before tribunals for inquiry into them merely by making the allegation that they are malicious."

In the reported case, *MUNDY v. McDONALD*, ante, 398), it appeared that the defendant, against whom an action for libel had been brought by the plaintiff, had, as a circuit judge, conducted certain proceedings for the removal of a municipal officer, at the termination of which he filed a report containing the statement complained of. Basing its decision on the principle that a judge of superior jurisdiction is immune from liability for his judicial acts, it is declared that the composing and filing of the findings complained of as libelous, being judicial acts, constituted no foundation for an action. It is held, further,

that it was immaterial whether the acts were in excess of jurisdiction; for to impose liability in such a case would force judges to decide questions of jurisdiction at their peril, and this would destroy the independence of the judiciary.

In *Childs v. Voris* (1897) 6 Ohio S. & C. P. Dec. 75, 4 Ohio N. P. 67, the plaintiff brought an action for libel against the defendant, who was a judge. It was not set forth how the publication was made, but the court said: "For aught that appears it may have been the written opinion of the court deciding a matter submitted to it for decision and announced in open court." The court treated the case as if the alleged defamatory statements were made by a judge in the course of his judicial duty, and declared that judges of courts of general jurisdiction are not liable in civil actions for their judicial acts, and that the acts and speech of a judge in the discharge of his duty in a matter over which he has jurisdiction are absolutely privileged, and that the motives for his acts and words may not be inquired into in a judicial proceeding.

It may be noted that in the reported case, *MUNDY v. McDONALD*, ante, 398, the immunity in question is spoken of as belonging to courts of superior jurisdiction, and in *Allen v. Earnest* (1912) — Tex. Civ. App. —, 145 S. W. 1101, there is a statement to the effect that the opinions of judges of superior courts are absolutely privileged. The same rule has, however, been applied in several cases to judges of inferior courts.

Thus, in *Valesh v. Prince* (N. Y.) supra, it appeared that the plaintiff sought to recover damages for an alleged libel on the part of the defendant, a judge of the municipal court of New York. The defamation alleged was contained in an opinion handed down by the defendant in the exercise of his judicial functions. The court said: "It would seem, therefore, that these statements were absolutely privileged, irrespective even of allegations charging malice, truth, or relevancy." The fact that the subject-

matter of the alleged libel was pertinent and material to the action on which the opinion was written was adverted to, without stating whether such pertinency was deemed to be essential to immunity.

So, *Aylesworth v. St. John* (1881) 25 Hun (N. Y.) 156, was an action wherein the plaintiff sought to recover damages for a libel written by the defendant, a justice of the peace. It appeared that the plaintiff was an attorney at law, and had acted in that capacity for one against whom a judgment was recovered, before the defendant as justice of the peace, and who had appealed from the judgment to a county court. The county court required an amended return, and the defendant complied with the order, adding thereto the alleged libel, viz., a statement that the plaintiff had slipped a bogus answer among the papers, the whole being signed by the defendant, with his official title. It was declared that if the alleged libel was a part of the defendant's return it was privileged, if it was material and pertinent, irrespective of motive, and that privilege would also be extended if the defendant, in fact, believed it in good faith to be pertinent and material, in which latter case evidence of actual malice would tend to show that the defendant did not believe the alleged libel to be pertinent and material.

A case not perhaps within the strict scope of this note, but closely related thereto, is *Law v. Llewellyn* [1906] 1 K. B. (Eng.) 487, 7 B. R. C. 234, 4 Ann. Cas. 431. In that case it appeared that the plaintiff had instituted proceedings for the prosecution of two other persons before the defendant, a justice of the peace, who, at the time of the speaking of words alleged to be defamatory, was sitting as chairman of the justices at a court of summary jurisdiction. On advice of counsel, the plaintiff agreed with the accused to withdraw the charge against them. The defendant, on granting leave to withdraw, spoke the words on the basis of which the plaintiff brought the present action. It was held that the defendant was

bound to state why nothing could be done except to allow the charge to be withdrawn, and when, on giving such leave, he made the statements alleged to be libelous, the observations were to be considered as made in the course of judicial duty, and so were not actionable. It was said: "A magistrate is a 'judge' within the meaning of the rule that defamatory observations made by a judge in the course of his judicial duties, that is, when sitting as a judge, are not actionable, even though it is alleged or suggested that the observations were made without reasonable or probable cause, and maliciously."

The same rule has been applied to military tribunals. Thus in *Jekyll v. Moore* (1806) 6 Esp. 63, 2 Bos. & P. N. R. 341, 127 Eng. Reprint, 658, it appeared that the plaintiff had preferred certain charges against a brother officer of the same regiment, the charges being tried by a general court-martial. The defendant, the president of the court-martial, in formulating an opinion, for delivery to the judge advocate, acquitting the officer charged, included a statement to the effect that the plaintiff, in producing malicious and groundless accusations, had been guilty of conduct most highly injurious to the good of the service, whereupon the action for a libel was brought. It was held that the words complained of formed part of the judgment of acquittal, and so no action could be maintained on it; for if the charges were absolutely without foundation it was no offense for the president of the court to state that the charge was groundless and malicious.

So, in *Home v. Bentinck* (1820) 2 Brod. & B. 130, 129 Eng. Reprint, 907, 4 J. B. Moore, 563, 22 Revised Rep. 748, 8 Price, 225, 146 Eng. Reprint, 1185, the plaintiff, an officer in the Army, brought an action of libel against the defendant, the presiding officer of a court of inquiry which had been created at the direction of the Commander in Chief of the Army, for the purpose of obtaining information as to the conduct of the plaintiff. The libel complained of was alleged to be

contained in the report filed with the Commander in Chief by the defendant in conjunction with the officers. The minutes of the court of inquiry were refused admission as evidence, to which the plaintiff objected. It was pointed out that the report made by the defendant was an act of duty, the result of an order from his superior commander, which he was bound to obey. It was declared that independently of the character of the court, these minutes constituting the report of the court of inquiry, on the broad rule of public policy and convenience, stood protected. Judgment for the defendant was affirmed.

Adam v. Ward [1917; H. L.] A. C. (Eng.) 309, 86 L. J. K. B. N. S. 849, 117 L. T. 34, 33 Times L. R. 277, Ann. Cas. 1917D, 249, although not within the scope of the note, is analogous to the two cases last set out. In that case it appeared that the plaintiff was an Army officer who, after having been removed from his regiment, was elected to Parliament, where he made an attack on a certain general. The general appealed to the Army Council for an inquiry, the result of which was widely published. The plaintiff alleged that this publication was libelous, and brought an action against the defendant, the secretary of the Army Council. It was held that the publication of the exoneration of the general was a duty incumbent on the Army Council, and that consequently the occasion was one that was protected by a qualified privilege, and that there was no proof of express malice which might rebut the privilege.

The doctrine has been applied to an official report of the receiver of a company. In *Bottomley v. Brougham* [1908] 1 K. B. (Eng.) 584, 77 L. J. K. B. N. S. 311, 99 L. T. N. S. 111, 24 Times L. R. 262, 52 Sol. Jo. 225, it appeared that the defendant was the official receiver of a company which was being wound up, and that in his report he made statements concerning the plaintiff, a managing director of the company, which the plaintiff alleged were libelous, and for the

publication of which he brought suit. It was held that the report, which was to be considered as the judgment of a judicial officer on a matter intrusted to him for inquiry, was absolutely privileged. The fact that the report was made *ex parte* was said to make no difference.

Burr v. Smith [1909] 2 K. B. (Eng.) 306, 78 L. J. K. B. N. S. 889, 101 L. T. N. S. 194, 25 Times L. R. 542, 53 Sol. Jo. 502, 16 Manson, 210, involved a question somewhat similar to that in *Bottomley v. Brougham* (Eng.) *supra*.

In that case, wherein the defendants, who were official receivers, were sued for a libel alleged to have been contained in a report published by them, it was said that they were performing their duty as officers of the court in connection with what might be called a judicial inquiry, and that in the performance of such a duty they were protected by an absolute privilege. The libel complained of consisted of the distribution to those interested of a statement of a liquidating company's affairs. R. S.

J. B. COOPER et al., Appts.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals — March 15, 1922.

(— Tex. Crim. Rep. —, 238 S. W. 658.)

Bail — forfeiture — variance — effect.

A judgment forfeiting the bail bond of J. B. Cooper, which is conditioned that Jim Cooper shall perform certain acts, is void for variance where there is nothing to show that J. B. and Jim Cooper are the same persons, although the bond is signed "J. B. Cooper."

[See note on this question beginning on page 411.]

APPEAL by defendants from a judgment of the County Court for Fannin County (Bolding, J.) in favor of the state in a proceeding to forfeit a bail bond. *Reversed*.

The facts are stated in the opinion of the court.

Messrs. Paul McMahon and Cunningham, McMahon, & Lipscomb, for appellants:

There being no averment that J. B. Cooper, the person named in scire facias as having been charged by information, is the same person as Jim Cooper, a bail bond requiring the personal appearance of Jim Cooper is not admissible on account of a variance.

Cassaday v. State, 4 Tex. App. 96.

The information was filed after the bond was taken, and therefore the bond is a nullity.

Baker v. State, 54 Tex. Crim. Rep. 52, 111 S. W. 735; *Leal v. State*, 51 Tex. Crim. Rep. 425, 102 S. W. 414; *Watkins v. State*, 16 Tex. App. 646.

Mr. R. G. Storey, Assistant Attorney General, for the State:

There was no variance between the scire facias and bond.

Barrett v. State, 68 Tex. Crim. Rep. 205, 151 S. W. 558.

Hawkins, J., delivered the opinion of the court:

Appeal is by the sureties from judgment final on forfeited bail bond. The judgment nisi introduced in evidence is dated June 7, 1921, and has the heading "The State of Texas v. J. B. Cooper, No. 11,119," and recites that J. B. Cooper failed to appear; that it appeared to the court that J. B. Cooper and the sureties (naming them) had, on May 20, 1921, entered into bond in the sum of \$250, conditioned that the principal should appear before

the county court of Fannin county on June 6, 1921, to answer upon a charge by "information," accusing him of the offense of a misdemeanor, to wit, swindling. Then follows a judgment forfeiting the bond, and authorizing a recovery against J. B. Cooper and the named sureties.

The bond introduced in evidence is dated May 20, 1921, and provides that Jim Cooper as principal and the other parties as sureties are bound, etc. The condition in the bond is that Jim Cooper, as principal, stands charged by "complaint" in the county court of Fannin county with a misdemeanor, and provides, if said Jim Cooper shall appear on June 6, 1921, the obligation should be void. It is signed by J. B. Cooper, principal, and the other parties as sureties.

The writ of scire facias recites substantially that on May 20, 1921, prosecution No. 11,119, against J. B. Cooper, defendant, was pending, and bond was entered into conditioned that said defendant should appear and answer to charge by information for a misdemeanor, to wit, swindling; that J. B. Cooper failed to appear, whereupon forfeiture was taken on the bond, and judgment rendered against J. B. Cooper and the named sureties.

Neither the complaint nor information was introduced in evidence. It was perhaps not necessary to introduce them, under authority of Martin v. State, 16 Tex. App. 265. But their absence from the record obscures the facts, and involves the questions raised.

The point is made that the bond offered in evidence recites that Cooper was charged by *complaint*. That if no information had been filed when the bond was taken, the bond was a nullity. In the absence

of the complaint and information this court is deprived of the true facts. The recitals in the bond and judgment are not in harmony, one reciting that Cooper was charged by "*complaint*," the other that he was charged by "*information*." Leal v. State, 51 Tex. Crim. Rep. 425, 102 S. W. 414, and Baker v. State, 54 Tex. Crim. Rep. 52, 111 S. W. 735, support the proposition that information must be filed in the county court before jurisdiction attaches, and, if bond be taken prior to filing information, it is without authority of law, and nonenforceable.

There is no finding in the judgment, or recital in the scire facias writ, that J. B. Cooper and Jim Cooper are the same person. When the judgment and bond were offered in evidence objection was made because of the variance. We have no means of knowing under what name the prosecution proceeded in the complaint and information, whether Jim Cooper or J. B.

Cooper. The variance—~~Bail—forfeiture—variance—effect.~~ in the name in the judgment nisi and the bail bond is fatal. See Cassaday v. State, 4 Tex. App. 96; Brown v. State, 28 Tex. App. 65, 11 S. W. 1022; Weaver v. State, 13 Tex. App. 191; Loving v. State, 9 Tex. App. 471; Uppenkamp v. State, 89 Tex. Crim. Rep. 131, 229 S. W. 544. As was said in the Uppenkamp Case, *supra*, the state was not without remedy in so far as the variance in name is concerned. If the dates of filing the complaint and information were before us, the other question suggested, as to whether the bond as taken before information filed, might not appear as a serious matter. However, as the record appears, the judgment must be reversed, and the cause remanded.

ANNOTATION.

Variance between name in bail bond and in judgment of forfeiture.

While the question does not seem to have arisen in any other state, the holding of the reported case (COOPER

v. STATE, ante, 410) that a variance as to the name of the accused between a bail bond and the judgment of for-

feiture entered thereon is fatal, in the absence of a finding of identity of person in the judgment, or an allegation thereof in the scire facias, finds support in several earlier Texas cases. *Lowe v. State* (1855) 15 Tex. 141 (bond signed "B. F. Low;" forfeiture against "Francis Lowe"); *Cassaday v. State* (1878) 4 Tex. App. 96 (bond signed "H. C. Fulton;" forfeiture against "Clay Fulton"); *Weaver v. State* (1882) 13 Tex. App. 191 (bond signed "W. F. Torlet;" forfeiture against "W. F. Torbett"); *Brown v. State* (1889) 28 Tex. App. 65, 11 S. W.

1022 (bond signed "J. B. Wilkins;" forfeiture against "J. B. Wilkin"); *Uppenkamp v. State* (1921) 89 Tex. Crim. Rep. 131, 229 S. W. 544 (bond signed "Joseph Uppenkamp;" judgment of forfeiture reciting failure of "Joe Uppenkamp" to appear). See also *Fitzgerald v. State* (1920) 88 Tex. Crim. Rep. 268, 225 S. W. 1096 (bond signed by principal and two sureties; forfeiture against principal and three sureties).

As to the correction of a misnomer in a judgment on a bond, see the annotation in 10 A.L.R., at page 591.

W. A. S.

SECURITY SAVINGS BANK

v.

WALTER H. RHODES, Appt.

Nebraska Supreme Court—November 26, 1921.

(— Neb. —, 185 N. W. 421.)

Evidence — agreement that third person should pay note.

1. Where defendant signed and delivered a note to a bank, making it payable to the bank, and received the face value of the note in money, held, in an action to recover on the note by the bank, that the defendant could not show a contemporaneous oral agreement between himself, the bank, and a third party, that the defendant was not to be held responsible upon the note, and that the third party was to pay it.

[See note on this question beginning on page 421.]

Banks — authority of president — agreement not to enforce paper.

2. The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced.

[See 3 R. C. L. 442; see also note in 1 A.L.R. 703.]

Evidence — contemporaneous parole agreement.

3. When a written contract has been

unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying, or contradicting the express terms contained in the writing.

[See 10 R. C. L. 1041; 2 R. C. L. Supp. 1144.]

Headnotes by FLANSBURG, J.

APPEAL by defendant from a judgment of the District Court for Douglas County (Leslie, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

(— Neb. —, 185 N. W. 421.)

Mr. Edward R. Burke, for appellant:

Oral testimony may be introduced to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note and in any case of a non-negotiable note.

Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37; *Exchange Bank v. Clay Center Bank*, 91 Neb. 835, 137 N. W. 845.

There is a legal presumption that an executive officer of a national bank has rightfully the powers which he assumes to exercise.

People's Bank v. Manufacturers' Bank, 101 U. S. 181, 25 L. ed. 907.

The authority of an officer of a bank may be given orally, and collected from circumstances, or implied from the conduct and acquiescence of the directors.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428.

An unauthorized act of an officer of a bank may be ratified by the board of directors.

National Bank v. Atkinson, 55 Fed. 465; *Spongberg v. First Nat. Bank*, 18 Idaho, 524, 31 L.R.A.(N.S.) 736, 110 Pac. 716, Ann. Cas. 1912A, 95.

The president or other officer of a national bank may borrow money of the bank, giving his note therefor.

3 *Michie, Banks & Bkg.* ¶ 269; *Blair v. First Nat. Bank*, 2 Flipp. 111, Fed. Cas. No. 1,485.

Mr. F. W. Fitch, for appellee:

Where an officer of a bank is individually interested in a note or other matter, the better opinion is that his knowledge is not to be imputed to the bank, since his interest is best served by concealing it.

5 Cyc. 461 (c); *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734; *Koehler v. Dodge*, 31 Neb. 329, 28 Am. St. Rep. 518, 47 N. W. 913; *State Bank v. Forsyth*, 28 L.R.A.(N.S.) 501, and notes, 41 Mont. 249, 108 Pac. 914; *First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.* 66 W. Va. 505, 28 L.R.A.(N.S.) 511, 66 S. E. 713; *Scott v. Choctaw Bank*, 4 Ala. App. 648, 59 So. 184; *First Nat. Bank v. Northrup*, 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672; *Davis v. Boone County Deposit Bank*, 25 Ky. L. Rep. 2078, 80 S. W. 161; *Central Bank v. Tayer*, 184 Mo. 61, 82 S. W. 142; *Brady v. Mt. Morris Bank*, 65 App. Div. 212, 73 N. Y. Supp. 532; *Bank of Overton v.*

Thompson, 56 C. C. A. 554, 118 Fed. 798; *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, 102 C. C. A. 1, 178 Fed. 53; *Melton v. Pensacola Sav. Bank & T. Co.* 111 C. C. A. 166, 190 Fed. 126; *Real Estate Trust Co. v. Washington, A. & Mt. V. R. Co.* 113 C. C. A. 124, 191 Fed. 566; *Breyfogle v. Walsh*, 71 Fed. 898; *McCalmont v. Lanning*, 84 C. C. A. 139, note; *Hummel v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954; *Innerarity v. Merchants Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282.

Flansburg, J., delivered the opinion of the court:

This was an action by the plaintiff, Security Savings Bank, against the defendant, Walter H. Rhodes, upon a promissory note, signed by the defendant and payable to the plaintiff. The defendant answered, admitting the execution of the note, but alleged that it was orally agreed that another person, not named in the note, should be held responsible, and that defendant should not be required to pay it. The court held that the answer of the defendant was insufficient, and entered judgment on the pleadings. From this judgment the defendant appeals. The sole question is whether or not the answer, setting up such an agreement, pleads a legal defense.

The answer alleges that the defendant rendered certain services for the plaintiff bank and for one Davis, president of the plaintiff bank. What proportion of the services was rendered for the bank is not stated, but much the greater part appears to have been for Davis individually. In any event, it is alleged, Davis took it upon himself to pay the defendant what was owing him, some \$2,700, and arranged that the defendant should make out and sign a note in that amount, payable to the bank, deliver to the bank and receive upon its face value. That was done. It is further alleged that Davis made an oral agreement with the defendant that the defendant would not be required to pay the note, but that Davis would pay it, and, in order to insure payment by Davis, Davis gave his note

to the defendant in a like amount. It is further alleged that the bank knew of this oral agreement. The allegations of the answer in that respect are, however, somewhat indefinite. What other officers of the bank knew of the transaction is not alleged. It may have been that the pleader meant no more than a legal conclusion that the bank was charged with knowledge because of the knowledge of the facts by its president. It appears from the pleadings that the note became due and was not paid.

If the bank had no knowledge of the transaction, it of course would not be bound by the agreement made by its president, to the effect that a note, based upon a good consideration and taken by the bank, should not be paid. *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59, note in, 28 L.R.A. (N.S.) 501.

Assuming, however, that the allegations in the answer are allegations of ultimate facts, and are sufficient to show that the plaintiff bank had knowledge of the oral agreement, the question presented is whether or not such an oral agreement could properly be proved, or whether the testimony to that end would be incompetent as evidence tending to vary or contradict the express terms of the written instrument.

Although parol evidence may be admissible to show the consideration of a written contract when that consideration is expressed as a recital of a receipt, as distinguished from a complete contractual stipulation (*Mattison v. Chicago, R. I. & P. R. Co.* 42 Neb. 545, 60 N. W. 925; *S. Spiegel & Son v. Alpirn*, — Neb. —, 185 N. W. 415); or to show a want or failure of consideration (*Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672; *Norman v. Waite*, 30 Neb. 302, 46 N. W. 639); or to show that an instrument, purporting to be a written contract, is in fact a sham and was never intended as a contract between the parties (*Coffman v.*

Malone, 98 Neb. 819, 154 N. W. 726, note in L.R.A.1917B, 263); or to show that the written instrument was delivered upon an oral agreement that it should not take effect as a contract until some condition had happened (*Musser v. Musser*, 92 Neb. 387, 138 N. W. 599); yet, on the other hand, when a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency should occur, cannot be shown, as such proof would have the effect of adding to, varying, or contradicting the express terms contained in the writing.

The rule is succinctly stated in 22 C. J. 1149, § 1540, as follows: "The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and of full effect, and hence parol evidence is admissible to show conditions relating to the delivery or taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; but evidence is not admissible which conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing."

For an able and exhaustive discussion of that rule and the authorities in relation thereto, see note in L.R.A.1917C, 306.

In this case the written contract

Evidence—contemporaneous parol agreement.

Banks—authority of president—agreement not to enforce paper.

(— Neb. —, 185 N. W. 421.)

was an agreement that the defendant would pay on a fixed day, absolutely, a certain sum of money. Its express terms could have had no other meaning. The note was delivered to the bank, and the defendant received the proceeds thereof. The agreement did not lack in consideration. That it was a subsisting contract must be conceded. By the very agreement sought to be proved, Davis was to be responsible and pay it, and the defendant was to be relieved from that obligation. The bank was looking to the payment of the note. Evidence of such an oral

—agreement that
third person
should pay note.

agreement as is set up by the answer is inadmissible, as its effect would be to vary, by parol, the express terms of the note. Van Etten v. Howell, 40 Neb. 850, 59 N. W. 389; Aultman, M. & Co. v. Hawk, 4 Neb. (Unof.) 582, 95 N. W. 695; Nebraska Exposition Asso. v. Townley, 46 Neb. 893, 65 N. W. 1062; Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849; Waddle v. Owen, 43 Neb. 489, 61 N. W. 731; Colvin v. Goff, 82 Or. 314, 161 Pac. 568, and note in L.R.A.1917C, 307; 22 C. J. 1152, § 1542.

The defendant finds some support in certain decisions of this court which we find it necessary to discuss. In the case of First Nat. Bank v. Burney, 91 Neb. 269, 136 N. W. 37, the defendant Britton signed a promissory note with one Burney, and, in an action upon the note, he set up as a defense an oral agreement that Burney was to pay the plaintiff all the proceeds of the sale of certain live stock; that, if Burney applied such proceeds upon the note, defendant's obligation was to then expire. Burney, however, did not so apply the proceeds of the sale and discharge the note, but, it was alleged, plaintiff allowed him to squander the money so received. It was not denied that the note had been signed and delivered, and was, in fact, a note and at least binding as such upon Burney. In our opinion the testimony of an oral agreement, to the effect that the note was

to be paid out of a certain fund only, was an attempt to contradict, by parol, the express terms and clear legal import of the written instrument, and such testimony should have been excluded as incompetent. The original opinion in that case (First Nat. Bank v. Burney, 90 Neb. 432, 133 N. W. 647), as we view it, should be adhered to.

The case of Exchange Bank v. Clay Center State Bank, 91 Neb. 835, 137 N. W. 845, is also relied upon by the defendant. In that case, the plaintiff bank transferred a note to the defendant bank and indorsed it "without recourse." The defendant bank was allowed to prove a parol agreement to the effect that the plaintiff bank had agreed to guarantee payment of the note. There were other phases of the record which might have led to the decision rendered. The assignment of the note appears to have been a sham assignment, and merely for the purpose of falsifying the bank records at a time when a visit from the bank examiner was expected. There was also a letter which accompanied the note at the time it was sent to the defendant bank, and this letter contained an indefinite reference to some agreement which might have been sufficient to introduce an ambiguity and allow of the introduction of parol testimony in explanation thereof. But the decision was not based upon those grounds. The opinion recognizes the contract of the assignment of the note to the bank as a subsisting contract. By its express terms, the assignment was "without recourse," and the testimony to prove a parol contract of guaranty, in direct contradiction of the terms of the written assignment, should have been held incompetent. To that extent the decision in that case is overruled.

In that case reference is made to the decision in Norman v. Waite, 30 Neb. 302, 46 N. W. 639, as being a decision in support of the opinion, but the decision in the case of Norman v. Waite was based upon a

failure of consideration. It was held competent to show what the consideration for the contract was, and that the contractual obligation assumed, which constituted such consideration, had not been performed by the other party.

The case of *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050, is also cited as authority in the *Exchange Bank Case*, but in that case the court pointed out that the written instrument involved was, on its face, not a complete contract, but merely a receipt or memorandum, and that the parol-evidence rule had no application. The court did in that case, by way of dictum, state that when the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time but omitted from the written instrument, though not by accident or mistake, parol evidence of the oral contract is admissible, although it may add to or contradict the terms of the written instrument. It is true that such is the rule in Pennsylvania, and a Pennsylvania case is cited in the opinion in support of the rule stated, but in Pennsylvania the so-called parol-evidence rule has been almost entirely abolished. The decisions in that state upon that point are not only in the minority, but seem to hold a unique position among the decisions of the courts of the other states in this country. See discussion in notes in 18 L.R.A.(N.S.) 434, and L.R.A.1917C, 321. To follow the dictum in the case of *Barnett v. Pratt*, *supra*, would be to utterly destroy the parol-evidence rule.

In the case of *Towner v. Lucas*, 13 Gratt. 705, it was represented to the defendant that, if he would sign the bonds, he would never be required to pay any part of the debt. It was argued in that case that the oral representation was an inducement to the signing of the written contract. In answer to that argument, the court said (page 724): "If it be averred that, although a note is on its face payable on de-

mand and unconditionally, there was a contemporaneous oral agreement that the time for payment should be postponed, or required only upon the happening of a certain contingency, parol evidence of such an agreement is inadmissible. . . . Yet it may be argued with the same force that this oral agreement may have induced the party to sign the note, and that it is a gross fraud to attempt to enforce it according to its terms. And so it would be if the existence of the agreement could be judicially established. But there being no legal proof of it, there is nothing of which fraud can be affirmed. The rule is founded in wisdom, and a different principle would weaken confidence in all securities for debts. Matters in writing, instead of finally importing the certain truth and agreement of the parties, would be a snare and delusion. The party relying on an instrument in writing as the final result in which all previous negotiations have centered would be met and 'controlled by an averment to be proved by the uncertain testimony of slippery memory,' "

We find a similarly reasoned decision by the Supreme Court of the United States in *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674. The court, in speaking with reference to such an oral representation, said on page 547 of 96 U. S.: "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made,

(— Neb. —, 185 N. W. 421.)

to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

For the reasons hereinbefore stated, the answer of the defendant, setting forth the oral agreement, was, in our opinion, insufficient to

present a legal defense. The judgment of the lower court was correct, and is affirmed.

NOTE.

The admissibility of parol evidence to show that a bill or note was conditional or given for a special purpose is discussed in the annotation post, 421. When the evidence is admissible as showing a conditional delivery, and when it is inadmissible as violating the parol-evidence rule, is a question of difficulty. The court in *SECURITY SAV. BANK v. RHODES* (reported herewith, ante, 412) holds the evidence there involved to be of the latter character. Evidence held to be of this character in other cases is discussed in III. of the annotation, to which reference is above made.

HENRY H. VINCENT, Appt.,

v.

G. H. RUSSELL, Respt.

Oregon Supreme Court (In Banc)—October 25, 1921.

(101 Or. 672, 201 Pac. 433.)

Evidence — to show that note was delivered conditionally.

1. Evidence is admissible in a suit on a note by one not a holder in due course that, although the note was absolute in form and manually delivered, it was not to become a binding obligation except upon the happening of a certain future event.

[See note on this question beginning on page 421.]

— to show consideration for note.

2. In an action by a holder, not in due course, of a promissory note, evidence is admissible that the note was delivered as a memorandum of the amount which was to be paid to a real estate broker out of the proceeds of a sale if the sale was consummated.

[See 3 R. C. L. 862; 1 R. C. L. Supp. 905.]

— evidence of want of consideration.

3. Evidence of want of consideration is admissible in an action on a note by one not a holder in due course.

[See 3 R. C. L. 924, 925; 1 R. C. L. Supp. 921.]

APPEAL by plaintiff from a judgment of the Circuit Court for Crook County (Duffy, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sharpstein, Smith, & Sharpstein, N. G. Wallace, and Donald M. Graham, for appellant:

20 A.L.R.—27.

It was error to admit testimony aduced on cross-examination from plaintiff's witness, A. A. Piper, and

received over his objection, as to a note received by Piper other than the one sued on.

Durkee v. Carr, 38 Or. 189, 63 Pac. 117.

Testimony of defendant as to certain matters was inadmissible.

Wilson v. Wilson, 26 Or. 251, 38 Pac. 185; 3 C. J. 823; 2 R. C. L. § 71.

Mr. M. R. Elliot also for appellant.

Mr. Jay H. Upton for respondent.

Bean, J., delivered the opinion of the court:

Plaintiff appeals from a judgment in favor of defendant, rendered upon the verdict of a jury. The complaint is based upon a promissory note for the sum of \$5,000, dated at Prineville, Oregon, April 18, 1918, due November 5, after date, payable to the order of A. A. Piper, in the usual form, signed by G. H. Russell, indorsed to Paxton Brothers, a corporation, May 15, 1918, and on the same date indorsed to Baker & Boyer National Bank, and on March 18, 1919, indorsed to plaintiff, Henry H. Vincent. Each indorsement is alleged to be for value received in due course of business.

Defendant answered, denying the allegations of the complaint, and further pleaded an entire want of consideration for the note; that the note was not intended for a promissory note, but merely as a memorandum of the money that would be payable to Piper & Paxton upon the completion of a certain sale contract, and therefore no stamp, tax, or internal revenue stamp was placed thereon or canceled, as required by law; that the note is irregular on its face; and that the holders thereof took the note subject to all defenses existing between defendant and the original payee. The answer set forth all the details of the transaction. The reply put in issue the new matter of the answer.

The circumstances relating to the note, as shown by the record, are substantially as follows: On March 5, 1918, defendant arranged with A. A. Piper and J. A. Paxton, of Walla Walla, Washington, to sell his ranch, live stock, and certain personal property for the sum of

\$276,900, for a commission of \$5,000. Piper & Paxton represented that they had a buyer for the property, one Claud M. Stewart, and requested defendant to name a price of \$286,900 to Stewart, and pay the added sum of \$10,000 to Piper & Paxton as additional compensation. Stewart was to pay \$40,000 as an initial payment, and \$46,900 on November 1, 1918, and the balance on terms. Defendant was to pay Piper & Paxton the additional compensation of \$10,000 upon payment to the defendant of the second instalment of \$46,900, due on November 1, 1918, and not otherwise. The deal was made upon those terms. The first payment of \$40,000 was made April 18, 1918, and the commission of \$5,000 paid. Piper & Paxton asked of defendant an evidence in writing that they would be entitled to receive the additional \$10,000 upon payment of the \$46,900 due upon the purchase price November 1, 1918. Defendant agreed to give them such an instrument in writing, with the promise that no moneys would be due to Piper & Paxton unless Stewart paid the next instalment. Thereupon Piper drew up two promissory notes, each for the sum of \$5,000 one of which is set out in the complaint. The notes were to mature November 5, 1918. Piper represented to the defendant that the notes would not be transferred, negotiated, or assigned, and would not become due or payable unless Claud M. Stewart made his next payment of \$46,900 on November 1, 1918. Stewart failed to make the payment of \$46,900, and abandoned the contract. J. A. Paxton is one of the stockholders and managing officers of the Paxton Brothers Company, and knew the circumstances in regard to the deal, and was interested therein. The indorsement to Baker & Boyer National Bank was made for collection, and the indorsement to Harry H. Vincent, plaintiff, was not made for value or in due course of business.

Upon the trial, defendant, Rus-

sell, testified in his own behalf in regard to the note sued on, in part as follows:

Q. Just tell the jury now Mr. Russell, what that note represents and the circumstances under which it was given.

A. This note was given for a half of \$10,000 that was to be paid by me to Piper & Paxton on the 5th day of November, 1918, after Stewart Brothers paid me \$46,900 and six months' interest.

Counsel for plaintiff moved to strike out this testimony, and saved an exception to the overruling of the motion. Russell further testified, over the objection of plaintiff, thus:

Q. Referring again, Mr. Russell, to this particular note and the circumstances under which it was executed, may I ask you this: Whether or not the money represented by this note was commissions to be paid to Piper & Paxton on this real estate deal, or did it represent some other item of consideration?

A. It represented some other consideration.

Q. Well, what was it?

A. That the money, this \$10,000 came from Stewart Brothers; I merely handling this to get them their \$10,000, so that it did not fall on Piper & Paxton at Walla Walla.

Q. That \$10,000 as I understand, was money they were charging their clients for making this deal, and not taking it out of you?

A. Yes, sir; that is it.

Q. And you were to pay it in to them when the money was paid in through your hands on the deal?

A. Yes, sir.

Q. Was that \$10,000 ever paid you by Stewart Brothers?

A. No, sir.

Q. Was any part of the \$46,900 ever paid you by Stewart Brothers?

A. No, sir.

Q. Or by Claud M. Stewart?

A. No, sir.

Russell also testified that, when Piper & Paxton brought the party over to buy the ranch, the first thing they told Russell was: "Now, we

have this party, but don't you say anything about the price. You make that \$286,000, and you can hold us out our \$10,000. We don't want them to know it, and we don't want them to know your price."

Russell also stated: "Then, when Stewart threw up the ranch in November, Mr. Piper came down here, and I asked him, 'What are you going to do about this note?' right in front of Michel's store. He said, 'We will just let that go; you will not need to pay that note.'"

At the close of the case counsel for plaintiff requested the court to direct a verdict in favor of plaintiff, which was refused, and an exception reserved. The objections and motion to strike out the main portion of defendant's testimony, and the request for a verdict in favor of plaintiff, raise the question as to the right of defendant to make the defense offered to the note. The motion to strike was based upon the grounds that the note "is a direct promise to pay on its face without any contingency annexed whatever; it is not made payable upon the happening or nonhappening of any event, to happen in the future; it is payable on a specific date;" and any evidence that the note was only to be paid upon the contingency of Stewart paying Russell a certain sum of money was incompetent.

We think the testimony challenged was admissible. It tended to show that the note was manually delivered to Piper, the payee, but was not to become a binding obligation unless Stewart paid to Russell the \$10,000, which was added to the price of the ranch, for the benefit of Paxton & Piper, and which Russell was only to handle for them. The testimony objected to also indicated that there was an entire want of consideration for the note. It is not

Evidence—
to show
consideration
for note.

—evidence of
want of con-
sideration.

contended upon this appeal, as we understand the record, that the evidence fails to show that the plaintiff was not a holder in due course.

The rule sanctioned by a practically uniform line of authorities is that parol evidence is admissible to show that a negotiable note, absolute in form, although manually delivered to the payee, was not to become a binding obligation except upon the happening of a certain further event, since such evidence does not vary or alter the instrument, but tends merely to show that it never became a valid undertaking. Especially is this the rule if such event or contingency affects the consideration of the note. Section 713, subd. 2, and § 798, subd. 3, Or. L.; *La Grande Nat. Bank v. Blum*, 26 Or. 49, 37 Pac. 48; *Colvin v. Goff*, 82 Or. 314, 325, 161 Pac. 568, L.R.A. 1917C, 300, note, pp. 306, 309, et seq.; note in 18 L.R.A. (N.S.) 288; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; *Lavalleur v. Hahn*, 152 Iowa, 649, 39 L.R.A. (N.S.) 24, 132 N. W. 877. The following cases support this rule:

It was held in *Smith v. Dotterweich*, 200 N. Y. 299, 33 L.R.A. (N.S.) 892, 93 N. E. 985, that parol evidence is admissible to show that a note given in payment of the premium on a life insurance policy was not to take effect as a valid and enforceable obligation unless the maker should be furnished with a loan of money.

In *Holt v. Gordon*, — Tex. Civ. App. —, 176 S. W. 902, it was ruled that parol evidence is admissible to show that, at the time the note was executed, it was agreed in parol that it should not become operative and binding unless the maker should succeed in procuring a loan upon certain land owned by him.

We find the rule again in the case of *Equitable Trust Co. v. Halpert* (Sup.) 132 N. Y. Supp. 776, that parol evidence is admissible in an action on a written instrument to show that the instrument would only be enforceable if the payee would issue a life insurance policy to the maker, entirely satisfactory to him;

and this whether the instrument in question is a negotiable instrument or non-negotiable.

In *Newgass v. Shulhof* (Sup.) 128 N. Y. Supp. 664, parol evidence was held to be admissible to show that a note was delivered to the payee upon condition that it should not become effective unless the maker received a certain sum from a transaction then pending.

It was held in *Stoughton v. Chu Fong* (Sup.) 130 N. Y. Supp. 228, that an answer that the note sued upon would have no validity whatever until a certain institution was established, and that no such institution was ever established, pleads a condition precedent to the validity of the note, and a complete provable defense.

To the same effect is the case of *Hughes v. Crooker*, 148 N. C. 318, 128 Am. St. Rep. 606, 62 S. E. 429, holding parol evidence admissible to show that a note was signed upon the inducement that the payee would perform certain obligations, and that until the maker or his son should sign a paper signifying that the payee had performed his obligation the entire transaction was unfinished. The action in this case was by the maker against the payee, who had negotiated the note, which the maker had been compelled to pay, and was for the purpose of recovering the amount so paid by him.

It was held in *Garrison v. J. I. Case Threshing Mach. Co.* 159 N. C. 285, 74 S. E. 821, that parol evidence is admissible to show that a note secured by a mortgage was not to take effect until it was determined that an engine for which the note was given would pass a certain test. The action was brought to recover damages for the sale of the land under the mortgage.

See also *Dan. Neg. Inst.* 6th ed. § 81a; *Gamble v. Riley*, 39 Okla. 363, 135 Pac. 390; *Street v. J. I. Case Threshing Mach. Co.* — Tex. Civ. App. —, 188 S. W. 725; *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174.

We think the testimony complained of was properly admitted, and that the refusal to direct a verdict for plaintiff was correct.

It is contended by plaintiff that the testimony to which the motion was directed was of a different purport than the later testimony of Russell, which more fully explained the transaction. If this claim is correct, then it was a question for the jury to determine as to what Russell meant, or which portion of his testimony was true. His version of the affair should be taken all together.

Wilson v. Wilson, 26 Or. 251, 38 Pac. 185, is cited and relied upon by plaintiff in support of the motion to strike out a part of the testimony. That was a case in which the defense offered to the note involved unsettled partnership mining affairs, which it was held should have been settled in a suit in equity. The note there involved was given by one partner for money which had been advanced for the partnership business by the other partner, who

retired from the partnership at the time the note was executed. The court, after discussing the partnership question, said: "So it would appear that an action at law is maintainable by one partner against another upon a promissory note executed by the one to the other, involving particular items or transactions of the partnership business, upon the ground that the giving of the note is an isolation or separation of the particular matter from the general partnership account, and that an accounting and final settlement of the partnership affairs is not necessarily involved in such action; that the execution of the note is such an acknowledgment of isolation or elimination of the particular transaction from the general partnership account as that the maker will be estopped at law from questioning the holder's right of action thereon."

That case differs from the one in hand. We find no error in the record.

The judgment of the Circuit Court is affirmed.

ANNOTATION.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose.

- I. Introduction, 422.
- II. Evidence to show conditional delivery:
 - a. Theory that evidence is admissible:
 - 1. Introduction, 424.
 - 2. General rules, 431.
 - 3. Condition that others sign, 440.
 - 4. Under Negotiable Instruments Act, 442.
 - 5. Admissibility as dependent upon relation to consideration, 446.
 - b. Theory that evidence is inadmissible, 448.
 - c. Instrument containing a condition, 450.
- III. Evidence to show a condition attached to the note:
 - a. Introduction, 452.
- III.—continued.
 - b. Application to various forms of evidence, 454.
 - c. Relation to consideration, 476.
- IV. Evidence held admissible on the theory of partial integration, 477.
- V. Evidence held admissible on the theory of discharge or payment, 481.
- VI. Pennsylvania decisions:
 - a. Holding the evidence admissible, 483.
 - b. Holding the evidence inadmissible, 487.
- VII. Evidence that the maker was to incur no obligation on the note, or that the note was given for a special purpose:
 - a. Introduction, 490.

VII.—continued.

- b. Rule that evidence is inadmissible, 490.

I. Introduction.

In the present annotation, it is the purpose to examine into the extent to which a bill or note that is admittedly delivered—at least manually—to the payee may be shown by evidence of a prior or contemporaneous oral agreement to be dependent upon a contingency. It is not the purpose to consider all oral agreements affecting bills and notes, but only such as make the note conditional. Oral agreements merely extending the time for payment to some future definite time, or to some event that is certain to happen, have not been generally considered. But where the agreement, although in form one of extension of time, is one which, in reality, may defeat the note altogether, the case is included. The line between these two classes is not altogether distinct, and some cases of the former class have been included. The same is true as to oral agreements that provide for a credit upon a note; cases dealing with such agreements have not been generally included herein. But see *infra*, III. b. Oral agreements that the instrument shall not be negotiated have not been included. Agreements to pay out of a certain fund have, in general, been excluded. The annotation is not concerned with the admissibility of evidence of an oral agreement among several makers of a note that one of them shall be relieved of liability, in an action between the makers themselves, for the purpose of adjusting their liability; nor is the admissibility of evidence of an oral agreement that the note was to be paid in instalments discussed. Parol evidence to show an agreement as to the capacity in which one who signs as "agent" or "trustee," etc., is to be bound, have, in general, been excluded.

In some jurisdictions, at least, a different rule prevails with reference to the admissibility of parol evidence of the character now under consideration, where a deed of real estate is involved, from that which prevails where a bill or note is involved. Holt

VII.—continued.

- c. Rule that evidence is admissible, 499.

v. Gordon (1915) — Tex. Civ. App. —, 176 S. W. 902. Accordingly, where a bill or note is given in a transaction in which a deed is also given, it sometimes becomes a question as to which of these rules is to be given effect. With this question the present note is not concerned. Nor is the case included if the rule applicable to deeds is decided to govern, since this note is confined to cases involving instruments for the payment of money. But if the rule applicable to bills and notes is held to govern, the case is included.

The situation covered in this note must be distinguished from that in which there has been a manual delivery to one other than the obligee, to hold until certain conditions have been met. This class of cases is illustrated by *Cedar Rapids Nat. Bank v. Carlson* (1912) 156 Iowa, 343, 136 N. W. 659, where a note was delivered to an agent upon condition that it was not to be delivered to the payee as a binding obligation until signed by a certain number of persons. It was claimed to have been secured by the payee without authority, and the parol evidence went to this effect. In *Bartholomew v. Fell* (1914) 92 Kan. 64, 139 Pac. 1016, involving a delivery to a third person, there is at least dicta to the effect that parol evidence is admissible to show a conditional delivery. One who signs a note as surety on the condition that the debtor execute a chattel mortgage to the payee, and that the note be not delivered to the payee until such mortgage has been executed, may show these facts by parol evidence in an action by the payee, if the payee had notice of the conditions at the time the note was delivered to him. *Goutermont v. Bland* (1917) 99 Kan. 431, 162 Pac. 270. In *Niblock v. Sprague* (1911) 200 N. Y. 390, 93 N. E. 1105, upon a settlement between partners, the retiring partner was to execute and deliver to a third person the notes which were the subject of the action, and which were to be held by the third person until the payment of the partnership

debts by the other partner, when, at the maker's direction, the third person was to indorse and deliver them to the other partner. The parol proof, it will be seen, does not attempt to show a conditional delivery to the real obligee, although the notes were delivered to the payee therein named. It was claimed the partner to whom the amount was payable obtained the notes without the maker's knowledge or consent. In this connection delivery to an agent of the payee must be considered. In some cases the agent is regarded as acting independently of his principal, so that delivery may be made to him without constituting a delivery to the principal. *J. I. Case Threshing Mach. Co. v. Barnes* (1909) 133 Ky. 321, 117 S. W. 418, 19 Ann. Cas. 246. It is expressly stated in this case: "We do not hold that a delivery to one of the parties to hold pending the performance or fulfilment of the condition upon which it [the note] was to become effective would be valid as an escrow. . . . In holding the writings he was not acting as the agent of the company, but as the agent of the purchaser; and it was admissible to prove the agreement under which the papers were placed in the hands of the agent." Cases which take this view are excluded; but other cases of delivery to an agent of the payee treat it as delivery to the principal, and are included in the note.

The note is confined to cases between the original parties, or those with notice of the conditions.

The admissibility of parol evidence to vary or explain the contract implied from the regular indorsement of a bill or note is discussed in the annotation in 4 A.L.R. 764.

From the foregoing outline it appears that the annotation has to deal, within the limits mentioned, with the so-called "parol-evidence rule." This rule is generally regarded not as a rule of evidence, but as a rule of substantive law. By virtue of the rule all prior and contemporaneous oral agreements are merged in the written contract. Not all cases have considered it such, however. For example, in *Hunt v. Adams* (1811) 7 Mass. 518,

the court, in denying the right of the maker of a note to show what was apparently a contemporaneous oral agreement, says: "The preference which the law gives to written evidence, when compared with parol testimony of parol agreements, is the unavoidable result of experience. It is impossible to expect or attain that certainty and exactness in the one form of evidence which is found in the other. When a contract has been stated in a writing assented to and signed by the parties concerned, and that continues in being, and under the control of the party relying upon it, evidence of the other parol agreements, to explain or vary the written contract, would be a rejection of that evidence which is necessarily the best." This theory of the Massachusetts court just quoted underlies a good many decisions applying the rule, notwithstanding the rule is recognized as one of substantive law.

The parol-evidence rule presupposes the existence of a written contract. One element of the existence of a written contract is delivery. The delivery of a written contract in practically every case rests in parol; there is no written evidence thereof. Hence, parol evidence is competent to prove delivery or the absence thereof. The evidence considered in this note does not go to the extent of showing that there was an entire absence of delivery; that is, not only that the paper writing did not pass out of the possession of the maker with his consent, but that he had no intention of giving the writing a legal and binding effect. One element of a delivery has taken place; it is admitted that the writing was intrusted to the custody of the payee therein named; the evidence over which the dispute arises is to the effect that it was not so intrusted with the intention of creating a legal obligation. In other words, it is sought to show by the evidence an absence of only one element of a delivery. A state of facts which is on the border line between these two situations appears in *Sutton v. Griebel* (1902) 118 Iowa, 78, 91 N. W. 825. In that case, an action upon a written instrument

by which the defendant and others proposed to undertake to pay \$100 each for shares in a certain stallion, the defendant was permitted to plead and prove that there was a collateral oral agreement between him and the plaintiff, at the time of signing the instrument, by which he was to be allowed to withdraw from the arrangement at any time before the final completion of the transaction involved, and that, at the time the signers met to complete the final arrangements, defendant did withdraw therefrom, notifying plaintiff and the other signers of the facts, and plaintiff secured another subscriber for defendant's share, as he had agreed to do. The court, in holding the evidence admissible, says: "Indeed, in the absence of any such collateral agreement, if, before the completion of the transaction contemplated, he notified plaintiff of his withdrawal, and such withdrawal was accepted by the substitution of another subscriber in his place, his liability would be discharged."

Some cases have taken the broad view that the instrument cannot be manually delivered to the payee therein named, to become effective only on condition. See *infra*, II. b. A good many of these are early cases. The great weight of authority at the present time undoubtedly supports the view that an instrument may be delivered to the payee to become effective only upon a condition. Undoubtedly in the application of this rule the evidence has been admitted in cases in which the oral agreement did not go to the delivery of the instrument, but merely to its obligation. Such cases, it is believed, rest upon an erroneous view of the law. As is true with any hard-and-fast rule of law, there is a disposition to avoid the application in the so-called "hard case," and it is believed that some of the cases of the class above mentioned have been instances of this kind. Parol evidence as it has been admitted to show conditional delivery is discussed in subd. II. hereof. Not all cases which admit evidence of prior and contemporaneous oral agreements base the admission upon a conditional

delivery. Such evidence has been admitted on the theory of partial integration. See *infra*, IV. And see *Lyons v. Stills* (1896) 97 *Tenn.* 514, 37 *S. W.* 280, *infra*, II. a, 1. Others admit the evidence on the theory that the bill or note is thereby discharged. See subd. V. Others admit it on the theory that a failure of consideration is shown. And evidence of the character under consideration has been admitted in Pennsylvania under a theory discussed in subd. VI. *infra*. The decisions in this state are not harmonious, however, as may be seen by reference to this subdivision. Some cases have admitted evidence showing a delivery for a special purpose on the theory that this shows a conditional delivery, but this is clearly incorrect. See *infra*, VII.

II. Evidence to show conditional delivery.

a. Theory that evidence is admissible.

1. Introduction.

In determining the admissibility of parol evidence of the character under consideration in this subdivision, it is necessary to determine which of two well-settled rules of law shall govern. The rules referred to are the parol-evidence rule that parol evidence is inadmissible to vary or contradict the terms of a written instrument, and the rule that parol evidence is admissible to show absence of delivery of an instrument. In addition to the above-mentioned rules it is necessary to bear in mind that fact that the parol-evidence rule does not prevent evidence to show that the agreement sued upon is without consideration, or that the consideration has failed, provided the evidence does not in other respects vary the legal effect of the contract. 3 *Jones, Ev.* § 468.

It appears from the subsequent discussion that the admissibility of evidence of a prior or contemporaneous oral agreement going to the delivery of the instrument and making it conditional is well established. This rule has been applied to some cases in which the evidence does not clearly show an agreement affecting the de-

livery. In fact, the evidence is held admissible in some cases in which the agreement is stated to have been that the instrument was "to become void" or "was not to be paid" upon the happening of the contingency. While a statement that an instrument is "to become void" or that it "is not to be paid" upon a contingency implies that it is an existing obligation, it is not clear that the courts—except as hereinafter noted—so speaking of it, which hold the evidence admissible, regard the instrument as unconditionally delivered. In other words, when these courts speak of the agreement that the instrument shall "become void" or that it shall "not be paid" upon the happening of the contingency, they really have in mind a condition going to the delivery of the instrument,—a condition precedent rather than a condition subsequent, which defeats an instrument that has become a valid, existing obligation. An allegation "that it was distinctly understood and agreed by and between" the makers and payee of a note "that the said note was to be used by said Rice (payee) for the purpose of raising the necessary money to finance" a stock-purchasing transaction negatives the idea of a conditional delivery; such facts show an oral agreement affecting the manner in which the note was to be paid. Such agreement cannot be shown in evidence to modify the written promise contained in the note. *Gwinn v. Ford* (1915) 85 Wash. 571, 148 Pac. 891.

The use of the term "delivered" in a loose sense has caused some confusion on this question. The term has two meanings. First, it may mean a manual delivery,—that is, the mere physical act of handing the paper to the obligee. Second, it may mean this physical act accompanied with the intention of the obligor that it shall take effect as a valid legal obligation. Unless "delivery" in the latter sense is present, the instrument cannot (as between the parties or those with notice) have any binding effect. This assumes, of course, that both parties to the contract understand the intent. It is frequently stated in the cases that

an instrument is executed and "delivered" under an agreement that it shall not become a valid and enforceable obligation except upon the happening of a contingency. The only sense in which the term "delivered" can possibly be used in such a statement without creating a plain contradiction is to mean the mere physical act of intrusting the instrument to the payee. If an instrument has been delivered in the sense that it is intended to take effect as a legal obligation, a valid legal relation is created thereby which cannot be varied or contradicted by parol evidence. It is, strictly speaking, inaccurate to characterize the condition with which this note deals as a "conditional delivery." There is in fact no delivery at all except the manual delivery. It is stated in the dissenting opinion of Ingraham, P. J., in *Carpenter v. Maloney* (1910) 138 App. Div. 190, 123 N. Y. Supp. 61, affirmed without opinion (1911) 203 N. Y. 571, 96 N. E. 1111, that a conditional delivery is "one by which the note was not to be regarded as delivered until the happening of a future event. But where the note was actually delivered, and to be a valid instrument until a future event should occur, when, upon a contingency, it should become void, there was not a conditional delivery." If, however, the term is properly understood, it is sufficiently accurate, and is used throughout this note.

There is no infallible test to determine when the evidence is admissible as showing a conditional delivery and when it falls within the prohibition of the parol-evidence rule. Various tests have been given and these are aids in determining the question. The evidence over which the dispute arises may be to the effect that the instrument was not intrusted to the payee with the intention of creating a legal obligation; that whether or not a legal obligation should be created depends upon a contingency; or it may be to the effect simply that the enforcement of the obligation is dependent upon the contingency. In the former case what is attempted to be shown by the evidence is that the written instrument never became a contract; in the latter

case it is assumed that the instrument became a contract; the evidence is directed merely to the enforcement of the obligation of the contract. If the evidence is of the former class, that is, if it is to the effect that the instrument was intrusted to the payee with the intention that it should not create any legal relation, but that whether or not it should take effect as a valid and binding instrument is dependent upon a contingency, the evidence is admissible, and this whether or not it affects the consideration. If, on the other hand, the evidence is to the effect that the enforcement of the instrument as an obligation is dependent upon a contingency, the evidence is not admissible. But, as stated above, the instrument may still be defeated by showing a lack of consideration, or that the consideration has failed within the rule above stated. The distinction is well stated in *Smith v. Dotterweich* (1911) 200 N. Y. 299, 33 L.R.A. (N.S.) 892, 93 N. E. 985, as follows: "When the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract which it is designed to contradict or change by parol, then the spoken word must yield to the written compact." The condition must be one that goes to the existence of the contract. If the evidence tends to prove that while the form of a written contract existed, no engagement was in fact ever concluded entitling the person claiming the benefit of the instrument to enforce its stipulation, the evidence is admissible; but if, on the other hand, there is no dispute but that a binding contract was made, which took effect when the instrument was delivered, and the dispute relates to what the agreement was, the evidence is not admissible. *Naftzger v. Buser* (1920) 106 Kan. 115, 186 Pac. 997. The supreme court of Michigan clearly recognizes the distinction between these two situations. That court admits as true the proposition that a promissory note, unconditional in terms, may be shown to have been conditionally delivered; that is

to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or become a binding obligation until the happening of some event; but in that case, in which the offer of proof which was set out in a notice under the general issue stated that the notes were delivered to the payee upon the clear and distinct understanding and conditions agreed to by the plaintiff, that, upon a certain contingency, the notes should become and be null and of no effect, and were not to be paid, the court says: "We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet, in a certain contingency, this sum should not be payable at all, and the notes be redelivered." *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11. The supreme court of Minnesota in *Smith v. Mussetter* (1894) 58 Minn. 159, 59 N. W. 995, has quite clearly distinguished between the two situations as follows: "The principal question on this appeal is whether the answer set up an agreement (shown by affidavit to have been oral) that the note sued on should become operative as a contract only on the happening of a future contingent event; or a parol condition not expressed in the instrument attached to the obligation of the contract. In other words, whether it means that the happening of the future contingent event was to be a condition precedent to the note becoming operative at all

as a contract, or whether it means that the obligation on the contract was not absolute according to its terms, but only conditional."

The test whether it is a condition precedent or a condition subsequent is one that is applied in a number of jurisdictions. The admissibility of the parol evidence is stated to depend upon whether or not it shows a condition precedent. *Ibid.* *Smith v. Dotterweich* (1911) 200 N. Y. 299, 33 L.R.A. (N.S.) 892, 93 N. E. 985; *Keller v. Prince* (1912) 76 Misc. 522, 135 N. Y. Supp. 573; *Ebling Brewing Co. v. Feldman* (1909) 114 N. Y. Supp. 910; *Newgass v. Shulhof* (1911) 128 N. Y. Supp. 664; *Stoughton v. Chu Fong* (1911) 130 N. Y. Supp. 228; *Equitable Trust Co. v. Halpert* (1912) 132 N. Y. Supp. 776; *Post v. Tamm* (1916) 91 Wash. 504, 158 Pac. 91. The condition precedent must be a condition precedent to the instrument becoming a valid obligation, and not merely a condition precedent to the payment, to render the evidence admissible. If it is a condition subsequent to the going into effect of the instrument as a valid and legal obligation, parol evidence thereof is not admissible. *Goddard v. Cutts* (1834) 11 Me. 440; *German Exch. Bank v. Schnitzer* (1911) 72 Misc. 362, 130 N. Y. Supp. 223; *Carnegie Trust Co. v. Kleybolte* (1911) 74 Misc. 246, 134 N. Y. Supp. 69; *Beecher v. Dunlap* (1894) 52 Ohio St. 64, 38 N. E. 795; *Post v. Tamm* (1916) 91 Wash. 504, 158 Pac. 91. If the instrument has once become a valid and enforceable contract, parol evidence is not admissible. *Smith v. Hedges* (1915) 170 App. Div. 349, 155 N. Y. Supp. 934, affirmed in (1918) 222 N. Y. 701, 119 N. E. 1077. After stating that the notes were rendered effective and complete by an unconditional delivery, the court states that the plea was "that the payee was to release the maker and to cancel the note provided the contract was not completed when the note fell due,—a future contingency."

A slightly variant test appears in *Moore v. Prussing* (1897) 165 Ill. 319, 46 N. E. 184, where the court says: "While it may be shown by parol that the note was delivered conditionally,

yet, where the facts averred show execution of the note, and its delivery for the consideration paid and received, an attempt to change the terms of the instrument by averring conditions in conflict with its terms is not a sufficient plea."

That it may be shown to have "ceased to be a contract" is, however, expressly stated in *Burns & S. Lumber Co. v. Doyle* (1899) 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483. And the supreme court of Tennessee in *Lyons v. Stills* (1896) 97 Tenn. 514, 37 S. W. 280, in admitting evidence of an oral agreement that the maker of the note had the right, at any time he was dissatisfied within six months, to return the goods for the purchase price of which the note was given, clearly recognizes the existence of the instrument. According to the court, such an oral agreement does not contradict the note, but sets up an independent agreement, made at the same time, that, upon a contingency or condition, the note was to become void. In *John Lucas & Co. v. Bradley* (1917) 158 C. C. A. 649, 246 Fed. 693, the court says: "Undoubtedly the giving of a promissory note raises the presumption that the amount named in it is then owing by the maker to the payee. But this presumption is rebuttable, and there are many cases in which the maker may prove a collateral agreement or other facts which relieve him from liability. Such proof does not vary or contradict the written note, but shows independently that it is not a binding obligation." The parol evidence was admitted in part in *Drovers' Cattle Loan & Invest. Co. v. McGraw* (1921) — Minn. —, 184 N. W. 365, on the theory that it showed an independent agreement. See *infra*, IV.

Although the courts have not expressly made time a determinative element in reaching a conclusion as to the class to which the evidence belongs, it seems that in order that the evidence show a conditional delivery the matter must be determined within a relatively short time. For example, a note given by the applicant for life insurance upon the condition that it

is not to be binding unless he is satisfied with the policy will, in a large majority of instances, at least be determined in a short time; at any rate, the matter is held in abeyance until the condition is determined, if there is a true conditional delivery. The defense pleaded in *Beecher v. Dunlap* (1894) 52 Ohio St. 64, 38 N. E. 795, brings the case clearly within facts showing a conditional delivery. The defense pleaded was as follows: "A parol agreement made at the execution and delivery of the note, that it was not to become operative unless a certain sum should be made from the manufacture and sale of a patent right for which the note was given." But from the testimony it appeared that the notes "were to be null and void" unless within a year the maker should be able to make a stated sum net from the manufacturer's sale of the patent rights. It is apparent from this evidence that the condition went merely to the obligation, although it was pleaded that the note was not to become operative. The extent to which the courts have gone in disregarding the time element, and the fact that the matter is held in abeyance until the contingency has been determined in the true conditional delivery, are illustrated by the facts in *Ewell v. Turney* (1905) 39 Wash. 615, 81 Pac. 1047, where, in the case of notes given to evidence the purchase price of mining property, the maker, in an action thereon, pleaded an agreement that the note should not become a note collectible against the defendant, or have any value at all, until the mining property became a shipper of ore, and that such property had not, as yet, become such a shipper. While the payee of the note was held entitled to a judgment thereon, this was upon the ground that the maker had failed to prove the conditional delivery, it being clearly recognized that the maker of a note may show a conditional delivery. There is, however, no discussion of the time element.

The principle that a conditional delivery may be shown is clear. But it is exceedingly difficult to determine from the evidence whether a situation

is presented in which the intent of the parties went to the delivery of the instrument, making it conditional, or merely to its obligation. This is a difficulty that confronts the courts when it becomes necessary to decide upon the character of the evidence. In a case in which there was held to be a conditional delivery, the testimony of some witnesses was to the effect that it was stated "the note should be no good;" others, that "there would be no sale;" and still others, that "the note would be no good, or void." *Hodge v. Smith* (1906) 130 Wis. 326, 110 N. W. 192. An agreement to "refund" the note upon certain conditions was held not to create a conditional delivery, in *Farmers' Bank v. Nichols* (1910) 25 Okla. 547, 138 Am. St. Rep. 931, 106 Pac. 834, 21 Ann. Cas. 1160. There was no question, however, of parol evidence in this case, as the agreement to refund the note was in writing. A case which clearly illustrates the difficulty here encountered is that of *Dulaney v. Burke* (1890) 2 Idaho, 719, 23 Pac. 915, reversed in (1894) 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816. In that case, according to the supreme court of Idaho, the payee of the note, in the negotiation leading up to its execution, offered to purchase a mining property, giving to the maker a one-half interest therein, the maker to execute to the payee his promissory note for one half the purchase price of said property. At the same time the payee agreed to give the maker an opportunity to examine and test the mining property, and if, after such examination, he did not desire to pay the note and receive his interest in the property, he might surrender the interest to the plaintiff, and, upon surrender of the interest, the payee would cancel defendant's note given therefor. This was by the supreme court of Idaho held to be an oral agreement, proof of which was prohibited by the parol-evidence rule, but the United States Supreme Court, upon an appeal, reached a different conclusion, and held that the evidence showed a conditional delivery, proof of which might be made, and this although, in the statement of the testi-

mony upon the trial, the United States Supreme Court stated a case which seems to be a clearer case of a violation of the parol-evidence rule. According to the United States Supreme Court the following question was propounded to the defendant at the trial: "State whether or not, prior to your making the note, the plaintiff agreed with you that you could explore, work, and develop the mining claims mentioned in the answer, and if at any time before the maturity of the said note you should desire to do so, that he would relinquish said option of purchase,—that you could relinquish your said option of purchase, and that he, plaintiff, would cancel the note and accept the deed in full discharge of the note and the cancelation thereof." The offer of proof, however, makes the case more nearly one for the admission of the evidence than does the question which was propounded as shown above. The offer to prove was that, "at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." And when the Supreme Court refers to the testimony in its own language it makes the case a clearer one for the admission of the testimony. It appears that the maker of the note worked the mining property from some time in September until the following March. This fact seems to indicate as well as the testimony that the condition was one going to the performance of the note, rather than to the delivery. The decision of the United States Supreme Court seems to mark an extreme limit in the admissibility of such evidence. The decision in *Drovers' Cattle, Loan, & Invest. Co. v. McGraw* (1921) — *Minn.* —, 184 N. W. 365, is another illustration of an extreme application of the rule of conditional delivery. In that case it was held competent for a purchaser of cattle, who had given her note for a balance due on the purchase price, to show an oral agreement

that she should take the cattle to her farm, pasture them for the summer, and return them to the vendor in the fall, who was thereupon to sell them and apply the proceeds on the note, and pay the maker any overplus, if any there was, but the maker was not to be held liable for any deficiency; in other words, that the vendor was to look to the cattle for the payment of the note. The effect of this testimony was to show an intention by the parties, according to the court, that the note would become operative as a contract only in case the maker failed to live up to the terms of the contract in caring for and returning the cattle for sale in the fall, and applying the proceeds thereof in extinguishment of the contract. This decision, however, is based on other grounds in addition to the conditional delivery. See *infra*, IV., and also VII. c.

A very slight change in the form of the evidence or offer of proof frequently changes a case which shows a state of facts violative of the parol-evidence rule into one in which the evidence is clearly admissible as showing a conditional delivery. For example, in *Meyer v. Beardsley* (1863) 30 N. J. L. 236, the offer of proof of the acceptor of a draft was as follows: "The defendant agreed to and did accept the draft to be paid on condition that the defendant receive from the drawer" certain evidence as to the freedom from encumbrances of property given in security for the acceptance. This evidence was held inadmissible as a violation of the parol-evidence rule. It seems clear that if the offer of proof had been that the defendant accepted the draft and delivered it to the payee, to become a binding obligation upon the acceptor's receipt of the proof above mentioned, that the evidence would, according to the great majority of cases, at least, have been admissible. Yet, looking at this case, without reference to the form in which the offer of proof was put, it seems clear that the latter situation is the attitude of mind—the real intention—which the acceptor of the draft had when he accepted it; that is, although in forming his offer of proof, it was

put as a case which looked like a condition subsequent rather than a condition precedent, in fact, the condition was one precedent rather than a condition subsequent.

Such evidence does not contradict the writing.

Evidence that the instrument was delivered conditionally does not contradict the writing within the meaning of the parol-evidence rule; that rule presupposes the existence of a valid contract. The evidence in question is for the purpose of showing that there is no valid contract between the parties, because there is no finality of utterance.

United States. — *Burke v. Dulaney* (1893) 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816.

Arkansas. — *Graham v. Remmel* (1905) 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167.

Colorado. — *Norman v. McCarthy* (1913) 56 Colo. 290, 138 Pac. 28; *Denver Brewing Co. v. Barets* (1897) 9 Colo. App. 341, 48 Pac. 834.

Connecticut. — *McFarland v. Sikes* (1886) 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Trumbull v. O'Hara* (1898) 71 Conn. 172, 41 Atl. 546.

Georgia. — *Heitmann v. Commercial Bank* (1909) 6 Ga. App. 584, 61 S. E. 590, s. c. on later appeal in (1910) 7 Ga. App. 740, 68 S. E. 51; *Hartman Stock Farm v. Henley* (1910) 8 Ga. App. 255, 68 S. E. 957.

Indian Territory. — *Mehlin v. Mutual Reserve Fund Life Asso.* (1898) 2 Ind. Terr. 396, 51 S. W. 1063.

Iowa. — *Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882.

Minnesota. — *Smith v. Mussetter* (1894) 58 Minn. 159, 59 N. W. 995.

New York. — *Smith v. Dotterweich* (1911) 200 N. Y. 299, 33 L.R.A. (N.S.) 892, 93 N. E. 985; *Keller v. Prince* (1912) 76 Misc. 522, 135 N. Y. Supp. 573.

North Carolina. — *Hughes v. Crooker* (1908) 148 N. C. 318, 128 Am. St. Rep. 606, 62 S. E. 429; *Garrison v. J. I. Case Threshing Mach. Co.* (1912) 159 N. C. 285, 74 S. E. 821.

Rhode Island. — *Sweet v. Stevens* (1863) 7 R. I. 375.

South Dakota. — *McCormick Har-*

vester Mach. Co. v. Faulkner (1895) 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163.

Texas. — *Merchants' Nat. Bank v. McAnulty* (1895) — Tex. Civ. App. —, 31 S. W. 1091.

Wisconsin. — *Harder v. Reinhardt* (1916) 162 Wis. 558, 156 N. W. 959.

According to the court in *McFarland v. Sikes* (Conn.) *supra*, "a written contract must be in force as a binding obligation to make it subject to this rule [the parol-evidence rule]. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its nondelivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them."

It has been stated that "the delivery of an instrument is an essential element to complete the contract written thereon, and of necessity this essential element cannot appear on the face of the instrument." *Norman v. McCarthy* (Colo.) *supra*. As to the effect of recital of delivery, see *Starr Piano Co. v. Edgar* (1909) 31 Ohio C. C. 295, *infra*, II. a, 4.

According to *Mehlin v. Mutual Reserve Fund Life Asso.* (1899) 2 Ind. Terr. 396, 51 S. W. 1063, the delivery of an instrument is a fact which generally must be within the scope of parol proof alone, as the writing, in the nature of things, does not usually contain the evidence of its delivery.

Norman v. McCarthy, in which the general statement above was made, involved a conditional delivery. It is further stated that the apparent contract written on the instrument is not

complete until the delivery thereof is or becomes unconditional. Under the Negotiable Instruments Law a presumption of delivery is stated to arise, but, as between the immediate parties, this presumption may be overcome by showing that the delivery was conditional; and when that is shown, the apparent contract written on the instrument is shown not to be a completed contract, but one which will be completed if the condition is fulfilled, and which cannot be completed if the condition becomes impossible of fulfillment. Again, it has been stated that such evidence merely postpones the legal operation of the instrument, and does not contradict the writing. *Hughes v. Crooker* (1908) 148 N. C. 318, 128 Am. St. Rep. 606, 62 S. E. 429.

In *Cochran v. Burdick Bros.* (1912) 7 Ala. App. 274, 61 So. 29, it is stated that the condition goes to the consideration of the instrument.

It must be remembered that this note is not concerned with the admissibility of the evidence as against bona fide holders,

Necessity of pleading.

It has been held that such condition must be set up by proper plea; unless this is done, the evidence is not receivable if objected to as variant or irrelevant. *Jefferson County Sav. Bank v. Compton* (1915) 192 Ala. 16, 68 So. 261. See *Hunter v. First Nat. Bank* (1908) 172 Ind. 62, 87 N. E. 734, *infra*, II. a, 3. But such evidence has been held admissible where the defendant admits that he made and "delivered" his "writing," containing all the terms of the note set forth in the complaint, but in a separate defense sets forth that the instrument was made and delivered upon a condition precedent which has never been fulfilled, where the plaintiff failed to move for judgment on the pleadings, but went to trial fully apprised that the defendant intended to show that there was no delivery of any binding contract. *Keller v. Prince* (1912) 76 Misc. 522, 135 N. Y. Supp. 573. The court states that there is some force in the contention that the defense that a contract was delivered upon a condition precedent may be shown upon a general denial.

Without expressly deciding upon the necessity of pleading such conditional delivery, it has been held that where conditional delivery is pleaded, it may be shown by parol. *Niblock v. Sprague* (1911) 200 N. Y. 390, 93 N. E. 1105. The general question of the necessity of pleading the condition is not covered in this note.

2. General rules.

Evidence that the instrument was not to become a binding obligation.

The rule sustained by a practically uniform line of authorities is that parol evidence is admissible to show that a bill or note, absolute in form, although manually delivered to the payee, was not to become a binding obligation except upon the happening of a certain event.

United States. — *Burke v. Dulaney* (1893) 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *Beach v. Nevins* (1908) 18 L.R.A.(N.S.) 288, 89 C. C. A. 129, 162 Fed. 129; *Gillette v. Hodge* (1909) 95 C. C. A. 205, 170 Fed. 313. (obiter.)

Alabama. — *Corbin v. Sistrunk* (1851) 19 Ala. 203. See *Hopper v. Eiland* (1852) 21 Ala. 717, *infra*, IV.

Arkansas. — *Graham v. Rammel* (1905) 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167.

Connecticut. — *Burns & S. Lumber Co. v. Doyle* (1899) 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483.

Indian Territory. — *Mehlin v. Mutual Reserve Fund Life Asso.* (1898) 2 Ind. Terr. 396, 51 S. W. 1063.

Maine. — *Goddard v. Cutts* (1834) 11 Me. 440.

Massachusetts. — *Watkins v. Bowlers* (1875) 119 Mass. 383; *Hill v. Hall* (1906) 191 Mass. 253, 77 N. E. 831; *Zielmann v. Copelof* (1919) 232 Mass. 393, 122 N. E. 552.

Michigan. — *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11 (obiter).

Minnesota. — *Smith v. Mussetter* (1894) 58 Minn. 159, 59 N. W. 995.

New York. — *Seymour v. Cowing* (1864) 4 Abb. App. Dec. 200, 1 Keyes, 532; *Benton v. Martin* (1873) 52 N. Y. 570; *Smith v. Dotterweich* (1911) 200 N. Y. 299, 33 L.R.A.(N.S.) 892, 93 N.

E. 985; Niblock v. Sprague (1911) 200 N. Y. 390, 93 N. E. 1105; Pratt & W. Co. v. American Pneumatic Tool Co. (1900) 50 App. Div. 369, 63 N. Y. Supp. 1062, affirmed in (1901) 166 N. Y. 588, 59 N. E. 1129 (rule recognized); Rubel v. Honig (1917) 178 App. Div. 53, 164 N. Y. Supp. 219; Keller v. Prince (1912) 76 Misc. 522, 135 N. Y. Supp. 573; Newgass v. Shulhof (1911) 128 N. Y. Supp. 664; Equitable Trust Co. v. Halpert (1912) 132 N. Y. Supp. 776.

North Carolina. — Hughes v. Crooker (1908) 148 N. C. 318, 128 Am. St. Rep. 606, 62 S. E. 429; Garrison v. J. I. Case Threshing Mach. Co. (1912) 159 N. C. 285, 74 S. E. 821.

Oklahoma. — Gamble v. Riley (1913) 39 Okla. 363, 135 Pac. 390.

Oregon. — La Grande Nat. Bank v. Blum (1894) 26 Or. 49, 37 Pac. 48; Colvin v. Goff (1916) 82 Or. 314, L.R.A.1917C, 300, 161 Pac. 568; VINCENT v. RUSSELL (reported herewith) ante, 417.

Texas. — Holt v. Gordon (1915) — Tex. Civ. App. —, 176 S. W. 902; Baines v. Kohler & Campbell (1918) — Tex. Civ. App. —, 201 S. W. 735.

Washington. — Ewell v. Turney (1905) 39 Wash. 615, 81 Pac. 1047; Gwinn v. Ford (1915) 85 Wash. 571, 148 Pac. 891, s. c. on rehearing (1916) 91 Wash. 498, 118 Pac. 536; Gwinn v. Ford (1915) 85 Wash. 699, 148 Pac. 892, s. c. on rehearing (1916) 91 Wash. 694, 158 Pac. 536.

No question seems to have been raised in Thompson v. Carter (1909) 6 Ga. App. 604, 65 S. E. 599, as to the admissibility of the evidence to show that a note given in payment of a horse was turned over to the vendor upon the express condition that it was not to become the property of the vendor as a note until the horse should be turned over to the vendee cured of a lameness with which it was afflicted. The Georgia courts have inclined toward the exclusion of such evidence. There are, however, cases in that jurisdiction which clearly recognized the admissibility. In addition to Thompson v. Carter, see Heitmann v. Commercial Bank (1909) 6 Ga. App. 584, 65 S. E. 590, *infra*, II. 3; Hart-

man Stock Farm v. Henley (1910) 8 Ga. App. 255, 68 S. E. 957, *infra*, II. 3.

That a delivery may be shown to be conditional was recognized in Foy v. Blackstone (1863) 31 Ill. 538, 83 Am. Dec. 246, but the evidence was rejected there because the action was by an assignee who was not shown to have had knowledge thereof. That a delivery may be conditional is clearly recognized in Moore v. Prussing (1897) 165 Ill. 319, 46 N. E. 184.

The rule is recognized also in McNight v. Parsons (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; Lavalleur v. Hahn (1911) 152 Iowa, 649, 39 L.R.A.(N.S.) 24, 132 N. W. 877; Bartholomew v. Fell (1914) 92 Kan. 64, 139 Pac. 1016. The rule is again recognized in Goutermont v. Bland (1917) 99 Kan. 431, 162 Pac. 270, where a surety signed notes under an agreement that the principal debtor was to give the payee of the note the chattel mortgage on the printing plant for the purchase price of which the notes had been given as part payment, before the notes were to be delivered to the payee. The principal debtor notified the payee of this understanding and agreement before the notes were delivered to the payee, but they were actually delivered before the chattel mortgage was given; in fact, the chattel mortgage was not given. It thus appears that there was no delivery at all with the consent of the surety, who was seeking to introduce the evidence. It is recognized as being competent for the maker of a note to show by parol that the note was to become a binding agreement only on the happening of a certain contingency, in Ewell v. Turney (1905) 39 Wash. 615, 81 Pac. 1047, but it is held in that case that the proof must be reasonably certain to that end, and in that case there was held to be not even a preponderance of the evidence in favor of the showing of a conditional delivery. This rule is recognized in Ebling Brewing Co. v. Feldman (1909) 114 N. Y. Supp. 910, but the evidence received by the trial court was not limited to the

proof of a condition precedent, and its admission was accordingly held error.

In addition to the above cases there are other cases which lend more or less support to the rule. In *Ware v. Allen* (1888) 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174, it was held competent for the obligors on an instrument promising to pay money on certain conditions to show an oral agreement that it was to be of no effect unless, upon consultation with counsel, the maker should be assured that the transaction out of which it arose was lawful. A note signed by a surety may be delivered to the payee, to become effective as a binding obligation only when the principal maker has given security to the surety. *Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882. An accommodation indorser of a note may show that it was executed and delivered under an oral agreement that it was not to be delivered as a note indorsed by the defendant unless and until a certain security was given to the defendant, and that the plaintiff received the note from the principal maker with express notice and actual knowledge of the agreement and understanding. *Ricketts v. Pendleton* (1859) 14 Md. 320. In *Catt v. Olivier* (1900) 98 Va. 580, 36 S. E. 980, where notes were given as subscriptions in aid of an educational institution upon certain conditions to be performed by the institution, evidence to prove these facts was held admissible against the receiver in insolvency of the institution, in an action by creditors who had not relied upon the notes in giving credit. It is not altogether clear whether the note involved in *Lipscomb v. Lipscomb* (1889) 32 S. C. 243, 10 S. E. 929, was delivered to the payee or to a third person. The payee, however, obtained possession of the note and sued thereon, and in the action the defendant was permitted to show that there was an unsettled account between the parties, and that the note was given with the express understanding that it should remain in the hands of a third person, awaiting the settlement of the account.

20 A.L.R.—23.

In the early English case of *Pym v. Campbell* (1856) 6 El. & Bl. 370, 119 Eng. Reprint, 903, 25 L. J. Q. B. N. S. 277, 2 Jur. N. S. 641, 4 Week. Rep. 528, the right to prove by parol evidence that a contract for the purchase of an interest in a patent was delivered upon the condition that if a certain person approved of the invention, the writing should be an agreement, but if he did not approve, it should not be one, was sustained. Such evidence does not vary the terms of the agreement, but shows that there is not an agreement at all. In *Bell v. Ingestre* (1848) 12 Q. B. 317, 116 Eng. Reprint, 888, the court, in holding admissible in an action by the indorsee of bills of exchange against the acceptor evidence that the bills were accepted for the express purpose of retiring overdue bills, and on the express condition that such overdue bills should be returned to the acceptor by the next post, says that it is a singular sort of escrow, for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. According to Patten, Judge, it was not intended that the indorsee should take any interest until the old bills were returned. But see *Adams v. Wordley* (1836) 1 Mees. & W. 374, 150 Eng. Reprint, 479, 2 Gale, 29, 1 Tyrw. & G. 620, 5 L. J. Exch. N. S. 158.

Where a compromise agreement had been entered into between the vendor and vendee of goods, by virtue of which the vendor agreed to discontinue an action pending against the purchaser, and delivered goods which it had theretofore failed to deliver, and, in consideration thereof, the purchaser gave his note for the purchase price, the purchaser may, when sued on the note, show that the vendor had failed and refused to perform his agreement to discontinue the action and deliver the goods. *Great Northern Moulding Co. v. Bonewur* (1908) 128 App. Div. 831, 113 N. Y. Supp. 60. The consideration and conditions of delivery are always open to inquiry, according to the court.

Evidence that a note was delivered to show that the maker was willing to

take shares in a company about to be formed, if it were formed, was evidently admitted in *Eastman v. Shaw* (1875) 65 N. Y. 522, but there is no discussion.

A great variety of facts are presented in the cases. The question has arisen in actions on notes given by applicants for insurance. It has been held competent for the applicant to show that the note was not to become a binding obligation unless he accepted the policy. *Watkins v. Bowers* (1876) 119 Mass. 383. The testimony in this case as to the oral agreements vary. According to some testimony the note "would not be binding" unless the maker decided to keep the policy. According to others the agent of the insurance company agreed that he "would give up the note." And in an action upon a note given upon an application for insurance, parol evidence has been held competent to prove that the agent represented that it was necessary to attach the note to the application to show the applicant's good faith, but that the note would not be binding upon him unless the policy, when it arrived, was satisfactory and he accepted it. *Graham v. Remmel* (1905) 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167. The maker of a note may show that it was left with the agent of the insurance company under an agreement that the maker was to look into the plan of the insurance, and, if satisfactory, the agent should forward the note to the company, and the policy should be issued. *Mehlin v. Mutual Reserve Fund Life Asso.* (1899) 2 Ind. Terr. 396, 51 S. W. 1063. In *Equitable Trust Co. v. Halpert* (1912) 132 N. Y. Supp. 776, parol evidence is held admissible in an action on a written instrument to show that the instrument would only be enforceable if the payee would issue a life insurance policy to the maker, entirely satisfactory to him; and this whether the instrument in question is a negotiable instrument or non-negotiable. It was held in *Smith v. Dotterweich* (1911) 200 N. Y. 299, 33 L.R.A.(N.S.) 892, 93 N. E. 985, that parol evidence is admissible to show

that a note given in payment of the premium on a life insurance policy was not to take effect as a valid and enforceable obligation unless the maker should be furnished with a loan of money. The maker of a note issued for a premium on a life insurance policy may show that it was not to become a binding obligation except in the event that he was able to enter into a business arrangement, and that this arrangement had failed. *Smith v. Musetter* (1894) 58 Minn. 159, 59 N. W. 995. An oral agreement, proof of which was held admissible in *Mendenhall v. Ulrich* (1906) 94 Minn. 100, 101 N. W. 1057, was that the note given for the premium on an insurance policy was to be delivered to a bank by the agent; instead, the agent never left the note at the bank, but put it in circulation.

The maker of a note given in payment of an interest in a mine may show that the note was not to be delivered as an absolute obligation until he had investigated the mine, and determined to accept or reject the interest. *Burke v. Dulaney* (1893) 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816.

Evidence is admissible in defense of an action by a receiver of an insolvent corporation to enforce a promissory note executed in his favor, that the note was delivered on condition that the stock of the corporation should be procured and delivered to the maker within a specified time. *Beach v. Nevins* (1908) 18 L.R.A.(N.S.) 288, 89 C. C. A. 129, 162 Fed. 129.

A bill may be accepted and delivered to the payee on condition that it shall not be a binding obligation until the drawer has performed certain services for which the bill was given. *Burns & S. Lumber Co. v. Doyle* (1899) 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483.

It is held in *Equitable Mfg. Co. v. Hill-Atkinson Co.* (1916) 17 Ga. App. 494, 87 S. E. 715, that parol evidence is admissible to show that a written contract was not to become a completed contract until certain prerequisites had been complied with.

The maker of a note may show that its delivery was conditional upon the sale of certain bonds by him. *Hill v. Hall* (1906) 191 Mass. 253, 77 N. E. 831.

The drawer of a draft which has been lost may, upon issuing a duplicate, issue it on the condition that he would not be held responsible in the future for any "back laches,"—that the new draft must take the place of the original. *Benton v. Martin* (1873) 52 N. Y. 570.

It is held in *Rubel v. Honig* (1917) 178 App. Div. 53, 164 N. Y. Supp. 219, that notes payable to infants, and delivered to their father, may be shown to have been delivered subject to an oral agreement between the father and the maker that the notes were not to take effect as obligations against the maker until the payment of a certain indebtedness from the firm of which the father was a member.

It is held in *Newgass v. Shulhof* (1911) 128 N. Y. Supp. 664, that parol evidence is admissible to show that a note was delivered to the payee upon condition that it should not become effective unless the maker received a certain sum from a transaction then pending.

In *Stoughton v. Chu Fong* (1911) 130 N. Y. Supp. 228, it is held that an answer that the note sued upon would have no validity whatever until a certain institution was established, and that no such institution was ever established, pleads a condition precedent to the validity of the note, and a complete provable defense.

In *Equitable Trust Co. v. Howe* (1911) 72 Misc. 46, 129 N. Y. Supp. 112, parol evidence is held admissible to show that a writing in the form of a letter, addressed to the general agent of a life insurance company, acknowledging receipt of policy, and authorizing and requesting the general agent to pay the amount of the first premium, and promising on the part of the writer of the letter to pay the general agent the amount so advanced, was delivered under an agreement that it was not to come into existence as a legal obligation unless

the general agent paid the amount so requested.

In *Hughes v. Crooker* (1908) 148 N. C. 318, 128 Am. St. Rep. 606, 62 S. E. 429, parol evidence is held admissible to show that a note was signed upon the inducement that the payee would perform certain obligations, and that until the maker or his son should sign a paper signifying that the payee had performed his obligation, the entire transaction was unfinished. The action in this case was by the maker against the payee, who had negotiated the note, which the maker had been compelled to pay, and was for the purpose of recovering the amount so paid by him.

In *Garrison v. J. I. Case Threshing Mach. Co.* (1912) 159 N. C. 285, 74 S. E. 821, parol evidence is held admissible to show that a note secured by a mortgage was not to take effect until it was determined that an engine for which the note was given would pass a certain test. The action was brought to recover damages for the sale of the land under the mortgage.

This rule is approved in *Gamble v. Riley* (1913) 39 Okla. 363, 135 Pac. 390, in an action by the indorsee against the indorser of a promissory note, transferred in part payment of a subscription to stock. A written receipt, however, had been given in this case, containing a clause that "should said subscription be not approved and accepted, the amount paid as per this receipt will be returned."

The makers of a note may show an oral agreement that the note was to take effect as an unconditional binding obligation upon them only in the event of the failure of one of the makers to comply with his agreement to account for the proceeds of certain notes which he had for collection. *LaGrande Nat. Bank v. Blum* (1894) 26 Or. 49, 37 Pac. 48.

In *Holt v. Gordon* (1915) — Tex. Civ. App. —, 176 S. W. 902, parol evidence is held admissible to show that, at the time the note was executed, it was agreed in parol that it should not become operative and binding unless the maker should succeed in procuring a loan upon certain

land owned by him. But see *Security L. Ins. Co. v. Allen* (1914) — *Tex. Civ. App.* —, 170 S. W. 131, *infra*.

In *Street v. J. I. Case Threshing Mach. Co.* (1916) — *Tex. Civ. App.* —, 188 S. W. 725, *s. c.* on 2d appeal (1919) — *Tex. Civ. App.* —, 216 S. W. 426, parol evidence is held admissible in an action by the maker of certain notes against the payee, to cancel the notes and mortgages given to secure them, to show that the notes were given in payment of certain machinery, and that the bargain was not to be consummated until after a certain trial of the machinery.

Sureties who executed a note with an insolvent debtor may show that the note was not to become effective or binding until the payee had extended a certain credit to the principal maker, and furnished him with goods for sale. *Baines v. Kohler & Campbell* (1918) — *Tex. Civ. App.* —, 201 S. W. 735.

In an action of assumpsit upon a written instrument for the payment of money for the services of the payee as overseer, it is competent to prove by parol that after the writing was signed by the maker, and while she was in the act of delivering it to the payee, she said that unless the payee brought a recommendation from a certain named person, she could not employ him as overseer, and that this was assented to by the payee, and that no recommendation could be produced from the person in question. *Corbin v. Sistrunk* (1851) 19 Ala. 203.

Evidence that the instrument was to become void or to be returned.

Evidence that the instrument was to become void or was to be returned in a certain contingency does not so clearly show a conditional delivery as evidence of the class last above discussed. In many cases, however, the facts as a whole show a condition going to the delivery, and the evidence is held admissible. *McFarland v. Sikes* (1886) 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Trumbull v. O'Hara* (1898) 71 Conn. 172, 41 Atl. 546; *Musser v. Musser* (1912) 92 Neb. 387, 138 N. W. 599; *Sweet v. Stevens* (1863) 7 R. I. 375; *Watson v. Rice*

(1914) — *Tex. Civ. App.* —, 166 S. W. 106. But compare with cases discussed in III. b, considering very similar evidence.

In holding admissible, in an action upon promissory notes, evidence of an agreement that, if the maker complied with certain conditions, the payees were "to surrender to him said notes without requiring him to pay them," the ground of the admission is not clearly stated in *Howell v. Ware* (1909) 99 C. C. A. 318, 175 Fed. 742. In one part of the opinion it is stated that "this was not in conflict with the well-established rule that evidence preceding the final agreement of the parties will not be admitted, for the reason that all such matters were finally merged in the written instrument, which must be taken to express the conclusion reached, but was for the purpose of ascertaining the real intention of the parties, and not to alter the contract in any particular." Farther on it is stated that "the notes may have been executed with the understanding that their payment was to be conditioned on transactions to be completed after their delivery, and if so, then testimony tending to prove that agreement was not only pertinent but essential for the proper solution of the controversy. As we see the case, the most important fact to be found by the jury was whether or not the contract between these parties was intended by them to depend upon the conditions set out in the defendant's answer. The very life of the contract depended on this finding of fact, and such finding was for the jury, and not the court. If, when the notes were delivered, an understanding existed between the parties of the character mentioned, set forth in the answer, then the fulfilment of the conditions included in such understanding discharged the defendant's liability under said note."

A purchaser of land, who had given his vendor a note in consideration of a rescission of the contract, was allowed to introduce parol proof of a verbal agreement to surrender the note to the maker if he would secure a purchaser for the land at a specified

price, on the theory that the legal effect of the verbal agreement was that, when the defendant performed his part of it, it was a payment of the note. *Hagood v. Swords* (1831) 18 S. C. L. (2 Bail.) 305.

A variety of facts are presented in these cases. The maker of a note may prove that upon a claim being made against him for an assault for an amount which he was unwilling to pay, and being without counsel, he asked to be allowed a few days to consider the matter, and offered to give his note for the amount of the claim, to be held by the plaintiff until then, and if he did not then appear, to be held by the plaintiff as a settlement for the injury, but if he should appear, to be returned to him to be canceled; and that thereupon the note in suit was executed and delivered. *McFarland v. Sikes* (Conn.) *supra*.

The maker of a note, when sued thereon, may show that it was executed and delivered to the plaintiff upon the condition that the defendant should take the horse for the purchase price of which the note was given, in his possession, and use him until he was satisfied that he was sound and all right in every way. If, after such usage, he should find said horse was not sound and all right, as represented and warranted by the plaintiff, the defendant should return the horse to the plaintiff, and the plaintiff should thereupon give up the note to the defendant. *Trumbull v. O'Hara* (1898) 71 Conn. 172, 41 Atl. 546.

One who is contemplating the purchase of a note of a third person, and who has given his check to the owner of the note, may show that the arrangement was conditioned upon the maker of the note accepting it as a set-off to a claim he had against the giver of the check, and that if he would not thus accept the note, the payee of the check was to return it, and take back his note. *Sweet v. Stevens* (1863) 7 R. I. 375.

In *Musser v. Musser* (1912) 92 Neb. 387, 138 N. W. 599, parol evidence is held admissible to show that a note was executed and delivered to the payee, to be held in trust by him until

the maker should determine whether certain representations made by the payee were true; and, if they were not true, the note was to be returned to the maker.

One of a number of purchasers of a machine, who signed a series of notes for the purchase price, may show that the notes were executed and delivered upon the agreement that if the maker was not satisfied with the transaction when the first note matured, the payee would repay him what cash he had paid, and return his notes. *Watson v. Rice* (Tex.) *supra*. But see *Security L. Ins. Co. v. Allen* (1914) — Tex. Civ. App. —, 170 S. W. 131, *infra*.

The contingency may be within the control of the payee. Thus, evidence is admissible in an action on a note given for bank stock, of an agreement that if the payee should elect not to sell within a stated time, the maker of the note would be released from his obligation on the note. *Hawkins v. Johnson* (1915) — Tex. Civ. App. —, 181 S. W. 563. It will be noted that the parol evidence went to the consideration of the note, and it is held admissible on this ground also.

Evidence that the instrument was to be paid only in a certain contingency.

Evidence that the instrument was to be paid only in a certain contingency shows a conditional delivery less clearly than either of the preceding forms of evidence. In some cases, however, in which the condition is stated to go to the payment merely, it is held that parol evidence is admissible to show that a bill or note, regular in form, was to be paid only upon the happening of a certain event, or that it was not "to be paid" except upon the happening of the contingency. *Fidelity Title Guaranty Co. v. Ruby* (1914) 16 Ariz. 75, 141 Pac. 117; *Farrington v. McNeill* (1917) 174 N. C. 420, 93 S. E. 957; *Adams v. Thurmond* (1915) 48 Okla. 189, 149 Pac. 1141; *Hamilton v. Hannus* (1912) — Tex. Civ. App. —, 185 S. W. 938; *Miller v. Murphy* (1918) — Tex. Civ. App. —, 206 S. W. 968; *Martineau v. Hanson* (1916) 47 Utah, 549, 155 Pac. 432.

In *Breeden v. Grigg* (1874) 8 Baxt. (Tenn.) 163, the executors of an insolvent estate who had given a note to a creditor of the estate for a part of his claim, upon which he had obtained judgment against them, were allowed to enjoin the judgment upon proof of an oral agreement that the creditor should hold the note, and not sue on it until it should be ascertained what was due him on a final settlement of the insolvent estate; then if the full amount of the note should not be due him, it was to be abated. The court says: "It is alleged that the note was signed and delivered, but to be binding only conditionally; and hence the legal effect of the allegation is that the note was held by Grigg as an escrow, and that, in violation of the contract under which he held it, he was seeking to enforce it before the condition on which the vitality depended had been complied with. In such case it is only by parol proof that the real character of the transaction can be developed." Compare with cases discussed in III. b.

A variety of facts have been presented under the form of evidence. Parol testimony is admissible in an action on a note given by a vendor for commissions for the sale of real estate, that the note was not to be paid unless the purchaser of the real estate paid a note which he had given to evidence a part of the purchase price. *Martineau v. Hanson* (Utah) supra. Such evidence was regarded as admissible in *Hamilton v. Hannus* (1912) — Tex. Civ. App. —, 185 S. W. 938, a similar case, but the chief dispute in that case was as to other evidence.

In *Fidelity Title Guaranty Co. v. Ruby* (Ariz.) supra, parol evidence of an agreement that the note in suit was not to be paid until the note of a third person should be paid to the maker is held admissible. The plea stated that the note sued on "was given by this defendant to . . . with the express understanding that the said sum of \$300 expressed in said instrument would not be collectible from defendant until defendant col-

lected the \$681 from said Gordon on his note." The court states that the answer under consideration and the evidence "shows that there never was any complete final delivery of the writing as the promissory note of the maker . . . payable at all events and according to its terms, for the reason it was made as a mere memorandum of the balance [the payee] was entitled to receive when the Gordon note was paid to [the maker], and was delivered as such with the understanding of the parties that it should be payable when the Gordon note was paid, and in no other event."

In *Farington v. McNeill* (1917) 174 N. C. 420, 93 S. E. 957, the maker of a note was held entitled to show an oral agreement that he should pay the note only in the event that a certain person, recovered certain lands against which there were adverse claims; the court stating that the evidence was competent to show that the note sued upon was executed upon the condition of a contingency as to its payment. This decision is based in part, also, upon the theory of the partial integration,—a theory upon which a majority of the North Carolina cases are based. See *infra*, IV.

In *Adams v. Thurmond* (1915) 48 Okla. 189, 149 Pac. 1141, parol evidence is held admissible to show that a note was delivered to the payee upon a condition that it was not to be paid until the title to certain land for which it was given was settled in favor of the payee, and the makers of the note put in possession thereof as purchasers.

A purchaser of corporate stock who has given a note for the purchase price may show a contemporaneous parol agreement to the effect that if the corporation should afterwards prove to be insolvent, the payees of the note would cancel it and never demand payment thereof. *Miller v. Murphy* (1918) — Tex. Civ. App. —, 206 S. W. 968. After alleging the parol agreement as above stated, the defendant in this case further alleged "that the corporation did thereafter prove to be insolvent, and therefore the note sued upon never became a

legal and binding obligation upon the maker. See *Roberts v. Greig* (1900) 15 Colo. App. 378, 62 Pac. 574, *infra*, "Paid in a certain manner."

The correctness of these decisions is very doubtful. As stated in the introduction, it seems evident that the courts treat the condition as one going to the existence of the contract. In some cases a condition that the instrument shall not be paid unless a certain event happens is construed as, in effect, an agreement operating as a suspension of the instrument until the contingency occurs. *Standard Bank v. Wettlaufer* (1915) 33 Ont. L. Rep. 441, 8 Ont. Week. N. 187, 23 D. L. R. 507, holding parol evidence admissible in an action upon a bill of exchange against the acceptors thereof, to show that the bill was accepted upon the condition that the defendant "should not be liable for and would not pay the bill at maturity unless at that date it was found that the defendants were indebted" to the drawers of the bill for the amount thereof; the court stating that the agreement "operated as a suspension of the bill until it was ascertained that there was an indebtedness at the end of the term mentioned in the bill."

Some cases clearly recognized the existence of the note as a valid obligation, but admit evidence of an oral agreement that it is to become void. The purchaser of a pony, who has given his note for the purchase price, may show an oral agreement that he took the pony only on "probation" for six months, and if, at any time before that, he was dissatisfied, he had the right to rescind the trade and deliver up the pony. Such an agreement, according to the court, does not contradict the note, but sets up an independent agreement made at the same time that, upon a contingency or condition, the note was to become void. *Lyons v. Stills* (1896) 97 Tenn. 514, 37 S. W. 280. Compare with cases discussed in III. b.

Paid in certain manner.

In a few cases the evidence has been held admissible where the agreement was that the instrument was to be paid in a certain manner. *Roberts*

v. Greig (1900) 15 Colo. App. 378, 62 Pac. 574, holding parol evidence admissible to show that the note on which the action was brought was executed and delivered on condition that it should be paid from the proceeds of a mill, and if there were no earnings, the note was to be returned and destroyed. It is held in *George v. Williams* (1915) 27 Colo. App. 400, 149 Pac. 837, that the maker of the note on which the action was brought, given to a trading company, might show that the note was given on condition that it should be paid out of the stock and patronage dividends thereafter to accrue, and that the maker should not be required to pay any cash thereon. It is expressly stated by the court that the instrument was strictly a negotiable promissory note, although it contained a recital that it was given for stock in the trading company, and there was a further recital that all dividends accruing to the maker on the stock should be applied to the payment of the note. The rule admitting parol evidence that an instrument was delivered upon condition has been held applicable where the condition was that it was to be paid out of the proceeds of the sale of certain stock, and no other payment was to be made; in other words, that there was to be no personal liability on the note. *Carpenter v. Maloney* (1910) 138 App. Div. 190, 123 N. Y. Supp. 61. The notes in suit were made by the maker to his own order and indorsed by the defendant. They were delivered to the maker upon condition that they were to remain in his possession and control, to be paid solely out of the proceeds of the sale of the stock above mentioned, and that the indorser was in no event to be held personally liable for their payment. In violation of this agreement they were indorsed to a third party, not a bona fide holder. From this conclusion there is a strong dissenting opinion which seems more in accord with the correct rules. The judgment of the majority, however, is affirmed by the court of appeals (1911) 203 N. Y. 571, 96 N. E. 1111. Parol evidence has been held

admissible in an action by one other than a bona fide holder on a note given in payment of stock, to show an agreement that it was to be carried and renewed by the payee for a stated time, and if, at the end of that time, the stock had not realized enough to pay the purchase price, and the maker of the note did not want the stock, the payee would take it off his hands and cancel the note. *Paulson v. Boyd* (1908) 137 Wis. 241, 118 N. W. 841. But the court concludes: "That it was not intended and agreed by them that the note should be a present binding agreement, but that it was delivered to" the payee upon the condition that if the maker paid interest on the sum for the stated time, the payee was to renew the note as agreed; and if, at the expiration of that time, the maker did not want the stock, the agreement to purchase was to be terminated at the maker's election and the note canceled. This, however, seems to be an erroneous view of the effect of the evidence; for, as pointed out in the dissenting opinion, the proof of delivery was not only not overcome, but there was affirmative proof of delivery of the note as a note, and that it was to be in force and effect as such. A failure to construe the evidence correctly seems to be what led to the conclusion in these cases, for none of these cases deny, in fact, they affirm, that the condition must be one that goes to the existence of the contract. As evidence that an instrument is to be paid in a certain manner, from its natural import, suggests a conditional obligation rather than a conditional delivery, it is difficult to avoid the conclusion that these courts first determined to admit the evidence and then assigned it the character necessary to harmonize the decision with the undisputed rule of law. Compare with cases discussed in III. b.

Conditional delivery created by custom.

Parol evidence has been admitted where the conditional delivery was created by custom, but there seems to have been no dispute over the admissibility of the evidence. *Citizens State Bank v. Garceau* (1912) 22 N. D.

576, 134 N. W. 882. The note involved in this case was given by an applicant for life insurance upon signing the application. It was a business method of the company and of the agent to return the note to the applicant if he failed to pass the medical examination. Under these circumstances there was held to be a conditional delivery of the note, rendering it ineffective in case of the rejection of the applicant, although nothing was said regarding the return of the note. It appears from the report that the dispute in this case did not arise over the admissibility of the parol evidence, but as to whether the fact showed a conditional delivery.

3. Condition that others sign.

The rule that parol evidence is admissible to show a conditional delivery is frequently applied to show a condition that other signers were to be obtained to the instrument. The makers of a note may, when sued thereon, show by parol that the note was signed not as a completed contract, but subject to the condition that the note was to become binding only when signed by another or all of a number of designated persons, and that none should be bound unless all of those whom it was agreed should sign the note did in fact sign it.

Georgia.—*Hartman Stock Farm v. Henley* (1910) 8 Ga. App. 255, 68 S. E. 957.

Kansas.—*White v. Smith* (1908) 79 Kan. 96, 98 Pac. 766; *Van Fossan v. Gibbs* (1914) 91 Kan. 866, 139 Pac. 174.

Minnesota.—*American Multigraph Sales Co. v. Grant* (1916) 135 Minn. 208, 160 N. W. 676.

North Dakota.—*First State Bank v. Kelly* (1915) 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044.

Ohio.—*Bovey Brick Co. v. Chilli-cothe Foundry & Mach. Works* (1879) 6 Ohio Dec. Reprint, 713.

Oklahoma.—*Mitchell v. Altus State Bank* (1912) 32 Okla. 628, 122 Pac. 666 (there was, however, held in this case to be no evidence to show that the note was signed conditionally, or that it was not to be delivered unless signed by another party).

South Dakota. — *McCormick Harvesting Mach. Co. v. Faulkner* (1895) 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163.

Texas.—*Merchants Nat. Bank v. McNulty* (1895) — Tex. Civ. App. —, 31 S. W. 1091, judgment modified in part on other grounds in (1896) 89 Tex. 124, 33 S. W. 963; *Proctor v. Evans* (1878) 1 Tex. App. Civ. Cas. (White & W.) 350.

In *Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192, parol evidence was held admissible in an action on a note signed by a number of persons to show that it was not to become a binding obligation until signed by all of a certain specified number of persons.

In *Zimbelman v. Finnegan* (1909) 141 Iowa, 358, 118 N. W. 312, where the court had instructed the jury in accord with the text above, it was claimed to be error to omit to state that if the parties "understood" the note was not to become binding upon defendant until others signed, it would not be a valid obligation. The court states there is no merit in this position; that if there was an understanding, it must have been based upon an agreement of the parties, and if there was an understanding by either, not based upon an agreement, it would not be binding upon the other.

Indorsers of a note may show that it was delivered to the payee on condition that others sign it before it should become legally effective. *Caudle v. Ford* (1903) 24 Ky. L. Rep. 1764, 72 S. W. 270; *Seattle Nat. Bank v. Becker* (1913) 74 Wash. 431, 133 Pac. 613. *Heitmann v. Commercial Bank* (1909) 6 Ga. App. 584, 65 S. E. 590. The circumstances in this case were peculiar. A note had been given, signed by thirteen indorsers; this note was renewed from time to time and without the knowledge of those signing it; three of the indorsers did not sign the renewals. Upon the discovery of this, the indorsers who had signed agreed to indorse another renewal note, and wrote the payee a letter, stating: "We have been unable to get all the old indorsers to indorse a new paper, and we therefore request you to accept the note indorsed by us and inclosed herewith, in pay-

ment of the old notes, and turn over the same to us so that we can bring suit to determine the liability of all the indorsers thereon." In a suit on the note thus given in renewal, parol evidence was held admissible to show that the instrument was delivered upon condition that all the ten indorsers should sign. It being shown that one of the ten had not signed, the instrument was held ineffective.

The surety on a note may show that it was delivered to the payee on the condition that other sureties should be obtained. *Westman v. Krumweide* (1883) 30 Minn. 313, 15 N. W. 255; *Goff v. Bankston* (1858) 35 Miss. 518; *Majors v. McNeilly* (1872) 7 Heisk. (Tenn.) 294 (note under seal); *Alexander v. Wilkes* (1883) 11 Lea (Tenn.) 221 (note under seal).

The sureties on a note absolute in form may, under the plea of non est factum, show that it was not to be delivered and become a binding obligation until signed by others. *Hunter v. First Nat. Bank* (1908) 172 Ind. 62, 87 N. E. 734. On the ground that the plea in this case was a plea non est factum, this case is distinguished from the earlier Indiana case of *Clanin v. Easterly Harvesting Mach. Co.* (1889) 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35.

The court in *Westman v. Krumweide* (Minn.) supra, states the rule generally as to all contracts, and limits it to those not under seal. The notes involved in this case were payable in chattels. In *Goff v. Bankston* (1858) 35 Miss. 518, the rule was applied in case of a sealed note.

See *Ex parte Goldberg & Lewis* (Ala.) infra, II. a, 4.

A guarantor of a bill or note may prove that it was delivered on the condition that it was not to be an obligation until signed by other guarantors. *Belleville Sav. Bank v. Bornman* (1888) 124 Ill. 200, 16 N. E. 210; *Merchants' Exch. Bank v. Luckow* (1887) 37 Minn. 542, 35 N. W. 434.

And it has been held that the signers of a bond conditioned to save the obligee harmless on a certain liability may show that it was not to be binding unless signed by certain other designated persons. *Francis v. Cor-*

nelius (1915) — Tex. Civ. App. —, 173 S. W. 947.

The condition must go to the existence of the contract; i. e., it must be to the effect that the instrument was never delivered as the final embodiment of the agreement between the parties. *Heitmann v. Commercial Bank* (1909) 6 Ga. App. 584, 65 S. E. 590; *Pidcock v. Crouch* (1910) 7 Ga. App. 299, 66 S. E. 971; *Hartman Stock Farm v. Henley* (1910) 8 Ga. App. 255, 68 S. E. 957.

Parol evidence is incompetent to show that the instrument was delivered to the payee as a completed contract, but upon a promise on his part to secure the signature of another thereto. *Pidcock v. Crouch* (1910) 7 Ga. App. 299, 66 S. E. 971.

In a case involving a surety, it has been stated that the condition that others shall sign as sureties involves the consideration for the note. *Hunter v. First Nat. Bank* (1909) 172 Ind. 62, 87 N. E. 734. The delivery to the payee upon such a condition is sometimes spoken of as a delivery in escrow. *Ibid.* It does not appear, however, that there was any formal escrow agreement.

Other cases deny that it is admissible to show an oral agreement that a note delivered to the payee was to become an obligation only when signed by another. *Massmann v. Holscher* (1871) 49 Mo. 87; *Hurt v. Ford* (1898) 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228. An answer to an action on a note, that it was to be signed by another as the joint obligor with the defendant, was held not to affect the defendant's liability where the answer admitted by implication the execution, including the delivery of the note by the defendant. The court says that the fact that the other party did not sign it does not destroy the effect of the execution and delivery of the note by the defendant. *Parks v. Zeek* (1876) 53 Ind. 221. It is stated in *Clanin v. Esterly Harvester Mach. Co.* (1889) 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35, that while it is competent to prove under proper issues that the note never was delivered, evidence is not admissible to prove that it was

delivered to the payee, who had parted with the consideration, as an escrow, or under an arrangement that the maker was not to be bound according to the terms of the note. It was therefore held not admissible to aver and prove that the payee agreed, when he received the note, that he would procure another person to sign it, and that it was not to become binding on the maker until it was so signed. But in *Wright v. Cohn* (1918) 68 Ind. App. 589, 121 N. E. 3, where a note was signed at the request of the president of a bank, as surety for such president, with an agreement and understanding between the president and the surety that it should not become a binding obligation until the same was executed by the president as principal obligor, evidence as to what was said in the transaction was held proper, and not subject to the objection that it sought to explain or vary the terms of a written contract. It is held in *Hubble v. Murphy* (1864) 1 Duv. (Ky.) 278, that neither an agreement that the note should not be obligatory on a surety unless the signature of another surety should be secured, nor a delivery of the note to the payee, on the condition that it should not be obligatory on the surety unless the said signature should be procured, is a defense in an action on the note, since, being in parol, it is contradictory of the writing, and cannot destroy the obligation of the writing.

It is held in *Levy & C. Mule Co. v. Kauffman* (1902) 52 C. C. A. 126, 114 Fed. 170, that the accommodation acceptor of a draft cannot, when sued on his acceptance, defeat liability by showing an oral agreement to advance the money evidenced by the draft on condition that another person advance a similar sum for the benefit of the accommodated party.

4. Under Negotiable Instruments Act.

That a bill or note may be shown to have been delivered upon condition is settled in the Negotiable Instruments Law. This act provides that "as between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made ei-

ther by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." It is accordingly held that parol evidence is admissible to show that a bill or note, regular in form, was manually delivered to the payee upon the condition that it was to become an enforceable obligation only upon the happening of a certain event.

Alabama.—*Bank of Cartersville v. Gunter* (1912) 4 Ala. App. 539, 58 So. 757.

Colorado.—*Sayre v. Leonard* (1914) 57 Colo. 116, 140 Pac. 196.

Iowa.—*Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882; *Herron v. Brinton* (1920) 188 Iowa, 60, 175 N. W. 831; *Mason v. Cater* (1921) — Iowa, —, 182 N. W. 179; *City Nat. Bank v. Mason* (1922) — Iowa, —, 186 N. W. 30.

New York. — *Grannis v. Stevens* (1916) 216 N. Y. 583, 111 N. E. 263 (the evidence in this case, however, was held not to show a conditional delivery; motion for reargument denied in (1916) 217 N. Y. 664, 112 N. E. 1060).

Ohio.—*Starr Piano Co. v. Edgar* (1909) 31 Ohio C. C. 295 (this was held in this case notwithstanding the note was secured by a chattel mortgage which in effect declared that the note had been delivered, the court stating that the chattel mortgage is only an incident of the debt, and, regardless of its terms, can be held to be nothing more, and if the debt fails the mortgage fails also); *Shive v. Merville* (1913) 34 Ohio C. C. 193 (holding parol evidence admissible to show that the note was delivered to the payee upon condition that it should be paid if certain stock should prove assessable, and should be returned if the stock should prove non-assessable).

Texas.—*Waters v. Byers Bros. & Co.* (1921) — Tex. Civ. App. —, 233 S. W. 572.

Utah.—*Martineau v. Hanson* (1916)

47 Utah, 549, 155 Pac. 432. See *supra* for facts. *Smith v. Brown* (1917) 50 Utah, 27, 165 Pac. 468.

Wisconsin.—*Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192.

See *Divine v. Western Slope Fruit Growers Asso.* (1915) 27 Colo. App. 368, 149 Pac. 841, *infra*, VII. c.

This rule has been applied under a variety of facts and circumstances. In *Sayre v. Leonard* (1914) 57 Colo. 116, 140 Pac. 196, it is held that a note given by one partner to his transferee might be shown to have been upon the condition that it was to become obligatory only in the event that a silent partner of the maker repudiated a transfer of their holdings which the maker had made to the payee of the note. In *Selma Sav. Bank v. Harlan* (1914) 167 Iowa, 673, 149 N. W. 882, it is held that parol evidence that a note was delivered to a bank by a surety on condition that it was not to become a binding obligation unless the principal debtor acknowledged an assignment and executed a note to the surety—was admissible. In *Waukeev Sav. Bank v. Jones* (1917) 179 Iowa, 261, 159 N. W. 691, it was held that parol evidence that a note delivered to a vendor was delivered upon condition that the vendee was to have until a specified date to determine whether or not the transfer of the note should be absolute—was admissible. In *Herron v. Brinton* (1920) 188 Iowa, 60, 175 N. W. 831, it was held competent for the defendant to prove, in an action on a note, that the payee of the note had advanced the money called for therein to the maker under an agreement that the maker was to pay interest on the sum so advanced so long as the payee should live, and such payment of interest should be in full discharge of the obligation imposed upon the maker by the acceptance of the money. Such an agreement is held to be admissible in evidence under the provisions of the Negotiable Instruments Act, permitting the showing of a conditional delivery. It was held in *Mason v. Cater* (1921) — Iowa, —, 182 N. W. 179, that the execution and delivery of a note may be shown to have been made upon the

express condition that the land conveyed to the maker was to be placed upon the market for sale, and, if sold to a purchaser acceptable to the payee, who would agree to pay the indebtedness evidenced by the note, then the maker of the note would not be liable for any other sum than the interest upon said note to the date of sale.

Where, in the organization of a corporation, it was agreed that one person was to subscribe and pay for a certain amount of the capital stock of the corporation, one half of which was to be issued in the name of another person, who was to manage and conduct the business affairs of the corporation under an agreement that the first person was to be repaid the amount he had advanced for the stock issued to the latter out of the first profits derived from the business of the corporation, and not otherwise, and a note was made and delivered to the first person as evidence of the amount of money he had advanced, the maker of the note may show these facts in defense of an action on the note. *Smith v. Brown* (1917) 50 Utah, 27, 165 Pac. 468. It further appeared that the payee of the note agreed to advance the necessary sums of money to carry on the business of the corporation, if any was necessary, and that, when he obtained the note, he refused to advance the necessary money.

There was held to be no conditional delivery in *Title Guarantee & T. Co. v. Pam* (1922) 232 N. Y. 441, 134 N. E. 525, where the owner of an irrigation project gave to a contractor certain notes under an agreement that the notes were made and delivered subject to all rights, claims, and defenses which the maker might have by reason of the inaccuracy of bills rendered, the total of which made up the amount of the note.

It has been held competent to show that the note was to be paid only upon the happening of a certain event. *Norman v. McCarthy* (1913) 56 Colo. 290, 138 Pac. 28, holding that the intervener in an attachment proceeding, who has given a check to the attach-

ing officer in lieu of a bond, to secure possession of the property, may, in an action on the check, show that it was to become payable only in case, on the trial of the right to the property, judgment should be rendered against the intervener. *Harder v. Reinhardt* (1916) 162 Wis. 558, 156 N. W. 959, holding parol evidence admissible in an action on a note to show that it was not to be paid unless a certain sum was collected in a lien suit by the defendant. The jury here found that the agreement was "that the note would not be used against the defendant, nor the amount thereof demanded from him," except upon the conditions stated. This provision was held in *Straus v. Citizens State Bank* (1911) 164 Ill. App. 420, to change the rule theretofore existing in Illinois and permit a conditional delivery to be shown. This case was affirmed by the supreme court ((1912) 254 Ill. 185, 98 N. E. 945) upon another theory.

Parol evidence has been held admissible where a note was given in payment of stock to show an agreement that it was to be carried and renewed by the payee for a stated time, and if, at the end of that time, the stock had not realized enough to pay the purchase price, and the maker did not want it, the payee was to take it off his hands and cancel the note. *Paulson v. Boyd* (1908) 137 Wis. 241, 118 N. W. 841. See comment supra, and see *Waters v. Byers Bros. & Co.* (1921) — Tex. Civ. App. —, 233 S. W. 572.

Some of these cases speak of the instrument as having been delivered to the payee in escrow. *Bank of Cartersville v. Gunter* (1912) 4 Ala. App. 539, 58 So. 757, holding that, as against a party other than a holder in due course, parol evidence is admissible to show that a note was delivered to the payee upon condition that he would obtain an agreement from certain parties to make a refund to the defendant, and that the note was not to be effective to charge such defendant unless and until said condition was complied with.

Bank of Cartersville v. Gunter

(Ala.) supra, is referred to with approval in *Stone v. Goldberg & Lewis* (1912) 6 Ala. App. 249, 60 So. 744, applying the rule so as to permit a surety signing a note on condition that others shall sign it as sureties before delivery by the principal obligor, to show this, and thus defeat an action on the note under the Negotiable Instruments Law. This case was reversed by the supreme court in *Ex parte Goldberg & Lewis* (1914) 191 Ala. 356, L.R.A.1915F, 1157, 67 So. 839, on the theory that the Negotiable Instruments Law has reference only to a conditional or special delivery to the payee or holder, of which he is advised at the time, and not to a delivery by an obligor to an agent or intermediary, for transmission to the payee.

As shown in the preceding paragraphs, parol evidence is held admissible to show a conditional delivery under the Negotiable Instruments Law. It has been expressly held that there is nothing in the law that requires a contract of conditional delivery to be in writing. *Norman v. McCarthy* (1913) 56 Colo. 290, 138 Pac. 28. Nor is there anything in the Statute of Frauds so requiring. *Waukeev Sav. Bank v. Jones* (1916) 179 Iowa, 261, 159 N. W. 691.

An agreement that a note executed for the special purpose of furnishing cash bail for one accused of crime would be returned when the bail was exonerated seems to have been regarded as an agreement for a conditional delivery in *First Nat. Bank v. Miller* (1920) — N. D. —, 179 N. W. 997, although this decision is based in part, at least, on what seems to be the correct ground, that it was delivered for a special purpose.

In some cases decided after the adoption of the Negotiable Instruments Act, the evidence has been held inadmissible without referring to the act. *Schultz v. Meyer* (1913) 181 Ill. App. 335; *Hesch v. Dennis* (1915) 194 Ill. App. 663; *Graff v. Fox* (1917) 204 Ill. App. 598; *Shinner v. Raschke* (1919) 213 Ill. App. 324. And this is true of a number of other cases.

Not all agreements show a condi-

tional delivery within the meaning of the Negotiable Instruments Act. Evidence of an oral agreement between a bank, which is the payee of the note, and the maker, that the bank would look to a third person for payment, does not show a conditional delivery where the bank, on the faith of the note, extends credit to the maker. *Niblack v. Frank* (1917) 209 Ill. App. 162.

The purchaser of cattle, who has given his notes for the purchase price thereof, secured by a chattel mortgage on the cattle, cannot show an oral agreement that he was to pay the notes out of the proceeds of the sale of the cattle from time to time, and that the payee, in order to enable the maker to do this, was to renew the notes every six months until they were so paid. It is not stated that any agreement was made as to the defendant's liability in the event the cattle never paid off the notes, though it may possibly be inferred that the effect of the agreement was that the notes were to be paid only out of the proceeds of the sale of the cattle, and that there was otherwise no personal liability on the part of the maker of the notes. *Waters v. Byers Bros. & Co.* (1921) — Tex. Civ. App. —, 233 S. W. 572. Hall, Judge, was of the opinion that the evidence of the oral agreement was admissible. It seems to the writer, however, that the majority of the court were correct in holding that the evidence in this case was not admissible. The existence of the notes as obligations was clearly recognized, and the oral agreement went merely to their performance. But see *Drovers' Cattle Loan & Invest. Co. v. McGraw* (1921) — Minn. —, 184 N. W. 365, *infra*, IV.

The maker of an accommodation note cannot show an oral agreement that the note was simply collateral security against loss by depreciation in corporate shares put up by the principal debtor as collateral for the loan, and that the note should only be used in case any deficiency arose after realizing on the security. *Vineberg v. Jones* (1912) Rap. Jud. Quebec 22 B. R. 128, 8 D. L. R. 513.

An oral agreement that the payee of notes would look to a third person for payment of the amount cannot be shown to defeat an action on the notes. *Clinton v. Royal* (1917) 203 Ill. App. 248. The maker of the notes in this case claims that a company which owed him money was owned by the payee, that the payee advanced him the amount of the notes, and agreed to look to the company for reimbursement.

An order on the back of a note made by the creditor of a company to an individual who owned the company, directing the company to pay the individual owner the amount of the note, and that it be charged to the maker's account, does not make the note conditional within the meaning of the Negotiable Instruments Law. *Ibid.*

In *Mt. Vernon Nat. Bank v. Kelling-Karel Co.* (1914) 189 Ill. App. 375, the court says that the facts stated in the affidavit of defense do not show an agreement that the delivery of the draft was conditional, but only an agreement that the acceptance was conditional; but the acceptance, as modified by such conditions, was delivered to appellee without limitation or reservation that property in the instrument should not be transferred until the happening of the conditions named. Accordingly, the evidence was held inadmissible in this case.

There are other states of facts which have been before the courts and held to show a conditional delivery which, to the mind of the writer, do not show such a delivery. The state of facts present in *Mason v. Carter* (1921) — Iowa, —, 182 N. W. 179, seems to show a condition subsequent rather than a condition precedent. In other words, the note was to be defeated upon the happening of the event. This seems not to be a conditional delivery, as the court held.

5. Admissibility as dependent upon relation to consideration.

There is a suggestion in a number of cases which concede the admissibility of such evidence that it is confined to evidence impeaching the con-

sideration. *Foy v. Blackstone* (1863) 31 Ill. 538, 83 Am. Dec. 246. The court in *Colvin v. Goff* (1916) 82 Or. 314, L.R.A.1917C, 300, 161 Pac. 568, thus states the general rule: "It may be shown as between the maker and the payee that, prior to the delivery of the note, its payment was made conditional, whenever the condition or contingency affects the consideration; that is to say, if the maker of the note stipulates that it shall take effect only upon the happening of an event, and the failure of such contingency affects the consideration to the extent that he does not get the value or thing that he has bargained for, it is a good defense, because there is a failure of consideration; or, if the note is given upon a stipulation that it shall not be effective unless a particular event shall happen, and, by reason of the failure of the event to happen, the maker does not reap the benefit contemplated by reason of its occurrence, there is a failure of consideration and the stipulation is good." And in some cases in which the evidence was admitted it is stated to show a lack of consideration. In *LaGrande Nat. Bank v. Blum* (1894) 26 Or. 49, 37 Pac. 48, where the oral agreement sought to show that the note was given to take effect as an unconditional, binding obligation upon the maker only in the event of his failure to comply with his agreement to account for the proceeds of certain notes which he had for collection, the court states that evidence of such an agreement and of the maker's compliance therewith would show a want of consideration for the note.

It is true that in many of the cases admitting the evidence, the oral agreement related to the consideration for the note, but the admissibility of evidence of the oral agreement is not based upon this fact. Proof of this is furnished by the fact that in the cases discussed in III. *infra*, the oral agreements just as distinctly related to the consideration, yet here the evidence is held inadmissible. Not every agreement which relates to the consideration shows a failure of consideration within the meaning of

the rule that failure of consideration defeats the bill or note as between the parties. That rule is entirely independent of the one now under discussion.

In some cases a defense very like the facts discussed above has been sustained on the theory that it showed a failure of consideration for the note. Without any discussion of the parol-evidence rule, a plea in an action upon a note given for a life insurance policy, setting up that the agent had stated (apparently, orally) to the maker that if, after the policy of insurance was received by him, he was not perfectly satisfied with its provisions, the policy would be taken back and the note returned to the defendant, was held good as against a demurrer, on the theory that the plea went to the consideration of the note sued on. *Parker v. Bond* (1898) 121 Ala. 529, 25 So. 898. A similar decision appears in *Gillespie v. Hester* (1909) 160 Ala. 444, 49 So. 580. In the latter case a demurrer to a plea in an action on a promissory note, that the note was given for an insurance policy, and that, in order to induce the defendant to sign the note, the agent stated to him that after the policy of insurance was received, if he did not want it, it might be given back and defendant would owe nothing on the note, on the ground that this was an attempt to contradict a written agreement by contemporaneous and previous parol statements, was overruled.

In *Cochran v. Burdick Bros.* (1912) 7 Ala. App. 274, 61 So. 29, the instrument sued on was given in consideration of certain goods which the defendant agreed to purchase, and the goods were purchased and the instrument given with the express understanding and agreement that if the purchaser should realize a certain profit on the goods, the instrument should be paid; and that was the only condition upon which the instrument should become payable. The court states that the contract or agreement set up did not vary or contradict the terms of the instrument sued on, but simply set up an agreement going to

the consideration of the bill which was the subject of the suit.

In *Jefferson County Sav. Bank v. Compton* (1915) 192 Ala. 16, 68 So. 261, an action on a promissory note given by a subscriber to corporate stock to the corporation, the evidence showed that it was agreed that the note was not to be paid unless the corporation's business became a paying proposition; that if it did, the note was to be paid and the stock issued to the subscriber; if not, the note should be returned to him; and it appeared that the company failed and went into bankruptcy before the time for the consummation of the contract. The court says: "Where the terms of the written contract are not thereby varied or contradicted, it is always competent as between the immediate parties to show the real consideration for a promissory note, and to show by parol evidence the terms and conditions upon which it is payable, or by which the payment may be avoided." The court, however, does not clearly point out just how the application of this rule would affect the evidence in question.

Apparently upon the theory of failure of consideration, the court, in *Clayton v. Western Nat. Wall Paper Co.* (1912) — Tex. Civ. App. —, 146 S. W. 695, allowed a merchant who had given his note for the purchase price of certain goods to show that the note was given under an oral agreement to take back all of certain goods which had been purchased prior thereto and which were found unsatisfactory, and give him credit on his note, when the same had been inventoried.

The theory of the decision in *Farrar v. Mathews* (1873) 37 Iowa, 418, is not altogether clear. In that case, in an action on a note, the answer of the defendant that the note was given for a sewing machine delivered to the defendant to be tried, and, in case it did not work to his satisfaction, to be returned to the payee; that it did not so work and was returned, whereby the consideration had failed,—was held not subject to demurrer on the ground that it sought to contradict or vary the terms of the note sued on.

The court states that the agreement that the defendant should have the right to return the machine if it did not work satisfactorily was not inconsistent with the idea of a sale of it to him, nor would it contradict or vary the note.

b. Theory that evidence is inadmissible.

According to some cases it is incompetent to prove that a bill or note was delivered to the promisee or agent of the promisee as an escrow. *Garner v. Fite* (1891) 93 Ala. 405, 9 So. 367; but see Alabama cases cited in II. 5, *supra*; *Scott v. State Bank* (1848) 9 Ark. 36; *Chandler v. Chandler* (1860) 21 Ark. 95 (obiter); *Findley v. Means* (1903) 71 Ark. 289, 73 S. W. 101; see *Graham v. Rummel* (1905) 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 157, *supra*, II. a, 2; *Walker v. Crawford* (1870) 56 Ill. 444, 8 Am. Rep. 701; *Roche v. Roanoke Classical Seminary* (1877) 56 Ind. 198; *Stewart v. Anderson* (1877) 59 Ind. 375; *Clanin v. Esterly Harvesting Mach. Co.* (1888) 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35; *Murray v. W. W. Kimball Co.* (1894) 10 Ind. App. 141, 37 N. E. 734; *Murray v. W. W. Kimball Co.* (1894) 10 Ind. App. 184, 37 N. E. 736; *Hubble v. Murphy* (1864) 1 Duv. (Ky.) 278; *Massmann v. Holscher* (1871) 49 Mo. 87; *Henshaw v. Dutton* (1875) 59 Mo. 139; *Jones v. Shaw* (1878) 67 Mo. 667; *Hurt v. Ford* (1898) 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228; *Montgomery v. Schwald* (1913) 177 Mo. App. 75, 166 S. W. 831.

This seems to be the view of the Kentucky court in *J. I. Case Threshing Mach. Co. v. Barnes* (1909) 133 Ky. 321, 117 S. W. 418, 19 Ann. Cas. 246, a case involving a delivery of the note to an agent of the payee, in which, after holding the agent an agent of the makers of the note, and not of the payee therein for the purpose of holding the note, the court states that when a writing fully executed is delivered to the party for whom it is intended, the other party, in the absence of fraud or mistake, will not be permitted to set up either an antecedent or contemporaneous parol agreement that will contradict

or vary the writing. It was sought to show in this case that notes were delivered to the agent on the condition that they were not to be delivered to his principal unless the machinery for which they were given proved satisfactory.

In *Hyde v. Tenwinkel* (1872) 26 Mich. 93, the makers of the note gave notice with their plea of the general issue that they should show that the note was given conditionally, to be paid, if at all, out of certain insurance money if that should be paid without suit or litigation, and that it was not paid without litigation. The offer of proof was as follows: "We offer to prove that the consideration for this note was the delivery of two endowment policies of the Continental Life Insurance Company, and also the payment of a life policy of Dr. Charles A. Hyde (who was then deceased), of \$5,000 with interest in full without delay and without litigation or expense to the defendants, but that defendants were put to the expense of litigation for a year, and then received the \$5,000 without any interest, and without the cost of the litigation; that the endowment policies having been received by defendants, were subsequently returned to the plaintiff, and were in his hands when this suit was begun, and that he now holds them and has held them ever since; that this note was delivered to plaintiff for the purposes and intents thus set forth, and not as an absolute, unconditional promissory note." This offer of proof was rejected by the trial court and the rejection held proper by the supreme court, which said that the obvious purpose was to show a verbal contemporaneous agreement or understanding to reduce the note from an absolute and specific undertaking, according to its terms and legal import, to a defeasible engagement; and this was certainly inadmissible.

See *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11. See cases in II. a, 3, *supra*, adhering to this view.

The Georgia Code, § 3675, is referred to in *Stapleton v. Monroe* (1900) 111 Ga. 848, 36 S. E. 428, as

authority for the proposition that an absolute and unconditional promissory note cannot be so changed by evidence of a contemporaneous parol agreement as to ingraft upon it a condition. This statute is also referred to in *Union Cent. L. Ins. Co. v. Wynne* (1905) 123 Ga. 470, 51 S. E. 389. But see *Georgia* cases *supra*, II. a, 2.

According to these cases a note cannot be delivered conditionally to the promisee; if delivered to the promisee, it is binding from delivery, whether the condition be performed or not.

A delivery to the payee passes title to the payee, though contrary to the actual intention of the parties. *Murray v. W. W. Kimball Co.* (1894) 10 Ind. App. 184, 37 N. E. 736.

Such evidence is stated to contradict the unconditional terms of the note. *Montgomery v. Schwald* (1913) 177 Mo. App. 75, 166 S. W. 831, *supra*.

Where a consideration is otherwise shown, this cannot be done under the guise of showing a failure of consideration. *Ibid*.

In at least some of the jurisdictions represented above the rule has been changed, as may be seen by the cross references. In any jurisdiction apparently adhering to this view it seems only a reasonable precaution to examine carefully for recent cases; since it is not at all unlikely that this rule once prevailing, having been abandoned in many jurisdictions, will be abandoned in still others when a case arises therein.

It was stated in *Clanin v. Esterly Harvesting Mach. Co.* (1888) 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35, that while it is competent to prove under proper issues that a note never was delivered, evidence is not admissible to prove that it was delivered to the payee, who had parted with the consideration, as an escrow, or under any agreement that the maker was not to be bound according to the terms of the note.

In *Murray v. W. W. Kimball Co.* (1894) 10 Ind. App. 141, 37 N. E. 734, the court, after stating that delivery to an agent of the payee in escrow would be a violation of his duty to his

principal, and that he was therefore incompetent to act as the depository or custodian of such note as an escrow, continues: "Such a delivery would have the same effect as if it had been made to the payee of the note directly, with the understanding that the instrument was not to become effective as the note until the condition set up in the answer had been performed. No such arrangement or understanding as this, resting in parol, could be proved, as it would be a clear contradiction of the provisions of the written contract."

In *Stewart v. Anderson* (1877) 59 Ind. 375, where the court announced the general rule that a note cannot be delivered to the payee or his agent in escrow, the note was delivered to the agent, who delivered the same to the payee, the payee having at the time no knowledge of the existence of the escrow agreement.

According to the court in *Walker v. Crawford* (1870) 56 Ill. 444, 8 Am. Rep. 701, it cannot be shown that a "note was delivered conditionally, or as collateral security for the performance of a parol promise or agreement by appellant." The court further says that "a note absolute on its face cannot be shown by parol to have been conditional." An acceptance which is, on its face, absolute, cannot be shown by parol to have been conditional, according to the court in *Haines v. Nance* (1893) 52 Ill. App. 406. But see *Moore v. Prussing* (1896) 165 Ill. 819, 46 N. E. 184, *supra*, I.

It is held in *Montgomery v. Schwald* (1913) 177 Mo. App. 75, 166 S. W. 831, that parol evidence is inadmissible to show that notes were to be valid only upon the contingency that a deed of trust should be taken from a third party and held by the payee to secure the payment of the notes, and to that extent relieve the maker.

In *Houck v. Frisbee* (1896) 66 Mo. App. 16, it was held not competent to show by parol evidence a condition precedent to the obligation of the defendant upon an agreement by him to pay the note of a third person, where it had been delivered.

The drawer and acceptor of a draft cannot set up in defense of an action thereon an oral agreement that the draft was given and accepted on condition that the payee would surrender and deliver up a certain promissory note, which he held against a third person. *Foster v. Clifford* (1878) 44 Wis. 569, 28 Am. Rep. 603. Compare with *Paulson v. Boyd* (1908) 137 Wis. 241, 118 N. W. 841, *supra*, II. a, 2, "Paid in certain manner."

In *Brown v. Hull* (1845) 1 Denio (N. Y.) 400, it was held that the maker of a promissory note is not entitled to show that, at a settlement of accounts between the parties, upon which settlement the note was given, the plaintiff agreed to give it up, unless he could find a receipt from the defendant for the payment for some property which the defendant had let him have, the parties differing as to whether the same had been paid for.

In the early case of *Payne v. La Due* (1841) 1 Hill (N. Y.) 116, it was held that a note could not be contradicted or controlled in legal effect by oral evidence of an agreement that it was to have no validity except in a certain event. *Erwin v. Saunders* (1823) 1 Cow. (N. Y.) 249, is relied upon as authority for this proposition. In so far as these cases announce the doctrine now under consideration, they are overruled by the later New York cases.

See *Ely v. Kilborn* (1848) 5 Denio (N. Y.) 514, *infra*, III. b, and other New York cases there cited.

In *Adams v. Wordley* (1836) 1 Mees. & W. 374, 150 Eng. Reprint, 479, the acceptor of a bill of exchange was denied the right to show that it was given for a claim held against him by the drawer under circumstances exactly similar to those under which a claim was held by the drawer against another person, against whom the drawer was about to begin an action, and that it was agreed that until the drawer should recover in the action thus about to be begun, or, if he should not so recover, he would not require the acceptor to pay the bill of exchange in question. According to the court, the proper course would

have been to put the bill into the hands of a third person, to hold until the determination of the suit; and the court says further: "It would be very dangerous to allow a party to alter in such a manner the absolute contract on the face of a bill of exchange. The effect of the cases is that you are estopped from saying that you made any other contract than the absolute one on the face of the bill." But see *Pym v. Campbell* (Eng.) *supra*, II. a, 2.

c. Instrument containing a condition.

It has been stated in cases involving conditional delivery, that the fact of delivery must necessarily rest in parol. *Norman v. McCarthy* (1913) 56 Colo. 290, 138 Pac. 28. In a sense this is not strictly accurate, for the condition upon which an instrument is intrusted to the obligee therein may be stated in the writing itself. This being true, the question arises, when a condition is stated in the writing, whether other conditions may be shown by parol. It has been held that this cannot be done. *Hurley v. Y. M. C. A.* (1914) 16 Ariz. 26, 52 L.R.A. (N.S.) 220, 140 Pac. 816; *First State Bank v. Noel* (1902) 94 Mo. App. 498, 68 S. W. 235.

It is held in *Ward v. Thompson* (1913) 13 Ga. App. 152, 78 S. E. 1012, that a note which stipulates that it is given for a domestic pump which is to be delivered within a stated time, and further provides that the note is to be void only upon condition that the company refuses to deliver the pump as above specified, and for no other cause whatsoever, cannot be affected by a subsequent agreement of an agent of the pump company to the effect that if the purchaser struck quicksand he would not be required to take the pump or pay the note; it is expressly stated, however, that the agent was not authorized to make the agreement.

A subscriber of a certain amount to a railroad company, who signed a note which contains a condition that the note is to become due and payable when the track of the railroad shall be laid between certain points and cars shall have run thereon, cannot

show an oral agreement that the note was to become void if the railroad was not completed within two years from the date of the note. *Cairo & V. R. Co. v. Parker* (1877) 84 Ill. 618. A similar decision appears in *Cairo & V. R. Co. v. Delap* (1880) 7 Ill. App. 60.

Where a note given for goods contains an express provision that the goods were bought without any guaranty, the maker cannot show an oral warranty that, if the goods were not as represented, he did not need to pay for the same. *Wooldridge v. Royer* (1888) 69 Md. 113, 14 Atl. 681.

It is held in *International Harvester Co. v. Parham* (1916) 172 N. C. 389, 90 S. E. 503, that parol evidence is inadmissible in an action on a note which is stated in the writing to have been given for certain farm machinery, to prove a parol agreement that unless some additional machinery was furnished, the note would be defeasible.

See *Heitmann v. Commercial Bank* (1909) 6 Ga. App. 584, 65 S. E. 590, supra, II. a, 3.

A physician who had given his note for a premium on a life insurance policy, which note recites that it is to be paid by medical examination, cannot show another agreement varying the written contract. *Dobbs v. Johnson* (1921) — Tex. Civ. App. —, 230 S. W. 1035.

The subscriber to a fund which is to become binding on certain conditions stated in the subscription contract cannot show other conditions on which he subscribed. *Hurley v. Y. M. C. A. (Ariz.)* supra, holding, in an action upon a subscription contract, by the terms of which the subscriptions were conditioned on procuring a certain sum total, that parol evidence is inadmissible to show other conditions relating to the character and arrangement of the ground at the time of the erection of the building, the beneficiaries of its privileges, and the use of the property. It is held in *Blair v. Buttolph* (1887) 72 Iowa, 31, 33 N. W. 349, that parol evidence is inadmissible in an action on a subscription contract to a railway, conditioned up-

on the completion of the railway to a certain city within a certain time, to show an additional oral stipulation that the road was to be completed from the city in question to another within a stated time. It is stated: "But when the parties by their writing made the completion of the railroad to Iowa Falls within the specified time the condition upon which his liability to pay the money should accrue, they definitely fixed that as the condition of the contract, and the conclusive presumption is that all other conditions were excluded. When, by the express terms of the written agreement, a particular condition is made the consideration for the undertaking, it is no more competent to contradict or vary its terms by parol evidence as to the consideration by which it is supported than as to its other conditions."

A note payable when a line of telephone is completed to a certain place cannot be varied by an oral agreement that the line was to be completed to that place within a stated time. *First State Bank v. Noel* (1902) 94 Mo. App. 498, 68 S. W. 235.

Parol evidence was held incompetent in *Thompkins v. Dinnie* (1911) 21 N. D. 305, 130 N. W. 935, in an action upon a subscription for the building of a church, in which subscription it was recited that it should not be binding until a certain amount had been subscribed or provided for, to show that the defendant's subscription was made on the condition that the pastor of the church should remain in that position.

The admissibility of parol evidence in case of contracts of subscription to corporate stock is not discussed herein, as those fall more properly under contracts in general than under instruments for the payment of money, to which this note is confined.

So, where certain conditions are reduced to writing in documents separate from the notes or drafts, other conditions cannot be shown by parol. *Prouty v. Adams* (1903) 141 Cal. 304, 74 Pac. 845.

It is held in *Banque Franco-Americaine v. Bergstrom* (1916) 171 App.

Div. 870, 157 N. Y. Supp. 635, affirmed in (1919) 225 N. Y. 710, 122 N. E. 876, that the acceptor of drafts drawn by a bank in its own favor cannot show that the drafts were not to become complete obligations until certain bonds had been sold by the bank, where preliminary negotiations were conducted in part, at least, by letters in which the drafts were stated to have been given in payment of the stock of the bank, provision was made for the renewal of the drafts until a stated time, and provision made also as to some details relating to the exchange and the holding of the stock certificates.

Where certain notes are turned over to the creditors as collateral to secure an indebtedness, and there is a written contract, conditioned that the notes are to be returned upon settlement of the account, it was held not error for the court to refuse to allow evidence of an alleged parol agreement that the notes at maturity were to be returned to the debtor for collection, where the evidence was offered for the purpose of avoiding the expense of collection of the notes. *Buxton v. Alton-Dawson Mercantile Co.* (1907) 18 Okla. 287, 90 Pac. 19.

Where, at the time of the execution of a note, and as a part of the transaction, the payee gives the maker a written agreement to indemnify him in payment of the note, thereby showing that the note was to be paid when it became due, and that, upon certain contingencies, the payee would indemnify the defendant to the extent of the payments, the maker cannot show that the note was to be paid only upon the happening of the contingencies. *Prouty v. Adams* (Cal.) *supra*.

But it has been held that a condition stated in a note given for a stallion, and intended to be subscribed by a number of persons, that "if full amount is not subscribed, this is null and void," does not exclude parol proof of other conditions not wholly repugnant thereto, such as that the payee should procure actually responsible and otherwise satisfactory subscribers, who should keep the stallion at a certain place. *Rutherford v. Holbert*

(1914) 42 Okla. 785, L.R.A.1915B, 221, 142 Pac. 1099.

In *Graham v. Remmel* (1905) 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167, parol evidence that a note given upon an application for insurance was not to be binding unless the insurance was accepted was held admissible without reference to the fact that the note itself recited that it was payable on the delivery of the insurance policy, and contained the express condition that, should the policy not be issued, the application was to be null and void.

And in *Divine v. George* (1917) 63 Colo. 341, 166 Pac. 242, where a separate written agreement had been executed by the payee of a note given for corporate stock that the note was to be returned to the subscriber if the corporation did not establish its store at a certain place, parol testimony as to what kind of a store it intended to and would establish was admitted on the theory that the word "store" was ambiguous.

It was held permissible in *Ware v. Allen* (1888) 128 U. S. 591, 32 L. ed. 563, 9 Sup. Ct. Rep. 174, an action on an instrument promising to pay money provided the obligors were not defeated in a certain suit, to show an oral agreement between the parties that the instrument was to be of no effect unless, upon consultation with counsel, the obligors should be assured that the transaction out of which it arose was lawful.

III. Evidence to show a condition attached to the note.

a. Introduction.

As stated in the discussion in II. a, 1, the underlying principles governing the admission of evidence of the kind under consideration in this annotation are clear, but great difficulty is encountered in applying the principles to the evidence involved in the cases. Where the evidence takes the form that the note, although manually delivered to the payee, was not delivered as a binding obligation, the courts, apart from those discussed in II. b, and those mentioned in the succeeding paragraph, agree that the evidence is

admissible. But where the evidence takes the equivocal forms that are found in many cases, there is no agreement in conclusion. The mere form of the evidence, however, is not a safe criterion as to its admissibility.

In *C. Aultman & Co. v. McKinney* (1894) — Tex. Civ. App. —, 26 S. W. 267, the court regarded as a violation of the parol-evidence rule an attempt to show that the note was to become binding only in a certain event. In this case it was held that the purchaser of an engine which failed to do satisfactory work, to whom the manufacturer gave a written agreement to overhaul the engine in the following spring, and replace any parts that might be needed or that were in any way defective, and see that it was in every way in good order and doing good work, and who thereupon gave his notes for the purchase price, antedating them as of the date of purchase, could not show an oral agreement that, if the engine was put in proper condition and made to do good work, then and in that event, the maker of the notes would accept the engine, and the notes were to become valid and binding obligations; but, unless the engine was repaired and made to do good work, then the notes would not be valid. The court does not discuss conditional delivery, but regards the case, the facts of which are stated above, as showing an attempt to vary a written contract by a contemporaneous parol agreement or understanding inconsistent therewith. While, as above stated, the court in this case does not discuss conditional delivery, the assumption throughout the opinion is that the note was delivered as a binding obligation, although this is contrary to the statement in the pleading, as above shown. Even if the note is executed on condition, if it is a condition subsequent, the oral agreement is inadmissible. *Goddard v. Cutts* (1834) 11 Me. 440. In this case the maker of a note declared that he would not sign it except upon the condition that an original note, of which the note in question was a renewal, should be procured and sent to him within a certain

time. This, according to the court, is manifestly a condition subsequent, not to be found in the note, but attempted to be attached thereto by parol evidence.

It is the purpose in the present subdivision to discuss the cases which have applied the parol-evidence rule to evidence that the bill or note was conditional. Some of these cases involve evidence that is very similar in form to that involved in *II. a, supra*.

It has been stated generally that parol evidence is not admissible to vary the terms of a bill or note which is absolute and unconditional, by showing that it was in fact conditional. *Stapleton v. Monroe* (1900) 111 Ga. 848, 36 S. E. 428; *Union Cent. L. Ins. Co. v. Wynne* (1905) 123 Ga. 470, 51 S. E. 389; *Dixon & Co. v. Bank of Quitman* (1919) 23 Ga. App. 279, 98 S. E. 112; *Sikes v. Payton* (1919) 23 Ga. App. 721, 99 S. E. 310; *Bradley v. Progressive Metal & Ref. Co.* (1917) 205 Ill. App. 552; *Feulner v. Gillam* (1918) 211 Ill. App. 348; *Citizens Bank v. Martin* (1913) 171 Mo. App. 194, 156 S. W. 488. *Naftzger v. Buser* (1920) 106 Kan. 115, 186 Pac. 997; *Shaw v. Hutton* (1919) 75 Okla. 255, 183 Pac. 477.

The Georgia cases apparently depend upon a statute. At least, the first two cases above cited refer to a statute in support of the decision.

The court in *Leonard v. Miner* (1898) 120 Cal. 408, 52 Pac. 655, referred to the well-settled principle of evidence that a contract cannot be contradicted or varied by evidence of an oral agreement entered into by the parties before or at the time of making such contract, and continues: "Evidence of a contemporary oral agreement between the parties to a bill or note, whereby the order or promise contained in the instrument is rendered null or conditional, or whereby the fact of payment is made to depend upon some contingent future event, comes within the same principle."

It is held in *Southern Fertilizer & Chemical Co. v. Harrell* (1916) 17 Ga. App. 642, 87 S. E. 911, that an attempt by parol to attach to a written contract

a condition not therein stated or referred to is a defense bad in law.

The terms of an acceptance in writing cannot be varied by a contemporaneous parol agreement. *Mt. Vernon Nat. Bank v. Kelling-Karel Co.* (1914) 189 Ill. App. 375.

b. Application to various forms of evidence.

Evidence that the instrument was not to be paid except in a contingency.

Cases in which evidence of this character has been admitted on the theory of conditional delivery are discussed in II. a, 2, *supra*.

Parol evidence has been held inadmissible where it was sought to show that the instrument was not to be paid unless a certain thing was done, or unless a certain contingency occurred.

Alabama. — *West v. Kelly* (1851) 19 Ala. 353, 54 Am. Dec. 192; *Gliddens v. Harrison* (1877) 59 Ala. 481; *Rice v. Gilbreath* (1898) 119 Ala. 424, 24 So. 421.

Connecticut. — *Osborne v. Taylor* (1890) 58 Conn. 439, 20 Atl. 605.

Georgia. — *Dinkler v. Baer* (1892) 92 Ga. 432, 17 S. E. 953; *Lunsford v. Malsby* (1897) 101 Ga. 39, 28 S. E. 496; *Probasco v. Shaw* (1915) 144 Ga. 416, 87 S. E. 466.

Illinois. — *Penny v. Graves* (1850) 12 Ill. 287; *Murchie v. Peck Bros. & Co.* (1896) 160 Ill. 175, 43 N. E. 356; *May v. May* (1890) 36 Ill. App. 77; *Hesch v. Dennis* (1915) 194 Ill. App. 663.

Indiana. — *Graves v. Clark* (1842) 6 Blackf. 183; *Brush v. Raney* (1870) 34 Ind. 416; *Croan v. Myers* (1912) 52 Ind. App. 143, 100 N. E. 380.

Iowa. — *Myers v. Sunderland* (1854) 4 G. Greene, 567; *Atkinson v. Blair* (1874) 38 Iowa, 156; *Farmer v. Perry* (1886) 70 Iowa, 358, 30 N. W. 72; *De Long v. Lee* (1887) 73 Iowa, 53, 34 N. W. 613.

Kansas. — *Naftzger v. Buser* (1920) 106 Kan. 115, 186 Pac. 997.

Kentucky. — *Dale v. Pope* (1823) 4 Litt. 166; *Simpson v. Blaine* (1921) 191 Ky. 465, 230 S. W. 934; *Jaudes v. Fisher* (1884) 5 Ky. L. Rep. 769 (abstract); *Begley v. Combs* (1905) 27 Ky. L. Rep. 1115, 87 S. W. 1081.

Maine. — *Cunningham v. Wardwell* (1835) 12 Me. 466; *Boody v. McKenney* (1844) 23 Me. 517; *Sears v. Wright* (1844) 24 Me. 278.

Maryland. — *Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.* (1912) 119 Md. 107, 86 Atl. 38.

Massachusetts. — *Adams v. Wilson* (1846) 12 Met. 138, 45 Am. Dec. 240; *Underwood v. Simonds* (1847) 12 Met. 275.

Michigan. — *Hyde v. Tenwinkel* (1872) 26 Mich. 93; *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11, s. c. on second appeal in (1905) 139 Mich. 82, 102 N. W. 280.

Minnesota. — *Curtice v. Hokanson* (1888) 38 Minn. 510, 38 N. W. 694; *Northern Trust Co. v. Hiltgen* (1895) 62 Minn. 361, 64 N. W. 909.

Mississippi. — *Wren v. Hoffman* (1868) 41 Miss. 616.

New Jersey. — *Meyer v. Beardsley* (1863) 30 N. J. L. 236.

New York. — *Jamestown Business College Asso. v. Allen* (1902) 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; *Smith v. Hedges* (1915) 170 App. Div. 349, 155 N. Y. Supp. 934, affirmed in (1918) 222 N. Y. 349, 119 N. E. 1077; *Prosser v. Miller* (1902) 37 Misc. 841, 76 N. Y. Supp. 974; *German Exch. Bank v. Schnitzer* (1911) 72 Misc. 362, 130 N. Y. Supp. 223; *Lewis v. Jones* (1860) 7 Bosw. 366; *Isaacs v. Jacobs* (1889) 26 N. Y. St. R. 96, 7 N. Y. Supp. 66; *Calvosa v. Donovan* (1918) 171 N. Y. Supp. 388.

North Carolina. — *Gatlin v. Kilpatrick* (1844) 4 N. C. (1 Car. Law Repos.) 534, 6 Am. Dec. 557.

Ohio. — *Holzworth v. Koch* (1875) 26 Ohio St. 33; *Beecher v. Dunlap* (1894) 52 Ohio St. 64, 38 N. E. 795.

Oregon. — *Colvin v. Goff* (1916) 82 Or. 314, L.R.A.1917C, 300, 161 Pac. 568.

Rhode Island. — *Sweet v. Stevens* (1863) 7 R. I. 375.

South Carolina. — *McClanaghan v. Hines* (1847) 33 S. C. L. (2 Strobb.) 122; *McGrath v. Barnes* (1879) 13 S. C. 328, 36 Am. Rep. 687; *Cline v. Farmers' Oil Mill* (1909) 83 S. C. 204, 65 S. E. 272.

Texas. — *Thompson v. Gage* (1892)

84 Tex. 654, 19 S. W. 862; *Geo. D. Barnard & Co. v. Robertson* (1895) — Tex. Civ. App. —, 29 S. W. 697; *Key v. Hickman* (1912) — Tex. Civ. App. —, 149 S. W. 275; *Merriman v. Swift & Co.* (1918) — Tex. Civ. App. —, 204 S. W. 775; *Denman v. Kaplan* (1918) — Tex. Civ. App. —, 205 S. W. 739.

Vermont. — *Hatch v. Hyde* (1842) 14 Vt. 25, 39 Am. Dec. 203; *Gillet v. Ballou* (1857) 29 Vt. 296.

Wisconsin. — *Foster v. Clifford* (1878) 44 Wis. 569, 28 Am. Rep. 603; *Wayland University v. Boorman* (1883) 56 Wis. 657, 14 N. W. 819.

England. — *Foster v. Jolly* (1835) 1 Crompt. M. & R. 703, 149 Eng. Reprint, 1263, 5 Tyrw. 289, 4 L. J. Exch. N. S. 65, 1 Gale, 10; *Adams v. Wordley* (1836) 1 Mees & W. 479, 150 Eng. Reprint, 479, 2 Gale, 29, 5 L. J. Exch. N. S. 158.

Canada. — *McNeil v. Cullen* (1904) 37 N. S. 13.

It is the general theory of these cases that to allow parol evidence of an agreement that the note was not to be paid except upon a certain contingency would destroy the legal effect of the instrument as a promissory note.

In addition to the foregoing there are other cases which support in a measure the inadmissibility of the evidence in such cases. One who, in the absence of fraud, knowingly gives his promissory note for a sum of money for the purchase price of land, for which he accepts from the payee of the notes a bond for title, conditioned upon the payment of that sum, cannot defeat the collection of the note by showing an antecedent executory agreement on the payee's part to give him the land or part of the purchase price, or to sell it to him at a price different from that stated in the written contract. *Carroll v. Hutchinson* (1907) 2 Ga. App. 60, 58 S. E. 309. The maker of a duebill which is in legal effect a promissory note cannot show an oral agreement that he was to be liable thereon only in a certain event, and then for only half the sum called for by the note. *Smith v. Thomas* (1860) 29 Mo. 307. The mak-

er of notes secured by corporate stock collateral, who has also executed a written agreement that the stock is to be delivered to the maker upon the payment of the notes, and if the notes are not paid, that the collateral is to be delivered to the payee, to be disposed of as collateral security, cannot show an oral agreement that the collateral was to be exhausted before the defendant should incur any liability on the notes. *Fisher v. Briscoe* (1890) 10 Mont. 124, 25 Pac. 30. The maker of a note cannot show an oral agreement that the note should never be sued upon if the maker should not be able to pay it. *German Exch. Bank v. Schnitzer* (1911) 72 Misc. 362, 130 N. Y. Supp. 223. In *Bedwell v. Thompson* (1860) 25 Tex. Supp. 245, a purchaser of land who had given a note for the purchase price was held not entitled to set up in defense to a suit on the note a parol agreement resting upon the result of the suit between other parties about the title to the land. The maker of a note to an insurance company for a loan secured from the company cannot show that the note was executed on the understanding that the money was not to be collected as long as he paid the monthly dues mentioned in two policies issued by the society on his life, and the interest accruing annually on the loan. *Allen v. Thompson* (1900) 108 Ky. 476, 56 S. W. 823. One who has given his note to a brewery for money advanced by it to pay for a liquor tax certificate taken out in the name of the maker of the note cannot show an oral agreement that the maker should only be required to pay a certain sum per week, so long as he remained in business, and to purchase beer of the plaintiff. *Ferdinand Munch Brewery v. DeMatteis* (1908) 128 App. Div. 830, 112 N. Y. Supp. 1042. The right to show a conditional acceptance of an order by parol was denied in *Baylor v. Butterfass* (1900) 82 Minn. 21, 84 N. W. 640.

See *Wooldridge v. Royer* (1888) 69 Md. 113, 14 Atl. 681, *supra*, II. c.

The evidence has been held inadmissible in a great variety of facts and circumstances. In a number of cases

evidence that the maker was not to be required to pay the note unless the payee should need the money or call for it in his lifetime has been held inadmissible. Thus, the maker of a note payable semiannually to the payee for life cannot show a promise by the payee that, if she did not need the sum for her support, the maker would not be required to pay it. *Osborne v. Taylor* (1890) 58 Conn. 439, 20 Atl. 605. The action in this case was by the administrator of the payee, and it appeared that six semiannual payments had been made on the note, and that seven were unpaid. The maker of notes payable to the maker's father cannot show an agreement that the father should require him to pay only so much of the notes as the father should need for the maintenance of himself and his family in his lifetime, and, at his death, that the notes were to be discharged and satisfied. *May v. May* (1890) 36 Ill. App. 77. The makers of a note cannot show that it was given to one who had been making her home with them, as a provisional memorandum against possible necessity, and under an agreement that the payee was not to claim payment of it from the defendants unless she should become poor afterwards and need it. *Atkinson v. Blair* (1874) 38 Iowa, 156. An oral contemporaneous agreement that a note was not to be paid unless called for during the lifetime of the payee was held inadmissible in *Boody v. McKenney* (1844) 23 Me. 517.

The purchasers of patent rights who have given notes for the purchase price have frequently sought to defeat the notes by showing an agreement that they were not to be paid unless certain profits were realized from the sale of the patent rights. The maker of a note given to evidence the purchase price of the right to sell a patent within a specified territory cannot show an agreement that he was not to be required to pay the note unless his profits from the business were sufficient for the purpose. *Rice v. Gilbreath* (1898) 119 Ala. 424, 24 So. 421. The maker of a note given for an interest in a patent washing ma-

chine cannot show a verbal agreement that he should be required to pay no money on the note except as it should be realized in the sales of the machines, and that the machine was wholly worthless and nothing was realized upon its sale. *DeLong v. Lee* (1887) 73 Iowa, 53, 34 N. W. 613. The purchaser of a patent right who has given a note for the purchase price cannot show an oral agreement that the note was not to become operative unless a certain sum should be made from the manufacture and sale of the patent right. *Beecher v. Dunlap* (1894) 52 Ohio St. 64, 38 N. E. 795. On the trial the defendant offered evidence to the effect that the note was to be "null and void" unless within a year he should be able to make a certain sum upon the manufacture and sale of the patent right.

The makers of notes for the purchase price of other articles have sought to defeat actions on the notes by showing an agreement that the notes were not to be paid unless a certain profit should be realized. Parol evidence of an agreement that the maker of the note purchased stock upon condition that it would thereafter pay a certain dividend, and, in the event it failed to pay such dividend, the note was not to be paid, is inadmissible. *Dinkler v. Baer* (1893) 92 Ga. 432, 17 S. E. 953. A note which recites that it is given to cover a balance of payment on shares of stock, and is to be paid as the stock is resold by the maker, cannot be shown to have been executed under an oral agreement or understanding that the makers were not to be liable to the plaintiff for the money mentioned in the instrument, except upon a sale of the stock at a certain price per share or better. *Naftzger v. Buser* (1920) 106 Kan. 115, 186 Pac. 997. A purchaser of corporate stock who has given his note for the purchase price, and has entered into an agreement with the corporation to sell its stock on commission, cannot show an oral agreement that, in the event his commissions were not sufficient to pay the note, it was not to be paid, and the stock was to be returned to the corpo-

ration, and the note canceled and returned to the maker. *Denman v. Kaplan* (1918) — Tex. Civ. App. —, 205 S. W. 739. A note payable from the avails of logs when there is a sale made cannot be modified by an oral agreement that it was the understanding of the parties that, if the logs could not be sold, and, if on being manufactured, there was a total loss to the owners, the note was not to be paid. *Sears v. Wright* (1844) 24 Me. 278.

In other cases the maker of a note has sought to defeat liability thereon by showing an agreement that it was not to be paid unless he realized from a certain source. The maker of a note cannot show that he sold goods for the payee, taking the note of the purchaser under an oral agreement that his note to the payee should not be paid unless he should collect the note which he had taken from the purchaser of the goods. *Underwood v. Simonds* (1847) 12 Met. (Mass.) 275. The maker of a note cannot show that it was given as a means of collecting a debt the payee held against a third person, who executed his note to the maker; and that it was given under an oral agreement that he was not to be called upon to pay the note unless the third person paid the note to him. *Gillet v. Ballou* (1857) 29 Vt. 296. Parol evidence is incompetent in an action upon an instrument in writing in the nature of a promissory note, to show that the maker was not to pay the note unless he could collect a certain sum from other persons. *Cline v. Farmers' Oil Mill* (1909) 83 S. C. 204, 65 S. E. 272.

Notes given for attorneys' services cannot be defeated by showing an oral agreement that they were not to be paid in a certain event. In assumpsit upon a promissory note given for legal services to be rendered in a suit, the makers cannot prove that the note was not to be paid unless the attorneys were successful in the suit in question. *West v. Kelly* (1851) 19 Ala. 353, 54 Am. Dec. 192.

Parol evidence is not admissible in an action on a promissory note given in consideration of money advanced to

pay the expenses of an appeal in a criminal case, to show that the note was to be paid only in case of reversal. *Colvin v. Goff* (1916) 82 Or. 314, L.R.A.1917C, 300, 161 Pac. 568. A note given for attorneys' fees cannot be varied by showing an oral agreement that it was not to be paid in the event of compromise. *Dale v. Pope* (1823) 4 Litt. (Ky.) 166.

A note given for the purchase price of machinery cannot be defeated by an oral agreement that it was not to be paid unless the machinery complied with certain warranties. Evidence of an express verbal agreement before notes sued on, which were given in payment of machinery, were executed, that unless the machines should meet certain requirements the notes were to be null and void, and the makers would be under no obligation to pay the same, is inadmissible. *Lunsford v. Malsby* (1897) 101 Ga. 39, 28 S. E. 496. The maker of notes given for certain appliances cannot show an oral agreement that he need not pay the notes when due if the appliances did not do all they were guaranteed to do. *Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.* (1912) 119 Md. 107, 86 Atl. 38.

A surety cannot show an oral agreement that he was not to be held liable except upon the insolvency or inability of the principal debtor to pay. *Brush v. Raney* (1870) 34 Ind. 416; *Myers v. Sunderland* (1854) 4 G. Greene (Iowa) 567; *Hunt v. Adams* (1811) 7 Mass. 518.

A surety cannot show that he was to be liable only upon the insufficiency of collateral or other security to the note. *Martin v. First Nat. Bank* (1907) 30 Ohio C. C. 398, 20 Ohio C. D. 398; *Anderson v. Matheny* (1903) 17 S. D. 225, 95 N. W. 911; *Abrey v. Crux* (1869) L. R. 5 C. P. 37, 39 L. J. C. P. N. S. 9, 21 L. T. N. S. 327, 18 Week. Rep. 63, 4 Eng. Rul. Cas. 195, holding that the drawer of a bill of exchange for the accommodation of the acceptor cannot show an oral agreement that the acceptor should deposit with the payee certain security, and, in case the bill should not be duly paid, that the payee should sell and dispose of the

security and apply the proceeds thereof in payment or liquidation of the bill, and that until the payee should have so sold and disposed of the securities, the drawer should not be liable for or be sued upon the bill. Persons who have executed a note as sureties for an insolvent debtor, payable to one of his creditors, cannot show an oral agreement of the creditor to furnish goods to the debtor, and not to enforce payment of the note faster than he should be able to pay. *Holzworth v. Koch* (1875) 26 Ohio St. 33. One who has undertaken to guarantee the payment of a note cannot show an oral agreement that he promised to pay it if it could not be made out of the original maker, and not otherwise. *Jones v. Jeffries* (1853) 17 Mo. 577. The defendant in this case did not sign the note, which was dated 1842, until 1847; when, for a consideration, he undertook to guarantee it as above stated. In *Martin v. First Nat. Bank* (1907) 30 Ohio C. C. 398, parol evidence is held inadmissible to show an agreement on the part of the payee of a note to obtain certain bonds, to be held by the payee as collateral for the payment of the note, and to be exhausted before any liabilities of the signer would attach. *Poffenbarger and Miller, JJ., in Long v. Potts* (1912) 70 W. Va. 719, 75 S. E. 62, were of the opinion that it was competent for the sureties on a note to show an oral agreement that they would execute the note as sureties for the principal debtor for twenty days, within which time the payee should procure for the principal debtor security in exoneration and indemnification of the sureties. According to these judges, this was a collateral arrangement for discharge of the note, the sureties being liable in the event of failure of the principal to give the deed of trust within the specified time. The parol-evidence rule is stated to have never been intended for use as a means of accomplishing inequitable and unjust purposes. Two other judges, however, were of the opinion that the evidence was not competent. Evidence of an agreement that the note was not to be paid by the

surety except upon the insolvency of the principal debtor or the insufficiency of collateral must be distinguished from evidence of agreements that the note was not to be paid at all, or that the surety was not to be liable thereon. The admissibility of such agreements is discussed in VII. *infra*.

In the following cases involving miscellaneous oral agreements that the note should not be paid except upon a contingency, such agreements were held inadmissible: The maker of promissory notes the consideration of which was the transfer by delivery to the maker of the promissory note for a much larger amount of a third person from whom the maker of the notes had purchased a tract of land cannot show a verbal agreement that, if the maker failed to pay for and hold the land, the notes executed by him should not be paid, and that he had failed to pay for and had lost all of the land except 80 acres. *Gliddens v. Harrison* (1877) 59 Ala. 481.

In an action upon a note given in payment of a stallion purchased by the makers, evidence that the agent of the payee stated that, before he would collect the note, the horse would have to come up to the guaranty,—that he did not intend to collect the note until the horse was proven up to the guaranty,—is inadmissible, since this is varying the absolute, unconditional terms of the note by a contemporaneous parol agreement. *Probasco v. Shaw* (1915) 144 Ga. 416, 87 S. E. 466.

The maker of a note cannot show an agreement that the note was not to be paid unless certain third persons claimed interest on other notes. *Penny v. Graves* (1850) 12 Ill. 287.

The maker of a note cannot show an oral agreement that the note was not to be paid according to its terms, but that its payment was dependent upon a sale of certain property by the maker. *Murchie v. Peck Bros. & Co.* (1896) 160 Ill. 175, 43 N. E. 356.

In *Croan v. Myers* (1912) 52 Ind. App. 143, 100 N. E. 380, a plea that the maker of the note, with others, had started a corporation to which the husband of the payee advanced money, taking the note of the maker under an

agreement that if the corporation should be a success, the money was to be repaid in accordance with the terms of the note, but, if the same was not a success, the money was to be a gift and never to be repaid; that the corporation was not a success, and that the husband of the payee retained the note in his possession until his death, and during the time never made demand for payment, and before his death he requested his wife to carry out his promise and to surrender the note to the maker, and within a few weeks after the death of the husband the payee did carry out the wish and surrender the note,—was held not to show a defense to the action.

One who signed notes secured by a mortgage after they were executed by the principal maker, in consideration of the waiver by the mortgagee of the obligation of the mortgagor to have the property on the mortgaged premises insured, cannot show an oral agreement that he was only to be liable in case the property should be destroyed by fire. *Farmer v. Perry* (1886) 70 Iowa, 358, 30 N. W. 752.

The maker of a note given upon a purchase of corporate stock cannot show an oral agreement that the payee would not exact payment of the note when it became due, if the maker did not want the stock at that time. *Simpson v. Blaine* (1921) 191 Ky. 465, 230 S. W. 934.

A note which contains an absolute promise to pay cannot be attacked by showing a parol agreement to the effect that the makers' promise was conditional, and that they were not to pay the note unless they got certain branded timber. *Begley v. Combs* (1905) 27 Ky. L. Rep. 1115, 87 S. W. 1081.

The drawer of a draft upon himself, which was considered as equivalent to the acceptance thereof, was held not entitled to show an oral agreement that the payee assumed a sea risk of a cargo shipped on a ship of which the drawer was the master, and that, if any portion of it was lost by reason of that risk, the amount of the draft was to be ratably reduced. *Cunningham v. Wardwell* (1835) 12 Me. 466.

An assignee of a debtor, who gave a creditor his note for the amount of her claim, cannot show an oral agreement that the note should not be payable unless the maker should be found to have funds of the debtor sufficient to pay it. *Adams v. Wilson* (1846) 12 Met. (Mass.) 138, 45 Am. Dec. 240.

An oral agreement upon the execution of a note given for the amount of a chattel mortgage which the payee held upon the property of a third person, purchased by the maker of the note, that, in case the vendor of the property should thereafter be forced into bankruptcy by any of its creditors upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, the note would thereupon become and be null and of no effect, and would not be paid, is inadmissible. *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11, s. c. on second appeal in (1905) 139 Mich. 82, 102 N. W. 280.

The maker of a note payable to a bank cannot show an oral agreement that she should not be liable to pay the note unless she failed to perform an agreement on her part to acquire the ownership of a deposit in the bank, belonging to her deceased husband. *Northern Trust Co. v. Hiltgen* (1895) 62 Minn. 361, 64 N. W. 909.

One who has executed notes as guardian of a minor cannot show an oral agreement that he was to pay the notes only upon the condition that assets of the minor should come into his hands sufficient for that purpose, and in case such assets did not come into his hands, he was not to pay the notes, and they were to be delivered up to him. *Wren v. Hoffman* (1868) 41 Miss. 616.

The acceptor of a draft cannot show that he accepted the draft to be paid on condition that he should receive from the drawer certain evidence that the security given to the acceptor was free and clear of encumbrances. *Meyer v. Beardsley* (1863) 30 N. J. L. 236.

One who has given a note for tuition in the payee's school cannot show an oral agreement that the note was

not to be paid if the maker did not take the course of instruction for which the note was given. *James-town Business College Asso. v. Allen* (1902) 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952.

An applicant for life insurance who has given a duebill to the agent, who has advanced the amount of the premium, cannot show an oral agreement that he was only to repay the sum so advanced if able to do so, and, if not able, the insurance policy was to be returned. *Prosser v. Miller* (1902) 87 Misc. 841, 76 N. Y. Supp. 974.

A note given by a bankrupt, subsequent to his bankruptcy, to a creditor whose debt has been discharged, cannot be shown to have been given upon the express condition that it should never be sued upon if the maker should not be able to pay it, although the maker agreed to pay interest thereon. *German Exch. Bank v. Schnitzer* (1911) 72 Misc. 862, 130 N. Y. Supp. 223.

The maker of a note to whom the payee has assigned a claim against third persons cannot show an oral agreement that the note should not become operative unless the money on the assignment was realized. *Isaacs v. Jacobs* (1889) 26 N. Y. S. R. 96, 7 N. Y. Supp. 66.

The maker of a note cannot show an oral agreement that it was not to be paid if the payee won an action then pending, to which he was a party. *Calvosa v. Donovan* (1918) 171 N. Y. Supp. 388.

The purchaser of a horse, who has given a note for the purchase price, cannot show an oral agreement that, if the horse died before the end of the season, no part of the price was to be paid. *Gatlin v. Kilpatrick* (1844) 4 N. C. (1 Car. Law Repos.) 534, 6 Am. Dec. 557.

The maker of a note cannot show that it was to be paid only upon the collection by him of notes placed in his hands by the payee for collection. *McClanaghan v. Hines* (1847) 33 S. C. L. (2 Strobb.) 122.

An executor who has given a note to a creditor for the amount of the creditor's claim against the dece-

dent's estate cannot show an oral agreement that the payment of the note was conditional upon the allowance by the ordinary of the claim made against the estate by the payee. *McGrath v. Barnes* (1879) 13 S. C. 328, 36 Am. Rep. 687.

The maker of a note cannot show that it was executed under an agreement that he was not to be required to pay it unless he might see proper to do so. *Geo. D. Bernard & Co. v. Robertson* (1895) — Tex. Civ. App. —, 29 S. W. 697.

In *Key v. Hickman* (1912) — Tex. Civ. App. —, 149 S. W. 275, parol evidence is held inadmissible to show that, at or before the time of the execution of the note, there was an agreement that the note was not to be paid unless the payee furnished the maker an itemized statement showing certain facts.

The drawer of a check cannot show an oral agreement that he was not to be liable on the check unless he was financially able to meet it, and should deposit the money in the bank with which it could be paid. *Merriman v. Swift & Co.* (1918) — Tex. Civ. App. —, 204 S. W. 775.

The purchaser of a diseased horse, who has given his note for the purchase price, cannot show an oral agreement that, if the horse should become useless or die as a result of the disease, the note should not be collectable or collected, but should be discharged. *Hatch v. Hyde* (1842) 14 Vt. 25, 39 Am. Dec. 203.

The drawer and acceptor of a draft cannot show in defense of an action thereon an oral agreement that the draft was given and accepted on condition that the payee would surrender and deliver up a certain promissory note which he held against a third person. *Foster v. Clifford* (1878) 44 Wis. 569, 28 Am. Rep. 603.

One who has given his note to the amount of a demand against a third person cannot show an agreement that the note should not be enforced in case the payee should obtain a verdict in an action against other persons who were also liable for the demand. *Foster v. Jolly* (1835) 1

Crompt. M. & R. 703, 149 Eng. Reprint, 1263, 5 Tyrw. 239, 4 L. J. Exch. N. S. 65, 1 Gale, 10.

The maker of a note expressed to be payable on demand cannot show an oral agreement that it was subject to a condition that she should not be called upon for payment unless the children should die before a certain legacy should become payable. **McNeil v. Cullen** (1904) 37 N. S. 813.

See **Standard Bank v. Wettlaufer** (1915) 33 Ont. L. Rep. 441, 8 Ont. Week. N. 187, 28 D. L. R. 507, *supra*, II. a. 2.

Evidence that the note was to be void or to be surrendered.

For cases dealing with this kind of evidence and holding it admissible, see II. a. 2.

Parol evidence of a prior or contemporaneous oral agreement that notes were to be void or to be surrendered in a certain contingency is inadmissible.

United States.—**Sioux Falls Nat. Bank v. Klaveness** (1920) 264 Fed. 40.

Connecticut.—**Converse v. Moulton** (1795) 2 Root, 195.

Georgia.—**Rodgers v. Rosser** (1876) 57 Ga. 319; **Johnson v. Cobb** (1896) 100 Ga. 139, 28 S. E. 72.

Illinois.—**Lane v. Sharpe** (1842) 4 Ill. 566; **Harris v. Galbraith** (1867) 43 Ill. 309; **Schultz v. Meyer** (1913) 181 Ill. App. 335.

Kansas.—**Thisler v. Mackey** (1902) 65 Kan. 464, 70 Pac. 334.

Kentucky.—**Moore v. Parker** (1893) 15 Ky. L. Rep. 125.

Michigan.—**Central Sav. Bank v. O'Connor** (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11.

Mississippi.—**Wren v. Hoffman** (1868) 41 Miss. 616.

Missouri.—**Wislizenus v. O'Fallon** (1886) 91 Mo. 184, 3 S. W. 837; **Farmers' State Bank v. Sloop** (1918) — Mo. App. —, 200 S. W. 304.

Nebraska.—**Aultman, M. & Co. v. Hawk** (1903) 4 Neb. (Unof.) 582, 95 N. W. 695.

New York.—**Erwin v. Saunders** (1823) 1 Cow. 249, 13 Am. Dec. 520; **Brown v. Hull** (1845) 1 Denio, 400; **Ely v. Kilborn** (1843) 5 Denio, 514; **Smith v. Hedges** (1915) 170 App. Div.

349, 155 N. Y. Supp. 934, affirmed in (1918) 222 N. Y. 701, 119 N. E. 1077; **Oppenheimer v. Kruckman** (1903) 84 N. Y. Supp. 129.

North Carolina. — **International Harvester Co. v. Parham** (1916) 172 N. C. 389, 90 S. E. 503.

Texas.—**Riley v. Treanor** (1894) — Tex. Civ. App. —, 25 S. W. 1054.

Vermont. — **Farnham v. Ingham** (1833) 5 Vt. 514; **Bradley v. Bentley** (1836) 8 Vt. 243; **Isaacs v. Elkins** (1839) 11 Vt. 679.

Washington.—**Post v. Tamm** (1916) 91 Wash. 504, 158 Pac. 91.

Wisconsin.—**Wayland University v. Boorman** (1888) 56 Wis. 657, 14 N. W. 819.

Canada.—**Wilton v. Manitoba Independent Oil Co.** (1915) 25 Manitoba L. R. 628, 25 D. L. R. 243.

A contemporaneous oral agreement at the time the note was given as a part of the purchase price of land which was sold to the maker that he, the maker, should have the option of retaining the land contract and paying the note, or surrendering the contract and requiring the vendor to pay the note, was held inadmissible in **McEwan v. Ortman** (1876) 34 Mich. 325. This decision is based upon two grounds: one, the inadmissibility of the oral agreement to change the written contract; and the other, that an oral agreement relating to lands is void under the Statute of Frauds.

As in the case with other forms of evidence treated in this annotation, the admissibility of evidence that the note was to be void or to be surrendered in a certain contingency has been denied under a variety of circumstances.

The purchaser of corporate stock who has given his note for the purchase price cannot show an oral agreement that, if the stock should thereafter be declared void for any reason, his note should not be enforced, but should be surrendered to him. **Sioux Falls Nat. Bank v. Klaveness** (1920) 264 Fed. 40. The note involved in this case was given to a bank,—not directly to the vendors of the stock; but no point is made of this fact. The case is decided as if the

note was given directly to the vendors; or, at least, as if the bank knew of the contract.

The maker of a note cannot show that it was given for the purpose of indemnifying the payee or his estate against a certain other note, and was to be void upon condition that the payee and his estate were indemnified. *Converse v. Moulton* (1795) 2 Root (Conn.) 195. In this case the note contained a memorandum reciting the consideration therefor, but contained no such condition as was sought to be proved.

An oral agreement that the maker of a note given for an insurance premium should have the right, at the maturity of the note, to surrender the policy and have the note canceled, is inadmissible. *Johnson v. Cobb* (1896) 100 Ga. 139, 28 S. E. 72.

An oral agreement at the time of entering into a contract for the sale of land by one having a tax title thereto, that if minor heirs should redeem the land, the contract, including notes given for the purchase price, should be rescinded, is inadmissible. *Lane v. Sharpe* (1842) 4 Ill. 566.

Where an owner of slaves sold the same to a person, and, in the absence of such person, delivered them to a third person, who executed a note therefor for the price, an oral agreement that, on the purchaser's return, his note was to be given and the note of the third person was to be surrendered, cannot be shown. *Harris v. Galbraith* (1867) 43 Ill. 309.

The maker of a note cannot show that the note was executed for the sole purpose of securing the payee for having signed as surety certain notes given by the maker and subsequently paid, and that there was an understanding between them at the time of the execution of the note sued on, that, in case the defendant made payment of said note which had been thus signed as surety, the note in question would be void and would be returned to the defendant. *Schultz v. Meyer* (1913) 181 Ill. App. 335.

The makers of a note given to secure part of the purchase price of a horse sold by the payee to the makers cannot show an oral contempora-

neous agreement that, when the horse became four years old, the makers should have the right to rescind the contract if they so desired, return the animal, and the payee would cancel and surrender the note. *Thisler v. Mackey* (1902) 65 Kan. 464, 70 Pac. 334.

The maker of a note to be given upon a purchase of corporate stock cannot show an oral agreement that, if he should become dissatisfied, he should have the privilege of returning the stock for which the note was executed, and have the note returned to him. *Moore v. Parker* (1893) 15 Ky. L. Rep. 125.

It is held in *Wislizenus v. O'Fallon* (1886) 91 Mo. 184, 3 S. W. 837, that parol evidence is inadmissible to show that a note was to be used for a certain purpose, and, if not so used, was to become void.

Where the guardian of an incompetent, together with other persons, have executed a note to a bank to obtain a loan for the benefit of the incompetent, the makers of the note cannot show an oral agreement that, upon the obtaining of an order to mortgage the incompetent's lands, and the giving of the mortgage to the bank, the security of the mortgage would be accepted and the note surrendered. *Farmers' State Bank v. Sloop* (1918) — Mo. App. —, 200 S. W. 304.

The purchaser of a harvesting machine who has executed a note therefor cannot show an oral agreement that the payee of the note would make the harvester run and do good work, and if he did not do so, the note was to become null and void, and be returned to the maker. *Aultman, M. & Co. v. Hawk* (1903) 4 Neb. (Unof.) 582, 95 N. W. 695.

A note payable in specific articles and absolute on the face cannot be defeated by oral evidence showing that it was to be void upon it appearing that the debt for which it was given had been inventoried by one of the makers on his applying for his discharge under the Insolvent Act. *Erwin v. Saunders* (1823) 1 Cow. (N. Y.) 249, 13 Am. Dec. 520.

Where a promissory note was given

for the payee's interest in his father's estate, with a parol agreement between the maker and payee that, if the interest of other heirs of the estate could not be obtained in a specified manner, both the note and release should be void, it was held that evidence could not be given of the parol agreement in defense of an action upon the note. *Ely v. Kilborn* (1848) 5 Denio (N. Y.) 514.

The purchaser of machinery which is to be constructed and set up by the vendor, who has given a note for the purchase price, cannot show an oral agreement that the payee was to relieve the maker and cancel the note, provided the contract was not completed when the note fell due. *Smith v. Hedges* (1915) 170 App. Div. 349, 155 N. Y. Supp. 934, affirmed in (1918) 222 N. Y. 701, 119 N. E. 1077.

The makers of notes cannot show a verbal agreement that, should the makers thereafter dissolve partnership, the notes were to be returned and the defendants were to return to the payee the certificates for certain goods which had been delivered to the defendants by plaintiff at the time of the making and delivery of the notes. *Oppenheimer v. Kruck* (1903) 84 N. Y. Supp. 129.

The purchaser of a manure spreader, to whom the vendor agreed to furnish a knife grinder without further charge, who executed his note for the purchase price, cannot show an oral agreement that, if the knife grinder was not furnished, the note was to be invalid. *International Harvester Co. v. Parham* (1916) 172 N. C. 389, 90 S. E. 503.

The purchaser of corporate stock, who had given a note for the purchase price, cannot show an oral agreement to take back the stock and cancel the note. *Riley v. Treanor* (1894) — Tex. Civ. App. —, 25 S. W. 1054.

In *Security L. Ins. Co. v. Allen* (1914) — Tex. Civ. App. —, 170 S. W. 131, it is held in an action on a note given in payment of the premium on a life insurance policy, that an agreement at the time of the execution of the note that it would be canceled and returned to the maker if he would thereafter aid in procuring life insur-

ance from other people, and that the note was to become a valid and binding obligation in the event only that the maker should fail to perform that agreement, was inadmissible in evidence, as its effect would be to vary by parol the terms of the note.

The purchaser of a stove, who has given his note for the purchase price thereof, cannot show an oral agreement that, at the expiration of a year from the date of the note, the purchaser might elect to pay the amount specified in the note, or to return the stove to the plaintiff, in satisfaction or payment of the note, and pay him \$6 for the use of the stove. *Bradley v. Bentley* (1836) 8 Vt. 243.

In *Farnham v. Ingham* (1833) 5 Vt. 514, where the maker of a note attempted to show that the payee agreed at the time the note was executed that, if he failed to discontinue a certain suit, the note should be void, the evidence was held inadmissible.

Although the court in *Isaacs v. Elkins* (1839) 11 Vt. 679, says of the case of *Farnham v. Ingham* (Vt.) *supra*, that parol evidence to show that the note was payable only on condition was admitted as an independent contract by which the note was to be paid in a manner different from that expressed in the written contract, from the report of the case in *Farnham v. Ingham* it seems that the evidence which actually was received was that if the payee failed to discontinue a suit, he would allow on the note all actual costs, trouble, and expense which the maker should be subject to in defending the suit. In so far as the evidence was held admissible, the case is overruled by the decision in *Isaacs v. Elkins*.

One who is engaged in buying horses for a government, who purchased horses, giving his note therefor, cannot show an oral agreement that he should take the horses to a certain place where they would be inspected by the government agents and either accepted or refused, and if they did not pass inspection, that he should have the right to return the horses to the place of purchase, deliver them to the vendor, and receive the note back. *Isaacs v. Elkins* (Vt.) *supra*. The

note sued upon was given to one who had no knowledge of the agreement, the transaction taking place through an agent; but no point is made of this fact.

One who has given his note for a scholarship in a university was held not entitled to show an oral agreement that the note should not be paid until the university should issue to him such scholarship; neither was he entitled to show an agreement that, if the university should fail to issue the scholarship, the note should become null and void. *Wayland University v. Boorman* (1883) 56 Wis. 657, 14 N. W. 819. The action in this case was by an indorsee, who claimed to be a bona fide holder, but the above holding, denying the admissibility of the parol evidence, seems not to be based upon this fact.

The purchaser of corporate stock in an oil company, who has given his note for the purchase price, cannot show an oral agreement that, if oil tanks were not put in at a certain place by a certain date, the note was to be returned. *Wilton v. Manitoba Independent Oil Co.* (1915) 25 Manitoba L. R. 628, 25 D. L. R. 243.

In an action on a promissory note in which the defense was that there was an oral agreement, contemporaneous with the execution and delivery of the note, to the effect that the maker intended subsequently to make a will, in which the payee was to be a beneficiary to the extent of the amount of the note, and that the note was to be held until the will was executed, when it was to be returned to the maker, the court states: "In this case the execution and delivery of the note are admitted and the obligation thereof recognized; and, for the purpose of defeating it, reliance is placed upon a contemporaneous oral agreement by which a condition not precedent but subsequent was offered to defeat liability. If a contemporaneous oral agreement providing for the surrender of the note upon the happening of a condition subsequent could be used to defeat recovery upon a note, the rule which provides that a note or other written contract cannot

be varied or modified by such an agreement would be abrogated." *Post v. Tamm* (1916) 91 Wash. 504, 158 Pac. 91.

Evidence that the note was to be paid in a certain way, or not to be paid unless it could be paid in a certain way.

Oral agreements shade gradually from those the purpose of which is to defeat the note altogether in the contingency named, into those which merely modify some term thereof. The former class of agreements is within the scope of this annotation; the latter is not. Between these two well-defined classes there are a number of classes of agreements which are equivocal. There are agreements that the instrument was to be paid in a certain way, or not to be paid unless it could be paid in a certain way; that there was to be a deduction in a certain event; that the note was not to be paid until a certain event; and many others. It is the purpose in the present annotation to discuss the representative cases belonging to these various classes, stopping short of those agreements which merely modify some term of the instrument. It is recognized, however, that there is no well-defined line between these classes of agreements; hence, the stopping place is necessarily more or less arbitrary.

Coming to the first of the classes of agreements just mentioned, it is held that evidence of an oral agreement that a note was to be paid in a certain way, or not to be paid unless it could be paid in a certain way, is inadmissible.

United States.—*Gorrell v. Home L. Ins. Co.* (1894) 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371; *Keith v. Parker* (1902) 115 Fed. 397.

Arkansas.—*Harmon v. Harmon* (1917) 131 Ark. 501, 199 S. W. 553.

Idaho.—*Stein v. Fogarty* (1896) 4 Idaho, 702, 43 Pac. 681.

Illinois.—*Walters v. Smith* (1860) 23 Ill. 342; *Hensley v. Mitchell* (1909) 147 Ill. App. 161.

Indiana.—*Tucker v. Talbott* (1860) 15 Ind. 114; *Parks v. Zeek* (1876) 53 Ind. 221; *Clanin v. Esterly Harvesting Mach. Co.* (1888) 118 Ind. 372, 38

L.R.A. 863, 21 N. E. 35. See *National City Bank v. Kirk* (1922) — Ind. App. —, 134 N. E. 772.

Iowa. — *Barhydt v. Bonney* (1881) 55 Iowa, 717, 8 N. W. 672; *Van Vechten v. Smith* (1882) 59 Iowa, 173, 13 N. W. 94; *Houts v. Sioux City Brass Works* (1907) 134 Iowa, 484, 110 N. W. 166.

Kansas. — *Van Fossan v. Gibbs* (1914) 91 Kan. 866, 139 Pac. 174; *Hangen v. Pinkston* (1922) — Kan. —, 204 Pac. 675.

Massachusetts. — *Currier v. Hale* (1864) 8 Allen, 47; *Perry v. Bigelow* (1879) 128 Mass. 129; *Commonwealth Trust Co. v. Coveney* (1909) 200 Mass. 379, 86 N. E. 895.

Missouri. — *National Live Stock Commission Co. v. Thero* (1911) 154 Mo. App. 508, 135 N. W. 961; *First Nat. Bank v. Henry* (1918) — Mo. App. —, 202 S. W. 281.

New York. — *Driscoll v. Colby* (1914) 161 App. Div. 922, 145 N. Y. Supp. 681; *Gillera v. Colby* (1914) 161 App. Div. 923, 145 N. Y. Supp. 682; *Gillera v. Owens* (1918) 182 App. Div. 580, 169 N. Y. Supp. 958; *Middleton v. Wooster* (1918) 184 App. Div. 165, 171 N. Y. Supp. 593; *Carnegie Trust Co. v. Kleybolte* (1911) 74 Misc. 246, 134 N. Y. Supp. 69; *Lewis v. Jones* (1860) 7 Bosw. 366.

Texas. — *Roundtree v. Gilroy* (1882) 57 Tex. 176; *Dwiggins v. Merchants' Nat. Bank* (1894) — Tex. Civ. App. —, 27 S. W. 171; *Nixon v. First State Bank* (1910) 60 Tex. Civ. App. 7, 127 S. W. 883, rehearing denied in (1910) — Tex. Civ. App. —, 129 S. W. 145; *Crooker v. National Phonograph Co.* (1911) — Tex. Civ. App. —, 135 S. W. 647; *Franklin v. Smith* (1880) 1 Posey, Unrep. Cas. 229. See *Clement, B. & Co. v. Houck* (1901) 113 Iowa, 504, 85 N. W. 765, *infra*, "Deduction in a contingency." See *Long v. Riley* (1911) — Tex. Civ. App. —, 139 S. W. 79.

Compare with cases discussed in II.

a. 2.

In addition to the foregoing cases there are certain agreements falling within the general class indicated which relate to matters that are subsequently treated, such as agreements

20 A.L.R.—30.

that the note is to be paid out of dividends or out of the proceeds of certain property.

The makers of a note executed for a stock of goods cannot show an oral agreement that the makers should not be required to pay any part of the note further than such sum as should be realized on account of said goods. *Bowers v. Linn* (1898) 14 Ky. L. Rep. 889.

In *Citizens Bank v. Martin* (1918) 171 Mo. App. 194, 156 S. W. 488, the condition is not stated. The defense the makers offered was that the money was borrowed for the purpose of purchasing stock to feed and put on the spring market, but it is not stated whether the condition was that the note was not to be payable unless the venture resulted successfully, or was merely that it was not to be paid until the stock was put on the market. That the court did not regard the condition as going to the existence of the contract seems clear from its citation of the earlier case in this jurisdiction of *Wislizenus v. O'Fallon* (1886) 91 Mo. 184, 3 S. W. 837, where a requested instruction was held erroneous in which the court was asked to declare that although the maker had executed and "delivered" his note in writing, containing an absolute and unconditional promise to pay, such note might be avoided by a condition not contained in the note, but dwelling in parol, that such note was to be paid only in a certain event.

An allegation that it was distinctly understood and agreed between the makers of a note and the payee that the note was to be used for the purpose of raising the necessary money to finance a certain transaction, and to purchase certain corporate stock, was held to show an agreement affecting the manner in which the note was to be paid, in *Gwinn v. Ford* (1915) 85 Wash. 571, 148 Pac. 891. According to the court, the written promise to pay cannot be so modified.

Where one partner has given a retiring partner a note to evidence money loaned by the retiring partner to the other, for the purpose of raising money to pay off the partnership

debts, and has obtained the defendant's indorsement on the note, the defendant, when sued on the note, cannot show that the payee, at the time of discount, agreed that the note should be repaid out of the effects of the copartnership, and that, if the assets of the copartnership did not pay the note, then that the payee would pay three fourths of the balance and the maker one fourth. *Gridley v. Dole* (1851) 4 N. Y. 486.

The maker of a note cannot show a contemporaneous parol agreement that it was to be paid in whole or in part in merchandise. *Harmon v. Harmon* (1917) 131 Ark. 501, 199 S. W. 553.

A variety of facts appear in these cases. Evidence that a note was to be paid out of the proceeds of certain broom corn sold, and that the broom corn had not been sold or the proceeds thereof collected, is inadmissible. *Hensley v. Mitchell* (1909) 147 Ill. App. 161. It is held in *Crooker v. National Phonograph Co.* (1911) — Tex. Civ. App. —, 135 S. W. 647, that parol evidence is inadmissible to show an agreement that a note might be paid by goods which the maker had on hand, purchased from the payee. The maker of a note cannot show that it was to be paid in work and labor. *Stein v. Fogarty* (1896) 4 Idaho, 702, 43 Pac. 681.

The purchaser of goods, who has given his note for the purchase price, cannot show an oral agreement that, if he did not have the money when the note matured, the payee would accept land in payment. *Barhydt v. Bonney* (1881) 55 Iowa, 717, 8 N. W. 672.

The general agent of a life insurance company, who has given his note to the company for money borrowed by him for the purpose of making a loan in such a manner as to procure policyholders for the company, cannot show an oral agreement that the note should be repaid out of renewals collected by him as agent out of the business. *Gorrell v. Home L. Ins. Co.* (1894) 11 C. C. A. 240, 24 U. S. App. 118, 63 Fed. 371.

The owner of a mine who has entered into an agreement to convey the

same to other parties, subject to a payment of \$50,000 to himself out of the net proceeds resulting from the operation of the mine or its sale, and through whom one of the persons to whom the mine was to be conveyed advanced \$7,500, for which the mine owner gave his note, cannot show an oral agreement that the note should be payable out of the first proceeds of the operation or sale of the mining claim, and not otherwise. *Keith v. Parker* (1902) 115 Fed. 397.

A creditor who has executed his note to the several creditors of his debtor cannot show an agreement that the note was to be paid only from money collected on accounts assigned to him, and that he should be liable to pay the notes only so fast as the collections would enable him to do so. *Walters v. Smith* (1860) 23 Ill. 342.

Evidence of an oral agreement that a surety signed the note on the distinct understanding that the principal maker of the note was to be retained in the employ of the payee until he could, from his earnings, pay the debt, is not admissible. *Tucker v. Talbott* (1860) 15 Ind. 114.

One who has given a note for the purchase price of a horse purchased from a person who owed him a sum of money in connection with another matter cannot show an oral agreement that, at the time of the contract, it was agreed between the parties that, if the payee of the note did not pay his indebtedness by doing certain work, then the horse should be accepted as payment of the note. *Parks v. Zeek* (1876) 53 Ind. 221.

The maker of a note which recites that it was given to secure the payment of a church debt cannot show that the payee agreed to collect the subscription which had been made, and apply the same to the payment of the note. *Clanin v. Esterly Harvesting Mach. Co.* (1888) 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35.

The maker of a note, who was appointed the agent of the payee to sell fencing material within his township, cannot show an oral agreement that he was to pay the note in commissions made on sales, and not otherwise.

Van Vechten v. Smith (1882) 59 Iowa, 173, 13 N. W. 94.

An oral agreement that the notes were not to be paid in money, but were to be available to the payee only in making final payment on a contract for telephone appliances, is inadmissible. *Houts v. Sioux City Brass Works* (1907) 134 Iowa, 484, 110 N. W. 166.

An oral agreement that the note was to be paid out of the profits of the business, which was to be launched by the use of money for which it was given, is inadmissible to vary the terms of the note. *VanFossan v. Gibbs* (1914) 91 Kan. 866, 139 Pac. 174; *Hangen v. Pinkston* (1922) — Kan. —, 204 Pac. 675. A decision similar to that in *VanFossan v. Gibbs* appears in *Underwood v. Viles* (1920) 106 Kan. 287, 187 Pac. 881, where there was a company organized and capital stock issued. It was held that an oral agreement that a note given in payment of capital stock was to be paid out of profits of the business was inadmissible.

The maker of a note which recites that it is secured by certain stock as collateral cannot show an oral agreement that, at the maturity, he was to have the right to have the stock back by paying the amount of the note, and, if he did not do so, that the payee was to have the stock absolutely, and the maker was not to pay the amount of the note. *Perry v. Bigelow* (1879) 128 Mass. 129.

It is held in *Commonwealth Trust Co. v. Coveney* (1909) 200 Mass. 379, 86 N. E. 895, that an oral agreement between an indorser and indorsee that payment should be required only of such sums as the indorser should realize as profits from the sale of his real estate could not be proved as a defense to an action on the note, nor in support of an independent action against the indorsee for breach of the agreement by enforcing the note.

Parol evidence is inadmissible to show a verbal agreement that the indebtedness described in certain notes should be paid out of the proceeds of certain horses then owned by the maker, and not otherwise. *National*

Live Stock Commission Co. v. Thero (1911) 154 Mo. App. 508, 135 N. W. 961.

A note given to a bank to obtain a loan with which to purchase stock in a real estate corporation organized by the bank's stockholders to take title to and dispose of real estate which the bank had acquired cannot show an oral agreement to the effect that the note was not to be paid unless the money was made out of a sale of the land. *First Nat. Bank v. Henry* (1918) — Mo. App. —, 202 S. W. 281.

The maker of a note secured by collateral cannot show an oral agreement that the note should be paid out of the proceeds of the collateral, or out of money which he claimed was due him as compensation for certain services. *Gilleran v. Owens* (1918) 182 App. Div. 580, 169 N. Y. Supp. 958.

A purchaser of corporate stock who has given his note for the purchase price cannot show an oral agreement that he would not be liable upon the note, but that the note was to be paid by the profits of the business. *Middleton v. Wooster* (1918) 184 App. Div. 165, 171 N. Y. Supp. 598.

It is held in *Carnegie Trust Co. v. Kleybolte* (1911) 74 Misc. 246, 134 N. Y. Supp. 69, that parol evidence is inadmissible in an action on a note which was delivered unconditionally, to show that it was orally agreed that payment of the note was to be dependent upon the ability of the maker to realize upon the sale of certain bonds.

The maker of a duebill for work and labor cannot show an oral agreement that part of the sum should be paid with two alternate land certificates. *Roundtree v. Gilroy* (1882) 57 Tex. 176.

One to whom land had been conveyed by the owner as a means of obtaining a loan, and who thereupon executed his note to the owner, which was discounted and the loan thus obtained, cannot show an oral agreement that the note was to be paid off by the owner of the land when it became due, and that, in case he failed to pay off the note, then the maker

should convey the land to the person who discounted the note, in full payment thereof. *Dwiggins v. Merchants' Nat. Bank* (1894) — Tex. Civ. App. —, 27 S. W. 171.

In *Nixon v. First State Bank* (1910) 60 Tex. Civ. App. 7, 127 S. W. 883, rehearing denied in (1910) — Tex. Civ. App. —, 129 S. W. 145, it is held that parol evidence is inadmissible in an action on a promissory note to show an agreement that the maker should have the option to satisfy the note by surrendering to the payee certain of its stock.

Where, in the course of the settlement of partnership transactions in real estate, one of the partners gave his note for a balance found due to the other, the maker of the note cannot prove by his own testimony that, at the time the note was given, the payee agreed that it should remain in his hands as a part of the partnership account, to be paid by any balance which might afterwards be due to the defendant for moneys received by the plaintiff for the firm. *Currier v. Hale* (1864) 8 Allen (Mass.) 47.

The maker of a note given upon a purchase of corporate stock cannot show that it was executed as a conditional obligation, payable only from dividends from the stock. *Abbott v. Kennedy* (1918) 133 Ark. 105, 201 S. W. 830; *Planters' Bank v. Brown* (1918) 22 Ga. App. 495, 96 S. E. 328; *Mumford v. Tolman* (1895) 157 Ill. 258, 41 N. E. 617; *Shinner v. Raschke* (1919) 213 Ill. App. 324; *Third Nat. Bank v. Reichert* (1903) 101 Mo. App. 242, 73 S. W. 893. In *Driscoll v. Colby* (1914) 161 App. Div. 922, 145 N. Y. Supp. 681; *Gilleran v. Colby* (1914) 161 App. Div. 923, 145 N. Y. Supp. 682, parol evidence is held inadmissible to show that certain notes for which shares in a company were pledged were to be paid from dividends on the shares.

See *Underwood v. Viles* (1920) 106 Kan. 287, 187 Pac. 881, *supra*.

Thus it is held that an unconditional note given upon a purchase of corporate stock cannot be converted into a promise dependent upon the happening of contingencies by an oral

agreement that the promoter would himself pay into the corporation for the maker the amount called for by the instrument, and that the dividends and profits accruing from the business would, within a stated period, pay off and discharge the obligation created by the written promise. *Planters' Bank v. Brown* (1918) 22 Ga. App. 495, 96 S. E. 328. The maker of a note cannot show that he and the payee formed a corporation of which he was the president and manager, and that he purchased 10 shares of stock from the plaintiff, for which the note in question was given, but that there was a parol agreement that the note should be paid out of the profits of the business, that stock bought by the defendant was to be held by plaintiff as collateral to the note, but that, if the business should not prove a success, the plaintiff should keep the stock and cancel the note. *Shinner v. Raschke* (1919) 213 Ill. App. 324.

Where the purchaser of corporate stock from the individual owners gave his note for the unpaid part of the purchase price, securing it by the stock purchased, the note containing provision for the sale of the collateral in case of default, such maker cannot enjoin the enforcement of the obligation by proving an agreement that, if the purchaser's share of the dividends is not sufficient to discharge the indebtedness at the maturity of his note, it would be from time to time extended until the profits should be sufficient to pay it, since this would make the performance of his contract depend upon conditions that were entirely outside of and disconnected from the contract itself. *Warner v. Bonds* (1914) 111 Ark. 238, 162 S. W. 788.

Evidence of an oral agreement that notes were to be paid only to the extent of money received for certain goods is inadmissible. *Byrd v. Marietta Fertilizer Co.* (1906) 127 Ga. 30, 56 S. E. 86; *Bowers v. Linn* (1893) 14 Ky. L. Rep. 889; *Western Mfg. Co. v. Rogers* (1898) 54 Neb. 456, 74 N. W. 849.

See comment upon *First Nat. Bank v. Burney* (1912) 91 Neb. 269, 186 N.

W. 37, in *SECURITY SAV. BANK v. RHODES* (reported herewith) ante, 412.

One to whom a debtor has assigned property, and who has given his note to another creditor of the same debtor, cannot show an agreement that the note was payable only out of the surplus of such assigned property after the payment of the maker's claim, and that there was no surplus, as this varies the terms of the note. *Guy v. Bibend* (1871) 41 Cal. 322. Such an agreement does not go to the consideration of the note. *Ibid*.

The maker of a note cannot show an oral agreement that he should expose for sale certain goods for the purchase price of which the note was given, and if they proved unsalable, they were to be returned to the payee of the note, who would receive the same at the same price at which they were originally sold. *Clement, B. & Co. v. Houck* (1901) 113 Iowa, 504, 85 N. W. 765. According to the court, to entertain this defense and permit the evidence in support thereof would clearly vary the terms of the note by making it payable in goods instead of in money.

In *Byrd v. Marietta Fertilizer Co.* (1906) 127 Ga. 80, 56 S. E. 86, supra, an action on ordinary promissory notes, each containing an absolute and unconditional promise to pay at a stated time a stated sum of money, a plea that, at the time these notes were given, it was agreed that the amount to be paid would not, at all events, be the amount stated in them, but that the makers were to pay whatever amounts were realized from the sale of fertilizer which had been shipped direct, and if the sales produced an amount which was less than the aggregate amount of the notes, they were only bound to pay that amount, was held bad as an attempt to vary the terms of the written contract by evidence of an oral contemporaneous agreement. The local representative of an agricultural machinery manufacturer who has given a note payable absolutely, and containing an indorsement of the payee on the back thereof that it is given for

certain agricultural machinery, and the maker is to have the option of paying it in notes of purchasers, cannot show that the note was given upon the representation of the manufacturer that he was dispensing with certain portions of the bookkeeping, and that the note would assist him in doing this, and that it was executed under an agreement that it need not be paid unless the goods were sold. *Western Mfg. Co. v. Rogers* (1898) 54 Neb. 456, 74 N. W. 849.

The right to return goods or part of the goods which constitute the consideration for the note has been held provable, on the theory that it constituted a set-off, in *Barnes v. Shelton* (1823) 16 S. C. L. (Harp.) 33, 18 Am. Dec. 642; and it was there held not to alter the terms of the note.

Parol evidence is not admissible to show an agreement that the maker of notes secured by mortgage was not to be held personally liable on the notes, but that the mortgagee is to look solely to the mortgage for the collection of the debt. *Smith v. McLaughlin* (1915) 120 Ark. 366, 179 S. W. 496.

The oral agreement which was held inadmissible in *Linville v. Holden* (1876) 2 MacArth. (D. C.) 329, was that the note was to be payable out of the property to which the payee of the note had the legal title, and which was being sold under some agreement between the payee and one of the makers.

See *Continental Gin Co. v. Stocker* (1916) 235 Fed. 1005, reversed on other grounds (1917) 157 C. C. A. 535, 245 Fed. 343, infra, V.

Agreements for a deduction in a contingency.

Another agreement which seeks to defeat the note only in part in a contingency is one that a deduction shall be made in the amount in a certain event. It has been stated generally that a promissory note cannot be trammelled with verbal conditions that make it obligatory for a less sum than that stated therein. *Swank v. Nichols* (1865) 24 Ind. 199. See *Cunningham v. Wardwell* (1835) 12 Me. 466, supra, "Not to be paid except in

a contingency." See *Title Guarantee & T. Co. v. Pam* (1922) 232 N. Y. 441, 134 N. E. 525, *supra*, II. a, 4.

And the cases generally sustain the conclusion that an agreement that there should be a deduction of a certain amount when determined or in a certain event is inadmissible in evidence.

In an action on a note given in a transaction of a sale of lumber, the defendant cannot show that the note was given subject to the terms of an oral understanding or agreement that a deduction should be made on account of some quantity of lumber not delivered. *Consolidated Lumber Co. v. Frew* (1916) 32 Cal. App. 118, 162 Pac. 480.

The maker of a note cannot show an oral agreement that the note was executed as a memorandum of the amount of his original indebtedness and interest due up to date thereof, with the collateral understanding and condition that when the amount of a certain indebtedness due the maker should be ascertained, it should be credited upon the memorandum, and the paper should then be considered as a promissory note. *Knight v. W. T. Walker Brick Co.* (1904) 23 App. D. C. 519.

An oral agreement to the effect that if the payee of a note should collect anything from the makers of original notes on which the maker of the note in suit was an indorser, the amount so collected should be credited upon the note in suit, which was given in satisfaction of his liability growing out of the indorsement, cannot be shown. *Prosise v. Phillips* (1913) 41 App. D. C. 226.

In an action upon an absolute and unconditional note for a stated sum, the defendant cannot show that he had effected a compromise with his creditors, of whom the payee of the note was one, for 50 cents on the dollar, but that, after the compromise had been agreed upon, the payee told the defendant that he would make out a note for the full amount of his claim, and desired the defendant to sign it, but that, immediately upon his signing the same, he, the payee, would

turn over the note to a third person for the defendant, and would abide by his former agreement to take 50 cents on the dollar in settlement of his former claim, but said that he wanted the note to show what amount had been compromised, and that he would then and there deliver the note to the third person for the defendant, but that when the note was signed and turned over to the payee, he refused to deliver it to the third person, in violation of his contract, or to accept one half the face value thereof in settlement of his claim. *Bowen v. Waxelbaum* (1907) 2 Ga. App. 521, 58 S. E. 784.

One who has assigned a promissory note for a stated sum without informing himself of the correctness of the amount named cannot show a parol promise of the other party to correct errors. *Stacer v. Ehrlich* (1918) 22 Ga. App. 285, 95 S. E. 1016.

A note given from one person to another, between whom there existed an open account, cannot be varied by a contemporaneous verbal agreement that whatever sum the payee had not accounted for to the maker on the settlement should, when ascertained, go in discharge of the note. *Mill v. Comparet* (1860) 15 Ind. 243.

One who signs a note as surety cannot show an oral agreement between himself and the payee at the time the note was signed, that before he could be held thereon or required to pay any portion thereof, the payee would exhaust chattel mortgage securities given by the principal, and that the defendant should be held for the balance only. *Conqueror Trust Co. v. Danforth* (1918) 103 Kan. 860, 177 Pac. 357.

A note given upon the purchase of a milk route by one who agrees to buy his milk from the payee at a certain rate cannot be modified by an oral agreement that, upon the settlement of the note, the maker is to be allowed a certain discount on the milk thus bought. *Kelley v. Thompson*. (1900) 175 Mass. 427, 56 N. E. 713.

The purchaser of cattle, who has given his note for the purchase price, cannot show an oral agreement that,

if other cattle which had been purchased by the maker from the payee for breeding purposes should prove to be barren, a credit for the amount of the damages should be allowed on the note. *Phelps v. Abbott* (1897) 114 Mich. 88, 72 N. W. 3.

The obligor on a bond secured by a mortgage for a sum certain cannot show an oral agreement that the bond should cover whatever may be found to be due upon a settlement. *Moffitt v. Maness* (1889) 102 N. C. 457, 9 S. E. 399.

The owner of land who has obtained a loan on the security of a deed of trust thereon, and given his note for the loan, cannot show an agreement at the time of delivery of the note that, if the land was sold or the note paid prior to its maturity, the payee would account to him for a proportional part of an amount which had been included in the note for interest. *Guarantee L. Ins. Co. v. Davidson* (1921) — Tex. —, 234 S. W. 888.

The purchaser of a store who has given his note for the purchase price, cannot show an oral agreement that, if any mistakes or errors are found or discovered in the amount due the vendor upon notes, books of accounts, and assets, the same should be allowed and indorsed upon the note. *Gregory v. Hart* (1858) 7 Wis. 532.

The purchaser of timberland who has given his note for the purchase price cannot show an oral agreement to allow him at a certain rate for any shortage. *Hubbard v. Marshall* (1880) 50 Wis. 322, 6 N. W. 497.

One who has executed a promissory note in the ordinary form for attorney's fees cannot show an oral agreement that, in the event he was not indicted, he should pay a less sum than that mentioned in the note. *Abelowich v. Greenville Nat. Bank* (1899) 22 Tex. Civ. App. 272, 54 S. W. 794.

So, parol evidence is incompetent to show that the signer of a subscription in the way of a donation was not to pay more than another.

First Free-Will Baptist Parish v. Perham (1892) 84 Me. 563, 24 Atl. 958, holding, in an action to recover on a contract of subscription toward

the building of a meeting house, that it is incompetent to show by parol that it was agreed that the defendant should subscribe for an equal amount with another individual, and that the defendant should not be required, in any event, to pay more than this individual paid.

But an agreement upon the execution of notes that, upon receipt of the proceeds of certain lands, the amount thereof would be indorsed on the notes, has been admitted on the theory that it does not in any manner tend to vary the terms of the notes. The oral agreement is said to be entirely independent of the notes, and to relate solely to the disposition of funds subsequently to be received. *Roberts v. Ozias* (1917) 179 Iowa, 1141, 162 N. W. 584.

Agreement that the note was not to be paid until the happening of a certain event.

It has been held that parol evidence is inadmissible to show that a bill or note, absolute as to time of payment, was not to be paid until the happening of a certain event.

Alabama.—*Walker v. Clay* (1852) 21 Ala. 797; *Cowles v. Townsend* (1857) 31 Ala. 133.

District of Columbia. — *Fowler v. Zimmerman* (1914) 42 App. D. C. 70.

Florida.—*Rivers v. Brown* (1911) 62 Fla. 258, 56 So. 553.

Indiana.—*Graves v. Clark* (1842) 6 Blackf. 183; *Harvey v. Laffin* (1851) 2 Ind. 477; *Grantham v. Hoglen* (1919) — Ind. App. —, 125 N. E. 461.

Kentucky. — *Fechheimer v. Goldnamer* (1916) 169 Ky. 243, 183 S. W. 541.

Maine. — *Porter v. Porter* (1862) 51 Me. 376; *Ockington v. Law* (1877) 66 Me. 551.

Maryland. — *McSherry v. Brooks* (1876) 46 Md. 103.

Minnesota.—*Security Nat. Bank v. Pulver* (1915) 131 Minn. 454, 155 N. W. 641.

Mississippi.—*Federal Discount Co. v. Fletcher* (1913) 104 Miss. 251, 61 So. 308.

Nebraska. — *Van Etten v. Howell* (1894) 40 Neb. 850, 59 N. W. 389;

Mallory v. Fitzgerald (1903) 69 Neb. 312, 95 N. W. 609.

New York. — **Bloom v. Horwitz** (1917) 100 Misc. 689, 166 N. Y. Supp. 786; **Lewis v. Jones** (1860) 7 Bosw. 366; **Weinhandler v. Loewenthal** (1916) 159 N. Y. Supp. 695, affirmed in (1917) 176 App. Div. 909, 162 N. Y. Supp. 1149.

North Carolina.—**Cherokee County v. Meroney** (1917) 178 N. C. 653, 92 S. E. 616; **Acme Mfg. Co. v. McCormick** (1918) 175 N. C. 277, L.R.A. 1918F, 572, 95 S. E. 555.

Oregon.—**Wilson v. Wilson** (1894) 26 Or. 251, 38 Pac. 185.

Texas. — **Long v. Riley** (1911) — Tex. Civ. App. —, 139 S. W. 79.

England. — **Moseley v. Hanford** (1830) 10 Barn. & C. 729, 109 Eng. Reprint, 621, 8 L. J. K. B. 261; **Adams v. Wordley** (1836) 1 Mees. & W. 375, 150 Eng. Reprint, 479, 2 Gale, 29, 5 L. J. Exch. N. S. 158.

Compare with cases discussed in II. a, 2, supra.

An oral agreement of the payee to renew the note from time to time until the improvement in the business situation should enable the maker to pay it cannot be shown in contradiction of the note. **Hall v. First Nat. Bank** (1899) 173 Mass. 16, 44 L.R.A. 319, 73 Am. St. Rep. 255, 53 N. E. 154.

It was held in **Hancock v. Edwards** (1846) 7 Humph. (Tenn.) 349, that a bill in chancery would not lie to enjoin the collection of a judgment on a note, on the theory that, at the time of the giving of the note, there was an oral agreement that it should not be enforced until a date subsequent to that fixed therein. The court says that there is no pretense that the promise formed a part of the contract which was intended to be reduced to writing, and was omitted by accident or mistake, or the fault or misconduct of the opposite party. It was only an inducement held out to secure the contract and make the most of it, and there is no principle upon which it can be incorporated into the written contract by parol proof.

See **Citizens Bank v. Martin** (1913) 171 Mo. App. 194, 156 S. W. 488, supra, "Paid in a certain way."

See **Adams v. Thurmond** (1915) 48 Okla. 189, 149 Pac. 1141, supra, II. a, 2, "To be paid only in a certain contingency."

A great variety of facts have been presented in the foregoing cases. Parol evidence is inadmissible to show that a note payable at a time certain, given for services to be rendered in the future, was not to be paid until the services were rendered. **Walker v. Clay** (1852) 21 Ala. 797.

The acceptor of a bill of exchange payable at a time certain cannot show a parol agreement that he should not be called upon to pay the bill until the payees had prosecuted the drawers to judgment or insolvency. **Cowles v. Townsend** (1857) 31 Ala. 133 (the consideration for the bill was goods sold by the payees to the drawers).

It is held in **Fowler v. Zimmerman** (1914) 42 App. D. C. 70, in an action upon a promissory note, that parol evidence that the payee agreed that he would extend the time of payment from time to time until the maker could dispose of certain real estate is inadmissible.

In **Rivers v. Brown** (1911) 62 Fla. 258, 56 So. 553, an action upon a promissory note, evidence of an agreement that the note should not be paid until certain property should be sold and the purchase price thereof collected was held inadmissible.

It is held in **Fechheimer v. Goldnamer** (1916) 169 Ky. 243, 183 S. W. 541, that a note cannot be varied or contradicted by a parol contemporaneous agreement that the payees would not demand payment of the note at maturity, or until such time as the principal debtor should be able to pay the same, or until he closed up or disposed of the business he then contemplated starting.

The maker of notes given to evidence the purchase price of an interest in machinery for making clothespins cannot show a prior or contemporaneous oral agreement that the time for the payment of the notes should be extended until he had realized sufficient from the clothespin business to pay them. **Ockington v. Law** (1877) 66 Me. 551.

A note payable one day after date cannot be modified by showing an agreement that it should not be sued on until it should be ascertained whether certain debts could be realized on or not. *McSherry v. Brooks* (1876) 46 Md. 103.

The maker of a note secured by collateral cannot show an oral agreement that he was not to be held liable on the note until the collateral was exhausted. *Security Nat. Bank v. Pulver* (1915) 131 Minn. 454, 155 N. W. 641.

The maker of a note given for goods cannot show an oral agreement that he was not to be called upon to pay the note until he had succeeded in disposing of sufficient goods to liquidate the same. *Federal Discount Co. v. Fletcher* (1918) 104 Miss. 251, 61 So. 308. The note involved in this case was a renewal note which had been given to an assignee of the original. The defendants claimed that the original note was given under an agreement that they were to be held liable only in event that they had sold a sufficient amount of the goods.

The maker of a note payable on a specified date cannot show an oral agreement that the note was not to be paid until a certain suit should be determined. *Van Etten v. Howell* (1894) 40 Neb. 850, 59 N. W. 389.

The maker of a note cannot show an oral agreement that it was not to be paid until he had recovered judgment in a certain action then pending. *Mallory v. Fitzgerald* (1913) 69 Neb. 312, 95 N. W. 601.

The maker of a note cannot show an oral agreement that the note was not to be payable nor the defendant liable thereon unless and until he had received out of the net rents, issues, and profits of certain property, sufficient to pay the note. *Lewis v. Jones* (1860) 6 Bosw. (N. Y.) 366.

It is held in *Myers v. Stein* (1913) 154 App. Div. 681, 139 N. Y. Supp. 762, that a defense to notes payable upon a date certain, that they were not to be paid until certain stock in the possession of the payee should be disposed of, whereupon the proceeds thereof were to be applied to the ex-

tinguishment of the notes, which were not to be enforced in any other manner unless, after such sale, a deficiency should arise, was an attempt to vary the terms of the notes.

It is held in *Weinhandler v. Loewenthal* (1916) 159 N. Y. Supp. 695, affirmed in (1917) 176 App. Div. 909, 162 N. Y. Supp. 1149, that parol evidence is inadmissible in an action on a demand note, to show that the note was not to be collected until the death of a certain person. In this case the holder of the note sought to introduce the evidence to avoid the Statute of Limitations.

The sureties on an official bond against whom the obligee of the bond obtained a judgment, who had executed a note for the amount thereof, which was payable at a time certain, were not permitted to show an oral agreement that the note was not to be paid until the sureties had sold certain real estate, in *Cherokee County v. Meroney* (1917) 173 N. C. 653, 96 S. E. 616.

The maker of a note cannot show an oral agreement that the payee would accept interest on the same annually until the defendant could pay the whole of the note. *Acme Mfg. Co. v. McCormick* (1918) 175 N. C. 277, L.R.A.1918F, 572, 95 S. E. 555.

The maker of a note cannot show an oral agreement that the note was intended merely as a memorandum, and was not to be paid until the amount thereof could be realized out of a mine. *Wilson v. Wilson* (1894) 26 Or. 251, 38 Pac. 185.

It was held in *Long v. Riley* (1911) — Tex. Civ. App. —, 139 S. W. 79, that a parol agreement cannot be set up to show that a note was to be paid out of money collected on an insurance policy, and that the payee would carry the note until such policy was paid.

Parol evidence is inadmissible to show that a note bearing a due date was to become due prior to the date mentioned therein upon the happening of a certain event. *Floyd v. Brawner* (1881) 1 Tex. App. Civ. Cas. (White & W.) 53.

In addition to the foregoing cases

there are a number of others that bear more or less directly upon the inadmissibility of evidence that the note was not to be paid until the happening of a certain event.

The drawer of a draft, who was sued upon the nonacceptance thereof by the drawee, cannot show an oral agreement that the draft should not be presented for acceptance until after a certain other draft was provided for by placing funds in the hands of the drawee, who had agreed to accept the last draft after funds had been received to meet his acceptance of the first. *Brown v. Wiley* (1857) 20 How. (U. S.) 442, 15 L. ed. 965.

The drawer of a bill of exchange payable at a certain date, which had been dishonored upon presentation for acceptance, may be sued immediately by the holder, and cannot set up an oral agreement not to sue in any event before the time stipulated in the bill for payment. *Rockmore v. Davenport* (1855) 14 Tex. 602, 65 Am. Dec. 132.

The maker of a note given in payment of goods purchased cannot defeat his written contract by showing a contemporaneous oral agreement providing that he was to pay for the goods, and have it credited upon the note as the goods were delivered to him. *Beattyville Bank v. Roberts* (1904) 117 Ky. 689, 78 S. W. 901.

In *Slusher v. Conant* (1896) 18 Ky. L. Rep. 660, 37 S. W. 579, an agreement that a note given for land was not to be paid until the grantor had the land surveyed and boundaries located, or until it was shown that it was included in a certain parcel, was denied admission, the court saying that as the agreement was of such importance as to defeat recovery on the note, it should have been evidenced by writing, and not left to the memory of those who are now making conflicting statements in regard to it.

An oral contemporaneous agreement that a mortgagor should have as long a time as he desired to pay and liquidate whatever sums of money should be secured by the mortgage is not admissible to contradict and con-

trol the express terms of the note secured by and described in the mortgage. *Downing v. Brennan* (1919) 232 Mass. 535, 122 N. E. 729.

Evidence of an oral agreement that the payee of a note would let the note run for the maker as long as he wanted it is inadmissible. *Simpson v. Blaine* (1921) 191 Ky. 465, 230 S. W. 934. Such agreements have, in general, been excluded from the present annotation.

It cannot be shown that a note was to be paid at a time other than that fixed therein. *International Harvester Co. v. Parham* (1916) 172 N. C. 389, 90 S. E. 503.

Stockholders who have signed a corporate note as sureties cannot show an oral agreement with the payee that he would extend the date of payment in the event that certain debts of the corporation should not be paid on or before maturity of the note. *Martin v. Daniel* (1914) — Tex. Civ. App. —, 164 S. W. 17.

The maker of a due bill executed in November, in which he acknowledges that there is due from him a stated number of sheep, cannot show that it was understood and agreed that the sheep were not to be delivered until the following spring. *Self v. King* (1856) 28 Tex. 552.

In fact it has been held that a note given for goods sold, which is payable at a time certain, cannot be modified by a written memorandum that the goods should be paid for at another time; that is, not until sold. *Miller v. White* (1845) 7 Blackf. (Ind.) 491. According to the court, if the note itself had contained a reference to the written contract, both might have been viewed as one contract and then construed together; but to suffer a connection between them to be established by parol evidence would be a violation of the rule that such evidence is not admissible to change or explain a written contract.

Parol evidence has been held inadmissible in cases in which there was a mere statement by the payee that he would not collect a note given for the purchase price of certain property until it had been proved that the

property met a guaranty given. *Probasco v. Shaw* (1915) 144 Ga. 416, 87 S. E. 466.

A note which, by its terms, was payable on demand, cannot be shown to have been made under an agreement that it was not to be paid until after the death of the payee, nor then unless the amount received by the maker as his share of the payee's estate should be greater than the amount received by the other children of the payee, or unless the payee should become insolvent. *Graves v. Clark* (1842) 6 Blackf. (Ind.) 183.

Where a note is given to one of two partners for a debt due the partners, and the partner to whom the note is payable subsequently executes another note to the other partner for his interest, he cannot show an oral agreement that the second note was not to be paid until the first had been paid. *Harvey v. Laffin* (1851) 2 Ind. 477.

An oral agreement at the time of the delivery of a note and mortgage that the note and mortgage were not to become due and payable until enough sand had been sold and removed from the real estate described in the mortgage to pay the same is inadmissible to vary the terms of the note. *Brantham v. Hoglen* (1918) — Ind. App. —, 125 N. E. 461.

The purchaser of a right to vend a "patent" medicine, who has given his note for \$50, payable in twelve months, "or as soon as I can sell" fifty dollars' worth of the medicine, cannot show, when sued on the note, that it was not due and payable until fifty dollars' worth of the medicine was sold, and that he had not sold any of the medicine, and could not have done so by the use of due diligence. *Harlow v. Boswell* (1853) 15 Ill. 56.

It was held competent in *Rosenstock v. Montague* (1899) 28 Misc. 483, 59 N. Y. Supp. 500, to show an oral agreement that a note payable upon demand was not to be presented or the payment thereof demanded until a certain event had taken place, and that such an event had not yet occurred. While the court does not

expressly state the grounds of this decision from the citation of authorities, it is apparently based upon the theory that this could be shown as a conditional delivery. This is, of course, a misapplication of the rule.

Evidence of an agreement to pay when a certain contingency occurred.

Parol evidence of an agreement that a note absolute in terms was to be paid when a certain thing was done is inadmissible. *Scaife v. Beall* (1871) 43 Ga. 333; *Block v. Stevens* (1902) 72 App. Div. 246, 76 N. Y. Supp. 213.

A note payable at a time certain cannot be modified by a verbal agreement that it was to be paid when the maker recovered a judgment upon a cause of action held by him. *Pringle v. Aston* (1918) 37 Cal. App. 409, 174 Pac. 78.

The acceptor of a bill of exchange, who has agreed in his acceptance "to pay when due," cannot show an oral agreement that he would pay when he had funds belonging to the drawer. *Sylvester v. Staples* (1858) 44 Me. 496.

A purchaser of goods who has given his note for the purchase price, payable at a time stated therein, cannot show an oral agreement that the note was to be paid when the goods were delivered. *Block v. Stevens* (1902) 72 App. Div. 246, 76 N. Y. Supp. 213.

The payee of a note cannot show an oral agreement that it was payable on a contingency which had occurred, for the purpose of accelerating the due date of the note. *Lauth v. Badeaux* (1914) 189 Ill. App. 88.

Parol evidence is not competent to show an agreement by the payee of a note that the same might be paid off in instalments. *Nalitzky v. Williams* (1916) 151 C. C. A. 44, 237 Fed. 802.

An oral agreement is inadmissible to show that a note was not to be paid at the maturity thereof, but was to be extended for an indefinite period. *Commercial Nat. Bank v. Hutchinson Box, Board & Paper Co.* (1916) 98 Kan. 350, 158 Pac. 44.

Compare with cases discussed in II. a, 2.

c. Relation to consideration.

A number of the foregoing cases which have denied the admissibility of the evidence have done so on the theory that it did not tend to impeach the consideration or show a failure thereof. *Penny v. Graves* (1850) 12 Ill. 287; *Walters v. Smith* (1860) 23 Ill. 342; *Foy v. Blackstone* (1863) 31 Ill. 538, 83 Am. Dec. 246; *Harris v. Galbraith* (1867) 43 Ill. 309; *Miller v. Wella* (1867) 46 Ill. 46. And see Georgia cases *infra*. What is and what is not a failure of consideration is a question of difficulty. The court in *Boynton v. Twitty* (1874) 53 Ga. 214, says: "It is sometimes difficult to say when the parol evidence offered is a mere explanation of the consideration and when it is an attempt to attach a condition to the contract; and it is hard to reconcile all the cases for this reason. The line of distinction is often so dim that one mind sees the case on one side of it and another mind sees it on the other." Perhaps as good a general test of the admissibility of evidence as can be framed appears in *Byrd v. Marietta Fertilizer Co.* (1906) 127 Ga. 30, 56 S. E. 86, as follows: "The consideration of a contract may be always inquired into to show that the promise is no longer binding according to its tenor; but, in inquiring into the consideration, the promisor cannot deny that he made the promise evidenced by the writing." The court in *Planters' Bank v. Brown* (1918) 22 Ga. App. 495, 96 S. E. 328, says the general rule which ordinarily permits the consideration of a written contract to be inquired into where the controversy is between the original parties does not authorize the promisor to alter or deny the terms of the obligation, whereby an unconditional promise is converted into one which is dependent upon the happening of contingencies.

It is beyond the province of this annotation to enter into any exhaustive discussion of what constitutes a failure of consideration. It is the purpose to notice that question only so far as it relates to the question of

parol evidence of oral, contemporaneous agreements. In accord with this limitation the following cases, holding that the evidence did not show a failure of consideration so as to render it admissible, are given merely as examples of what constitutes a failure of consideration.

An attempt to show that notes were to be paid only to the extent of the proceeds realized from the sale of fertilizer which had been shipped to the maker does not show merely a failure of consideration, but is an attempt to show that the promise in the writing was not the promise really made. *Byrd v. Marietta Fertilizer Co.* (Ga.) *supra*.

Evidence of an agreement that a note was not to be paid if other persons did not claim interest on other notes has nothing to do with the consideration of the note in question. *Penny v. Graves* (1850) 12 Ill. 287.

An oral agreement between the creditors of a debtor, under which one of them gave his note for the amount of the indebtedness, that he should not pay the note except in so far as he should collect the money from accounts of the debtor assigned to him, and that he should be liable to pay the note only as fast as the collections would enable him to do so, states a fact which does not prove a want or failure of consideration for the note, but is an attempt to vary the terms thereof. *Walters v. Smith* (1860) 23 Ill. 342.

An oral agreement by one who accepted the delivery of slaves sold to another and the vendor, that a note given by the person thus accepting the delivery should be surrendered upon the return of the purchaser of the slaves and the giving of his note, does not impeach the consideration of the note, for the slaves were delivered to the maker. The vendor parted with his property in them on the face of the note, and it is immaterial to whom the benefit accrued, whether to the actual purchaser or to the maker of the note. This is a matter that must be adjusted between them. *Harris v. Galbraith* (1867) 43 Ill. 309.

There is no failure of consideration where an administratrix who had a claim against certain persons, being desirous of realizing a part thereof, applied to them for that purpose, and they agreed that if she would execute a note, with security, they would secure for her that sum,—by the time the note matured, they would pay her upon the demand she held against them in a sum sufficient to pay the note,—where she admits having received the sum of money mentioned in the note from the payees thereof. *Miller v. Wells* (1867) 46 Ill. 46.

An oral agreement that the maker of a note given upon the purchase of a patent washing machine was not to pay any money on the note except such as should be realized from sales of the machine, does not pertain to the consideration of the note, but goes to its validity. *De Long v. Lee* (1887) 73 Iowa, 53, 34 N. W. 618.

Where a note is given to an attorney in payment of his services in a certain case, and there is no failure or unwillingness on his part to render the services, but he is precluded from doing so by the compromise of the suit, an oral agreement that the note was not to be paid in the event of a compromise cannot be shown, on the theory that it shows a failure of consideration. *Dale v. Pope* (1823) 4 Litt. (Ky.) 166.

There is no absolute and total failure of consideration for a note which was given by the purchaser of personal property on which there was a chattel mortgage, to the holder of the chattel mortgage, where the chattel mortgage and promissory notes, which had indorsers against whom it would be enforceable, were assigned to such purchaser. *Central Sav. Bank v. O'Connor* (1903) 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11, s. c. on 2d appeal (1905) 139 Mich. 82, 102 N. W. 280.

No failure of consideration is shown in an action on a note given by a purchaser of corporate stock, who had an agreement with the corporation to sell its stock on commis-

sion, when the defendant was unable to sell sufficient stock to enable him to pay the note from the commissions, the note was not to be paid, but the stock returned and the note canceled, and that he had not been able to sell sufficient stock. *Denman v. Kaplan* (1918) — Tex. Civ. App. —, 205 S. W. 739.

IV. Evidence held admissible on the theory of partial integration.

The principle of evidence is well settled that the parol-evidence rule, excluding parol evidence to contradict or vary the terms of a written instrument, does not apply where the entire agreement of the parties has not been reduced to writing, to exclude parol evidence of the part not in writing. This exception has been stated in various ways. Greenleaf, after referring to certain other exceptions to the parol-evidence rule, says in vol. 1, § 284a: "Nor does the rule apply in cases where the original contract was verbal and entire and a part only of it was reduced to writing." Wigmore, after referring to the cases in which a certain part of the transaction has been embodied in a single writing, but another part has been left in some other form, says: "Here, obviously, the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder." 4 Wigmore, Ev. p. 3425, § 2430. Chamberlayne, in his discussion in the *Modern Law of Evidence*, says, vol. 5, § 3553, that "evidence of a prior or contemporaneous parol agreement or understanding is frequently received where it is consistent with the writing in question, and it is apparent that the instrument was not intended as a complete embodiment of the undertaking."

Whether the writing which appears as a memorial of the transaction exclusively represents the terms of the transaction as an embodiment of the entire transaction is a question of intention; and, being such, the application of the rule to specific facts is one of difficulty. 1 Greenl. Ev. § 805f; 4 Wigmore, Ev. p. 3425, § 2430. Obviously, however, parol evidence can-

not be introduced on the theory of partial integration to affect a part of the contract which is actually put in writing. This is a condition of the rule as stated by all of the above authorities. Applying this to a bill or note, it would seem that any agreement that would defeat the obligation of the note and make it conditional would contradict the part of the agreement which is put in writing in the unconditional obligation evidenced by the note.

It must be admitted, however, as will appear from the subsequent cases, that this conclusion is not sustained, for in many of the cases the unconditional obligation of a note has been contradicted and varied by parol evidence of an agreement that makes the obligation conditional, on the theory of partial integration.

On the theory that there had been only a partial integration, parol evidence of a prior or contemporaneous oral agreement was admitted in *Pryor v. Ludden & B. S. Music House* (1910) 184 Ga. 288, 28 L.R.A. (N.S.) 267, 67 S. E. 654, holding that where a note recites that it is given in consideration of the purchase price of a particular described piano, in a suit thereon by the promisee, the maker may plead in defense of the action that the plaintiff represented that the piano was new and capable of being used as a musical instrument, and that the defendant, acting on this representation and warranty, and without actual or constructive knowledge of its true condition, bought it, when in point of fact it is worthless and second hand, and not capable of being used as a musical instrument. This case is approved in *International Harvester Co. v. Morgan* (1917) 19 Ga. App. 716, 92 S. E. 35.

Although, under the rule stated in *Pryor v. Ludden & B. S. Music House* (Ga.) *supra*, a plea setting up a breach of an oral warranty can be maintained in a suit on a purchase-money note which, though reciting the consideration, fails to integrate within itself the terms of the sale agreement, where the note sued on recites that, "in consideration of such

renewal and extension of time of payment, I hereby expressly waive all claims arising out of the purchase of said property and all defenses, statutory or otherwise, to the payment thereof," this provision of the agreement is a waiver of any express or implied warranties relative to the subject-matter of the sale, with the effect that all previous and contemporaneous representations and warranties are merged into and controlled by the instrument. *Anderson v. International Harvester Co.* (1921) — Ga. App. —, 109 S. E. 417.

The maker of a note given for the purchase price of a horse may show an oral agreement that the note should be returned if the horse died. *Barlow v. Flemming* (1844) 6 Ala. 146. According to the court: "The note given as the price of the horse does not necessarily refer to the contract of sale, or contain, any of its terms. In itself it is a mere promise to pay, and its consideration was a proper subject of inquiry, whether shown by parol or in writing."

In an action by a bank upon a note signed by one of its stockholders, the defendant was permitted to plead and prove an agreement between the bank, which had suffered a loss causing a deficit in its capital, and the stockholders, that each stockholder should execute to the bank a promissory note for the face value of each share of stock held by him, and if any part of the money so lost to the bank should be recovered, the amount thereof should be credited pro rata on the several notes executed by the stockholders, and that the bank had collected stated amounts of the deficit, and that the proportion thereof due the defendant under the agreement was sufficient to reduce his liability to a stated amount, and tendered the balance. The court says that the note did not purport to express the entire antecedent contract out of which it sprang, and that contract was therefore not merged into it. Two of the judges dissent on the theory that an absolute, unconditional promissory note cannot be changed into a conditional obligation by parol evidence

in the absence of fraud, accident, or mistake. *Thompson v. Citizens' Bank* (1915) 144 Ga. 10, 85 S. E. 1002.

In an action to recover a balance of the purchase price of a binder, in which notes given by the purchaser were introduced in evidence to prove plaintiffs' case, the maker may show a breach of warranty, and that the machine delivered was not equal to the sample by means of which the sale was made. *Gammon v. Ganfield* (1890) 42 Minn. 368, 44 N. W. 125.

The maker of a note given for the purchase price of corporate stock may show an oral agreement that, at any time he ceased to be a director of the corporation, or should desire to return or resell the stock, the corporation would take it back and surrender to him his note. *Germania Bank v. Osborne* (1900) 81 Minn. 272, 83 N. W. 1084.

A purchaser of cattle from a dealer, who has given his note for a balance due on the purchase price, may show an agreement that he should pasture the cattle, and at a later date sell them through the dealer, who was to apply the proceeds on the note, and pay the maker any overplus, but the maker was not to pay any deficiency. *Drovers Cattle Loan & Invest. Co. v. McGraw* (1921) — Minn. —, 184 N. W. 365.

It has been held competent for the purchaser of a stock of goods for the purchase price of which he gave his two notes, to show an oral agreement that, later on, the vendor and payee of the notes would enter into the business as an equal partner, in consideration of one of the notes, which he would deliver up to the maker. *Henry v. McCardell* (1897) 15 Tex. Civ. App. 497, 40 S. W. 172. Such an agreement, according to the court, is consistent with the notes.

In *Hopper v. Eiland* (1852) 21 Ala. 714, where a written contract for the payment of money was drawn up, but did not actually represent the contract between the parties, and the payee, who was in a hurry, proposed to the maker that if he would sign the instrument, they would meet at some future time, when convenient, and ex-

ecute another instrument which should contain the terms of the contract as then agreed upon, the court held that, for want of an absolute, unconditional delivery, the paper never had the character and qualities of a note so as to make it evidence as such for any purpose. No objection was made in the court below to the parol evidence going to vary a written instrument, and the supreme court held that the objection could not be noticed in that court, but it is said that if the objection had been made, the court would have been disposed to consider it untenable under the proof in the case.

In *Rahe v. Yett* (1914) — Tex. Civ. App. —, 164 S. W. 80, a defense to an action on a check, that it was to be paid by goods to be furnished the payee by the drawer, was held a proper one, but on the theory that the check was given as part of a more comprehensive transaction, the terms of which were not permitted to be expressed in writing, so that proof of the parts not reduced to writing was admissible; and further, because the check was not given in final settlement of the account between the parties, but with the distinct understanding that a further settlement would be had at a future time.

See *Oakland Cemetery Asso. v. Lakins* (1904) 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559, *infra*, VII. c.

In North Carolina the maker of a note or acceptor of a bill is held entitled to show an oral agreement that he was to pay the same only in a certain event, on the theory of partial integration. *Penniman v. Alexander* (1892) 111 N. C. 427, 16 S. E. 408; *Quin v. Sexton* (1899) 125 N. C. 447, 34 S. E. 542; *Evans v. Freeman* (1906) 142 N. C. 61, 54 S. E. 847; *Martin v. Mask* (1912) 158 N. C. 436, 41 L.R.A.(N.S.) 641, 74 S. E. 343; *Kernodle v. Williams* (1910) 153 N. C. 475, 34 L.R.A.(N.S.) 934, 69 S. E. 431; *Kernodle v. Kernodle* (1917) 174 N. C. 441, 93 S. E. 956; *Farmington v. McNeill* (1917) 174 N. C. 420, 93 S. E. 957.

And see *Parker v. Bond* (1898) 121 Ala. 529, 25 So. 898, and *Gillespie v.*

Hester (1909) 160 Ala. 444, 49 So. 580, supra, II. a, 5,—cases which more nearly involve such failure of consideration.

The facts involved in these cases illustrate the broad way in which this principle has been applied.

An owner of land for whom a contractor is erecting houses, who has accepted an order of the contractor in favor of a materialman, may show an oral agreement that he was only to pay the acceptance in case he became indebted to the contractor for the amount thereof. Penniman v. Alexander (1892) 111 N. C. 427, 16 S. E. 408.

One of two coadventurers in a real estate speculation to whom a note for the purchase money of the real estate sold by them was given, and who executed his sealed note to his coadventurer for the coadventurer's share in the transaction, may show an oral agreement that the sealed note was only to show the payee's part of the price for which the land had been sold, and that the note was to be paid out of the purchase money when received from the purchaser of the land, and that it was not to be paid until the purchase money was paid, that no part of the purchase money had ever been paid and never would be paid, as the purchaser was insolvent, and nothing was to be made out of him by legal process. Quin v. Sexton (1899) 125 N. C. 447, 34 S. E. 542.

The purchaser of the right to sell a patent device, who has executed his bond for the purchase price, was held entitled to show an agreement that payment of the bond was to be made out of the proceeds of the sale of the patent right for which it was given, and if there were no such sales, there was to be no payment. Evans v. Freeman (1906) 142 N. C. 61, 54 S. E. 847. It is stated that where only part of the contract has been reduced to writing, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written.

A daughter and her husband, who have given a bond to her father, may

show an oral agreement that the makers were to pay a certain amount upon the bond, which had been paid, and that the balance thereof was to be accounted for in settlement with the father's estate as an advancement, and that no part thereof was to be paid to his executors unless needed to pay debts of the estate. Kernodle v. Williams (1910) 153 N. C. 475, 34 L.R.A.(N.S.) 934, 69 S. E. 431. A similar decision on similar facts appears in Kernodle v. Kernodle (1917) 174 N. C. 441, 93 S. E. 956.

The maker of a note may show that the note was executed on the distinct understanding and agreement between the maker and payee, and as a part of the agreement, that the maker should pay the note only in the event that a named person recovered certain lands in a pending action. Farrington v. McNeill (1917) 174 N. C. 420, 93 S. E. 957.

Parol evidence was held admissible in Martin v. Mask (1912) 158 N. C. 436, 41 L.R.A.(N.S.) 641, 74 S. E. 343, in an action on rent notes, to show an agreement that the maker would pay said notes which were given for the house in which he was to reside and did reside during his stay in the city, but that, if he was required to leave the city, he was to pay no other note, and would surrender the possession of the house to the payee.

An oral agreement that a note was to be surrendered in a certain event has been held competent. Braswell v. Pope (1880) 82 N. C. 57. In this case the maker of a note was held entitled to show an oral agreement that the payee was to accept the assignment of a judgment upon its recovery by the maker, and a mortgage held by the maker for its security, and surrender to the maker his note, and pay the difference, if any, in money.

Executors who have given a note for a debt of their testator may show an oral agreement by the payee to allow the proceeds of certain cotton as a credit on the note. Kerchner v. McRae (1879) 80 N.C. 219.

The court in Germania Bank v. Osborne (1900) 81 Minn. 272, 83 N. W. 1984, said: "In what respect written

contracts may be affected by parol testimony is a problem frequently confronting the practitioner and demanding the attention of the courts, and in respect to that particular phase of its application involved in the case before us able courts have arrived at different conclusions. We should first determine what the contract was between these parties, and what relation the note bears to it. The contract was, in substance, a sale of the stock in consideration of the execution and delivery of the note, coupled with the right to return the stock and take up the note. The note expresses only the method of payment in case the maker did not exercise the right to return the stock. The note is in terms just what the parties agreed it should be. The contract preceded the execution and delivery of the note, and the note was executed and delivered as a result of the contract, not as itself the contract. The consideration for the note was the stock, provided the maker exercised the option to retain it. The consideration for the delivery of the stock was the payment of \$400, according to the terms of the note, provided the maker exercised the same option. Although the whole transaction was an entirety, and the agreement for the sale was, in a sense, contemporaneous with the execution of the note, yet the parties did not reduce the agreement for the sale to writing in the terms of the note."

In *Drovers' Cattle, Loan, & Invest. Co. v. McGraw* (1921) — Minn. —, 184 N. W. 365, an action to recover a balance said to be owing upon a promissory note, in which the maker claimed that the note was given for a balance due upon a purchase of cattle under an agreement that he was to pasture the cattle during the summer and return them in the fall for sale by the vendors, who would apply the proceeds on the note and pay him any overplus, but that he was not liable for any deficiency, the court, after stating that the maker performed all the conditions of the agreement, said: "The note never became operative beyond the amount the cattle might

20 A.L.R.—31.

bring in the fall. It was delivered and held in the nature of a pledge that the agreement would be performed. The note expresses only the method of payment in case the maker failed to keep her contract. . . . The evidence is admissible where the note was given as a part of a larger transaction, the facts with reference to which give an independent right to defeat recovery."

To admit such evidence is according to the court in *Kernodle v. Williams* (1910) 153 N. C. 475, 34 L.R.A. (N.S.) 934, 69 S. E. 431, "not varying, altering, or contradicting the written instrument, but merely showing forth the entire contract that was made." The court says further: "If the entire contract, as set up by the defendants which the jury find to be true, had been made entirely in writing, or entirely oral, there would have been no difficulty in holding it valid. For instance, a mortgage on its face is a conveyance of land with a further clause providing for a condition upon which it is a nullity, or under which the land may be sold. The latter part is not held to contradict the former, though in no event is the instrument really a conveyance. So, also, with a penal bond which is generally in a large sum, with a condition annexed by which it is of no effect unless a certain event happens, and even then the obligor is usually called on to pay a much smaller sum. There are many other instances which might be given of a like nature."

The foregoing North Carolina cases are difficult to harmonize with other decisions in this state. See *International Harvester Co. v. Parham* (1916) 172 N. C. 389, 90 S. E. 503, *supra*, III. b; *Cherokee County v. Meroney* (1917) 173 N. C. 653, 92 S. E. 616, *supra*, III. b; and *Acme Mfg. Co. v. McCormick* (1918) 175 N. C. 277, L.R.A. 1918F, 572, 95 S. E. 555, *supra*, III. b.

V. Evidence held admissible on the theory of discharge or payment.

Parol evidence of an agreement that makes the note conditional has been admitted on the theory that a

compliance with the agreement discharges or pays the note.

In an action brought to enforce an alleged vendor's lien upon land conveyed by the plaintiff to the defendant, for which the latter gave notes, the defendant may prove that the conveyance was made in consideration of his agreement to support the grantor during his life, and that the notes sued on were given to secure the performance of this agreement on his part, and that he had performed the same, since the admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the notes were given to secure the execution by the grantee of a promise to support and take care of the grantor, and that promise was fulfilled, the notes were discharged, and parol evidence is admissible to prove that a written agreement has been totally discharged. *Howard v. Stratton* (1884) 64 Cal. 487, 2 Pac. 263.

In an action by the administrator of the payee of a note, the maker was permitted to show that it was given upon a family settlement for the reversionary interest of the payee in the one third of an estate subject to dower, under an oral agreement that the interest should be applied to the widow's support, and the principal, also, if the interest proved insufficient, and if, at the death of the widow, the whole amount should have been exhausted, then the maker should pay nothing. *Crosman v. Fuller* (1835) 17 Pick. (Mass.) 171. The theory of the court seems to have been that supplies furnished by the defendant to the widow were, by the consent of the payee, applied towards the note, and as they exceeded the note, there was a payment thereof. The equities of this case seem to have influenced the decision very much, together with the fact the payee of the note, a short time before his death, recognized that it had been paid in the manner above indicated.

Evidence of an oral agreement between the maker and payee of a note given in satisfaction of an injury done

the payee by the circulation of false reports, that if the maker would make it appear to the satisfaction of the payee that he did not originate the report, the payee would give up the note, was held competent in *Sanders v. Howe* (1821) 1 D. Chip. (Vt.) 363, on the theory that the evidence did not contradict the note, but proved that the parties had agreed on a mode by which the defendant might satisfy the note by the performance of a future act. According to the court, when that act was performed the note was as clearly paid and satisfied as though the defendant had paid the amount in money. See *Farnham v. Ingham* (1833) 5 Vt. 514, *supra*, III. b; and see *Bradley v. Bentley* (1836) 8 Vt. 243, *supra*, III. b, and other cases there cited.

A note given by an insolvent debtor to one of his creditors may be shown to have been given on the oral agreement that if the debtor made his settlement (apparently meaning a compromise with his creditors), the note was to be held for nothing. *Bissenger v. Guiteman Bros. & Co.* (1871) 6 Heisk. (Tenn.) 277. This is upon the theory that the evidence did not vary the note, but proved that it was discharged.

The successor in office of a postmaster, who purchased certain letter boxes, drawers, and other furniture in the postoffice, and gave his note for the purchase price thereof, can show an oral agreement that each one should have and receive his proportionate share of the rents of boxes and drawers for the then current quarter, which had been collected by the retiring officer, and that as soon as this was definitely ascertained, the amount thereof should apply in liquidation of the note. According to the court, such an agreement does not contradict or vary the terms of the written instrument. The agreement does not tend to show that the sum named in the note was not absolutely to become due and payable, but "the effect of the agreement would merely tend to show that at the time the note was given, it was understood that a portion was to be paid in a particular

manner, and had been so paid." *Jones v. Keyes* (1863) 16 Wis. 562. Compare with *Gregory v. Hart* (1858) 7 Wis. 532, *supra*, III. b.

It has been held in an action against sureties on a note that parol evidence is competent to show an agreement on the part of the payee of the note, which was secured by mortgage, that, in case of default and foreclosure of the mortgage, the money derived from the sale of the property should be applied upon the note on which the defendants were sureties, where a default, foreclosure, and sale had taken place, but the money received had been applied on other notes. *Continental Gin Co. v. Stocker* (1916) 235 Fed. 1005, reversed on other grounds in (1917) 157 C. C. A. 535, 245 Fed. 343. Such evidence, according to the court, does not "seek to alter or change or modify the contract" signed by the defendants, but shows "facts from which they contend that the debt has been partly paid." It is further stated that if the money had not been actually received by the payee of the notes from the foreclosure, the evidence would be inadmissible.

A purchaser of property who has executed his notes for the purchase price, one to an agent of the owner and another to a third person, may show that, at the time of the execution of the notes, the owner of the property was indebted to the maker on an account, and that the agent, as agent of the owner and of the third person to whom the one note was made payable, agreed that the note should be paid by being credited and offset with the account. *Bennett v. Tillmon* (1896) 18 Mont. 28, 44 Pac. 80. Such an agreement, according to the court, in no way altered or changed or varied the terms of the note. It was only a reservation of the right by the maker to pay them by setting up the indebtedness of the owner of the property due him as a counterclaim.

There was an equal division of the court in *Long v. Potts* (1912) 70 W. Va. 719, 75 S. E. 62, as to whether sureties on a note could show an oral

agreement that they were to execute the note as sureties for the principal debtor for twenty days, and that, within that time, the payee would procure from the principal debtor a deed of trust for the benefit of the payee and in exoneration and indemnification of the sureties. *Brannon and Williams, JJ.*, were of the opinion that this evidence could not be heard, as it was a violation of the parol-evidence rule, while *Poffenbarger and Miller, JJ.*, held that it was admissible as a collateral arrangement for discharge of the note, not violative of the parol-evidence rule. According to the latter two judges the sureties were liable only in the event of failure of the principal to give the deed of trust within the specified time.

In some cases it is held merely that an oral agreement that certain sums shall, when determined, be credited on the note, is admissible, without any clear theory as to the admissibility.

Where the payee of a note was indebted to the maker in varying sums when the note sued on was given, and such indebtedness was not then liquidated, an oral agreement that the sums so due would be credited on the note, when determined, is admissible. *John Lucas & Co. v. Bradley* (1917) 158 C. C. A. 649, 246 Fed. 693. The court in this case says generally, that there are many cases in which the maker of a note may prove a collateral agreement or other fact which relieves him from liability; that such proof does not vary or contradict the written note, but shows independently that it is not a binding obligation. The credit claimed here was set up as counterclaim in an action on the note.

VI. *Pennsylvania decisions.*

a. *Holding the evidence admissible.*

The parol-evidence rule, as generally interpreted, has been stated not to exist in Pennsylvania. As expressed in one case, the policy was "adopted in this state at a very early period, and since steadfastly adhered to, of excepting out of the operation

of the English rule excluding parol evidence to vary, contradict, or alter a written contract, cases where a contemporaneous parol promise is proposed to be shown, on the faith of which the contract was executed. . . . And so we have it settled in Pennsylvania beyond all dispute 'that where, at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible, though it may vary and materially change the terms of the contract.' " *Croyle v. Cambria Land & Improv. Co.* (1912) 233 Pa. 310, 82 Atl. 360, quoting from *Greenawalt v. Kohne* (1877) 85 Pa. 369. The Pennsylvania decisions, however, show quite conclusively that the courts of this state have acquired no very high degree of steadfastness in following the rule that the court in *Croyle v. Cambria Land & Improv. Co.* supra, regards as so well settled. In fact, quite as many of the decisions in this state have held the oral agreement inadmissible to vary or explain the note as have held it admissible. Some of the latter decisions can probably be reconciled with the rule stated by the court in *Croyle v. Cambria Land & Improv. Co.*; at least, by indulging in some extremely attenuated distinctions; but others cannot be reconciled. The cases which hold the evidence admissible will be first discussed.

Evidence of the class hereinafter discussed in VII., to the effect that the note was given only for some special purpose, but was in no event to take effect as a note, has been held admissible. The surety may show that he signed notes under the assurance of the payee that his signing was a mere matter of form,—that he would not be held liable on the notes. *Miller v. Henderson* (1823) 10 Serg. & R. 290. The indorser of a note may show that he was not to be held liable on his indorsement,—that the indorsement was a mere matter of form,—that the payee would look alone to security given. *Cake v. Potts-*

ville Bank (1887) 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302. A subagent for an automobile, who, upon the return of a sample car to the agent, gave a note representing depreciation, etc., on the car, may show an oral agreement that the note was not to be retained by the agent, and no part of it was to be claimed in money, but that the note was to be used to straighten up the agent's books and to credit the subagent with the return of the automobile, and was to be returned upon the release of liability by the manufacturer. *Martz v. W. H. Wilcox Co.* (1914) 57 Pa. Super. Ct. 169. A purchaser of land who has given a bond secured by mortgage may show an oral agreement that the obligee in the bond would look alone to the mortgage security,—that there should be no personal liability on the bond. *Greenawalt v. Kohne* (1877) 85 Pa. 369.

Evidence of an agreement to return property and cancel or return the note has been held admissible. A purchaser of land who has given his bond, secured by mortgage for the purchase price, may show an oral agreement of the vendor to take back the property on certain conditions. *Ibid.* In an action on a note in *Fischer v. Dalmas* (1896) 173 Pa. 296, 34 Atl. 435, an affidavit of defense which alleged that the maker of the note purchased a piano and gave the note for the purchase price under an agreement that if he could not pay the note, or desired to surrender the instrument, the payee would take the same back again and surrender and cancel the note, was held sufficient to prevent judgment being entered against the defendant for want of a sufficient affidavit of defense. Evidence of an agreement that the payee would, in a certain contingency, release the maker from all obligations on the note, is admissible where the payee is seeking to enforce it. *Faux v. Fitler* (1909) 223 Pa. 568, 132 Am. St. Rep. 742, 72 Atl. 891, holding, in an action of assumpsit by a payee against the maker of a note, that parol evidence is admissible to show that the parties ventured into stock

speculation, and that the note was given to evidence the maker's share in the partnership, and that it was agreed "in the event of the investment proving a loss, involving wholly the amounts to be advanced by the plaintiff, he would release the defendant from all obligations assumed by defendant under and by virtue of" the note; and that, but for this agreement, the maker would not have signed or delivered the note. Upon a second appeal of this case (1911) 232 Pa. 33, 81 Atl. 91, the evidence produced by the maker of the note was held insufficient to sustain his plea, and a recovery for the plaintiff was sustained. After referring to the testimony of the maker, in general, the court concludes that he "nowhere in his testimony states that he ever said to the plaintiff or that the plaintiff said to him that the notes were not to be paid according to the terms of the written contracts. It is a very usual thing when one friend lends money to another and requests a note as an acknowledgment to remark, as a matter of politeness, that the written promise to pay is merely taken as a memorandum of the transaction, to cover the contingency of death. The testimony of the defendant concerning the making of the notes in suit would be entirely consistent with such an incident." In an action on a note given in settlement of a charge of bastardy against one of the makers, oral evidence of an agreement that, in case the child died, the note should not be paid, is admissible. *Hill v. Shucker* (1863) 1 Woodw. Dec. 251. One of the makers of a note may show that he signed it upon the promise and assurance of an oral agreement that, if he paid his own personal share of the indebtedness and interest thereon within one year, his entire liability should thereby be discharged. *Reed v. Kuntz* (1908) 17 Pa. Dist. R. 365. An affidavit of defense filed in an action on a note, to the effect that the note was given and accepted as a guaranty for the payment of certain money loaned by the plaintiff to a mining company in which both the plaintiff and the de-

fendants were alike financially interested, and that the makers of the note were to be called on to pay only in the event that the mining company was unable, and then only such amount as was not recoverable from the company, was held sufficient to prevent judgment. *Marquis v. McKay* (1907) 216 Pa. 307, 65 Atl. 678. An affidavit of defense to an action on a promissory note which stated that the maker of the note was in negotiation with a third party to buy or take from him in trade certain unfinished houses where they should be clear of liens and encumbrances, and the payee, a creditor of the third party, learning of such negotiation, importuned the defendant to give him a note in part payment of the third party's indebtedness to him, which the defendant at first refused to do, but finally consented on the express agreement and understanding that he would not be liable to pay the note unless the arrangement with the third party should be consummated before the maturity thereof, and that the third party had failed on his part to complete the transaction,—was held to state a defense, in *Elliott v. Adams* (1876) 3 W. N. C. 44.

So, evidence of an agreement that the payee shall look for payment to a special fund is admissible where such agreement constituted a part of the consideration, or operated as an inducement for entering into the contract. While this rule is affirmed in *Alexander v. Righter* (1913) 240 Pa. 22, 87 Atl. 427, in that case the payee of the note took his action on an alleged promise to pay aside from the note, and it is stated by the court that "where the written engagement is not sued upon, but comes collaterally into a case, the rule against the admission of parol evidence to vary a written contract has no control." A railroad contractor who has taken over a contract from a prior contractor, who had become insolvent, and through whom, upon the completion of the contract, certain money which had been withheld from the prior contractor would be paid, who executed a note to a creditor of the prior con-

tractor, may show, when sued on the note, that there was an express agreement that the note should be payable only out of the fund earned by the prior contractor, which he, the maker of the note, would receive on the completion of the work, and that payment of it should not be demanded before that time. *Forcite Powder Co. v. Howley* (1909) 40 Pa. Super. Ct. 412.

Evidence of an oral agreement that the note was not to be paid until the happening of a certain event is admissible. One who, after lending money to a corporation, gives his note for corporate stock to the president, who induces him to make the loan and take the stock on the agreement that he will not be called upon to pay his note until the loan is repaid by the corporation, may set up such agreement as a defense to a suit on the note by the original payee. *Gandy v. Weckerly* (1908) 220 Pa. 285, 18 L.R.A. (N.S.) 434, 123 Am. St. Rep. 691, 69 Atl. 858. Evidence is admissible in an action by a loan association upon a bond and mortgage to show a parol agreement that the bond was not to be paid until the amount due on a first mortgage given by the defendant had been paid by the maturing of certain stock for which he had subscribed in the building and loan association, at which time the defendant would have the option of taking out additional shares of stock in the association to the amount of the bond and mortgage, and of having the loan changed to one secured by a building association mortgage, with the additional stock as collateral. *Excelsior Sav. Fund & L. Assn. v. Fox* (1916) 253 Pa. 257, 98 Atl. 593. It was alleged by the defendant that he did not read the bond and mortgage at the time of their execution, and that he was not informed that the papers were not drawn in accordance with the parol agreement, and that, but for the promise which was sought to be shown by parol, the writing would not have been executed. The acceptor of a draft may show that it was not to be payable until certain houses, being built by him,

were completed. *Leary v. Meredith* (1878) 5 W. N. C. 37. An affidavit of defense which set out a parol agreement made at the time of drawing the note, that, if the defendant could not meet it at maturity, he was to have two years from date, and was not to be pressed until the expiration of that time; that it was only on account of this agreement that the note was given,—was held to prevent a judgment for want of sufficient affidavits of defense, in *National Bank v. Jones* (1881) 10 W. N. C. 436.

The purchaser of land who has given notes secured by trust deed for the unpaid part of the purchase price may show in defense of the notes a contemporaneous parol agreement on the faith of which the notes were signed, that the land was to be at once reconveyed to a trustee, who should hold it as security for the sum due upon the notes, and who should exhaust the security thus furnished before the payment of the notes should be required of the maker. *Clinch Valley Coal & I. Co. v. Willing* (1897) 180 Pa. 165, 57 Am. St. Rep. 626, 35 Atl. 737.

An affidavit of defense which set up that mutual accounts existed between the maker and the payee of the notes, and that, upon the execution of the notes, it was agreed that an account should be furnished, and that, if the full amount of the notes was not due the payee, he should provide payment pro tanto, or for the whole sum, as the case might be, when the notes reached maturity, was held to prevent judgment for want of a sufficient affidavit of defense. *Corr v. Kelly* (1874) 1 W. N. C. 387.

The theory of these cases is that it is a fraud to secure the execution of an instrument by representations as to the payment different from those contained in the instrument, and then attempt to compel compliance with the terms of the instrument. *Gandy v. Weckerly* (1908) 220 Pa. 285, 18 L.R.A. (N.S.) 434, 123 Am. St. Rep. 691, 69 Atl. 858. The fraudulent intent, however, need not have existed at the time of the execution of the writing, under this rule; if the

parol modification is subsequently denied, it is such a fraud as will, under the rule, operate to let in evidence of the real intent, to the final conclusion of the parties. *Excelsior Sav. Fund & L. Asso. v. Fox*, and *Gandy v. Weckerly*, *supra*.

In *Clinch Valley Coal & I. Co. v. Willing*, *supra*, the court said: "The existence of a contemporaneous parol agreement between the parties, under the influence of which a note or contract had been signed which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all."

But in *Fuller v. Law* (1903) 207 Pa. 101, 56 Atl. 333, the court says that "it is straining both legal and moral definitions to call the mere failure to perform an oral promise to accept payment in a particular form a fraud; dishonest it may be, but it is no more a legal fraud than immediate collection of a past-due debt on which the creditor has orally promised the debtor indulgence."

b. Holding the evidence inadmissible.

Many of the cases holding the evidence admissible insist upon the fact that the execution of the note was induced by the oral promise or agreement. This, however, seems to be little more than a matter of pleading, for, in practically every case in which the oral agreement is relied upon as modifying the writing, the maker of the note can truthfully say that he relied upon the oral agreement, or was induced thereby to execute the writing. On this theory, however, some of the cases denying the admissibility of the evidence are harmo-

nized with those admitting the evidence. One who has received a note for collection from the owner, and who has given his note for the amount of the note thus received, cannot relieve himself from liability on his note by showing that it was never intended as evidence of a debt, but simply as an acknowledgment that he received a note of equal amount from the payee for collection. *Phillips v. Meily* (1884) 106 Pa. 536. The court here makes an attempt to distinguish the case from the earlier cases, saying that parol evidence is admissible where there has been fraud, accident, or mistake in the creation of the instrument itself, and also where there has been an attempt to make fraudulent use of the instrument in violation of a promise or agreement, made at the time the instrument was signed, and without which it would not have been executed. It is then stated that there is not a word to show that the note in suit was signed by the defendant upon the faith of any assurance or promise on the part of the plaintiff that he would not proceed to collect it, or use or treat it as a promissory note. In *Anspach v. Bast* (1865) 52 Pa. 356, 12 Mor. Min. Rep. 110, a parol agreement, made contemporaneously with the note, that it should not mature absolutely until six months, according to its terms, was held inadmissible; the court stating that no case goes to the length of ruling that parol evidence is admissible to change the promise itself without proof or even allegation of fraud or mistake. According to the court in *Patton v. Fox* (1903) 22 Pa. Super. Ct. 416, a contemporaneous agreement, in order to avail the maker of a note, must not only be the basis of its execution, but it must be exclusively set forth as the moving cause to induce the execution of the written contract, and the circumstances must be such that the enforcement of the contract would be a fraud on the maker. The question usually arises in this state upon the sufficiency of an affidavit of defense.

The decision in some of the cases denying the admissibility of the evi-

dence may be explained by reason of the omission of an averment in the affidavit of defense that the maker was induced to sign the note by reason of the oral stipulation. For instance, in *Appleby v. Barrett* (1905) 28 Pa. Super. Ct. 349, where the maker of a note filed an affidavit of defense alleging an oral agreement that the note should be given merely as a memorandum, and that it was distinctly understood between him and the payee that it was to be paid out of his share of the profits of certain business transactions. This defense was held insufficient because the affidavit contained no averment that the defendant was induced to sign the note by reason of the oral stipulation. In *Weaver v. Paul* (1895) 16 Pa. Co. Ct. 471, the court, after stating that there was neither allegation nor proof that the form of the note was due to fraud, mistake, or accident, nor that its execution was induced by a promise which would be broken if recovery should be permitted, says that therefore, under nearly all the authorities, parol agreement that the note should be an oral agreement cannot be proved by the testimony of the maker of the note alone is held in *Fuller v. Law* (1903) 207 Pa. 101, 56 Atl. 333,—a case in which the purchaser of stock, who has given his note for the unpaid part of the purchase price, was attempting to show a contemporaneous parol agreement that the note should be paid out of dividends on the stock, and that, if the dividends failed to pay the purchase price in six years, he need not pay the note at all.

The court in *Clinch Valley Coal & I. Co. v. Willing* (1897) 180 Pa. 165, 57 Am. St. Rep. 626, 36 Atl. 737, says of *Clarke v. Allen* (1890) 132 Pa. 40, 16 Atl. 1071, and *Ziegler v. McFarland* (1892) 147 Pa. 607, 23 Atl. 1045, *infra*, that in these cases the agreement set up was wholly inconsistent with the terms of the note; the written contract, and the alleged parol contract set up as an inducement to its execution, were so inconsistent that both could not stand; and that, in the case before the court in *Clinch Valley Coal & I. Co. v. Willing*, this was not true.

And see distinction made in *Second Nat. Bank v. Yeager* (1920) 268 Pa. 167, 111 Atl. 159, *infra*.

The court in *Fuller v. Law* (1903) 207 Pa. 101, 56 Atl. 333, says: "There is no doubt that there is much apparent and some real conflict in the numerous cases involving the question as to when parol testimony is admissible in contradiction of written instruments."

Enough has been said to show that there is some real conflict in the decisions in this state. Without further attempts to harmonize the decisions, the cases denying the admissibility of the evidence will now be set out. Anyone interested in pursuing the subject further will find a valuable discussion of the rule in this state in *American Law Reg.* (1904) (52 O. S. 43 N. S.) p. 601.

Evidence has been held inadmissible to show that there was to be a liability only in a certain event. A stockbroker who has sold stock on deferred payments, and who has given his note to the owners for the amount of the purchase price, cannot show, in defense of an action on the note, an oral agreement that he was not to be liable on the note except in the event that he should receive from the purchaser of the stock the money due thereon. *American Baptist Publication Soc. v. Erb* (1887) 44 Phila. Leg. Int. 144. In *Hacker v. National Oil Ref. Co.* (1873) 73 Pa. 93, 13 Mor. Min. Rep. 538, a purchaser of stock who gave her note for the purchase price was held not entitled to show an oral agreement that she should subscribe for the stock, providing she received a sum of money from a debtor, and that the debtor paid no part of the sum, whereupon she declined to take the stock, and notified the corporation. An affidavit by the defendant in an action on the note, that the money for which the note was given was a loan to a third person, and that the maker was not to be held responsible except upon a contingency was held not to be a defense in *Rodgers v. Donovan* (1879) 36 Phila. Leg. Int. 156. It was also held in this case that an allegation that the note was

signed upon the express agreement that the maker was not in any way to be liable thereon was not a defense. Nothing is said as to the parol-evidence rule.

Evidence that the note was to be paid in a certain way has been denied admission. In *Fuller v. Law* (1903) 207 Pa. 101, 56 Atl. 333, it is held not competent for the purchaser of corporate stock, for the unpaid part of the purchase price of which he had given his note, to show a contemporaneous parol agreement that the note was to be paid out of dividends on the stock, and that, if the dividends failed to pay the note, it need not be paid. In an action on a note given by one partner to another upon his purchase of his partner's interest in the partnership, an affidavit of defense that the note had been given upon the understanding and agreement that it should be paid out of the profits arising from the business, and that this was afterwards prevented by the payee filing a bill in equity for the dissolution of the partnership and the appointment of a receiver, was held insufficient in *Lee v. Longbottom* (1896) 173 Pa. 408, 34 Atl. 436.

One of the joint makers of a note cannot defeat judgment thereon by showing an oral understanding that he was not to be liable unless another joint maker was unable to repay plaintiff a stated sum loaned to a corporation of which the other joint maker was president, and in default of such payment that the first joint maker was not to be liable until the corporation had built a new dam then in contemplation, and had made and floated a bond issue, from the proceeds of which issue the note was to be paid. *Second Nat. Bank v. Yeager*, supra. Referring to the earlier Pennsylvania cases the court says: "In an action on a promissory note defense may be made by an oral contemporaneous parol agreement providing for payment of the note from a certain fund, or the raising of such fund for payment by means over which the promisor had control; in such case the source of payment must be first exhausted before recourse can be had

upon the note. . . . Assuming that the averments were otherwise sufficient, the affidavit does not aver any such fund existed, or that any of the persons had control of the means whereby the funds might be raised. . . . This is not a case of modification by parol. The agreement does more than vary the written instrument, it destroys it." A further defense that the first joint maker was not to be liable in any event except for one fourth of the note was held to be indefinite in substance and not to be considered.

Evidence that the note was not in fact an obligation, as therein indicated, has been denied admission. A husband who has given a note for an amount of money received by his wife from her mother cannot show that the money so received was an advancement, and that it was agreed that the principal should never be returned, but that only interest should be paid. *Heydt v. Frey* (1888) 10 Sadler, 84, 21 W. N. C. 265, 13 Atl. 475. The maker of a duebill cannot show that he had sold a horse to the payee, which was returned as unsatisfactory, and that the duebill was given as a mere memorandum, not understood to be any settlement or obligation to pay the debt or sum of money mentioned therein, but as an undertaking to furnish the payee with a satisfactory horse in place of the one which had been brought back. *Ziegler v. McFarland* (1892) 147 Pa. 607, 23 Atl. 1045. Evidence of an oral agreement that the note which was given by one partner to another was executed on the promise of the payee that it would be used simply in the settlement of their partnership account is inadmissible. *Wharton v. Douglass* (1874) 76 Pa. 273.

See *Second Nat. Bank v. Yeager* (1920) 268 Pa. 167, 111 Atl. 159, supra.

A prior or contemporaneous oral agreement that the note was not to be paid until a certain event, or was to be renewed, is incompetent to vary the note. An affidavit of defense which stated that the note was not to be paid until such time as certain corporate stock could be sold advantageously was held not sufficient to

prevent a judgment, in *Dyott v. Williams* (1888) 21 W. N. C. 226. One who has borrowed money and given a note therefor cannot show an express oral agreement that he should use the money in the erection of certain buildings, and that the note would be renewed from time to time until the buildings were sold; that then, and not until then, was the note to be paid. *Homewood People's Bank v. Heckert* (1903) 207 Pa. 231, 56 Atl. 431. An applicant for life insurance who has given a note for the amount of the premium cannot show an oral agreement that the payment of the note was not to be asked, expected, or demanded until it was possible and convenient for the maker to spare from his business the amount thereof. *Clarke v. Allen* (1890) 132 Pa. 40, 16 Atl. 1071. In *Spanlove v. Westrup* (1875) 1 W. N. C. 156, a rule for judgment for want of a sufficient affidavit of defense was made absolute in an action on a promissory note where the affidavit of defense set up that the note was given for the price of certain machinery, and with the verbal agreement that it was to be renewed, and the defendant was not to be called on to pay it until he had sold the machinery, where the affidavit alleged that the defendant had not sold the machinery, but did not aver any diligence in endeavoring to do so. The maker of a note cannot show an oral agreement that the note was to be renewed for a period of three months from maturity. *Patton v. Fox* (1903) 22 Pa. Super. Ct. 416.

Where a written agreement providing for the giving of a note specifies that the person to whom the note is to be given agrees that, in any proceeding she may institute against her husband for divorce, she will not assign any other reason therefor than the desertion of her by her husband, the maker of the note cannot show, in an action thereon, that the plaintiff was not to receive the note until she procured a divorce from her husband. *Irvin v. Irvin* (1890) 142 Pa. 271, 21 Atl. 816.

VII. Evidence that the maker was to incur no obligation on the note, or that the note was given for a special purpose.

a. Introduction.

The oral agreements which have been discussed in subdivisions II. and III. of this annotation have been agreements that the note should or should not take effect as a note, or should or should not be paid, according as a contingency named did or did not occur. In other words, the note or the obligation thereof was dependent upon a contingency. The present subdivision is concerned with agreements that the maker was to incur no liability on the bill or note, or that it was delivered for a special purpose, but was not, as it purported to be, an absolute obligation for the payment of money. The distinction between these two classes of agreements is clear. Notwithstanding this, they have been confused; particularly under the Negotiable Instruments Act.

The great majority of cases prior to the Negotiable Instruments Act held that evidence of an oral agreement that the instrument was delivered for a special purpose, or that the maker was to incur no liability thereon, was inadmissible.

b. Rule that evidence is inadmissible.

Agreement that the maker should incur no liability.

Thus it is held that parol evidence of an agreement that the maker of a note should incur no liability thereon, or that it would never have to be paid, cannot be shown.

United States. — *Burns v. Scott* (1886) 117 U. S. 582, 29 L. ed. 991, 3 Sup. Ct. Rep. 865; *Earle v. Enos* (1904) 130 Fed. 467; *Payne v. Mutual L. Ins. Co.* (1905) 72 C. C. A. 487, 141 Fed. 339; *Wagner v. Kohn* (1915) 140 C. C. A. 592, 225 Fed. 718.

Arkansas. — *Smith v. McLaughlin* (1915) 120 Ark. 366, 179 S. W. 496.

California. — *Leonard v. Miner* (1898) 120 Cal. 403, 52 Pac. 655; *Lompoc Valley Bank v. Stephenson* (1909) 156 Cal. 350, 104 Pac. 449.

Florida. — Strickland v. Jewell (1920) 80 Fla. 221, 85 So. 670; Forbes v. Ft. Lauderdale Mercantile Co. (1922) — Fla. —, 90 So. 821.

Georgia. — Hirsch v. Oliver (1893) 91 Ga. 554, 18 S. E. 354.

Illinois. — Westbrook v. Howell (1889) 34 Ill. App. 571; Clinton v. Royal (1917) 203 Ill. App. 248.

Iowa.—Dickson v. Harris (1883) 60 Iowa, 727, 13 N. W. 335.

Kansas. — Dominion Nat. Bank v. Manning (1899) 60 Kan. 729, 57 Pac. 949; Stevens v. Inch (1916) 98 Kan. 306, 158 Pac. 43; German American State Bank v. Watson (1917) 99 Kan. 686, 163 Pac. 637; Union Nat. Bank v. Pirotte (1920) 107 Kan. 573, 193 Pac. 327.

Kentucky.—Farmers' Bank v. Wickiffe (1909) 131 Ky. 787, 116 S. W. 249; Stewart v. Gardner (1913) 152 Ky. 120, 153 S. W. 3.

Maine. — Fairfield v. Hancock (1852) 34 Me. 93.

Massachusetts.—Perkins v. Young (1860) 16 Gray, 389; Davis v. Randall (1874) 115 Mass. 547, 15 Am. Rep. 146.

Missouri.—Barnard State Bank v. Fesler (1901) 89 Mo. App. 217; Bass v. Sanborn (1906) 119 Mo. App. 103, 95 S. W. 955; Bank of Dexter v. Simmons (1918) — Mo. App. —, 204 S. W. 837; Harms v. Long (1919) — Mo. App. —, 213 S. W. 507.

Nebraska. — Garneau v. Cohn (1901) 61 Neb. 500, 85 N. W. 531.

New Hampshire.—Concord Bank v. Rogers (1844) 16 N. H. 8.

New Jersey.—Wright v. Remington (1879) 41 N. J. L. 48, 32 Am. Rep. 180, affirmed in (1881) 43 N. J. L. 451; Gerli v. National Mill Supply Co. (1909) 78 N. J. L. 1, 73 Atl. 252, affirmed on opinion below in (1910) 80 N. J. L. 464, 78 Atl. 1134.

New York. — Ryan v. Sullivan (1911) 143 App. Div. 471, 128 N. Y. Supp. 632. But see New York cases *supra*.

North Carolina.—Western Carolina Bank v. Moore (1905) 138 N. C. 529, 51 S. E. 79.

Ohio. — Lillie v. Bates (1888) 3 Ohio C. C. 94, 2 Ohio C. D. 54.

Oklahoma. — Colbert v. First Nat. Bank (1913) 38 Okla. 391, 133 Pac. 206; Gillis v. First Nat. Bank (1915) 47 Okla. 411, 148 Pac. 994.

Oregon. — Portland Nat. Bank v. Scott (1891) 20 Or. 421, 26 Pac. 276; Farmers' State Bank v. Forsstrom (1918) 89 Or. 97, 173 Pac. 935; McFarland v. Hueners (1920) 96 Or. 579, 190 Pac. 584.

South Carolina. — McClanaghan v. Hines (1847) 33 S. C. L. (2 Strobbh.) 122; Arthur v. Brown (1912) 91 S. C. 316, 74 S. E. 652.

South Dakota.—First Nat. Bank v. Engebretson (1911) 28 S. D. 185, 132 N. W. 786; First State Bank v. McMahon (1921) — S. D. —, 185 N. W. 1014.

Texas. — Dolson v. De Ganahl (1888) 70 Tex. 620, 8 S. W. 321; Jackson v. Chemical Nat. Bank (1898) — Tex. Civ. App. —, 46 S. W. 295; Lockney State Bank v. Damron (1915) — Tex. Civ. App. —, 179 S. W. 552.

Utah. — First Nat. Bank v. Foote (1895) 12 Utah, 157, 42 Pac. 205.

Vermont.—Morse v. Low (1872) 44 Vt. 561.

Washington. — Tacoma Mill Co. v. Sherwood (1895) 11 Wash. 492, 39 Pac. 977; Hemrich v. Wist (1898) 19 Wash. 516, 53 Pac. 710; Anderson v. Mitchell (1908) 51 Wash. 265, 98 Pac. 751; Pitt v. Little (1910) 58 Wash. 355, 108 Pac. 941; Bank of California v. Starrett (1920) 110 Wash. 231, 9 A.L.R. 177, 188 Pac. 410; Moore v. Kildall (1920) 111 Wash. 504, 191 Pac. 394.

West Virginia. — Duty v. Sprinkle (1908) 64 W. Va. 39, 60 S. E. 882.

Wisconsin. — Gillman v. Henry (1881) 53 Wis. 465, 10 N. W. 692.

England. — Hill v. Wilson (1873) L. R. 8 Ch. 888, 42 L. J. Ch. N. S. 817, 29 L. T. N. S. 238, 21 Week. Rep. 757, 24 Eng. Rul. Cas. 502.

Canada.—Murphy v. Bryden (1906) 7 Ont. Week. Rep. 250.

An oral agreement that the drawer of a draft should be released from liability upon acceptance thereof by the drawee is inadmissible. Wood v. Surrells (1878) 89 Ill. 107; Bright v. Kenefick (1901) 94 Ill. App. 137; Citizens' Bank v. Millett (1898) 103 Ky.

1, 44 L.R.A. 664, 82 Am. St. Rep. 546, 44 S. W. 366; *Cummings v. Kent* (1886) 44 Ohio St. 92, 58 Am. Rep. 796, 4 N. E. 710; *Bryan v. Duff* (1895) 12 Wash. 233, 50 Am. St. Rep. 889, 40 Pac. 936.

It was argued in *Bryan v. Duff* (Wash.) *supra*, that since the liability of the drawer of the draft grows out of a legal conclusion which is not in writing, to vary or contradict such conclusion is not to vary or contradict a written instrument. In answer to this contention the court says: "In our opinion the liability of the drawer of a bill of exchange or the indorser of a note has become so well established under the rules of the law merchant, and is so well understood, that the person who assumes such liability must be held to have understood the effect thereof, and by his signature to have bound himself in the same manner as he would have done had the conditions been, at the time of such signature, fully written out and signed by him." From this conclusion there is a dissenting opinion by Dunbar, J. See note in 4 A.L.R. 764, as to the admissibility of parol evidence to vary or explain the contract implied from the regular indorsement of a bill or note, in which the right to vary the contract implied by law from the indorsement of a bill or note is fully discussed.

Parol evidence of an agreement that one who signed as surety was not to be held liable is inadmissible. *Dendy v. Gamble* (1877) 59 Ga. 434; *Altman v. Anton* (1894) 91 Iowa, 612, 60 N. W. 191; *Barnstable Sav. Bank v. Ballou* (1876) 119 Mass. 487; *Kulenkamp v. Groff* (1888) 71 Mich. 675, 1 L.R.A. 594, 15 Am. St. Rep. 283, 40 N. W. 57; *Towner v. Lucas* (1857) 13 Gratt. (Va.) 705.

A surety on a note cannot show an oral agreement with the payee that the payee should extend to the principal maker such further credit as would enable him to carry on his business, and that he, the payee, would credit in the note all sums the principal maker should pay him until the note was fully paid. *Trentman v. Fletcher* (1884) 100 Ind. 105.

The plea of a surety, that he signed the note upon the request of the principal maker, and upon the representation made to him by the payee that the note would never be enforced against him, is said to offer no defense to the action, as it involves the absurdity that an oral promise of the payee to the payor, made when a note is executed, not to enforce its payment, destroys the obligation evidenced by a written instrument. *Fambro v. Keith* (1909) 57 Tex. Civ. App. 302, 122 S. W. 40.

See *First Nat. Bank v. Burney* (1912) 91 Neb. 269, 136 N. W. 37, set out in *SECURITY SAV. BANK v. RHODES* (reported herewith) ante, 412.

A distinction must be made between an agreement that the note was to be paid out of the security,—that the maker was not to incur any liability,—and an agreement that he was to be liable only in case of insufficiency of the security. As to those cases, see III. b, *supra*.

In addition to the foregoing cases there are others dealing with various agreements in which the evidence has been held inadmissible. The maker of a note cannot show an oral agreement with the payee that he was to be liable for only one half of the note. *Bailey v. Lankford* (1916) 54 Okla. 692, 154 Pac. 572; *Ford v. Drake* (1912) 46 Mont. 314, 127 Pac. 1019. A statute under which *Ford v. Drake* was rendered provided that the execution of a contract in writing, whether the law required it to be in writing or not, supersedes all the oral negotiations or stipulations concerning this matter which preceded or accompanied the execution of the instrument. An oral agreement that the maker of a note should be required to pay nothing on it but interest is inadmissible. *True v. Shepard* (1872) 51 N. H. 501. An oral agreement with one of the three makers of the note that, if he would execute the note and advance a stated sum, he should not be held liable for any other or further amount of said note, apparently was held inadmissible in *Ewing v. Clark* (1882) 76 Mo. 545. The ground of this decision is

not stated in the opinion. The maker of a note cannot show in defense of an action on the note that she had a claim against the payees as administratrix for an amount largely exceeding the amount of the note, and that, being desirous of realizing the amount of the note, applied to the payees for that purpose; that they agreed that, if she would execute the note with security, they would procure for her that sum, and by the time the note matured they would pay her upon the demand she held against them a sum sufficient to pay the note; and, relying upon the agreement, she gave the note, but that they failed to pay her a sum sufficient to meet the note. *Miller v. Wells* (1867) 46 Ill. 46. Persons interested in the formation of a corporation, who purchase property to be delivered to the corporation when it is organized, and who give their note for the purchase price, cannot show an oral agreement that the note was to have no binding effect against the makers after the corporation has been so organized. *Gurney v. Morrison* (1895) 12 Wash. 456, 41 Pac. 192. A husband who has executed a joint promissory note secured by a mortgage on his wife's land cannot show an oral agreement to the effect that he was not to incur any personal liability, but would sign the note simply as evidence of his consent to the execution of the note and mortgage by the wife. *Jackson v. Jackson* (1890) 12 Ky. L. Rep. 388. A surety on a sealed note cannot show an oral agreement that certain property which was then in the hands of the principal debtor should be sold to pay the same, and that the payee should accompany the principal debtor until the property should be sold, and should receive and take the proceeds of the same and apply it in satisfaction thereof. *Ellis v. Hamilton* (1857) 4 Sneed (Tenn.) 512. The maker of notes, when sued thereon, cannot show that the notes were not given as evidence of an indebtedness, but for the purpose of indicating the interest which the payee had in certain real property. *Chapman v. Chapman* (1906) 132 Iowa, 5, 109 N. W. 300.

The evidence in this case seems to have gone more to show the facts and circumstances than any specific agreement as to the notes. The decision, however, is placed upon the rule that a prior or contemporaneous oral agreement cannot be shown in evidence to vary the terms of the note. Parol evidence is incompetent to show that a subscription for the building of a church was made under an agreement that it was not to be binding upon the subscriber, but was to be used merely to influence others. *Blodgett v. Morrill* (1848) 20 Vt. 509.

The facts in the cases holding that the maker or surety cannot show that he was not to be bound on the note present an interesting variety.

In *Arthur v. Brown* (1912) 91 S. C. 316, 74 S. E. 652, parol evidence is held incompetent to show that a note was to have no force or effect of any kind. The fact that the letter "c" appeared after the signature does not make the testimony competent.

A partner who is settling up the partnership business, and who has possession of property belonging to it, cannot show that a note given by him to one of the partners was given with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount which should be estimated as the share of the payee on account of the property, in a settlement among the partners. *Burnes v. Scott* (1886) 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865.

The maker of a note cannot show that it was a mere memorandum or receipt for money received by him from the payee, which he was to apply in extinguishment of a judgment against the payee's son. *Dickson v. Harris* (1883) 60 Iowa, 727, 113 N. W. 335.

The maker of a note cannot show that the note was given as a voucher or receipt for money paid by the payee in pursuance of a partnership agreement, and that it was understood and agreed that the note would be delivered up and canceled on the delivery of a bill of sale of the payee's interest

in the partnership. *Perkins v. Young* (1860) 16 Gray (Mass.) 389.

It cannot be shown that a note payable to a corporation was given to enable the trustees to have an apparent amount of funds in order to obtain a charter, and that it was promised and agreed that the note should be given up after a few years' interest had been paid. *Warren Academy v. Starrett* (1839) 15 Me. 443.

A plea in an action upon rent notes that, if there was any liability on the notes, it was not that of the maker, but of a named company; that the maker, at the instance of the plaintiff's agent, signed the notes with the distinct understanding that there was no liability on the defendant, but that the signing was simply to satisfy plaintiff that she held the rent notes for the place, it being then and there known to her that the defendant was only to act as agent for the company named, which, at the time of the signing of the notes, was forming, and had not given itself a name; that the maker never used the storehouse as his, but said company at once took possession and used it with full knowledge and consent of the plaintiff, the plaintiff collecting the rent from it, and none from the defendant, and recognizing at all times the fact that the defendant was not liable on the note, but that the company was,— was held bad as an attempt to modify the note by evidence of a prior or contemporaneous parol agreement. *Hirsch v. Oliver* (1873) 91 Ga. 554, 80 S. E. 354.

Parol evidence is not admissible to show that a draft drawn by one as an individual upon a firm for which he was acting as agent was drawn in accordance with a parol agreement between him and the payee that he should not be bound thereon. *Citizens' Bank v. Millett* (1898) 103 Ky. 1, 44 L.R.A. 664, 82 Am. St. Rep. 546, 44 S. W. 366.

The makers of notes cannot show that they were executed merely as memoranda to be used by the payee for the purpose of showing a corporation in which the makers were interested how much they had paid

out individually for its account. *Stewart v. Gardner* (1913) 152 Ky. 120, 153 S. W. 3.

An oral agreement that the drawer of a draft, who was the agent of the drawee, should not be held liable upon the draft as drawer, is inadmissible. *Farfield v. Hancock* (1852) 34 Me. 93.

The maker of a note to a bank, secured by stock of the bank as collateral, cannot show that the plaintiff bank was desirous that he become one of its stockholders and act as one of its directors; that the president of the bank asked him to take stock in it, and agreed to accept his note for the stock, and agreed that the dividends on the stock should be applied to the payment of the interest on the note, and the transaction should be merely colorable; that the stock should never be in reality his, and that neither principal nor interest of the note should ever be demanded of him. *Dominion Nat. Bank v. Manning* (1899) 60 Kan. 729, 67 Pac. 949.

One who has accepted a transfer of corporate stock and given his note for the purchase price cannot show that the transaction was merely formal, and that there was an oral agreement that the note should never be collected or presented for payment. *Western Carolina Bank v. Moore* (1905) 138 N. C. 529, 51 S. E. 79.

The maker of a note to a bank cannot show that the bank desired to make a loan to a third person, who had already borrowed from the bank as much as it could loan to any one individual, and that it desired to make the loan in the name of the defendant; that the defendant consented to this on the agreement of the bank that it would not be regarded as any personal obligation of his. *German American State Bank v. Watson* (1917) 99 Kan. 686, 163 Pac. 637.

The maker of a note cannot show that it was agreed it should be regarded as a memorandum, not an absolute promise, and have the legal effect arising from its terms only upon the collection by the maker of two notes placed in his hands by the payee. *McClanaghan v. Hines* (1847) 33 S. C. L. (2 Strobb.) 122.

One who has given his note to a payee, cannot show an oral agreement that the payee would not attempt to collect the note from him, but would look solely to the corporation. *Pitt v. Little* (1910) 58 Wash. 855, 108 Pac. 941.

In *Stevens v. Inch* (1916) 98 Kan. 806, 158 Pac. 43, upon the sale of a business by one partner to the other, who was unable to pay the purchase price, a note was executed by the purchaser's relatives to the seller. Parol evidence to the effect that the seller stated that the note was a mere form, and agreed with the maker that the debt would be considered the debt of the purchaser, and that she could pay it out of the business of the store, and that, if she were unable to do so, the maker would never be asked to pay the note, was held inadmissible.

One who has given his note to a bank cannot show that it was executed upon the representation of an officer of the bank that the bank was the owner of certain land which it could not carry on its books as assets, and desired the note for the purpose of showing assets at the bank in the place of the land; that the note should not be put in circulation or used for any other purpose. *Jackson v. Chemical Nat. Bank* (1898) — Tex. Civ. App. —, 46 S. W. 295.

The maker of a note cannot show an oral agreement that it was executed upon the representation of the payee that it was simply intended as a matter of form,—that the maker would not be called upon to pay it. *First Nat. Bank v. Foote* (1895) 12 Utah, 157, 42 Pac. 205.

The maker of a note given for the amount of a premium on a life insurance policy cannot show an oral agreement that he was to give the agent letters of introduction to prominent people with whom he was acquainted, recommending the policy, and thereby enabling the agent to write insurance, and that, in consideration of such services, the agent promised that he would never have to pay the note. *Garneau v. Cohn* (1901) 61 Neb. 500, 85 N. W. 531.

One to whom a company is indebted, who has given his note to the owner of the company for the amount of an advancement made by him, cannot show an oral agreement by the owner that he would look to the company for reimbursement, and that the maker would not have to pay his note. *Clinton v. Royal* (1917) 208 Ill. App. 248.

The president of a corporation who has, for a sufficient consideration, given his individual note for corporate

debts, cannot show an oral agreement that the payee would not attempt to collect the note from him, but would look solely to the corporation. *Pitt v. Little* (1910) 58 Wash. 855, 108 Pac. 941.

The maker of a note cannot show that he was not to be liable thereon, and that the note was to be paid by a third person. *Lillie v. Bates* (1888) 3 Ohio C. C. 94, 2 Ohio C. D. 54.

The maker of a note for a consideration which passes to a third person cannot show an oral agreement that the third person was to be liable for the payment thereof, and the maker was not to be held. *Portland Nat. Bank v. Scott* (1891) 20 Or. 421, 26 Pac. 276.

The accommodation maker of a note cannot show an oral agreement with the payee that the party for whose accommodation the note was given should pay it. *Wagner v. Kohn* (1917) 140 C. C. A. 592, 225 Fed. 718; *Bank of California v. Starrett* (1920) 110 Wash. 231, 9 A.L.R. 177, 188 Pac. 410; *Gerli v. National Mill Supply Co.* (1909) 78 N. J. L. 1, 73 Atl. 252, affirmed on opinion below in (1910) 80 N. J. L. 464, 78 Atl. 734.

The accommodation maker of a note cannot show an oral agreement with the payee that the payee would not look to the maker for the payment of the note, or hold him liable thereon, but would look to the accommodated party alone, and to his collateral deposited with the payee for payment. *Earle v. Enos* (1904) 130 Fed. 467.

The acceptor of a draft for the accommodation of the drawer cannot

show an oral agreement with the payee that the acceptor should not be called upon to pay the draft, but that the payee would look to other security which it held. *Davis v. Randall* (1874) 115 Mass. 547, 15 Am. Rep. 146.

In *Portland Nat. Bank v. Scott* (1891) 20 Or. 421, 26 Pac. 276, parol evidence is held inadmissible to show an agreement that the payee of a note was to look alone to a party which received the consideration for the payment of the note.

The surety of notes payable to a bank cannot show that, before signing the notes, the bank assured him that they were entirely good and amply secured by collateral; that they wanted him as surety only because of the rule of the bank requiring three names to secure a loan; that he would take no risk by so signing; and that they gave him to understand that the bank would not look to him to pay. *Barnstable Sav. Bank v. Ballou* (1876) 119 Mass. 487.

And see *Union Nat. Bank v. Pirotte* (1920) 107 Kan. 573, 193 Pac. 327.

The surety on a note executed to a bank cannot show a contemporaneous oral agreement that the principal maker was to execute to him a mortgage on certain property, and that the bank would look to the mortgage for the debt, and not hold him responsible in any way. *Farmers' Bank v. Wickiffe* (1909) 131 Ky. 787, 116 S. W. 249.

One selling land for another, who accepts a conveyance of the land, executing to the vendor a note secured by a mortgage for the unpaid part of the purchase price, and then conveys to the purchaser, subject to the mortgage, cannot show an oral agreement that the vendor should look alone to the mortgage security, and not hold him liable on the note. *Gillman v. Henry* (1881) 53 Wis. 465, 10 N. W. 692.

It has been held that, in a case of a note secured by mortgage, it cannot be shown that the creditor agreed to seek satisfaction solely out of the mortgaged premises. *Smith v. McLaughlin* (1915) 120 Ark. 366, 179 S. W. 496. Nor that a creditor agreed to protect guarantors against any liabil-

ity on a note by taking security from the principal debtor. *Lompoc Valley Bank v. Stephenson* (1909) 156 Cal. 350, 104 Pac. 449.

A wife who has joined with her husband in signing a note given for a claim held against her husband cannot show an oral agreement that she would not be required to pay it. *Duty v. Sprinkle* (1908) 64 W. Va. 39, 60 S. E. 882.

A wife who, with her husband, has executed a joint and several promissory note, cannot, when sued upon the note, set up an oral agreement that she was not to be held personally liable thereon, but had only signed the note as a member of the community. *Hemrich v. Wist* (1898) 19 Wash. 516, 53 Pac. 710.

One of two joint makers of a note cannot show an oral agreement that he was not to be liable thereon, but that the note was executed by him for the purpose of allowing the payee to come in under a mortgage previously given by the other joint maker. *Tacoma Mill Co. v. Sherwood* (1895) 11 Wash. 492, 39 Pac. 977.

One of the joint makers of a note cannot show an oral agreement with the payee that he was not to be personally liable for any amount by reason of his having signed the note, but that the same was to be paid out of the mortgage security. *Colbert v. First Nat. Bank* (1913) 38 Okla. 391, 133 Pac. 206.

The maker of a note cannot prove an oral agreement that the payee would rely upon a mortgage securing the note alone, and would not assert any personal liability against the maker. *McFarland v. Hueners* (1920) 96 Or. 579, 190 Pac. 584.

The maker of a note cannot show that it was given in pursuance of a family arrangement, under an agreement that only the interest on the note should be paid, and this only in the event that the payee should need it and call for it during his lifetime. *Morse v. Low* (1872) 44 Vt. 561.

Where the maker of a promissory note had, prior to the execution of the note, received a sum of money under a condition which might have been a

gift or a loan, the giving of a promissory note is conclusive evidence that the parties determined that it should be a loan, and not a gift, and therefore parol evidence is not admissible for the purpose of proving that the parties verbally agreed that the note should not be paid, but should stand only as security for the interest. *Hill v. Wilson* (1873) L. R. 8 Ch. 888, 42 L. J. Ch. N. S. 817, 29 L. T. N. S. 238, 21 Week. Rep. 757, 24 Eng. Rul. Cas. 502.

The sureties on a note cannot show that they refused to sign it except in consideration of a promise on the part of the payee that he would take from the principal mortgages on real estate sufficient to secure the note and save the sureties harmless. *Concord Bank v. Rogers* (1844) 16 N. H. 8.

Parol evidence of a prior and contemporaneous agreement is not admissible to show that a note given by a child to a parent was a mere memorandum of an advancement, and not intended as a note. *Fennell v. Henry* (1881) 70 Ala. 484, 45 Am. Rep. 88; *Mason v. Mason* (1887) 72 Iowa, 457, 34 N. W. 208; *Russell v. Smith* (1901) 115 Iowa, 261, 88 N. W. 361. A daughter to whom her father delivered slaves, and who gave her notes, bearing interest, for the estimated value, cannot by parol evidence show that the notes were not to evidence a debt, but merely an advancement. *Fennell v. Henry* (Ala.) supra.

The maker of a note to his wife's father cannot show that it was executed as a memorandum or evidence of money given by the father to his daughter as an advancement, and that the money was received by the husband in trust for his wife, who was insane. *Gerth v. Engler* (1887) 71 Iowa, 616, 33 N. W. 131. A son who has given his note for the purchase price of goods purchased at a public sale held by his father cannot show an oral agreement that the note was to be regarded merely as evidence of an advancement. *Mason v. Mason* (1887) 72 Iowa, 457, 34 N. W. 208. A promissory note held by a father against a son cannot, by parol evidence, be shown to have been evi-

dence of an advancement merely, and not of a debt. *Russell v. Smith* (Iowa) supra.

But compare with cases relating to the same evidence in VII. c, infra.

Agreement that the note should be surrendered.

Parol evidence is inadmissible to show an agreement that the note would be surrendered to the maker. *Bomar v. Rosser* (1901) 131 Ala. 215, 31 So. 430; *Howard v. Stephens* (1874) 52 Ga. 448; *Knote v. Bense* (1915) 94 Kan. 294, 146 Pac. 363; *Warren Academy v. Starrett* (1839) 15 Me. 443; *Bryant v. Mansfield* (1843) 22 Me. 360; *Spring v. Lovett* (1831) 11 Pick. (Mass.) 417; *Tower v. Richardson* (1863) 6 Allen (Mass.) 351; *Barnard State Bank v. Fesler* (1901) 89 Mo. App. 217. See *Perkins v. Young* (1860) 16 Gray (Mass.) 389.

An answer in an action by an administrator on notes given to him, alleging that the notes were made for the purchase money of certain lands sold by the administrator, and that the maker had a demand against the estate of plaintiff's intestate, and, at the time of the sale, he had a verbal understanding and agreement with the administrator that payment of the notes would not be required, but that he might retain the amount thereof on his claim, presents no defense to the action, since the answer sets up a verbal agreement that is contradictory of the written contract. *Bishop v. Dillard* (1887) 49 Ark. 285, 5 S. W. 341.

A surety cannot set up an agreement that he was to be liable for only a few days, and then be discharged. *Mansfield v. Barber* (1877) 59 Ga. 851.

Nor that the payee would take a chattel mortgage from the principal debtor, and the surety would thereupon be released from all liability. *Graff v. Fox* (1917) 204 Ill. App. 598.

The maker of a note containing, as a part thereof, a mortgage on the maker's chattels, cannot show that the note was executed as a memorandum of the balance due the payee, and that it was agreed that it should be returned to the maker upon the de-

livery of certain personal property. *Knote v. Bense* (1915) 94 Kan. 294, 146 Pac. 363.

The maker of a note cannot show that it was executed to the payee, who conveyed land to her under an agreement that, as soon as he should find a purchaser for the land, the note should be surrendered upon her re-conveying the land to him. *Bryant v. Mansfield* (1843) 22 Me. 360.

The maker of a note cannot show that it was given in a real estate transaction upon a verbal agreement that, upon his giving a deed of the real estate to the payee, the note should be given up. *Spring v. Lovett* (1831) 11 Pick. (Mass.) 417.

The maker of a note cannot show an oral agreement between himself and the payee that the note should be given up unless the maker should obtain a discharge from all his debts. *Tower v. Richardson* (1853) 6 Allen (Mass.) 351.

The maker of three notes cannot show that, upon the payment of one, the others were not to be enforced, but were to be returned to him. *Barnard State Bank v. Fesler* (1901) 89 Mo. App. 217.

Parol evidence of an agreement that the note was given for a sewing machine, and that the plaintiff agreed at the time the note was given that, if the machine did not give satisfaction to the maker's wife, he, the agent, would take it back at any time within six months, the agent saying that his time would soon be out, and that he wanted the note so as to enable him to get his commission for selling the machine. *Howard v. Stephens* (1874) 52 Ga. 448.

Agreement that the maker should not be called on for payment, or that the note would not be enforced.

Evidence of an oral agreement that the maker would never be called upon to pay the note is inadmissible. *Sasser v. McGovern* (1912) 11 Ga. App. 88, 74 S. E. 797. An oral agreement that the maker should not be called on to pay the principal so long as he paid interest is inadmissible. *Church & Congregation in Second Precinct v. Stetson* (1828) 5 Pick. (Mass.) 506.

Nor can the maker show that the payee agreed to look to a third person for payment. *Niblack v. Frank* (1917) 209 Ill. App. 162; *Bank of California v. Starrett* (1920) 110 Wash. 231, 9 A.L.R. 177, 188 Pac. 410. See further cases of this class supra, "Agreement that maker should incur no liability."

Evidence of an oral agreement not to sue on the note is inadmissible. *Crooker v. Hamilton* (1907) 3 Ga. App. 190, 59 S. E. 722.

The maker of a note cannot show that it was given as evidence of the purchase price for a stock of goods which was sold to him under a contract that he should not be bound to pay for the stock until he should work it up and make some money out of the same, but that the payee of the note induced him to give the note under an agreement that he would never bring suit thereon. *Withrow v. Wiley* (1852) 3 Ind. 379.

A prior or contemporaneous oral agreement not to enforce a note according to its terms cannot be shown. *Henry Wood's Sons Co. v. Schaefer* (1899) 173 Mass. 448, 73 Am. St. Rep. 305, 53 N. E. 881; *First Nat. Bank v. Holmes* (1921) 213 Mich. 41, 181 N. W. 46.

In *Fambro v. Keith* (1909) 57 Tex. Civ. App. 302, 122 S. W. 40, an oral promise of the payee to a surety on the note, that the note would not be enforced against the surety, is held no defense to an action on the note.

Agreement that note was collateral security.

The maker of a note cannot claim that it was collateral security, payable only upon a contingency. *Moore v. Prussing* (1896) 165 Ill. 319, 46 N. E. 184.

The court in *Moore v. Prussing* (Ill.) supra, says: "Whilst a person signing a note has a right to prove by parol the capacity in which he signs the paper, and such proof is not an attempt to vary the terms of the written instrument, yet, where the note is accepted as a separate and independent contract, an attempt to vary the terms of the contract by parol is not

admissible, and the plea attempting to set up that the note signed was accepted as collateral security could not change the legal effect of the instrument, as a liability would exist according to the terms of the contract, and the attempt to set up such an agreement constituted no defense. As the sole makers of the note, defendants cannot show they only signed as sureties."

The maker of a note cannot show that it was delivered as collateral security for the performance of a parol promise or agreement by the maker. *Walker v. Crawford* (1870) 56 Ill. 444, 8 Am. Rep. 701.

c. Rule that evidence is admissible.

Some cases take the view that an oral agreement that the note was delivered for a special purpose, or was not to become an obligation, is admissible. An agreement that the note is a mere memorandum, and was never to be an enforceable obligation, but was to be delivered upon certain contingencies, is admissible. *Denver Brewing Co. v. Barets* (1897) 9 Colo. App. 341, 48 Pac. 834; *Schindler v. Muhlheiser* (1877) 45 Conn. 153. In some cases in which parol evidence was admissible it amounted to but little more than evidence of the circumstances under which the alleged note was given. *Denver Brewing Co. v. Barets* (Colo.) *supra*. In this case the maker of the alleged note proposed to a brewing company that it put up the money to purchase a saloon, and take the promissory note of a prospective purchaser which the maker had in view. To this proposition the brewing company acceded and gave the maker the amount of money required to make the purchase. After its delivery, the brewing company asked him to give a memorandum showing his receipt of the money; thereupon the note was drawn up and signed by him, and left with the brewing company, which agreed to return it on receipt of the note and chattel mortgage of the prospective purchaser of the property. This arrangement was completed, the sale to the prospective purchaser was being

carried out, and his note, secured by chattel mortgage, as agreed, was delivered to the brewing company.

The maker of a note may prove that it was given under an arrangement between him and the payee that the payee should convey land to the maker for a certain purpose, and that the note should be executed and delivered, and when the purpose for which the land was conveyed had been accomplished, it should be reconveyed to the payee, and the payee should deliver up the note. *Schindler v. Muhlheiser* (Conn.) *supra*.

In other cases the oral agreement admitted in evidence showed that the note was not in fact a note, but was given for some other purpose, and was to be surrendered when the purpose was accomplished.

Thus, in *Julliard v. Chaffee* (1883) 92 N. Y. 529, the evidence was to the effect that the note was only part of the prior parol arrangement by the terms of which the payees were to advance money in anticipation upon the debts owing by them, and the maker promised that the money so paid should be applied in discharge of those debts, and it was provided that the papers should be returned to the maker when the money was so applied. According to the court, the note did not constitute the agreement, and in this case it was not set out in the complaint as the foundation of the action; it was merely evidence of part of the agreement, and, when relied upon by one party, the other might properly show in defense the whole transaction; and when that was shown, the defense was made out, not by controlling the contract indicated by the writing, but by a collateral agreement with which it was incidentally connected, the execution of which inured as payment of the note in the manner directed by the payees, and upon faith in which the note was given.

In *Higgins v. Ridgway* (1897) 153 N. Y. 130, 47 N. E. 32, it was held competent for the maker of the note to show an oral agreement that it was delivered upon the express condition

that the maker should not be liable thereon.

A duebill may be shown to have been delivered as a mere memorandum, to evidence the amount of money furnished by the obligee to the maker for use in a partnership transaction. *Ostrander v. Snyder* (1893) 73 Hun, 378, 26 N. Y. Supp. 263.

It was held competent in *Clark v. Ducheneau* (1903) 26 Utah, 97, 72 Pac. 331, to show that a note was given to secure the performance of an agreement to purchase the stock, and that it was to be surrendered when the stock was delivered.

Parol evidence has been held to show that an absolute promise in writing to pay a certain sum of money was a mere receipt or memorandum to show the amount of an advancement. *Storey v. Storey* (1914) 131 C. C. A. 269, 214 Fed. 973; *Norman v. Norman* (1858) 11 Ind. 288; *Brook v. Latimer* (1890) 44 Kan. 431, 11 L.R.A. 805, 21 Am. St. Rep. 292, 24 Pac. 946; *Garner v. Taylor* (1900) — Tenn. —, 58 S. W. 758.

But compare with cases relating to the same evidence in VII. b, *supra*.

The court in *Brook v. Latimer* (1890) 44 Kan. 431, 11 L.R.A. 805, 21 Am. St. Rep. 292, 24 Pac. 946, says: "We do not deem the admission of evidence tending to show that a promissory note, absolute by its express terms, is a mere evidence of an advancement by a parent to a child, to be a violation of that rule of evidence that forbids a written instrument to be varied or contradicted by parol."

In other cases, while the existence of the note as such is admitted by the case made by the oral evidence, it has been held competent to show that the maker was not to be held liable thereon. *Garfield Nat. Bank v. Colwell* (1890) 57 Hun, 169, 10 N. Y. Supp. 169; *Simmons v. Thompson* (1898) 29 App. Div. 559, 51 N. Y. Supp. 1018; *Williams v. First Nat. Bank* (1899) 45 App. Div. 239, 60 N. Y. Supp. 1105, affirmed in (1901) 167 N. Y. 594, 60 N. E. 1122; *Farnum v. Carr* (1902) 69 App. Div. 493, 74 N. Y. Supp. 1111.

The purchaser of certain territorial

rights in a patent device, who has given his note therefor, may show that the note was given upon the oral agreement of the payee that he, the payee, would obtain advertisements sufficient to pay the note, and that the maker would never be called upon to pay other than from the proceeds of such advertisements. *A. H. Andrews & Co. v. Hess* (1897) 20 App. Div. 194, 46 N. Y. Supp. 796. This state of facts, according to the court, brings the case fairly within the rule that the delivery of the note having been limited by the conditions upon which the delivery was made, the performance of those conditions was essential to the validity of the note.

The maker of a note may show that the note was merely a formal matter to enable the payee to make a loan to a borrower without criticism, and under an agreement that the maker would incur no personal liability by signing the note, but that the payee would take care of it. *Simmons v. Thompson* (1898) 29 App. Div. 559, 51 N. Y. Supp. 1018.

An oral agreement that the indorsers of the note should not be held liable for its payment was admitted in *Lattimer v. Hill* (1876) 8 Hun (N. Y.) 171, on the theory of conditional delivery.

It was held competent in *Solenberger v. Gilbert* (1890) 86 Va. 778, 11 S. E. 789, to show that notes were delivered only for the purpose of having them discounted, and with the understanding that they were to be renewed.

Even prior to the Negotiable Instruments Act, a prior or contemporaneous agreement was held competent to show that a note was delivered for a special purpose.

Thus, in *Oakland Cemetery Asso. v. Lakins* (1904) 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 359, an oral agreement that the note was not delivered to the payee as a note or as his property, but that it was simply to be held by him during his lifetime as evidence of and as security for the makers' obligation to pay interest, and that, upon the payee's death, the makers became entitled to the possession of the

note, was held admissible. The court says: "Here the delivery was only as security for the main promise, which was in parol, and the note was never delivered otherwise than as security for the fulfilment of this promise." A letter had been written by the payee which bore out the intention of the makers of the note, and the court says that this letter should be construed with the other writings as if a part of the transaction, and that it showed that the entire agreement was not embodied in the writing.

Although the court seems to regard this evidence as showing a conditional delivery, the evidence shows more clearly a delivery for a special purpose.

In other cases in this state the maker of a note has been allowed to show an oral agreement that the note was in reality only an obligation to pay interest, and not to pay the principal. *Marsh v. Chown* (1898) 104 Iowa, 556, 73 N. W. 1046; *Ball v. James* (1916) 176 Iowa, 647, 158 N. W. 684; but neither of these cases based the decision upon conditional delivery. In *Marsh v. Chown* the amount of money which was stated in the note as the principal thereof had been advanced by the payee to the maker, who was his child, and the oral evidence was admitted on the theory that the consideration of the note would always be inquired into. In *Ball v. James* a verbal agreement on the part of the payee of the note that she would leave the money to the maker at her death, and that the principal would never have to be paid, was admitted on the theory that it did not purport to vary the terms of the note, but was merely evidence of the inducement to the execution of the note.

But see *Chapman v. Chapman* (1906) 132 Iowa, 5, 109 N. W. 300, supra, VII. b.

The Negotiable Instruments Act expressly provides that evidence is admissible to show a delivery for a special purpose.

The maker of a note given to a corporation was permitted to show in an action by the corporation that he executed and delivered the note for the

sole purpose of enabling the corporation to place the same with a bank as collateral security for money which it borrowed in order to enable it to transact business for which it was organized, until it should come into possession of ample funds of its own. That the note had been so pledged, but that the corporation had paid its obligation to the bank, and had come again in the possession of the note (*Divine v. Western Slope Fruit Growers Asso.* (1915) 27 Colo. App. 368, 149 Pac. 841); but whether this was on the theory that it was a conditional delivery, or that it was delivered for a special purpose, is not made clear.

The makers of a note may show that it was executed for the special purpose of furnishing cash bail for one accused of crime, and upon the condition that the note would be returned when the bail was exonerated. *First Nat. Bank v. Miller* (1920) — N. D. —, 179 N. W. 997.

The maker of a note may show that he was engaged to marry the daughter of the payee, and that the payee, intending to make a wedding present to his daughter of \$500, deposited this amount in an account in the joint names of his daughter and her intended husband; and that, being desirous of some security from the husband against his withdrawing the money and not marrying the daughter, the note in suit was executed; and that, on the day after the marriage, he asked the payee for the note, and was advised by him that he had torn it up. *Lopato v. Hayman* (1920) — R. I. —, 111 Atl. 529.

Although the Negotiable Instruments Law, expressly providing that it may be shown that a note was delivered for a specified purpose, had been enacted in Michigan long prior to the giving of the note involved in *First Nat. Bank v. Holmes* (1921) 213 Mich. 41, 181 N. W. 46, there is an implication in that case that it cannot be shown that a note was delivered for a special purpose. No reference is made to the Negotiable Instruments Law, nor is there any clear statement to the above effect.

The delivery in *Herron v. Brinton*

(1920) 188 Iowa, 60, 175 N. W. 881, supra, seems to have been for a special purpose rather than a conditional delivery.

Although nothing is said in *Gwinn v. Ford* (1915) 85 Wash. 571, 148 Pac. 891, s. c. on rehearing in (1916) 91 Wash. 498, 158 Pac. 536, as to the Negotiable Instruments Law, the notes involved in that case were given after the law went into effect in that state. It is there held that an allegation in an answer to the effect "that it was distinctly understood and agreed by and between these defendants and the said Rice that the said note was to be used by said Rice for the purpose of raising the necessary money to finance the transaction above described, and to purchase a certain amount of the stock of the Jexite Powder Company at 35 cents per share," was to negative the idea of a conditional delivery.

Storey v. Storey (1914) 131 C. C. A. 269, 214 Fed. 973, supra, was decided under the Negotiable Instruments Act, but the provisions of that act are stated to be merely a codification of the general law in that respect, as established by a preponderance of

sound authority. The court here takes the view that there was no delivery of the note for the purpose of giving effect to it as a contract, because the manual transfer was for a special purpose, and not for the purpose of transferring the property in the instrument.

In *Drovers' Cattle, Loan, & Invest. Co. v. McGraw* (1921) — Minn. —, 184 N. W. 365, it was held competent for the purchaser of cattle, who had given her note for a balance due on the purchase price, to prove by parol that, notwithstanding the delivery of the note, it was intended by the parties that it would become operative as a contract only in case she failed to live up to the terms of her contract to care for and return the cattle for sale in the fall, and apply the proceeds thereof in extinguishment of the contract. According to the court, the note was delivered and held in the nature of a pledge that the agreement would be performed. The decision, however, in this case, is not based, at least, not expressly based, upon delivery for a special purpose, nor is the Negotiable Instruments Law referred to.

W. A. E.

STATE OF KANSAS

v.

GEORGE TOLIVER, Appt.

Kansas Supreme Court — November 12, 1921.

(109 Kan. 660, 202 Pac. 99.)

Indictment — burglary — failure to name owner.

1. An information for burglary may be sufficient as against a motion to quash on the ground no offense is stated, although the name of the known owner of the building be not disclosed.

[See note on this question beginning on page 510.]

— motion to quash — effect.

2. A motion to quash an information for burglary, on the ground the facts stated do not constitute a public offense, raises the question whether all

ingredients of the crime are present, but does not raise the question whether details, not of the substance of the offense, but which good pleading requires should be stated, are present.

Headnotes by BURCH, J.

Burglary — who is owner.

3. Under the statute of this state making it burglary to break and enter in the nighttime, with felonious intent, a store in which goods are kept, the essence of the crime is violation of the security of the occupancy. The person injured is the one who occupies the store by keeping goods there, and ownership of the store is properly laid in such occupant.

[See 4 R. C. L. 432.]

Indictment — burglary — identifying owner.

4. In an information for burglary of a store and for larceny committed in connection with the burglary, ownership of the store and goods was alleged to be in "the Durnil Dry Goods Company." Held, it was not necessary further to identify the owner by stating whether the company were a corporation or a partnership.

[See 4 R. C. L. 434.]

Appeal — omission of monitory instruction — effect.

5. Under the facts stated in the opinion, it was not prejudicial error to omit to give, upon request, a monitory instruction concerning the individual responsibility of each juror in determining what the verdict should be.

— instruction that crime is established.

6. The proceedings considered, and held, the court did not err in instructing the jury that the crime of burglary had been established beyond dispute, and that the only issue for their consideration was whether or not the defendant participated in the burglary as a principal.

— absence of error.

7. Various assignments of error considered, and held to be without substantial merit.

APPEAL by defendant from a judgment of the District Court for Wilson County (Brown, J.) convicting him of burglary and larceny. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. F. S. Jackson and E. D. Mikesell, for appellant:

Failure of the information to allege the ownership of the building burglarized, and the failure to allege the character of the Durnil Dry Goods Company as to whether it was a corporation or a copartnership, and, if it was a copartnership, the failure to allege the names of the partners, was fatally defective.

State v. Fockler, 22 Kan. 542; Simpson v. State, 5 Okla. Crim. Rep. 57, 113 Pac. 549; James v. State, 77 Miss. 370, 78 Am. St. Rep. 527, 26 So. 929; Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23, 7 So. 48; Davis v. State, 51 Fla. 37, 40 So. 179; Cooper v. State, 89 Ga. 222, 15 S. E. 291; McCrillis v. State, 69 Ind. 159; State v. Davis, 138 Mo. 107, 39 S. W. 460; State v. Horned, 178 Mo. 59, 76 S. W. 953; State v. Hupp, 31 W. Va. 355, 6 S. E. 919; People v. Richards, 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371; 25 Cyc. 88; State v. Jones, 168 Mo. 398, 68 S. W. 566; State v. Wilson, 73 Kan. 334, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737; Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23, 7 So. 48.

It is the duty of the court, in his instructions, to properly define the offense charged, and give the jury a statement of its essential elements.

State v. Lynch, 86 Kan. 528, 121 Pac. 351; State v. Jackson, 42 Kan. 384, 22 Pac. 427; State v. Truskett, 85 Kan. 804, 118 Pac. 1047.

Mr. F. B. Hanlon also for appellant. Messrs. Richard J. Hopkins, Attorney General, B. M. Dunham, and W. H. Edmundson, for the State:

It is not necessary to allege that a certain "company" is a corporation.

State v. Watson 102 Iowa, 651, 72 N. W. 283; State v. Williams, 120 Iowa, 36, 94 N. W. 255; State v. Kelley, 12 Ann. Cas. 683, note; State v. Kelter, 108 Kan. 555, 196 Pac. 241; People v. Henry, 77 Cal. 445, 19 Pac. 830; Norton v. State, 74 Ind. 337; State v. Golden, 86 Minn. 206, 90 N. W. 398; Hamilton v. State, 34 Ohio St. 82; Burke v. State, 34 Ohio St. 79; Morris v. United States, 143 C. C. A. 584, 229 Fed. 516.

Ownership was properly laid in the Durnil Dry Goods Company.

State v. McAnulty, 26 Kan. 533; 3 Enc. Pl. & Pr. 762; Winslow v. State, 26 Neb. 308, 41 N. W. 1116; People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964; 9 C. J. 1044, § 79; State v. Burns, 155 Iowa, 488, 136 N. W. 520; Adams v. State, 13 Ala. App. 330, 69 So. 358.

The unsupported testimony of accomplices is sufficient to sustain a conviction, if the jury feels such tes-

timony is entitled to credence and weight.

State v. Patterson, 52 Kan. 335, 34 Pac. 784; State v. Bratcher, 105 Kan. 593, 185 Pac. 734; State v. McDonald, 107 Kan. 568, 193 Pac. 179.

Burch, J., delivered the opinion of the court:

The defendant was convicted of burglary and larceny, and appeals.

The charging parts of the information read as follows:

" . . . Did then and there unlawfully, wrongfully, wilfully, feloniously, and burglariously break and enter in the nighttime a store building in the city of Neodesha, Wilson county, Kan., occupied and used by the Durnil Dry Goods Company as a retail store, where were kept and offered for sale, goods, wares, and merchandise, with intent to take, steal, and carry away therefrom goods, wares, and merchandise belonging to the said the Durnil Dry Goods Company. . . .

"Did then and there unlawfully, wrongfully, and feloniously, take, steal, and carry away from a store building situated in the city of Neodesha, Wilson county, Kan., and occupied by the Durnil Dry Goods Company as a retail store, goods, wares, and merchandise. . . .

"All being of the goods, wares, merchandise, and chattels of the said the Durnil Dry Goods Company. . . ."

A motion to quash the information, on the sole ground it did not state facts sufficient to constitute a public offense, was made and overruled. It is contended the court erred in overruling the motion, because ownership of the building burglarized was not stated, and because the nature of the organization or association called the Durnil Dry Goods Company was not stated.

The statutes defining the crimes charged read as follows:

"Every person who shall be convicted of breaking and entering in the nighttime . . . any . . . store . . . in which there shall be at the time some human being,

or any goods, wares, or merchandise, or other valuable thing kept or deposited, . . . with the intent to steal or commit any felony therein, shall on conviction be adjudged guilty of burglary in the second degree."

"If any person in committing burglary shall also commit a larceny, he may be prosecuted for both offenses in the same count, or in separate counts of the same indictment; and on conviction of such burglary and larceny, shall be punished by confinement and hard labor, in addition to the punishment hereinbefore prescribed for the burglary, not exceeding five years."

Gen. Stat. 1915, §§ 3436, 3440.

An information may be defective because some element of the crime attempted to be charged is omitted. Pleading to such an information, and going to trial upon it waive nothing. Should a verdict of guilty be returned, judgment may be arrested on motion of the defendant, or on the court's own motion, because the information did not state facts sufficient to constitute a public offense. An information may be defective for lack of details which are not of the substance of the offense, but which good pleading requires should be stated. Such defects may be waived, and they are waived, unless the information be challenged in due time by a motion to quash which points out the particular insufficiencies. In this instance every element of the crimes defined by the statutes appears in the information, ^{Indictment—}and the motion to ^{motion to quash}quash, which specified no defect except failure to state a public offense, was properly overruled. ^{—effect.}

The defendant very earnestly insists that, under the authorities, including decisions of this court, the information was fatally defective because ownership of the store was not stated. In the case of State v. Fockler, 22 Kan. 542, the store burglarized was described in the information as follows: "A certain

store situated on the north end of lot No. 5, in block number seventeen (17), in Witherell's addition to the town (now the city) of Osage City, in the county and state aforesaid." 22 Kan. 542.

In the opinion it was said: "We think the name of the owner of the 'store' should have been stated in the information. We think the authorities are uniform in holding that in burglary the name of the owner of the building must be given in the charge, if known, and, if not known, then that fact must be set out." 22 Kan. 543.

In framing the syllabus, however, the court was much more reserved. The syllabus reads: "A criminal information which charges the commission of burglary by the breaking and entering into a certain store building in the nighttime with intent to steal, but which does not state or show who the owner of the building was, or whether it was owned or possessed by any person or not, is not sufficient." 22 Kan. 542.

An examination of the decided case will disclose that the word "owner" does not of necessity mean owner at all. Generally the term refers to occupancy or possession at the time of the burglary, and it may apply to one who has wrongful possession as against the owner. If ownership be unknown, it need not be stated; if it be in several, it is enough to name one (Gen. Stat. 1915, § 8020 [Code Crim. Proc. § 106]); and, so far as legal title is concerned, a man may be guilty of burglarizing his own house. What, then, is the basis of the requirement, said to be imperative in a multitude of decisions, that ownership of the building burglarized must be stated in the indictment or information?

A full account of the law of burglary has not yet been written. Pollock and Maitland were unable to trace its genesis (2 Hist. Eng. Law, p. 493), and Holdsworth leaves the course of its development incompletely sketched (3 Hist. Eng. Law, p. 292). When Britton wrote, bur-

glary was beginning to be something different from the ancient hamsoken or housebreaking: "Let inquiry also be made of burglars. Such we hold to be all those who feloniously in time of peace break churches, or the houses of others, or the walls or gates of our cities or boroughs. Infants under age, and poor people, who through hunger enter the house for victuals under the value of twelve pence, are excepted; as are also idiots and madmen, and others, who are incapable of felony; and those who enter into any tenement of seisin in respect of some right which they think they have are not held to be burglars. The punishment of such felons is death." Book 1, chap. 11, Nichol's Translation, p. 36.

When Coke wrote, common-law burglary was practically limited to nighttime depredations on mansion houses:

"A burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not. . . .

"The word in the indictment or appeals is 'noctanter.' . . .

"The indictment saith, domous mansionalis, a mansion or dwelling house."

3 Inst. pp. 63, 64.

The approximate time when the word "noctanter" became indispensable to an indictment for burglary has not been ascertained. The disposition to restrict burglary to mansion houses led Coke to explain burglary of a church by saying a church is the mansion house of Almighty God.

Hale quotes Spelman's definition of burglary, which recognizes breaking of churches and gates and walls of towns, and quotes Coke's definition, but confines his text to what may be regarded as a mansion house: 1 Hist. P. C. pp. 549, 556. This phase of the development of the

law of burglary is described by Hawkins as follows:

"It seems to be the current opinion at this day that it can be committed only in a dwelling house, and that the indictment for it must necessarily allege the fact in domo mansionali.

"And Sir Edward Coke seems to say that the breaking a church, etc., is therefore burglary, because the church is the mansion house of God. But I can find nothing in the more ancient authors to countenance this nicety; for the general tenor of the old books seems to be that burglary may be committed in breaking houses, or churches, or the walls or gates of a town. And Staunforde and Anderson mention precedents of indictment of burglary 'in domo' without adding 'mansionali' However, the constant course of late precedents and opinions makes it certainly very dangerous, if not an incurable fault, to omit the word mansionalis in an indictment of burglary in a house; and therefore, without question, it ought always to be inserted where the truth of the case will bear it. But surely it cannot be necessary or proper to have any such word in an indictment of burglary in a church, which, by all books above cited, seems to be taken as a distinct burglary from that in a house."

1 Hawk. P. C. chap. 17, §§ 16, 17.

As Coke indicated, it was not necessary that the felonious intent accompanying breaking and entering be accomplished, and the essence of the crime consisted in violating the security of the habitation. When statutes made invasion of places other than dwelling houses burglary, the essence of the crime consisted in violating the security of the occupancy or possession.

**Burglary—
who is owner.**

Side by side with the substantive law of burglary, and perhaps to an extent dominating it, grew the system of pleading. In this field the legal mind refined with luxuriant subtlety, and some doctrines including that of certainty, assumed such

extravagant importance that they are astonishing to the practical intelligence of to-day. Expansion of the notion of certainty in criminal pleading is apparent in the following quotation from Hawkins: "It seems to be taken as ground in many books that regularly the persons offended, as well as the defendant, ought to be certainly described in every indictment." P. C. book 2, chap. 25, § 71.

Hawkins's authorities, except the case from Coke, are not immediately available. Crystalization of rule is indicated by the decision in that case: "A Third Exception. — Because the indictment is 'Quod felonice furatus fuit quandam peciam panni linei cujusdam Antho. Nixon præd' draper, ad valentiam,' etc., and doth not say, 'De bonis et catallis cujusdam Anthonii Nixon,' as the common form of the precedents are, and therefore ill; for an indictment ought to be certain to every intent, without any intendment to the contrary; and here it may be that this piece of linen was not the goods and chattels of Anthony Nixon at the time of his taking of them, but by him let out, or delivered, or pledged to another; and it ought to have been shown whose bona et catalla they were; and it ought not to vary from all other precedents. And the court held it to be a material exception, for the reasons aforesaid; and for that cause the indictment was discharged by the whole court." Long's Case, Cro. Eliz. p. 490, 78 Eng. Reprint, 740.

Chitty cites many authorities in support of the rule that, when the name of the person injured is known, it is fatal to omit the name from the indictment (1 Crim. Law, p. 213), and the rule extended to indictments for burglary. Thus East says: "It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment. And here it is to be lamented that the same rule does not prevail in this case as in arson, which is considered as an

offense against the actual possessor by whatever title he may hold the possession. But in burglary the rule is much more complex; the ownership being neither referable altogether to the legal title, nor to the possession, but partaking sometimes of one, sometimes of the other, as well as of both." 2 P. C. p. 499.

Now, in order that a mansion house should be such, it was essential that somebody should bear to it the relation indicated by the flexible term "owner," and it was essential to burglary that such owner be some one other than the person making the hostile incursion. Definition of the crime, however, stopped with saying the dwelling house "of another." While ownership was in a sense an ingredient of the offense, it was always sufficient that it be vested in anyone except the intruder. It was never material that the owner be any particular person or have any specific name or addition. Except for the tyranny of the rule of pleading, burglary under the statute of this state would be made out in an information in the terms of the information in the Fockler Case (State v. Fockler, 22 Kan. 542), or in an information which merely charged that the locus in quo was owned by a person other than the defendant. The purpose of the rule of pleading requiring the name of the person offended to be stated was merely identification, albeit identification "certain to every intent." The result is the requirement that the name of the person injured by burglary be stated, in order fully to apprise the defendant of the accusation against him, is one thing, while the requirement that the name of the person injured be stated, not as a descriptive circumstance, but as a substantive part of the offense itself, is quite another thing, and the court holds an information for burglary may be sufficient as against

er of the building burglarized be not disclosed.

The statute makes it burglary to break and enter a store in which goods are kept. In the present case it was alleged the breaking and entering were done unlawfully, wrongfully, feloniously, and burglariously. That was sufficient to apprise the defendant the store did not belong to him. It was alleged the building was occupied and used by the Durnil Dry Goods Company as a retail store where goods, wares, and merchandise were kept for sale. The crime being one against security of possession, the criterion of ownership for the purpose of pleading burglary is not legal title, but occupancy or possession. 9 C. J. 1044. The person injured is the one who occupies the store by keeping goods there. The Code of Criminal Procedure requires that an information state the facts in plain and concise language (Gen. Stat. 1915, § 8017 [Code Crim. Proc. 103]), and the plain statement of the facts in the information under consideration fully identified the "owner" of the store.

It is said the description of the owner of the store and goods was bad, because the word "company" was used without designating its character. In the case of State v. Suppe, 60 Kan. 566, 57 Pac. 106, the syllabus reads as follows: "An information alleged that the defendant knowingly and feloniously received into his possession personal property which had been stolen from the Carterville Mercantile Company, without averring whether said company was a corporation, joint-stock company, or partnership. Held, that the court erred in overruling a motion to quash the information." ¶ 1.

The opinion expounded the doctrine that a defendant should be apprised of the exact charge against him, to enable him to prepare his defense, and to protect him from further prosecution. It was said a statement of the ownership of property is essential to such ex-

Indictment—
—burglary—
failure to name
owner. a motion to quash
on the ground no
offense is stated, al-
though the name of the known own-

actness, and because the Carterville Mercantile Company, although bearing a name appropriate to corporate existence, might be a partnership, and title might be in the individual partners, the information did not state a public offense. The conclusion that the information did not state a public offense at all was unsound, for reasons which have been indicated. A conclusion that the information was defective for want of certainty, in describing the owner would be justified by all the authorities which have perpetuated the medievalism of the common-law system of criminal jurisprudence. The writer does not join in recognition of the supremacy of those authorities, and the court declines to extend their reasoning to burglary and to larceny committed in connection with burglary.

The Suppe Case was decided in 1899. In the year 1900, in a case involving a bond given by "the Boyden Abstract Company," the court delivered itself as follows: "It purports upon its face to be the bond of a corporation. The decisions are uniformly to the effect that institutions with names of a character like unto that of the concern in question will be understood to be corporations, in the absence of contrary knowledge. The name 'The Thomas Harrow Company' fairly imports a corporation. *Seymour v. Thomas Harrow Co.* 81 Ala. 250, 1 So. 45. The name 'The Muskingum Manufacturing Company' implies a corporation. *Harris v. Muskingum Mfg. Co.* 4 Blackf. 267, 29 Am. Dec. 372. The name 'The Cicero Hygiene Draining Company' denotes a corporation. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274. So also does the name 'The Indianapolis Sun Company.' *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527." *Allen v. Hopkins*, 62 Kan. 175, 187, 61 Pac. 754.

Therefore the name "the Durnil Dry Goods Company" imported an incorporated body. The defendant was authorized to frame his defense

accordingly, and the record would have protected him from subsequent prosecution accordingly. The weight of authority is that, in charging burglary of corporate property, it is not necessary to allege incorporation (note in 12 Ann. Cas. 683), and the same rule should apply to larceny committed in connection with burglary.

burglary—
identifying
owner.

There is another view. One of the most common applications of the word "company" is to an association of persons for business purposes. Usually companies are either corporations or partnerships. If the association be incorporated, the corporate entity will hold title to its property. If the association be a partnership, the partners will hold title. The partners will necessarily be those, and only those, who compose the named company; and their individual names are in fact of no more practical consequence to a defendant charged with burglary than the names of incorporators would be. The precise state of the legal title to the property is not a matter of concern to him. Naming the owner in the information serves no purpose except to identify the property, and, whatever the composition of the Durnil Dry Goods Company, that purpose was sufficiently accomplished, under any rational conception of the administration of justice, by naming it as owner.

The Durnil Dry Goods Company was a corporation. Evidence of the fact was not disputed, and ownership of the store and goods was not disputed. The proceedings at the trial disclosed that the asserted imperfection in the information did not embarrass the defendant with respect to the merits of the case, and no substantial right of the defendant was in fact prejudiced. Therefore the judgment may not be reversed because the information was not quashed. Gen. Stat. 1915, §§ 8024, 8215 (Code Crim. Proc. §§ 110, 293).

The defendant requested an in-

struction concerning the individual responsibility of each juror in determining what the verdict should be, and none was given. The case of State v. Witt, 34 Kan. 488, 8 Pac. 769, is relied on as establishing the principle that such an instruction must be given in a criminal case if requested. The offense charged in the Witt Case was capital, the proof was wholly circumstantial, and the decision was predicated on those facts. In this instance burglary and larceny were proved beyond controversy. The defendant's connection with the crimes was proved directly by the testimony of his confederates, who were abundantly corroborated, and by proof of incriminating statements and conduct of the defendant himself. Therefore need for the monitory instruction is not apparent.

Appeal—omission of monitory instruction—effect.

The defendant polled the jury after the verdict was returned, and each juror signified that the verdict was his verdict and that he was satisfied with it. Polling the jury subserved no purpose except to test the genuineness of each juror's concurrence in the verdict. Under these circumstances, failure to give the instruction did not constitute prejudicial error.

The court gave the following instruction; "That there was a burglary committed in violation of the statute above quoted on the night of the 25th of September, 1919, at the store of the Durnil Dry Goods Company at Neodesha, Wilson county, Kansas, has been established by the evidence in this cause beyond dispute. So that the only issue for your consideration is whether or not the defendant, George Toliver, participated in said burglary in such manner as to be guilty as a principal in said burglary."

The defendant argues that he placed the commission of burglary in issue by his plea of not guilty, and the issue of fact thus raised could not be taken from the jury and determined by the court. The case of State v. Jackson, 42 Kan.

384, 22 Pac. 427, is cited in support of the argument. The syllabus reads as follows: "In a criminal prosecution, where it is necessary for the maintenance of the action that a certain fact should be shown, and such fact is disputed by the defendant, both by his plea of not guilty and during the trial by his evidence, and evidence is introduced with reference to such fact, but the evidence introduced does not clearly, unquestionably, directly, and conclusively prove the fact, it is error for the trial court to take the question with reference to such fact away from the jury and to decide it itself." 42 Kan. 384.

In this instance the defendant did not dispute burglary, except by his plea, and the evidence introduced directly and conclusively proved the crime. It was proved directly by the burglars themselves, and their testimony was corroborated, not merely by circumstances, but by other convincing evidence. The sole fact controverted at the trial was whether or not the defendant had guilty connection with the active participants, and the instruction given was doubtless prompted by the following language, found in the opinion in the cited case: "In criminal cases it is never competent for the court to take a question of fact away from the jury and to decide it itself. Of course, a necessary fact may in some cases not be a question of fact; for the fact itself might be admitted by the parties, or it might not be disputed, and the entire and uncontradicted evidence in the case might clearly, unquestionably, conclusively, and directly prove the same. In such a case there might not be any question of fact to be decided." 42 Kan. 386.

Since no ingenuity, or even perversity of mind, could find a basis for disputing burglary, it was not error to give the instruction.

—instruction that crime is established.

There is nothing else of impor-

tance in the case. A captured telegram to the defendant from one of his confederates, and testimony relating to it, were properly received in evidence. The corporate character of the dry goods company was properly proved. Ownership of the building and goods and the value of the goods were sufficiently established. The testimony of the defendant's accomplices relating to his

participation in the burglary and larceny was well corroborated. A requested instruction appropriate to a case depending on circumstantial evidence was inapt. Objections to various instructions given are without substantial merit.

—absence of error.

The verdict was sustained by the evidence, and the judgment of the district court is affirmed.

ANNOTATION.

Necessity of naming owner of building in indictment or information for burglary.

- I. Scope of note, 510.
- II. Majority view, 510.
- III. Minority view, 511.

I. Scope of note.

This annotation is confined specifically to the necessity of alleging in an indictment or information for burglary the ownership of a building entered. The sufficiency of such an allegation, and the evidence by which it must be supported, are excluded from consideration.

II. Majority view.

By the great weight of authority an indictment or information for burglary must allege directly the ownership of the building entered.

Alabama.—Ward v. State (1874) 50 Ala. 120; Beall v. State (1875) 53 Ala. 460, 2 Am. Crim. Rep. 463; Graves v. State (1879) 63 Ala. 134; Adams v. State (1915) 13 Ala. App. 330, 69 So. 357. See also Anderson v. State (1872) 48 Ala. 665, 17 Am. Rep. 36; Webb v. State (1875) 52 Ala. 422; Johnson v. State (1883) 73 Ala. 486; Arp v. State (1898) 97 Ala. 5, 19 L.R.A. 357, 38 Am. St. Rep. 137, 12 So. 301, 9 Am. Crim. Rep. 517.

Florida.—Pells v. State (1884) 20 Fla. 774, 5 Am. Crim. Rep. 96; Davis v. State (1906) 51 Fla. 37, 40 So. 179; Vicente v. State (1913) 66 Fla. 197, 63 So. 423.

Illinois.—Willis v. People (1837) 2 Ill. 399; People v. Picard (1918) 284 Ill. 588, 120 N. E. 546; People v.

Zangain (1922) 301 Ill. 299, 133 N. E. 783.

Iowa.—State v. Morrissey (1867) 22 Iowa, 158; State v. Jelinek (1895) 95 Iowa, 420, 64 N. W. 259; State v. Wrand (1899) 108 Iowa, 73, 78 N. W. 788.

Massachusetts.—Com. v. Perris (1871) 108 Mass. 1.

Mississippi.—James v. State (1899) 77 Miss. 370, 78 Am. St. Rep. 527, 26 So. 929; State v. Ellis (1912) 102 Miss. 541, 59 So. 841.

Missouri.—State v. Davis (1897) 138 Mo. 107, 39 S. W. 460; State v. Jones (1902) 168 Mo. 398, 68 S. W. 566; State v. Horned (1903) 178 Mo. 59, 76 S. W. 953.

Nebraska.—Winslow v. State (1889) 26 Neb. 308, 41 N. W. 1116; Hahn v. State (1900) 60 Neb. 489, 83 N. W. 674, 14 Am. Crim. Rep. 112.

Ohio.—Wilson v. State (1877) 34 Ohio St. 199. Compare Ducher v. State (1849) 18 Ohio, 308.

Oklahoma.—Simpson v. State (1911) 5 Okla. Crim. Rep. 57, 113 Pac. 549.

South Carolina.—State v. Trapp (1882) 17 S. C. 470, 43 Am. Rep. 614.

West Virginia.—State v. Reece (1886) 27 W. Va. 375; State v. Hupp (1888) 31 W. Va. 355, 6 S. E. 919.

Wisconsin.—Jackson v. State (1882) 55 Wis. 589, 13 N. W. 448.

England.—Rex v. White (1783) 1 Leach, C. L. 252, 2 East, P. C. 513, 780; Rex v. Rawlins (1835) 7 Car. & P. 150; Rex v. Jarrald (1863) 9 Cox, C. C. 307.

If the ownership of the building is unknown that fact must be alleged. *State v. Morrissey* (Iowa) *supra*; *State v. Davis* (Mo.) *supra*.

The purpose of the requirement has been said to be to fix the identity of the building entered. *State v. Jelinek* (1895) 95 Iowa, 420, 64 N. W. 259.

In *State v. Trapp* (S. C.) *supra*, a further reason for the rule was advanced, viz., "for the purpose of showing on the record that the house alleged to have been broken into was not a dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into his own house." See to the same effect *Adams v. State* (1915) 13 Ala. App. 330, 69 So. 357. The reason last stated would seem to be more convincing, since the building may be identified with certainty without an averment of ownership (see *infra*, III.) and moreover it has been held that the allegation of ownership must be positive in form, and not merely by way of description. *Davis v. State* (1906) 51 Fla. 37, 40 So. 179, wherein the court held to be insufficient for want of an allegation of ownership, an indictment charging the breaking and entry of "that certain building commonly known as and called the storehouse of one B. F. Pope."

III. *Minority view.*

In several jurisdictions it is held that if an indictment or information for burglary sufficiently identifies the building entered, an allegation of ownership is not necessary. *State v. Clifton* (1878) 30 La. Ann. 951; *State v. Mish* (1907) 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459; *State v. Wilson* (1915) 36 S. D. 416, 155 N. W. 186. And see the reported case (*STATE v. TOLIVER*, ante, 502) which overrules *State v. Fockler* (1879) 22 Kan. 542.

In *State v. Clifton* (La.) *supra*, it was said: "He objects that the information does not state the ownership of the dwelling house. This was not necessary, nor of the essence of the charge. The dwelling house was sufficiently described as situated at and designated as No. 148 Canal

street, and known as the New Orleans Club House and occupied by some person or persons to the district attorney unknown, 'the said person or persons being lawfully therein at the time.' "

So, the court said in *State v. Mish* (1907) 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459, *supra*: "We hold that the information should negative the idea that the defendant, at the time of entry, had the right to enter, or, in other words, should show that the entry was a trespass. It does not necessarily follow that the ownership of the room or building must be specifically alleged, although, where this is known to the pleader, it would be the safer practice to do so. The name of the person having the right of possession, other than the defendant, may be alleged, or, in the absence of such allegation, terms should be employed indicating that the defendant, at the time of entry, was a trespasser."

In California, a statute provides that "when an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." Under that act an indictment for burglary need not allege the ownership of the building entered if the building is otherwise identified. *People v. Price* (1904) 143 Cal. 351, 77 Pac. 73; *People v. Redman* (1919) 39 Cal. App. 566, 179 Pac. 725; *People v. Mendoza* (1911) 17 Cal. App. 157, 118 Pac. 964. In the case last cited it was said that the ownership of the building was immaterial, except for the purpose of affording a means of its identification; that this was done by alleging it to be a tool house located at Lemoyne street and Marcom avenue, in the city of Los Angeles; that in the absence of proof that there was more than one such building so located, such description was sufficient, and fully apprised the defendant of the house he was charged with feloniously entering; and hence that the allegation of ownership was surplusage. But in *People v. Parker* (1891)

91 Cal. 91, 27 Pac. 587, it was held that where no other description of the building is given an allegation of ownership is essential. See also *People v. Webber* (1902) 138 Cal. 145, 70 Pac. 1089, 13 Am. Crim. Rep. 698.

In Oregon an indictment for burglary, following the statutory form, which omits an averment of the ownership of the building, is good. *State v. Wright* (1890) 19 Or. 258, 24 Pac. 229. W. A. S.

**BOARD OF COUNTY COMMISSIONERS OF LOGAN COUNTY, Plff.
in Err.,
v.
JOHN ADLER.**

Colorado Supreme Court (In Banc) — December 6, 1920.

(69 Colo. 290, 194 Pac. 621.)

Eminent domain — injury by public improvement — right to damages.

1. An action lies against a county for damages for injuries to property by the construction of a public improvement, although no part of the injured property was taken, under a constitutional provision requiring compensation for property taken or damaged for public use.

[See note on this question beginning on page 516.]

Action — against county — constitutional provision.

2. A constitutional provision that property shall not be taken or damaged for public use without compensa-

tion authorizes an action against counties to recover compensation for injuries to property by the construction of public improvements.

[See 4 R. C. L. 199.]

ERROR to the District Court for Logan County (Stephenson, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for injury to plaintiff's property by an overflow of water alleged to have been caused by the negligent construction of a bridge. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. T. E. Munson, for plaintiff in error:

A county is not liable in an action for damages based upon negligence, or, in other words, for torts.

4 Dill. Mun. Corp. § 1640; 4 Am. & Eng. Enc. Law, 364; *El Paso County v. Bish*, 18 Colo. 474, 33 Pac. 184; *Pitkin County v. Ball*, 22 Colo. 125, 55 Am. St. Rep. 117, 43 Pac. 1000; *Grand County v. People*, 16 Colo. App. 215, 64 Pac. 675; *Downing v. Mason County*, 87 Ky. 208, 12 Am. St. Rep. 473, 8 S. W. 264; *Shawnee County v. Jacobs*, 79 Kan. 76, 99 Pac. 817; *Maguth v. Passaic County*, 72 N. J. L. 226, 62 Atl. 679; *Wenck v. Carroll County*, 140 Iowa, 558, 118 N. W. 900; *Symonds v. Clay County*, 71 Ill. 355.

Messrs. Coen & Sauter, for defendant in error:

The basic law of the state of Colorado grants to the citizens of the state the privilege and the legal right of maintaining an action for damages which may result as the consequence of the construction of a bridge for the use of the general public, by a county through its proper agents acting in a lawful manner.

Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; 15 Cyc. 654; *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 20 L. ed. 557; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; *Atlanta v. Green*, 67 Ga. 386; *Chester County v. Brower*, 117 Pa. 647, 12 Atl. 577; *Brown v. Seattle*, 5 Wash. 35, 20 L.R.A. 68, 34 Am. St. Rep. 839, 31 Pac. 313, 32 Pac. 382.

There can be a taking, within the constitutional sense, without an actual

invasion of the property of the complaining party.

10 R. C. L. § 61; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 96 Ala. 571, 18 L.R.A. 166, 11 So. 642; *Elser v. Gross Point*, 114 Am. St. Rep. 326, and note 223 Ill. 230, 79 N. E. 27; *Ft. Worth Improv. Dist. v. Ft. Worth*, 48 L.R.A.(N.S.) 994, and note 106 Tex. 148, 158 S. W. 164; *Brown v. Seattle*, 5 Wash. 35, 20 L.R.A. 68, 34 Am. St. Rep. 839, 31 Pac. 313, 32 Pac. 382; *King v. United States*, 59 Fed. 12; *United States v. Lynch*, 188 U. S. 446, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Harrison v. Denver City Tramway Co.* 54 Colo. 593, 44 L.R.A.(N.S.) 1164, 131 Pac. 409; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295; *Delaware County's Appeal*, 119 Pa. 159, 13 Atl. 62; *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

Teller, J., delivered the opinion of the court:

Plaintiff in error, in constructing a bridge across the Platte River, filled up certain of its channels, thereby causing the water in time of flood to back up and overflow lands of the defendant in error. He brought suit to recover damages for the injury caused by such overflow.

A demurrer to the complaint having been overruled, and answer filed, the cause went to trial, and plaintiff had judgment.

Plaintiff in error now contends that the court erred in not sustaining the demurrer to the complaint, and in entering judgment on a verdict for plaintiff, because: First, the county is not liable for a tort; and, second, plaintiff cannot recover under § 15 of article 2 of our Constitution, because this court has held that it applies only to proceedings under the eminent domain act.

Counsel for the defendant in error concede that a county is not liable for the torts of its agents, in the absence of an express statute making it liable. *El Paso County v. Bish*, 18 Colo. 474, 33 Pac. 184.

20 A.L.R.—33

They have abandoned the charge of negligence as not necessary to the cause of action, and maintain that an action lies, under said constitutional provision, for the damages suffered, regardless of the question of negligence in the construction of the improvement. They contend, further, that this provision constitutes express authority for an action against a county under the facts of this case.

It being a prerogative of the state to be exempt from coercion by suit, a provision of the fundamental law for compensation in case of damage which is applicable to injuries caused by instrumentalities of the state, or by its agents, and to no other injuries, must be held to except such cases from the exemption. If this be not so, the plain intent of the inhibition is limited, and made, to a considerable extent, ineffective.

On principle this objection would apply to actions to recover for injury by the construction of railroads, or changes of street grades, because, in either case, the authority to take private property for the improvement is derived, either directly or indirectly, from the state. Whether exercised by a city, a county, or a railroad company, the right of eminent domain is exercised under power delegated by the state.

The purpose of such provisions is, as the courts have many times declared, to prevent a property owner from being made to suffer an uncompensated injury, not common to the public, as a result of the construction of a public improvement. Such improvements are frequently made or authorized by counties; and to say that because of that fact damages so suffered cannot be recovered is to deny to the language of the Constitution its obvious import.

This construction, however, in no way changes the rule that a county, as a subdivision of the state, is not ordinarily liable for the torts of its agents. That rule is always subject to the qualification that a county may be made liable by law. Section 15 of article 2 of our Constitu-

tion is a consent by the state to the bringing of suits against a county under such circumstances as are disclosed in this case.

The second objection is that a right of recovery claimed under the constitutional provisions mentioned does not exist, because of our decision in *North Sterling Irrig. Dist. v. Dickman*, 59 Colo. 169, 149 Pac. 97, Ann. Cas. 1916D, 973. The plaintiff there asserted the right under said provision to recover for injuries resulting from seepage; but this court held that the provision "refers and is limited to proceedings in eminent domain, or to cases where injury results by reason of the taking of property in which the abutting owner has an interest. Its purpose was to require compensation to be paid the owner of land taken in such cases, not only for the land actually taken, but for damages to the residue."

It is to be observed that, although in the *Dickman* Case the damages alleged were claimed because of seepage upon land no part of which had been taken in condemnation proceedings, the statement in the opinion refers only to damages to the residue of lands taken. This would seem to limit the protection afforded by the constitutional provision to property directly concerned in condemnation proceedings.

If the rule announced in that case is to be applied to the determination of this case, defendant in error had no right of action. There was no condemnation proceeding, and if there had been he would not have been a party to it.

The importance of this question justifies, in the mind of the court, a re-examination of the subject, a determination of the scope of the provision, and of the proper construction to be given to the term "damaged," as there used.

As is well known, constitutional provisions prohibiting the taking of private property for public use without compensation have been included in practically all of the state Constitutions. Where a part of a

property was taken and the residue suffered a direct physical damage as a result of the taking, such damage was held by many courts to be a "taking," within the meaning of the constitutional provision like that above mentioned. This court so held in *Denver v. Bayer*, 7 Colo. 120, 2 Pac. 6. But this left a property owner who sustained merely consequential damages from a public improvement without remedy. The injustice of this result was generally recognized.

In 1870 the Illinois Constitution was amended so as to prohibit both the taking and the damaging of private property for public use without compensation. The propriety of the change made in the Illinois Constitution has been recognized by amendments to nearly all the state Constitutions; and doubtless the framers of our Constitution adopted the language under consideration from the Constitution of Illinois.

This section applies to proceedings in eminent domain, and to situations in which such proceedings would be proper; i. e., where condemnation would be necessary were the required property not otherwise acquired.

The use of the word "damaged" in this section in connection with the word "taken" indicates clearly that the damage contemplated was such as would result from the making of an improvement in which the right of eminent domain might be called into use.

The first sentence directly and specifically inhibits the taking or damaging of private property for public or private use without just compensation. It is in no wise limited by the following provisions which prescribe the procedure in the appropriation of private property to a public use. The inhibition applies wherever condemnation proceedings are or might be necessary, or proper, whether such proceeding is instituted or not. The provision being thus limited, it may be held, as has been done in

many jurisdictions, that the right of recovery under such a constitutional provision is not limited to actions maintainable at common law. This construction obviates the possible objection, suggested by Judge Helm in *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714, that if actions for compensation were not limited to those maintainable at common law, a landowner might be liable to an adjoining lot owner for "incidental injuries occasioned by a prudent exercise of his right of dominion."

The full purpose of the provision cannot be effected if the rule announced in the *Dickman Case* is to prevail. Under that rule, where condemnation proceedings are instituted in the making of a public improvement, a property owner, no part of whose property was taken, and who was not, therefore, a party to the proceedings, would be without remedy, save in a case of negligence, no matter how greatly his property might be damaged by the improvement.

Under that rule, if a part of a property is taken, the owner may recover the value of what is taken, and such damages to the residue as result from the taking; but one whose property does not abut upon the improvement, although damaged, is without remedy, because he has no right to begin condemnation proceedings. It is so held in *Stetson v. Chicago & E. R. Co.* 75 Ill. 74. However, such an owner is not in fact without remedy; he may bring his action for damages. *Rigney v. Chicago*, 102 Ill. 64; *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 212; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 16 N. W. 475, 17 N. W. 120; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; *Brown v. Seattle*, 5 Wash. 35, 18 L.R.A. 161, 34 Am. St. Rep. 839, 31 Pac. 313, 32 Pac. 214; *Atlanta v. Green*, 67 Ga. 386;

St. Louis v. St. Louis, I. M. & S. R. Co. 272 Mo. 80, 197 S. W. 107; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Jackson v. Kiel*, 13 Colo. 378, 6 L.R.A. 254, 16 Am. St. Rep. 207, 22 Pac. 504; *Pueblo v. Strait*, 20 Colo. 13, 24 L.R.A. 392, 46 Am. St. Rep. 273, 36 Pac. 789, 20 C. J. 672-739. And this is true where a public improvement is constructed without condemnation proceedings. *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412. In this respect he is not limited to the cases in which he had a right of action at common law, but may sue for damages suffered, though there be no negligence in the making of the improvement in question. *Denver Circle R. Co. v. Nestor*, supra; *Rear-don v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *White v. Metropolitan West Side R. Co.* 154 Ill. 620, 39 N. E. 270; *Aldis v. Union Elev. R. Co.* 203 Ill. 567, 68 N. E. 95. The latter case holds that in an action by a property owner for damages the measure of damages and the rules of evidence are the same as in a direct proceeding by condemnation.

**Eminent domain—
injury by
public improve-
ment—right to
damages.**

All these cases, including those from this court, are in direct conflict with the holding in the *Dickman Case*, in which, it may be noted, there is no authority cited in support of the ruling under consideration. *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6, is cited, as to the purpose of the constitutional provision, the fact being apparently overlooked that the case is directly in conflict with the court's subsequent statement that said provision applies only to proceedings in eminent domain.

If the case is to stand, the frequently exercised right of recovery for damages in the making of public improvements, such as viaducts and bridges, the changing of street grades, etc., where damages are not assessed in eminent domain proceed-

ings, or where the improvement is made without such proceedings, no longer exists in this jurisdiction.

In the case at bar, though the injuries are consequential, they are to the corpus of the plaintiff's property. No question is made but that the injury resulted from the placing of the bridge embankments as they are.

Upon a full view of the case, we are constrained to hold that the limitation in the Dickman Case to

damages such as might be recovered in eminent domain proceedings was without justification. We therefore hold that the rule there announced does not properly construe the constitutional provision in question, and it cannot defeat plaintiff's right of recovery. The demurrer to the complaint was properly overruled, and there was no error in the entering of judgment on the verdict.

The judgment is accordingly affirmed.

ANNOTATION.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken.

That the constitutional provision against taking or damaging property may, as held in the reported case (LOGAN COUNTY v. ADLER, ante, 512), be invoked in a proceeding other than an eminent domain proceeding, seems to be well settled. It is settled more by practice, however, than by direct adjudication upon the point. That the rights guaranteed by this constitutional provision may be enforced and applied in an action in damages is held in *Dallas County v. Dillard* (1908) 156 Ala. 354, 18 L.R.A. (N.S.) 884, 47 So. 135; *Hamilton v. Alabama Power Co.* (1915) 195 Ala. 438, 70 So. 737. And see cases set out infra.

In one case in which an owner of two lots a part of one of which was being taken in an eminent domain proceeding for a railroad was seeking to obtain damages to the lot not taken and separated from the first one by a street, the court, in denying his right to have the damages to the second lot included in the damages allowed in the eminent domain proceeding, says that if, by the construction and operation of the railroad on the first lot, the property of the owner in the second lot will be specially damaged, and the damages sustained by him are not common to the public, he has a complete remedy in an action at law to recover all damages sustained.

White v. Metropolitan West Side Elev. R. Co. (1894) 154 Ill. 620, 39 N. E. 270.

The court in *Aldis v. Union Elev. R. Co.* (1903) 203 Ill. 567, 68 N. E. 95, says that where no property is taken, the improvement may be made before the damages are ascertained and paid, and in such a case the property owner is driven to his action at law for damages, but that such action is in the nature of a condemnation suit, and, when resorted to, the measure of damages and rules of evidence which are to be adopted are the same as though a direct proceeding had been brought to determine the amount of damages to be paid prior to the making of the improvement.

In denying the right of an adjoining owner to be made a party to a condemnation proceeding of a lot of land for the purpose of building thereon a jail, the court in *Mercer County v. Wolff* (1908) 237 Ill. 74, 86 N. E. 708, after stating that the damages to the adjoining owner were entirely consequential, says that, when no part of the land of an abutting owner is taken, the Constitution does not require the ascertainment and payment of his consequential damages before entry can be made upon the property condemned, that "damages resulting to an abutting proprietor no part of whose land is physically

taken are not within the contemplation of the eminent domain act, but he is remitted to his action at law for his damages."

In *Cook v. Lehigh Valley R. Co.* (1920) 181 N. Y. Supp. 217, where a railroad company had interfered with an easement without instituting action for condemnation, the court held that the owner of the easement was entitled to maintain an action in damages. This decision, however, refers to a statute providing a tribunal for the ascertainment of damages arising to property owners whose lands are either taken or injured.

In *Gram Constr. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1916) 36 N. D. 164, 161 N. W. 732, an action by a property owner to recover for damages occasioned to plaintiff's property by the construction and operation of a spur track in front of the same, the court says: "An action for damages is, in such a case, indeed similar to a condemnation proceeding and the injury to the property from the construction of the railroad can be estimated even though the amount of the future traffic is not actually proved."

In *Chester County v. Brower* (1888) 117 Pa. 647, 2 Am. St. Rep. 713, 12 Atl. 577, an action on the case to recover damages of a county caused by the erection of a county bridge, the court, after stating that the legislature had not provided any remedy to enforce the constitutional provision that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, says: "But the Constitution confers a right upon the citizen to recover consequential damages in certain cases, and he cannot be deprived of that right by the neglect or omission of the legislature. When a right exists, and no adequate remedy is provided, it may be enforced by an action on the case."

In sustaining the right of an abut-

ting owner to maintain an action in damages against a railroad which had constructed and was operating its road in the street in front of his property, the court says that, by the addition of the guaranty against damaging property, to that against taking property, the right was conferred to sue for damages for the injury sustained, and not the right to arrest the progress of the work until compensation was made or secured. *Settegast v. Houston, O. L. & M. P. R. Co.* (1905) 38 Tex. Civ. App. 623, 87 S. W. 197.

In sustaining an action in damages under a constitutional provision against taking or damaging private property for public use without compensation, the court in *Swift & Co. v. Newport News* (1906) 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821, says that when, in a constitutional provision, damage to private property is forbidden, but no remedy is pointed out, and no statute affords one for the invasion of the right of property thus secured, the constitutional provision is self-executing, and the common law which provides a remedy for every wrong will furnish the appropriate action for the redress of such grievance.

An action for damages for injury done to real estate by a change of grade was sustained in *Nelson County v. Loving* (1919) 126 Va. 283, 101 S. E. 406, on the theory advanced in *Swift & Co. v. Newport News* (Va.) *supra*.

It is stated in *Frankle v. Jackson* (1887) 30 Fed. 398, that under a constitutional provision against damaging property without compensation, any lot owner the value of whose lot is diminished by the laying of a railroad track and the running of trains in the street in front thereof may have an action for such damages.

Equitable and extraordinary legal remedies have frequently been denied the landowner on the theory that he has an adequate remedy in damages. In denying the right of a person whose property was damaged by a regrading of a street, to mandamus to compel the institution of condemna-

tion proceedings, the court in *State ex rel. Whitten v. Spokane* (1916) 92 Wash. 667, 159 Pac. 805, says that the landowner has a plain, speedy, and adequate remedy at law to recover damages, and therefore the action in mandamus will not lie. An injunction was denied in *Thorberg v. Hoquiam* (1914) 77 Wash. 679, 138 Pac. 304, in favor of a landowner who had permitted a city to begin and prosecute a street improvement involving a change of grade, until near completion, to restrain the city from further proceedings in the improvement on the theory that the plaintiff's only remedy in the case was to recover damages. Under the West Virginia constitutional provision that "private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purpose of internal improvements until just compensation shall have been paid or secured to be paid to the owner; and when private property shall be taken or damaged for public use for the use of such corporations compensation to the owner shall be ascertained in such manner as may be prescribed by general law,"—an owner who is merely damaged by the erection of a public improvement is not entitled to an injunction restraining the improvement until his damages have been ascertained, but must sue the improvement company doing the damage in a court of law. *Spencer v. Pt. Pleasant & O. River R. Co.* (1884) 23 W. Va. 406. A decision similar to the *Spencer Case* appears in *Watson v. Fairmont & Suburban R. Co.* (1901) 49 W. Va. 528, 39 S. E. 193. In denying a motion for a temporary injunction by a lot owner to enjoin a railroad from constructing and operating its railway on the street in front of his property, the court in *Lorie v. North Chicago City R. Co.* (1887) 32 Fed. 270, says that if the complainant can show that the construction and maintenance of the tracks in front of his premises will result in a special injury to him, not a mere injury which he will sustain

in common with the public at large, his remedy will be at law for the special damage, and not by injunction.

A landowner whose injuries from the construction of a drain were consequential was left to his action for damages in *Woodlawn Trust & Sav. Bank v. Drainage Dist.* (1918) 163 C. C. A. 562, 251 Fed. 568, and an injunction denied.

An injunction was denied in *Stetson v. Chicago & E. R. Co.* (1874) 75 Ill. 74, to an owner of property whose damages were consequential from the construction of a railroad, on the theory that he will be left to his action at law. This case was approved in *Moore v. Atlanta* (1883) 70 Ga. 611. The decision in the Georgia case is criticized in *Brown v. Seattle* (1892) 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214, on a point not within the scope of this note; that is the right of the landowner to an injunction. The court in the Washington case points out that the Georgia constitutional provision is that private property shall not be taken or damaged for public purposes without just and adequate compensation being "first" paid. The Washington court granted the injunction, but this, as above stated, that is, the right to an injunction, is not within the scope of this annotation. The court in *Chicago, M. & St. P. R. Co. v. Darke* (1893) 148 Ill. 226, 35 N. E. 750, says: "The Constitution gives to every property owner whose property is damaged for a public use the right to compensation, and while he cannot sue as for a nuisance where his property has been damaged by a public improvement erected and maintained in pursuance of law, his right to compensation remains and may be enforced by any appropriate remedy."

It is stated in *Southern R. Co. v. Fitzpatrick* (1921) — Va. —, 105 S. E. 663, that if the owner of private property which is damaged, but not taken, is not a party to the proceeding to condemn the property of another, and his rights have not been passed upon, he may maintain an action at law to recover just compensation. The right to recover such compensa-

tion is not restricted to the proceeding in which the right of eminent domain is exercised.

That incidental damages can only be recovered in the method provided by the statute authorizing a company to exercise the power of eminent domain, is stated in *Moraski v. T. A. Gillespie Co.* (1921) 239 Mass. 44, 131 N. E. 441, citing *Perry v. Worcester* (1856) 6 Gray (Mass.) 544, 66 Am. Dec. 431, and *Saltonstall v. New York C. R. Co.* (1921) 237 Mass. 391, 130 N. E. 185.

The Pennsylvania constitutional provision that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction," is held in *Pennsylvania R. Co. v. Marchant* (1888) 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690, to be intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, and not from the future operation or management of the work. The provision that the damages shall be paid in advance, or security given therefor in advance, is held to require this construction.

It was held, however, in *Pennsylvania Schuylkill Valley R. Co. v. Walsh* (1889) 124 Pa. 544, 10 Am. St. Rep. 611, 17 Atl. 186, that where a railroad was laid in a street, close to the curbstone in front of abutting property, and has continuously and constantly run locomotives and trains of passenger and freight cars over the track, that the injury is caused by the construction of the road, and not by its operation, within the meaning of this rule and therefore damages are recoverable. This was on the theory that the access to the property was interfered with. In the subsequent case of *Pennsylvania Schuylkill Valley R. Co. v. Ziemer* (1889) 124 Pa. 560, 17 Atl. 187, recovery was allowed for the construction of a rail-

road in a public street in such a way as to interfere with drainage.

In *Stork v. Philadelphia* (1900) 195 Pa. 101, 49 L.R.A. 600, 45 Atl. 678, it was held that the appropriate remedy for enforcing the constitutional guaranty is not in a proceeding before viewers, but for injury by negligent performance of the work; the remedy must be by action of trespass. This case is followed in *Curran v. East Pittsburg* (1902) 20 Pa. Super. Ct. 590, and *Cooper v. Scranton City* (1902) 21 Pa. Super. Ct. 17.

In *Parish v. Yorkville* (1913) 96 S. C. 24, L.R.A.1915A, 282, 79 S. E. 635, it is held that if a municipality fails to take the initiative by proceedings under the condemnation statute to condemn property which is injured by the pollution of a stream from sewage, the landowner may institute such a proceeding or compel the municipality to proceed to condemn the right. The court did not decide whether the landowner had a right of action in damages, saying that that was unnecessary. The constitutional provision invoked in this case seemingly forbade only the taking of private property.

That the owner of property may compel the institution of an eminent domain proceeding, see *Stockdale v. Rio Grande Western R. Co.* (1904) 28 Utah, 201, 77 Pac. 849.

In *North Sterling Irrig. Dist. v. Dickman* (1915) 59 Colo. 169, 149 Pac. 97, Ann. Cas. 1916D, 973, disapproved in the reported case (*LOGAN COUNTY v. ADLER*, ante, 512), an owner of land brought an action against an irrigation company to recover damages for injury to his land as a result of seepage from a ditch constructed and operated by the irrigation company. No negligence in the construction of the ditch was alleged, the plaintiff relying upon the constitutional provision that private property shall not be taken or damaged for public or private use without just compensation. In denying the right to recover, the court takes the general theory, as stated in the reported case, that this constitutional provision refers to and is limited to

proceedings in eminent domain or to cases where injury results by reason of the taking of property in which the abutting owner has an interest.

In a number of cases the right to recover for consequential damages, under such a constitutional provision, in an action in damages, has been sustained.

United States.—*Chicago v. Taylor* (1887) 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Mason City & Ft. D. R. Co. v. Wolf* (1906) 78 C. C. A. 589, 148 Fed. 961; *Idaho & W. N. R. Co. v. Nagle* (1911) 106 C. C. A. 578, 184 Fed. 598.

Arkansas.—*Hot Springs R. Co. v. Williamson* (1885) 45 Ark. 429, affirmed in (1890) 136 U. S. 121, 34 L. ed. 355, 10 Sup. Ct. Rep. 955.

California.—*Eachus v. Los Angeles Consol. Electric R. Co.* (1894) 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

Georgia.—*Atlanta v. Green* (1881) 67 Ga. 386; *Campbell v. Metropolitan Street R. Co.* (1889) 82 Ga. 320, 9 S. E. 1078; *Smith v. Floyd County* (1890) 85 Ga. 420, 11 S. E. 850; *Austin v. Augusta Terminal R. Co.* (1899) 108 Ga. 671, 47 L.R.A. 755; 34 S. E. 852.

Illinois.—*Stone v. Fairbury, P. & N. W. R. Co.* (1873) 68 Ill. 394, 18 Am. Rep. 556; *Elgin v. Eaton* (1876) 83 Ill. 535, 25 Am. Rep. 412; *Rigney v.*

Chicago (1881) 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres* (1883) 106 Ill. 511; *Illinois C. R. Co. v. Trustees of Schools* (1904) 212 Ill. 406, 74 N. E. 39.

Louisiana.—*Helmer v. Colorado Southern N. O. & P. R. Co.* (1908) 122 La. 141, 47 So. 443.

Minnesota.—*Stuhl v. Great Northern R. Co.* (1917) 136 Minn. 158, L.R.A.1917D, 317, 161 N. W. 501.

Mississippi.—*Alabama & V. R. Co. v. Bloom* (1893) 71 Miss. 247, 15 So. 72.

Texas.—*Gulf, C. & S. F. R. Co. v. Fuller* (1885) 63 Tex. 467; *Gainesville, H. & W. R. Co. v. Hall* (1890) 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259; *Ft. Worth & R. G. R. Co. v. Downie* (1891) 82 Tex. 383, 17 S. W. 620; *Rische v. Texas Transp. Co.* (1901) 27 Tex. Civ. App. 33, 66 S. W. 324; *Novich v. Trinity & B. Valley R. Co.* (1907) 45 Tex. Civ. App. 664, 101 S. W. 476; *Missouri, K. & T. R. Co. v. Calkins* (1904) — Tex. Civ. App. —, 79 S. W. 852.

Utah.—*Cook v. Salt Lake City* (1916) 48 Utah, 58, 157 Pac. 643.

Washington.—*Jacobs v. Seattle* (1916) 93 Wash. 171, L.R.A.1917B, 329, 160 Pac. 299.

West Virginia.—*Stewart v. Ohio River R. Co.* (1893) 38 W. Va. 438, 18 S. E. 604. W. A. E.

PARKER WAGNER, By Guardian ad Litem, Respt.,
v.

MATHILDA A. MITTENDORF, Appt.

JENNIE P. WAGNER, Respt.,
v.

SAME, Appt.

New York Court of Appeals—February 3, 1922.

(232 N. Y. 481, 134 N. E. 539.)

Negligence — accidental aggravation of injury — liability.

One negligently breaking another's leg is liable to compensate him for

a second break accidentally caused without his negligence, when, under the doctor's orders, he is beginning to get about.

[See note on this question beginning on page 524.]

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming judgments of a Trial Term for New York County in favor of plaintiffs, and from orders denying motions for new trial, in actions brought to recover damages for personal injuries to the minor plaintiff alleged to have been caused by defendant's negligence, and for loss of services. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George S. Mittendorf and F. DeLysle Smith for appellant.

Messrs. Alfred W. Meldon and Joseph Force Crater for respondents.

Crane, J., delivered the opinion of the court:

While Parker Wagner, a young man eighteen years of age, was riding a motorcycle on the Albany Post road at Montrose, New York, he collided with a touring car owned by the defendant, breaking his right leg. These actions were brought, one by him to recover for his personal injuries, and the other by his mother to recover for her loss of services, which have resulted in verdicts for the plaintiffs in moderate sums. The judgments entered upon these verdicts having been unanimously affirmed by the appellate division, it is conclusively established thereby that the defendant, through her chauffeur, was negligent, that Parker Wagner was free from contributing neglect, and that the damages found have been sustained.

We, however, allowed an appeal to this court on exceptions taken to the admission of evidence bearing upon the injury and damage, presenting a question which we deemed to be of sufficient importance to review, as it had not heretofore been directly passed upon by this court.

After the accident the plaintiff was taken to the Peekskill hospital, where his leg was set in a plaster of paris cast. On October 25th he was able to get around on crutches and was taken by automobile from Peekskill to his home in Ninety-fourth street, New York city. Dr.

Ransom Parker, of that city, removed the plaster cast, and thereafter the plaintiff was able to get around on crutches, although unable to put the least weight on his foot. Dr. Parker, in his testimony, states that it was about the 10th of November that he removed the plaster cast, and found his leg in good condition, except that the upper part, the tibia, projected just a trifle beyond the lower part. There seemed to be a good union, but the leg was not absolutely straight. He advised the patient to get around and take a little exercise, as he thought it would strengthen up his leg, and because the muscles after being a long time in a cast become weakened. The doctor wanted them strengthened and told Wagner to exercise.

The plaintiff says that after the cast was taken off his leg he had been walking around with the assistance of his crutches, had been out, on a few little walks, out in the park, one day, and was just able to put the least little bit of weight on this foot.

The plaintiff then testified as follows:

I was a member of the Naval Militia at the time, and I wanted to go down and see Dr. Kimball. He was in the Medical Department of the Naval Militia. My duties were in the Medical Department down there, and I wanted to see Dr. Kimball and some of the boys, and also watch the drill, and I went down there in a taxicab with a couple of boys, who accompanied me, and while there I went to step over a

doorsill, to go into one of the other rooms, and one of my crutches slipped, and I fell halfway, and hit this leg against a desk.

The plaintiff had refractured his leg, said Dr. Parker, at the same point exactly where it had been broken before. It had been rebroken. Over objection and exception, the plaintiff and his doctor then detailed his re-entry into the hospital and the consequences of this second fracture. The court charged the jury as follows: "Now upon the question of damages the question arises as to what effect the second injury that he received will have upon the damages. The law is this: 'If a person is injured, as the plaintiff was, and proceeds in accordance with the doctor's instructions and in a careful manner, reasonably careful manner in getting about, and another accident happens to him which results in aggravating his injury, without negligence on his part, then the added injury may be added to the original injury, and the damages may be compensation for all of the injury. If, on the other hand, the second injury was the result of the negligence of the plaintiff, disobedience of the instructions of his physician, for example, lack of care in going about, if the second injury results from lack of care, then the defendant may not be charged with the added injury so received. The defendant, in any event, is only liable for the injuries naturally resulting from the accident.'"

By reason of the unanimous affirmation all the facts are conclusively presumed to have been found in plaintiff's favor. The jury must, therefore, have found that the plaintiff did not break his leg the second time through any neglect or carelessness upon his part. Or else, if the jury found that the break was due to his neglect, then, under the instructions of the court, the defendant has not been harmed, as no damage has been allowed for the

second break. We consider the charge as made by the trial court as substantially stating the correct rule of law for these facts. There has been no decision in this state, so far as we can ascertain, directly upon this point, although one or two cases suggest the rule.

In *Lyons v. Erie R. Co.* 57 N. Y. 489, the defendant objected to the plaintiff offering proof that the exercise which he took and which might have retarded his recovery was due to the advice of his physician. The evidence was held competent, Earl, J., saying: "When one receives an injury through the carelessness of another, he is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury and charge it to another. If his arm be broken he cannot omit to have it set, and charge the loss of the arm to the wrongdoer. He is not obliged to employ the most skilful surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can. But suppose he makes a mistake and innocently eats or exercises so as to retard his cure or impair his chances of recovery; or suppose he employs a physician who makes a mistake in his treatment, so that he is not as well or as soon restored as he otherwise would have been; who is to be responsible for the mistake? Can the wrongdoer, who has placed him in the position where he must make the choice of remedies and doctors, take advantage of such mistake? Can he shield himself from all the consequences of his wrong because the injured man has not adopted the best means and employed the best doctors? I think not. A wrongdoer breaks an arm; the injury is then done, and the arm for

*Negligence—
accidental
aggravation of
injury—liability.*

the time is destroyed. He cannot complain that the injured person has failed to restore it so long as he has acted in good faith in its treatment, using the ordinary means within his reach." Page 490.

Matter of Phillips v. Holmes Exp. Co. 229 N. Y. 527, 129 N. E. 901, arose under the Workmen's Compensation Law (Consol. Laws, chap. 67). The claimant, a chauffeur, received a fracture of the right forearm while cranking a motorcar. Some time thereafter the claimant returned to work, and while attempting to crank a car the fracture rebroke. After the first accident the policy of the Aetna Life Insurance Company expired, and the Maryland Casualty Company was the insurer at the time of the second break. Which insurance carrier was liable? We determined, in affirming the appellate division, that the latter injury was the result of the former, and that the first insurer should bear the entire liability.

Of course, these cases are not directly in point, but indicate that added injuries may be included in the damage provided they arose out of the first injury or would not have happened but for the first injury, and are not due to the neglect or carelessness of the injured party.

The precise question has, however, arisen in other states. In *Hoseth v. Preston Mill Co.* 49 Wash. 682, 96 Pac. 423, the plaintiff, about three months after he received his original injury, was permitted by his physician to go about the hospital wards on crutches, and as he was ascending the stairs from the wards one of his crutches slipped on the landing and he fell to the floor, rebreaking his leg. The supreme court of Washington said: "The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury. And in this case if the

respondent was out on crutches under the instructions of his physician, and was in the exercise of due and reasonable care at the time of his fall, he may recover the entire damages sustained, provided, of course, the second injury was attributable to and would not have occurred except for the original injury."

In *Conner v. Nevada*, 188 Mo. 148, 161, 107 Am. St. Rep. 314, 86 S. W. 256, the plaintiff had broken her leg. While subsequently riding in a buggy with her husband before the fracture had united, the wheel of the carriage broke down and the broken bones slipped. The court said: "Whilst it was the duty of the plaintiff to have used reasonable care to promote a recovery, yet if she was guilty of no negligence in this respect and an accident happened to her in which the result was more serious because of her then condition than it would have been if she had not already been afflicted, such more serious result in reality becomes the result of the first accident. There was nothing to indicate that the plaintiff was imprudent in this respect; the accident occurred by the breaking down of the wheel of the vehicle, but for which there would have been no jar, and but for the already broken and yet ununited bone in her leg the jar would have produced no ill effect."

To the same effect is *Postal Teleg. Cable Co. v. Hulsey*, 132 Ala. 444, 31 So. 527.

The testimony regarding Parker Wagner's second fracture of his leg and the consequences resulting therefrom was competent and properly admitted by the trial judge. The charge of the court correctly stated the rule of law applicable to these circumstances. We find no error in the case justifying a reversal.

The judgments appealed from should be affirmed, with costs.

Hiscock, Ch. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

ANNOTATION.

Liability of person causing injury for aggravation thereof by accident.

The liability of a person causing an injury, for the aggravation thereof due to a subsequent accident, is exhaustively discussed in the annotation in 9 A.L.R. 255. In the reported case (*WAGNER v. MITTENDORF*, ante, 520) and in two other recent cases the question has again been raised and decided.

It appeared in the reported case (*WAGNER v. MITTENDORF*) that the plaintiff had suffered a fractured leg, and that after the plaster cast had been removed he began to walk, on the advice of the attending physician, for the purpose of straightening his leg. While so doing, and while in the exercise of due care, he fell, refracturing his leg. The court holds the original wrongdoer to be liable for the aggravation of the injury, on the theory that the second injury was a sequence or natural result of the first fracture.

A like conclusion was reached in *Stahl v. Southern Michigan R. Co.* (1920) 211 Mich. 350, 178 N. W. 710. In that case it appeared that the plaintiff fell from one of defendant's cars while in the act of alighting therefrom. Following her fall, she was carried to her sister's home, who lived near by. A physician was called, and, after making a superficial examination, found an injury to the sciatic nerve, but was of the opinion that there were no fractures. She remained in bed for a time, and suffered much pain. When partially recovered, and while packing her suit case, it fell against her, and she lost her balance and fell to the floor, striking on the injured hip. Another physician was called, who found that the left hip was fractured. In an action for damages for both injuries the defendant contended that the plaintiff was not entitled to recover for any injuries which she may have suffered in the suit-case accident. The court said: "If the suit-case injury was the result of the injuries she received in the railway accident, and her own

negligence did not contribute to it, she would be entitled to recover all of her damages against the defendant in this action. . . . Under this rule plaintiff was entitled to have the question submitted to the jury whether the negligence of the defendant was the proximate cause of the suit-case injury, with the instruction that, if they so found, she was entitled to recover all of her damages, if the suit-case accident were not caused or contributed to by her want of ordinary care."

It was held in *Clayton v. Holyoke Street R. Co.* (1920) 236 Mass. 359, 128 N. E. 460, that there was no error in a refusal to instruct the jury that there was no evidence that the plaintiff's fall in the hospital, some eight or nine weeks after the collision sued for, was the natural and proximate result of his original injury, the court saying that the "testimony of the plaintiff and physician, although meager, warranted the jury in finding that, while Clayton was attempting, with the aid of crutches, to walk in the hospital, he slipped on the floor and fell,—thereby fracturing his leg a second time." The court overruled the contention that the judge in the course of his charge erroneously told the jury, in effect, that the defendant was responsible for the second fracture, as a matter of law, saying: "While this portion of the charge is open to criticism, the defendant's counsel did not except to it at the trial, and cannot avail of it now. If he had called the erroneous statements to the attention of the judge, it is fair to assume that they would have been corrected. Indeed, the jury were charged, as requested by the defendant, that 'the burden of proof is upon the plaintiff to prove that his fall in the hospital was the natural and proximate result of his injury occasioned by the collision with the street car, and not the result of a separate, independent, and intervening act for which the defendant is in no way responsible.'" A. S. M.

JAMES BOURLAND and Wife, Appts.,
v.
A. A. BAKER.

Arkansas Supreme Court — December 15, 1919.

(141 Ark. 280, 216 S. W. 707.)

Husband and wife — liability for torts of wife.

1. The common-law liability of a man for the torts of his wife was abrogated by the Married Woman's Act, and therefore he is not liable merely because she drove an automobile against a pedestrian to his injury.

[See note on this question beginning on page 528.]

Appeal — instructions — general — presumption as to action of jury.

2. Under an instruction to find against one alleged to have negligently injured another by driving an automobile against him, if from the evidence it is found that defendant was negligent, the jury will, in the absence of specific objections to the instruction, be presumed to consider only such grounds of negligence as are supported by the evidence, although others are alleged in the complaint.

Trial — instructions — general and specific — right to complain.

3. A defendant in a negligence case who obtains instruction on each allegation of negligence contained in the complaint cannot complain of general terms in an instruction given at the request of plaintiff, that they should find for him if defendant was found to be negligent.

— instructions — reference to complaint — incorporation of allegations.

4. An instruction to find for plaintiff if defendant was found to be negligent as charged in the complaint does not incorporate into the instruction exaggerated forms of lack of ordinary care charged in the complaint, where there are other positive instructions to the contrary.

— instruction as to liability of automobile driver.

5. An instruction cannot be given in an action to hold an automobile driver liable for injuring a pedestrian, exempting defendant from liability, if she temporarily took her eyes off the street to give attention to her children, without any reference to the circumstances under which the act was done.

APPEAL by defendants from a judgment of the Circuit Court for Sebastian County (Little, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of an automobile by the defendant wife. *Affirmed as to the defendant wife; reversed as to defendant husband.*

The facts are stated in the opinion of the court.

Messrs. James B. McDonough and J. Sam Wood for appellants.

Mr. Edwin Hiner for appellee.

Humphreys, J., delivered the opinion of the court:

Appellee instituted suit against appellants in the Sebastian circuit court, Ft. Smith district, to recover \$11,000, on account of an injury received by him through the alleged negligent operation of an automobile by appellant Queen Bourland, wife of appellant James Bourland.

The allegations of negligence in the complaint consisted: First, in driving the car at a high and dangerous rate of speed; second, in driving it on the left, instead of the right, hand side of the street, in violation of a city ordinance; third, in driving it without giving the proper warning or keeping the proper lookout when approaching appellant.

Appellants filed answer, denying the material allegations in the complaint, and pleading the negligence

of appellee as the proximate cause of the injury.

The cause was submitted to a jury, upon the pleadings and evidence, and a verdict and judgment rendered in favor of appellee for \$2,000, from which an appeal has been duly prosecuted to this court.

Appellee was injured by an automobile driven by appellant Queen Bourland. When the injury occurred, he was walking south on the east side of North Thirteenth street, about midway between the suburban railway and North O street. Queen Bourland was on the front, and her little boy and infant on the back, seat of the chummy roadster she was driving. She was on the same side of the street and going the same direction appellee was walking. The street is straight, between the suburban railway and O street, and the distance between the two points about 200 yards. Appellee was near the curbing on the east side of the street. When struck, his legs were thrown under the car and his body on the outside, with his head lying very near the curbing. The car stopped just as the hind wheel reached him. He was severely injured, and as no question is made in regard to the amount of damages recovered, it is unnecessary to set out the nature of the injury.

The evidence on behalf of appellee tended to show that the car was being rapidly driven, and approached and struck him suddenly, without signal or warning, about 2 o'clock in the afternoon of September 17, 1918; that he heard the car, stepped to the east, giving almost the entire street, and did not look back because he expected it to pass around and not strike him; that the place where there should have been a sidewalk was rough and grown up in weeds; that the street was paved; and that he had chosen the east side of the street near the curbing upon which to travel, because automobiles usually traveled on the right-hand, or west, side of the street.

The evidence of appellants tended

to show that, at the time of the injury, appellant Queen Bourland was driving her car at a slow rate of speed; that, when she reached and crossed the suburban, she looked in front and saw nothing; that she then looked back at the baby and told her boy to sit down; that she again glanced to the front and observed appellee immediately in front of her; that he had stepped in front of the car suddenly; that she did not see him at all until he stepped in front of the car; that she instantly shut off the engine, put on the brakes with both feet, and stopped the car; that the front wheel ran over appellee, but that the hind wheel stopped just as it reached him.

It is first insisted by appellant that there is no foundation in the allegations and evidence justifying the rendition of a judgment against appellant James Bourland, the husband of Queen Bourland. The verdict was returned and judgment rendered against James Bourland on the sole ground that a husband in this state is responsible for his wife's torts. At the common law, a husband was liable for the torts of his wife committed in his absence. That rule of liability is still in force in Arkansas, unless abrogated by Act 159, Acts of the Legislature of 1915, known as the Married Woman's Act. The reason existing for the rule at common law was the legal unity incident to the marriage relationship. It was reasoned that, on account of the unity, the husband could absolutely control his wife in and out of his presence. It followed that, because of this control, he could prevent his wife from committing a tort on another, even in his absence. The Married Woman's Act of 1915, as construed in the case of Fitzpatrick v. Owens, 124 Ark. 167, L.R.A.1917B, 774, 186 S. W. 832, 187 S. W. 460, Ann. Cas. 1918C, 772, had the effect of absolutely and completely destroying the legal unity founded upon the nuptial contract. The act has effectually severed the legal unity between husband and

wife in this state. In holding that the emancipation of the wife was so complete that the wife might sue the husband for a tort committed by him on her person, this court said, in the case of Fitzpatrick v. Owens, supra: "These enactments [referring to the Married Woman's Acts antedating the Act of 1915] left but little in the way of restrictions upon the rights of married women, but the legislature deemed it proper to provide further legislation to completely emancipate her, and they did so by this statute [referring to the Married Woman's Act of 1915], which declares its purpose in the broadest terms, to 'remove the disabilities of married women.' An analysis of the language of the statute shows that the legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by unmarried women. The words 'to sue and be sued,' when considered by themselves, merely enlarge the remedies of a married woman and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman 'to contract and be contracted with,' and the words which follow declare in the very broadest terms her right 'in law and equity' to 'enjoy all rights and be subjected to all the laws of the state as though she were a feme sole.' If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights which she would enjoy if she still remained a single woman, and that with respect to those rights she may sue and be sued. . . . It was evidently meant

to confer upon her the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried."

The legal unity, which was the reason of the rule fixing liability on the husband for his wife's torts, having been swept away by the act, the liability is swept away. The reason being dissolved, the rule cannot exist. It was therefore error to ^{Husband and wife—liability for torts of wife.} refuse to instruct the jury peremptorily to return a verdict for appellant James Bourland.

It is insisted that the court erred in giving instruction No. 4. The instruction is as follows: "Therefore, if you find from the evidence that the defendant Queen Bourland operated her car in a negligent manner at the time the plaintiff was injured, as charged in plaintiff's complaint, and that his injuries were the result of said negligence, you must find for the plaintiff, unless it affirmatively appears from the evidence that the plaintiff was at the time of his injury himself guilty of negligence contributing to the injury."

The instruction is assailed because, according to appellant's interpretation thereof, it submitted all the allegations of negligence set up in the complaint to the jury for consideration, whether supported by evidence or not. It is true evidence was not introduced in support of every allegation of negligence in the complaint. The trend of the evidence, however, limited the issues to whether the injury resulted from fast driving, failure to give a signal of warning, failure to keep a proper lookout, or whether due to appellee's own negligence; and, in the absence of specific objections to the general terms in which the allegations of negligence were submitted, it will be presumed that the jury considered only such grounds of negligence as were supported by the evidence. No specific objections were

Appeal—Instructions—general—presumption as to action of jury.

made to the instructions. Again, appellant Queen Bourland requested and obtained instructions submitting separately each allegation of negligence contained in the complaint, so said ap-

Trial—instructions—general and specific—right to complain.

pellant is in no position to complain. The instruction is

also assailed on the ground that it imposed an extraordinary degree of care upon said appellant to prevent the injury. It is contended the instruction must be read in connection with the allegation of the complaint to the effect that appellant Queen Bourland injured appellee "by her failure to keep a vigilant and constant lookout for persons lawfully upon the streets." This is only an allegation in an exaggerated form of a lack of

—instructions—reference to complaint—incorporation of allegations.

ordinary care, and cannot be treated as an instruction imposing an extraordinary degree of

care upon said appellant. No such inference could have been indulged by the jury in the face of positive instructions to the contrary. Instructions Nos. 2 and 7 necessarily enlightened the jury in this regard. The instructions referred to were as follows: " 'Negligence,' as defined and used in these instructions, is a failure to exercise ordinary care. 'Ordinary care' is such care as a reasonably prudent and careful person would be expected to exercise under the same or like circumstances."

"The rights of pedestrians and drivers of motorcars and other vehicles have equal rights to the use of the streets of the city. It is the duty of the one to use ordinary care and caution to prevent injury to another. It is likewise the duty of the other to use ordinary care and caution to avoid being injured."

It is also contended by appellant Queen Bourland that the court erred in refusing to give instruction No. 11 requested by her. That instruction exempted Queen Bourland from liability if she temporarily took her eyes off the street in front to give attention to her children while driving along. Such an act on her part might, or might not, have been negligent, dependent upon all the circumstances in the case. The instruction was properly refused.

—instruction as to liability of automobile driver.

It is also contended that the case was erroneously submitted upon the theory that appellant Queen Bourland was liable for the injury if driving on the left-hand side of the street. It was alleged in the complaint that she was driving on the left-hand side of the street, contrary to an ordinance of the city. No such proof was made, and, under our interpretation of instruction No. 4, no such issue was submitted to the jury.

The judgment is affirmed as to Queen Bourland, but is reversed and the cause dismissed as to James Bourland.

ANNOTATION.

Liability of husband for independent tort of wife.

I. Generally, 529.

II. In absence of statute:

- a. Florida, 529.
- b. Georgia, 529.
- c. Louisiana, 529.
- d. South Carolina, 530.
- e. Tennessee, 530.
- f. British Columbia, 530.
- g. Quebec, 530.

III. Under statute expressly abrogating or limiting common-law rule:

- a. Alabama, 531.
- b. Connecticut, 531.
- c. Georgia, 531.
- d. Illinois, 531.
- e. Indiana, 531.
- f. Maine, 532.
- g. Massachusetts, 532.

III.—continued.

- h. Michigan, 532.
- i. Missouri, 532.
- j. New York, 533.
- k. North Carolina, 534.
- l. Ohio, 534.
- m. Rhode Island, 535.
- n. South Carolina, 535.
- o. South Dakota, 535.
- p. Vermont, 535.
- q. Washington, 536.
- r. Ontario, 536.

IV. Under statute not expressly abrogating or limiting common-law rule:

- a. View that husband is relieved from liability:
 - 1. Arizona, 536.
 - 2. Arkansas, 536.
 - 3. Colorado, 537.

I. Generally.

At common law it was the general rule that a husband was civilly liable for the torts of his wife committed of her own volition during coverture. This liability on the part of the husband was founded mainly on the theory that, as the wife could not be sued alone, the injured person would be without redress unless the husband was held to be liable with her.

In most jurisdictions, statutes have been passed which either expressly abrogate or limit, or by implication are held to abrogate or limit, the common-law liability of the husband for the torts of his wife, committed by her without his participation. In some jurisdictions, however, statutes not expressly changing the common-law rule are strictly construed, and are held not to relieve the husband of his common-law liability.

In a few jurisdictions there has been apparently no statutory change in the common-law rule, and consequently the rule still prevails. In addition to the cases there cited, cases upholding the common-law rule in jurisdictions where a statute is now in force may be found in the subdivisions dealing with the law of those jurisdictions.

II. In absence of statute.

a. Florida.

In Florida a husband is held to be liable for the torts of his wife on the
20 A.L.R.—34.

IV. a.—continued.

- 4. Illinois, 537.
- 5. Kansas, 537.
- 6. Kentucky, 537.
- 7. Nebraska, 537.
- 8. New Hampshire, 537.
- 9. New Jersey, 538.
- 10. Pennsylvania, 538.
- 11. Utah, 539.
- b. View that husband is not relieved from liability:
 - 1. California, 539.
 - 2. Iowa, 539.
 - 3. Minnesota, 539.
 - 4. Missouri, 540.
 - 5. New York, 540.
 - 6. Ohio, 540.
 - 7. Texas, 540.
 - 8. West Virginia, 540.
 - 9. England, 541.

ground that at common law a suit cannot be maintained against the wife alone during coverture. *Prentiss v. Paisley* (1889) 25 Fla. 927, 7 L.R.A. 640, 7 So. 56. See also *Graham v. Tucker* (1908) 56 Fla. 307, 19 L.R.A. (N.S.) 531, 131 Am. St. Rep. 124, 47 So. 563.

b. Georgia.

In Georgia, under the common law, a husband is liable for the torts of his wife. See *Smith v. Taylor* (1852) 11 Ga. 20, wherein it was held that a husband was liable for slanderous words uttered by his wife. See *infra*, III. c, for a statute thus far apparently not construed by the courts.

c. Louisiana.

In Louisiana, it seems that a husband is not liable for the wrongful acts of his wife committed without his knowledge. See *McClure v. McMartin* (1901) 104 La. 496, 29 So. 227, an action for slander, wherein the court said: "There is no evidence before us upon the basis of which a judgment could be rendered against Mr. McMartin. In fact it is not shown that he is the husband of Mrs. McMartin. But, if that be conceded, it is not shown that he was cognizant of the utterances of his wife which have given rise to this suit, and we know of no law in Louisiana under which he could be held liable for the damages here claimed."

d. South Carolina.

In South Carolina, under the common law, a husband is liable for the torts of his wife. See *Edwards v. Wessinger* (1903) 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518, wherein the court held that the husband may alone be responsible for a tort committed by his wife at his instigation, saying, with reference to the liability of the husband: "(1) If the tort is committed in the presence of the husband, and nothing more appears, it is his sole tort, as the wife is considered to have acted under his coercion. (2) If the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort. (3) If the tort is committed in his presence and against his will, it is her tort, and he is liable with her. (4) If the tort is committed out of his presence but by his direction, she is jointly liable with him. (5) If the tort is committed out of his presence and without his knowledge or consent, he is liable with her."

See also *Henderson v. Wendler* (1893) 39 S. C. 555, 17 S. E. 851; *McKeowen v. Johnson* (1822) 12 S. C. L. (1 M'Cord) 578, 10 Am. Dec. 698.

The common-law rule applies to torts committed before marriage as well as to those committed by the wife during coverture. *Hubble v. Fogartie* (1831) 37 S. C. L. (3 Rich.) 413, 45 Am. Dec. 775. See also *Bohe v. Frouner*, *infra*, III. a, and *contra*, see *Moffit v. Com.* *infra*, IV. a, 10.

And where the wife, as administratrix, has committed a devastavit before marriage, the estate of the husband remains liable after his death. *Knox v. Picket* (1810) 4 S. C. Eq. (4 Desauss.) 92; *Moone v. Henderson* (1814) 4 S. C. Eq. (4 Desauss.) 459.

See also *infra*, III. n, for a statute thus far apparently not continued by the courts.

e. Tennessee.

At common law, in Tennessee, the husband is jointly liable with his wife for a personal tort committed by her. See *Missio v. Williams* (1914) 129 Tenn. 504, L.R.A.1915A, 500, 167 S. W. 473, holding that where a wife

harbored vicious dogs on her own premises in the absence and without the knowledge of the husband, he was jointly liable with her, for injuries inflicted by them.

And in *Price v. Clapp* (1907) 119 Tenn. 425, 123 Am. St. Rep. 730, 105 S. W. 864, it was held that a husband was liable for a libel by his wife, but that he was liable for compensatory damages only, while she was liable for punitive damages. The court quoted with approval the language of the opinion in the case of *Lee v. Atchley*, an unreported decision of the same court, to the following effect: "It is well settled that the husband is not joined as defendant in such cases on the ground that the wife's misconduct is imputable to him, but for conformity's sake. His being a defendant results not from his participation in the wrong, but from the fact that the existence of the marriage relation makes it impossible for the injured party to sue the wife alone. To reach her, the husband must be joined in the action."

f. British Columbia.

In British Columbia a husband is liable in damages, under the common law, for a wrongful act, in the nature of a libel, committed by his wife. *Mackenzie v. Cunningham* (1901) 3 B. C. 206.

g. Quebec.

In Quebec the husband is not liable for the torts of the wife, when not commanded, authorized, or participated in, by him. *Fortier v. Demers* (1902) Rap. Jud. Quebec 21 C. S. 543. See also *Dubuc v. Trottier* (1901) Rap. Jud. Quebec 19 C. S. 202; *Camiré v. Bergeron* (1899) 3 Quebec Pr. Rep. 281.

Thus, it has been held, in an action for slander by a married woman, that her husband could not be held liable where it was not shown that he was present when the slander was uttered, or that he encouraged or became responsible therefor. *Camiré v. Bergeron* (1899) 3 Quebec Pr. Rep. 281.

And the husband is not liable for an injury received by a third person as a result of the wife's control and

management of her property. *Theoret v. Allen* (1913) *Rap. Jud. Quebec* 43 C. S. 401.

III. Under statute expressly abrogating or limiting common-law rule.

a. Alabama.

In Alabama it is provided by statute that the husband shall not be liable for a tort of his wife in the commission of which he does not participate.

See *Strouse v. Leipf* (1893) 101 Ala. 433, 23 L.R.A. 622, 46 Am. St. Rep. 122, 14 So. 667, wherein the court said: "Our statute has changed the common law on this subject. Section 2345 of the Code declares that the husband is not liable for the torts of the wife, 'in the commission of which he does not participate; but the wife is liable . . . for her torts, and is suable therefor as if she were sole.' This has changed the entire law as to the manner of suing a married woman, and has rendered it improper to join the husband, when the charge is that the wife herself committed the tort."

But it was held in *Hopper v. Crocker* (1919) 17 Ala. App. 372, 85 So. 843, writ of certiorari denied in (1920) 204 Ala. 698, 85 So. 922, that notwithstanding the statute a husband who is, with his wife, the joint owner of a dog, is liable for an act of negligence in allowing the dog to run at large.

In *Bobe v. Frowner* (1850) 18 Ala. 89, it was held that at common law a husband was responsible for torts committed before marriage as well as for those committed by the wife during coverture.

b. Connecticut.

The Connecticut statute provides that an action may be sustained against a married woman "for any tort committed by her without the actual coercion of her husband." See *Blakeslee v. Tyler* (1887) 55 Conn. 397, 11 Atl. 855, holding that a husband was not liable for the act of his wife in wrongfully placing an obstruction on the public highway, in the absence of proof that she did it under his actual coercion.

c. Georgia.

The Georgia statute provides that

a husband shall be liable for the torts of his wife committed "by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." This statute, by declaring a liability in a limited class of cases, would seem to negative any liability in cases not falling within its scope, but it apparently has never been considered in a case dealing with the question of a husband's liability for the torts of his wife. For a case holding the common-law doctrine, see *Smith v. Taylor* (1852) 11 Ga. 20, see *supra*, II. b.

d. Illinois.

In Illinois the husband is expressly exempted from liability for his wife's torts, by a statute declaring that for civil injuries committed by a married woman her husband shall not be responsible, "except in cases where he would be jointly responsible with her, if the marriage did not exist." *Christensen v. Johnston* (1917) 207 Ill. App. 209.

But where the wife acts in the capacity of agent for her husband, and commits a wrongful act while engaged in the performance of her duties, thereby injuring another, her husband, despite the provisions of the statute, is responsible for the tort. *McNemar v. Cohn* (1904) 115 Ill. App. 31.

In *Martin v. Robson* (1872) 65 Ill. 129, 16 Am. Rep. 578, it was held that under a statute merely enlarging the property rights of married women, the husband is discharged from liability for her torts committed in his absence, and with which he has no connection. See to the same effect, *Hagebush v. Ragland* (1875) 73 Ill. 40.

In *Baker v. Young* (1867) 44 Ill. 42, 92 Am. Dec. 149, the common-law doctrine was declared that a husband was liable for the tortious acts of his wife, though they were committed without his consent.

e. Indiana.

In Indiana it is provided by statute as follows: "Married women, without reference to their ages, shall be liable for torts committed by them; and an action may be prosecuted against them

for torts committed, as if unmarried. Husbands shall not be liable for the contracts or the torts of their wives." See *McCabe v. Berge* (1882) 89 Ind. 225.

A husband is not liable for the negligence of the wife in using a vehicle belonging to him. *Radke v. Schlundt* (1902) 30 Ind. App. 213, 65 N. E. 770.

In *Ball v. Bennett* (1863) 21 Ind. 427, 83 Am. Dec. 356, it was held that an action under the common law for the wife's tort should be brought against the husband and wife jointly. To the same effect, see *Stockwell v. Thomas* (1881) 76 Ind. 506, and *McCaslin v. State* (1884) 99 Ind. 423 (cases arising prior to statute). But the nonjoinder of the wife was not fatal if not objected to. *Choen v. Porter* (1879) 66 Ind. 194.

f. Maine.

In Maine the statute specifically provides that the husband shall not be liable for the torts of his wife in which he takes no part. See *Marcus v. Rovinsky* (1901) 95 Me. 106, 49 Atl. 420, wherein it was held that, under the statute, a husband may be made a nominal party defendant with his wife in an action based on her tort committed without his participation.

The common-law rule was declared in the following earlier cases: *Hinds v. Jones* (1861) 48 Me. 348; *Ferguson v. Brooks* (1877) 67 Me. 251; *Atwood v. Higgins* (1884) 76 Me. 423.

g. Massachusetts.

In Massachusetts the nonliability of the husband is declared, without limitation, by a statute providing that "any married woman may sue and be sued in actions of tort in the same manner as if she were sole, and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit." *Hill v. Duncan* (1872) 110 Mass. 238; *Austin v. Cox* (1875) 118 Mass. 58; *McCarty v. De Best* (1876) 120 Mass. 89.

For cases decided under the common law, see *Heckle v. Lurvey* (1869) 101 Mass. 344; *Tobey v. Smith* (1860) 15 Gray, 535.

It was said in *McCarty v. De Best* (1876) 120 Mass. 89: "The statute

. . . was manifestly intended to make the wife alone liable to action, judgment, and execution for torts committed by her in the future."

If the wife commits a tort by the husband's instigation, both are liable. *Handy v. Foley* (1876) 121 Mass. 259, 23 Am. Rep. 270. See also *Heckle v. Lurvey* (1869) 101 Mass. 344.

h. Michigan.

In Michigan, by legislative enactment expressly declaring that the husband shall not be liable for the torts of his wife, the common-law rule is abrogated. *Burt v. McBain* (1874) 29 Mich. 260; *Ricci v. Mueller* (1879) 41 Mich. 214, 2 N. W. 23; *Weber v. Weber* (1882) 47 Mich. 569, 11 N. W. 389; *Scott v. Chambers* (1886) 62 Mich. 532, 29 N. W. 94; *Konkle v. Haven* (1905) 140 Mich. 472, 103 N. W. 850; *Sweezy v. Fisher* (1905) 142 Mich. 258, 105 N. W. 749.

i. Missouri.

In Missouri a statute provides as follows: "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her if the marriage did not exist." It was held in *Moore v. Doerr* (1918) 199 Mo. App. 428, 203 S. W. 672, that this statute "means the overthrow of the common law frequently announced in this state, viz., that the wife was not liable for torts committed in the presence of her husband, presumably under his coercion, and that the husband was liable for her torts, whether committed in or out of his presence. It substitutes for such common law, a liability of the wife for torts committed by her, whether in his presence or not, and also a non-liability of the husband in all instances where he would not have been liable had he not been her husband."

The following cases held, under a statute merely enlarging the rights of married women with respect to property, that the common-law liability of the husband for the tortious acts of the wife was unchanged: *Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W.

947 (obiter); *Taylor v. Pullen* (1899) 152 Mo. 434, 53 S. W. 1086; *Miller v. Busey* (1916) — Mo. —, 186 S. W. 983 (obiter); *Bruce v. Bombeck* (1899) 79 Mo. App. 235; *Aronson v. Ricker* (1915) 185 Mo. App. 528, 172 S. W. 641. But see *Boutell v. Shellabarger* (1915) 264 Mo. 70, L.R.A.1915D, 847, 174 S. W. 384.

But in *Boutell v. Shellabarger* (1915) 264 Mo. 70, L.R.A.1915D, 847, 174 S. W. 384, an action for an injury to the plaintiff due to the negligent operation of an elevator in buildings belonging to the wife's separate estate, it was held that the husband was not liable under a statute. (Rev. Stat. 1909, §§ 8304, 8309) which explicitly provides that a married woman shall be deemed feme sole with respect to her right to manage her property, to contract and be contracted with, sue and be sued. "The statutes," said the court, "wholly emancipate the wife, at least so far as her separate property is concerned, and open new fields of endeavor closed to the wife by the common law. Since the husband is left no legal right to intermeddle with the business affairs and property of the wife, it is not logical to admit him to her new sphere solely that he may pay damages for torts the wife commits therein, excluding him for all other purposes.

And in *Claxton v. Pool* (1917) — Mo. —, L.R.A.1918A, 512, 197 S. W. 349, affirming (1914) 182 Mo. App. 13, 167 S. W. 623, the earlier cases heretofore cited were overruled, and it was held that "according to the spirit, purpose, and general scope of recent legislation, in addition to specific statutory provisions, as well as the freedom of contract accorded to married women of later years, all indicating a complete absence of the reason which supported the old rule relating to a husband's common-law liability for his wife's torts, the rule should no longer be recognized as in existence."

In *Flesh v. Lindsay* (1893) 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. E. 907, the common-law rule that the husband is responsible for the tortious acts of the wife was declared.

But it was held in *Merrill v. St.*

Louis (1882) 12 Mo. App. 476, that it was only for the torts simpliciter, or pure torts of the wife, that the husband was liable at common-law, and for torts mixed with any element of contract, committed by the wife, the husband was not liable. To the same effect is *Wirt v. Dinan* (1891) 44 Mo. App. 589.

It was decided in *Andrews v. Ormsbee* (1848) 11 Mo. 400, that if a third person, without the authority or consent of the husband, left money with the latter's wife, and she made away with it, the husband was not liable at common law.

j. New York.

In New York, under a statute providing that a husband shall not be liable for the tortious acts of his wife "unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved,"—it was held in *Tanzer v. Read* (1914) 160 App. Div. 584, 145 N. Y. Supp. 708, that when a wife commits a tort while independently engaged in pursuing her own pleasure, the husband is protected by the statute, and is not liable for her act.

And in *Strubing v. Mahar* (1899) 46 App. Div. 409, 61 N. Y. Supp. 799, under a prior similar statute, the court held that a husband was not liable for the tortious act of his wife in the absence of proof that such act was the result of his actual coercion or instigation.

The following cases decided under statutes enlarging the rights of married women with respect to property, but prior to the passage of the act expressly declaring the nonliability of the husband for the torts of his wife unless directed by him, held that such acts did not abolish the liability of a husband for tortious acts of a personal nature done by the wife:

Mangam v. Peck (1888) 111 N. Y. 401, 2 L.R.A. 150, 18 N. E. 617; *Fitzgerald v. Quann* (1888) 109 N. Y. 441, 17 N. E. 354; *Muser v. Lewis* (1884) 18 Jones & S. 431; *Hoffman v. Lachman* (1878; *Marine Ct. Sp. T.*) 1 N. Y. Civ. Proc. Rep. 278, note; *Berrien v.*

Steel (1878; Sup. Sp. T.) 1 N. Y. Civ. Proc. Rep. 279, note; Fitzsimons v. Harrington (1881; Sup. Sp. T.) 1 N. Y. Civ. Proc. Rep. 360. See also Dean v. Metropolitan Elev. R. Co. (1890) 119 N. Y. 547, 23 N. E. 1054.

In a number of other cases the husband was held not to be liable, under the statutes last referred to, for torts committed by the wife in the management and control of her separate property.

Rowe v. Smith (1871) 45 N. Y. 230; Baum v. Mullen (1872) 47 N. Y. 577; Fiske v. Bailey (1872) 51 N. Y. 150; Mason v. Mason (1892) 66 Hun, 386, 21 N. Y. Supp. 306; Eagle v. Swayze (1867) 2 Daly, 140.

See also Callahan v. Matthews (1895) 87 Hun, 527, 34 N. Y. Supp. 499; Noonan v. Tuttle (1879; Marine Ct. Tr. T.) 1 N. Y. City Ct. 190; Gillies v. Lent (1865; Com. Pl. Gen. T.) 2 Abb. Pr. N. S. 455; Peak v. Lemon (1869) 1 Lans. 295, affirmed in (1872) 49 N. Y. 666. Thus, it was held that if an injury was sustained from the bite of a vicious dog owned by the husband, which was kept on premises owned and maintained by the wife, the husband was not liable, but the wife was liable if she permitted the dog to remain on her premises, with knowledge of its vicious propensities. Quilty v. Battie (1892) 135 N. Y. 201, 17 L.R.A. 521, 32 N. E. 47, 1 Am. Neg. Cas. 177, reversing (1891) 61 Hun, 164, 15 N. Y. Supp. 765; Valentine v. Cole (1886; Buffalo Super. Ct. Gen. T.) 1 N. Y. S. R. 719. Compare Genenz v. De Forest (1888) 15 N. Y. Civ. Proc. Rep. 145, 2 N. Y. Supp. 152. And it was held that if the wife set fire to a house owned by her, and it was burned, the husband was not liable for loss sustained by the tenant of the property. Lansing v. Holdridge (1880) 58 How. Pr. 449.

In a number of earlier cases following the common-law rule it was held that a husband was liable for the torts of his wife (Solomon v. Waas (1858) 2 Hilt. 179; McCready's Goods (1869) 1 Tucker, 374); that an action for the wife's tort must be brought, under the common law, against the husband and wife jointly (Anderson v. Hill (1869)

53 Barb. 238; Horton v. Payne (1864) 27 How. Pr. 374; Austin v. Bacon (1888) 49 Hun, 386, 3 N. Y. Supp. 587; Kowing v. Manly (1872) 49 N. Y. 200, 10 Am. Rep. 346; Bunce v. Van Der Grift (1839) 8 Paige, 37); that if there was a recovery, judgment must be entered against both husband and wife (Flanagan v. Tinen (1868) 53 Barb. 587); and that where the wife, as administratrix, committed a devastavit before marriage, the husband could not be held liable after her death (Elliott v. Lewis (1836) 3 Edw. Ch. 40).

k. North Carolina.

In North Carolina the common-law rule has been limited by a statute providing that "every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her." It was held in Young v. Newsom (1920) 180 N. C. 315, 104 S. E. 660, that under this statute a husband living with his wife is responsible in damages for a tort committed by her in slandering another, notwithstanding various other acts giving her many of the rights of a feme sole.

In Presnell v. Moore (1897) 120 N. C. 390, 27 S. E. 27, the court held a husband to be liable for slanderous words spoken by his wife in his absence, without his knowledge or consent. See also Roberts v. Lisenbee (1882) 86 N. C. 136, 41 Am. Rep. 450.

Likewise, it was held in Brittingham v. Stadiem (1909) 151 N. C. 299, 66 S. E. 128, that, under the statute, a husband is liable jointly with his wife for a tort committed by their minor son in the course of his employment as clerk in the wife's shop, since the wife herself is liable.

l. Ohio.

In Ohio, the statute reads as follows: "Neither husband nor wife, as such, is answerable for the acts of the other."

See Bretzfelder v. Demaree (1921) 102 Ohio St. 105, 130 N. E. 505, where in the court said: "At common law, unquestionably, the husband was liable for acts . . . committed by his wife. This principle was then estab-

lished because of the servitude of marriage, whereby the husband not only possessed control over her person and acts, but, upon coverture, became entitled to her goods and chattels, and had the absolute right to reduce her choses in action to possession during her life. The wife's existence was merged in that of her husband, and in actions against herself her husband was required to be joined. However, in the development of our statute law, this principle of liability upon the part of the husband was abrogated by the adoption in various states of certain statutes . . . providing that neither husband nor wife should be liable for the tortious acts of the other because of the marital relationship."

The following earlier cases held that under a statute concerning the rights and liabilities of married women in relation to property, the common-law rule making the husband liable for torts committed by the wife during coverture was not abrogated. *Fowler v. Chichester* (1874) 26 Ohio St. 9; *Holtz v. Dick* (1884) 42 Ohio St. 23, 51 Am. Rep. 791.

In *Scheurer v. Scheurer* (1878) 4 Ohio Dec. Reprint, 297, it was held that, under the common law, after a divorce had been obtained by a wife and the husband had married a second time, he might be held liable for the wrongful act of the second wife in alienating his affections from the first.

m. Rhode Island.

In Rhode Island, the statute relieves the husband of his common-law liability for the torts of his wife by declaring expressly that he shall not be liable for torts committed by his wife, unless he participates therein or coerces her thereto. *McElroy v. Capron* (1902) 24 R. I. 561, 54 Atl. 44. See *Simmons v. Brown* (1858) 5 R. I. 299, 73 Am. Dec. 66, and *Ferguson v. Neilson* (1890) 17 R. I. 82, 9 L.R.A. 155, 33 Am. St. Rep. 855, 20 Atl. 229, upholding the common-law rule prior to the statute.

n. South Carolina.

The South Carolina statute (Code Civ. Proc. § 163) provides that when a married woman is a party her hus-

band must be joined with her, except that "when the action concerns her separate property she may sue or be sued alone: Provided, that neither her husband nor his property shall be liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate as if she were sole." Apparently this statute has not yet been considered in a case dealing with the question of a husband's liability for the torts of his wife, and therefore the common-law doctrine still prevails. For cases announcing the common-law doctrine, see *supra*, II. d.

o. South Dakota.

A statute in South Dakota expressly relieves the husband from liability for the torts of his wife, by providing as follows: "Neither husband nor wife, as such, is answerable for the acts of the other." See *Bebout v. Pense* (1914) 35 S. D. 14, 150 N. W. 289, holding that while the statute is sufficient, in terms, to relieve a husband or wife, as such, of all liability for the tortious acts of the other, and that, so far as the husband's liability for the acts of his wife is concerned, it places them in the position of persons who are not related at all, it does not purport to relieve them as individuals, and they are liable jointly where the wife commits a tort at the command or instigation of her husband.

p. Vermont.

The Vermont statute provides that a husband shall not be liable for the torts of his wife unless committed by his authority or direction. See *Story v. Downey* (1890) 62 Vt. 243, 20 Atl. 321; *Russell v. Phelps* (1901) 73 Vt. 390, 50 Atl. 1101; *Fadden v. McKinney* (1913) 87 Vt. 316, 89 Atl. 351.

"To render a husband liable under . . . statute, for a tort committed by his wife, it must be alleged and proved that the tort was committed by his authority or direction." *Story v. Downey*, *supra*.

It was held in *Fadden v. McKinney*, *supra*, that, under the statute, a husband could not be held liable in an

action for trespass for a wrong committed by another, although he knew that his wife had employed such person to commit the wrong complained of.

In *Woodward v. Barnes* (1873) 46 Vt. 332, 14 Am. Rep. 626, it was held that at common law the husband is responsible only for the pure torts of the wife, and was not liable for any torts connected with contract.

In *Shaw v. Hallihan* (1874) 46 Vt. 389, 14 Am. Rep. 628, the common-law rule was laid down.

q. Washington.

In Washington the statute in terms absolves the husband from liability for the wrongful acts of the wife, "except in case where he would be jointly responsible with her if the marriage did not exist." See *Killingsworth v. Keen* (1916) 89 Wash. 597, 154 Pac. 1096, wherein the court held that a husband was not liable for the tortious act of the wife in taking and damaging an automobile.

r. Ontario.

In Ontario the liability of a husband for wrongs committed by his wife, either before or after marriage, is limited by statute to the extent of property belonging to his wife acquired by him subject to certain deductions. *Lee v. Hopkins* (1890) 20 Ont. Rep. 666.

IV. Under statute not expressly abrogating or limiting common-law rule.

a. View that husband is relieved from liability.

1. Arizona.

In Arizona the married women's statutes, which confer on the wife the ownership and management of her own property free from the control of her husband, are held to abrogate the common-law liability of the husband for the torts of his wife connected with her separate estate, though the statutes do not expressly refer to the subject of his liability for her torts. *Hageman v. Vanderdoes* (1914) 15 Ariz. 312, L.R.A.1915A, 491, 138 Pac. 1053, Ann. Cas. 1915D, 1197.

But, under a statute requiring that

when a married woman is a party, her husband shall be joined with her, except when the action concerns her separate property, or is between herself and her husband, the husband should be made a party defendant in an action for the wife's assault committed out of his presence, although he is not liable for the tort. *Ibid.*

2. Arkansas.

In Arkansas the Married Woman's Act which declares in broad terms its purpose to be "to remove the disabilities of married women" and to allow a married woman to "enjoy all rights and be subjected to all the laws of the state as though she were a feme sole," is held in the reported case (*BOURLAND v. BAKER*, ante, 525) to abrogate the common-law rule that the husband is liable for the torts of his wife committed in his absence; and the unity of husband and wife, which was the reason of the common-law rule, having been abolished by the statute, the husband's liability is also abolished.

Compare the following cases, holding that earlier statutes conferring certain rights and imposing certain liabilities on married women with reference to property did not operate to discharge the husband from liability for the torts of his wife committed in his absence and without his consent: *Jackson v. Williams* (1909) 92 Ark. 486, 25 L.R.A.(N.S.) 840, 123 S. W. 751; *Townslley v. Yentsch* (1911) 98 Ark. 312, 135 S. W. 882; *Minor v. Mapes* (1912) 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219; *Williams v. Fulkes* (1912) 108 Ark. 196, 146 S. W. 480. In *Minor v. Mapes* (1912) 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219, the court, holding that a husband was liable for a negligent act of his wife which was committed in his presence but not under his direction, said: "Where the tort is committed in the absence of the husband or, if in his presence, without any control or compulsion on his part, the husband and wife are jointly liable and must be joined in the action."

Compare, also, the following cases, wherein it was held, without reference to any statute, that a husband was lia-

ble, under the common-law rule, for the torts of his wife: *Ferguson v. Collins* (1848) 8 Ark. 241; *Kosminsky v. Goldberg* (1884) 44 Ark. 401; *Mahoney v. Roberts* (1908) 86 Ark. 130, 110 S. W. 225.

3. *Colorado.*

In Colorado under a statute giving the wife control and dominion over her property and person, and conferring many other rights on her, it was held in *Schuler v. Henry* (1908) 42 Colo. 367, 14 L.R.A. (N.S.) 1009, 94 Pac. 360, that a husband was not liable for the tort of his wife with which he was in no way connected. The foregoing decision was followed in *Murray v. Newmyer* (1919) 66 Colo. 459, 182 Pac. 888.

4. *Illinois.*

See the cases cited *supra*, III. d.

5. *Kansas.*

Under a statute of Kansas giving to a married woman control over her property, and declaring that she may sue and be sued in the same manner as if she were unmarried, it was held in *Norris v. Corkill* (1884) 32 Kan. 409, 49 Am. Rep. 489, 4 Pac. 862, that a husband was not liable for slanderous words uttered by his wife out of his presence and with which he had no connection.

6. *Kentucky.*

In Kentucky it is provided by statute that the husband shall have no estate or interest in his wife's property, and that "during the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, free from the debts, liabilities, or control of her husband." It was said in *Lane v. Bryant* (1896) 100 Ky. 138, 36 L.R.A. 709, 37 S. W. 584: "The liability of the husband at the common law was based on the idea of his absolute dominion over the person of his wife, with the right to all her personal and the use of her real estate; to the rents and profits of her realty; to her earnings and labor; and the power of the control of the wife by the husband was caused to such an extent as to vest in him the

right to use such forcible means as would bridle her tongue or make her of good behavior. This rule is a harsh one at best, and with the progress of civilization, and the changes by wise, modern legislation, of the relation between husband and wife as to the right of property and personal control by the husband, it would seem absurd in this enlightened age to regard the wife as a mere machine, made to labor and to talk as the husband directs, and to make him liable on that ground for her torts when not committed by his direction or procurement." To the same effect, see *Davidson v. Manning* (1916) 168 Ky. 288, 181 S. W. 1111.

Prior to the act, the court in *Phillips v. Richardson* (1830) 4 J. J. Marsh. 212, laid down the common-law rule.

7. *Nebraska.*

In Nebraska, various statutes provide that a married woman may be sued in the same manner as if she were unmarried and may dispose of her property with like effect as a married man, and may also carry on business on her sole and separate account.

It was held in *Goken v. Dallugge* (1904) 72 Neb. 16, 99 N. W. 818, 103 N. W. 287, 9 Ann. Cas. 1222, 16 Am. Neg. Rep. 479, without specific reference to these statutes, that the common-law rule that a husband was liable jointly with his wife for tortious acts done by her in his presence, but without his consent or direction, solely on the ground of the marriage relation, was not in force in Nebraska.

8. *New Hampshire.*

In New Hampshire by legislative enactment the wife is given the right to hold property to her own use, free from the interference or control of her husband. Under the statute conferring this privilege it was held in *Harris v. Webster* (1878) 58 N. H. 481, that in an action for slander against a married woman, the husband should not be joined as a party defendant, the court saying: "Since the wife's property is no longer her husband's nor her earnings his, by mere force of law; and since he has no more legal power of physical control over her than she has over him, no . . . rea-

son seems to remain for holding him liable for her torts."

The following earlier cases maintained the common-law doctrine that the husband was liable for the torts of his wife, and must be joined in the suit against her: *Little v. Gardner* (1831) 5 N. H. 415, 22 Am. Dec. 468; *Cram v. Dudley* (1854) 28 N. H. 537; *Carleton v. Haywood* (1870) 49 N. H. 314.

9. *New Jersey.*

In New Jersey, by virtue of a statute permitting a married woman to hold real and personal property as a feme sole, a husband is relieved from liability for the torts of his wife committed in the management and control of her separate property. *D. Wolff & Co. v. Lozier* (1902) 68 N. J. L. 103, 52 Atl. 303.

That case was approved in *Harrington v. Jagmetty* (1912) 83 N. J. L. 548, 83 Atl. 880, wherein the court said: "Whatever may have been the consequence of the necessary joinder of husband and wife, in an action for a tort committed by the wife before the passage of the statutes relating to married women, since the passage of those acts the husband is not liable for torts of his wife, growing out of the conduct by her of her own business, or arising from the management by her of her own separate property."

The following earlier cases laid down the common-law rule. *Crane v. Van Duyne* (1853) 9 N. J. Eq. 259; *State, Hildreth, Prosecutor, v. Camp* (1879) 41 N. J. L. 306.

10. *Pennsylvania.*

In Pennsylvania, under the Married Women's Property Act of 1893, providing that "a married woman may be sued civilly in all respects and in any form of action with the same effect and results and consequences as an unmarried person," the husband is not liable in damages for the torts of his wife. *Gustine v. Westenberger* (1909) 224 Pa. 455, 73 Atl. 913. So, it was held in *Smith v. Machesney* (1913) 238 Pa. 538, 86 Atl. 493, that it is not only unnecessary, but improper, to join the husband as a defendant in a suit against the wife, even though the case is made against him only by reason of

his supposed responsibility for the tort of his wife, and not as an actual tortfeasor. To the same effect see *Crouse v. Lubin* (1918) 260 Pa. 329, 103 Atl. 725.

And in *Hinski v. Stein* (1917) 68 Pa. Super. Ct. 441, a husband was held not to be liable in damages, under the act, for slanderous words uttered by his wife in his absence, and without his knowledge or consent.

Under the Married Persons' Property Act of 1887, repealed by the Act of 1893, it was held in *Kuklence v. Vocht* (1887) 4 Pa. Co. Ct. 370, affirmed (1888) 10 Sadler, 11, 21 W. N. C. 521, 18 Atl. 198, that a husband was not liable for his wife's torts, and that it was unnecessary to join the husband as defendant in a suit against the wife for her tort. Compare *Quick v. Miller* (1883) 103 Pa. 67.

In *Ridgway v. Spellman* (1898) 7 Pa. Dist. R. 290, 20 Pa. Co. Ct. 596, it was held that since the Act of 1887, declaring in express terms that a husband was not liable for damages recovered against his wife for her torts, was repealed by the Act of 1893, by which she was exempted from arrest or imprisonment for her torts, a husband was jointly liable with his wife for slanderous words spoken by her.

And, the Married Persons' Property Act of 1893 was held in *Hess v. Heft* (1897) 3 Pa. Super. Ct. 582, not to modify a husband's liability for the torts of his wife.

The following earlier cases announced the common-law doctrine that a husband was liable for the torts of his wife. *Overholt v. Ellswell* (1829, 1 Ashm. 200; *Maffit v. Com.* (1847) 5 Pa. 359; *Keen v. Hartman* (1865) 48 Pa. 497, 86 Am. Dec. 606, 88 Am. Dec. 472, affirming (1864) 5 Phila. 443; *Wheeler & W. Mfg. Co. v. Heil* (1887) 115 Pa. 487, 2 Am. St. Rep. 575, 8 Atl. 616; *Hess v. Heft*, and *Ridgway v. Spellman*, *supra*.

In *Overholt v. Ellswell*, *supra*, it was held that, under the common law, nothing short of a marriage *de jure* can render a man responsible for torts committed by his wife before marriage.

And under the common law, the

"general principle that, for the fraud or other tort of a married woman, an action may be maintained against her and her husband . . . is to be understood as applicable only to actions brought for wrongs done by the wife, which are what are sometimes denominated 'torts simpliciter,' in other words, torts the substantive basis of which is not the wife's contract." *Keen v. Hartman* (1865) 48 Pa. 497, 86 Am. Dec. 606, 88 Am. Dec. 472, affirming (1864) 5 Phila. 448.

But the husband of an administratrix was not liable at common law for a devastavit committed by her before marriage. *Maffit v. Com.* supra.

But see supra, II. d, III. a, and III. l.

11. Utah.

In Utah it is provided by statute that "all property owned by either spouse before marriage, and that acquired afterwards by purchase, gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired; and separate property owned or acquired as specified above may be held, managed, controlled, transferred, and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage;" and that "either spouse may sue or be sued, plead and be impleaded, or defend and be defended at law."

Under these statutory provisions it was held in *Culmer v. Wilson* (1896) 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833, that a husband was not responsible for the torts of his wife, committed before marriage, and while she was the wife of another man, the court saying: "The common-law rule . . . which made the husband liable for the wife's torts, proceeded upon the ground that as the husband succeeded jure mariti, to the entire estate of the wife, real and personal, and to the right to her earnings, so that she could not respond in damages for any wrong which she might commit, it was but right that he should respond for her, so long as the coverture con-

tinued. Such being the reason of the rule, if a statute intervenes giving the wife, during coverture, the sole control of all property owned by her before marriage, and that acquired afterwards by purchase, gift, bequest, with the rents, issues, and profits thereof, and the same is the separate property of the wife, and the same may be held, managed, controlled, and transferred, and in any manner disposed of, by her, without any limitation or restriction by reason of marriage, with the right to use and possess the same, thus taking away entirely the reason of the common-law rule, it would seem, on principle, that the rule itself ought to cease."

b. View that husband is not relieved from liability.

1. California.

The California statute under which a married woman is given the right to manage her own separate estate has been held not to have changed the common-law rule that a husband is liable for the torts of his wife. Therefore, in an action for an assault and battery committed by the wife, the husband is liable in damages, although the act was not committed in his presence and was done without his knowledge or permission. *Henley v. Wilson* (1902) 137 Cal. 273, 58 L.R.A. 941, 92 Am. St. Rep. 160, 70 Pac. 21.

2. Iowa.

In Iowa the statute provides that liabilities may be incurred by a wife, "and the same enforced against her to the same extent, and in the same manner, as if she were unmarried." In *McElfresh v. Kirkendall* (1873) 36 Iowa, 224, it was held that the liability of the husband at common law for the torts of his wife had not been changed by the provisions of the aforesaid statute. And the decision of the court in this case was followed in *Luse v. Oaks* (1873) 36 Iowa, 562. Compare *Enders v. Beck* (1864) 18 Iowa, 86.

3. Minnesota.

In Minnesota the Married Woman's Acts have been held not to abrogate the common-law rule which holds a

husband liable in damages for the torts of his wife committed without his presence and in which he did not participate in any way. *Pett-Morgan v. Kennedy* (1895) 62 Minn. 348, 30 L.R.A. 521, 54 Am. St. Rep. 647, 64 N. W. 912.

Prior to the act, the court in *Brazil v. Moran* (1863) 8 Minn. 236, Gil. 205, 83 Am. Dec. 772, laid down the common-law rule.

4. *Missouri.*

See the cases cited *supra*, III. i.

5. *New York.*

See the cases cited *supra*, III. j.

6. *Ohio.*

See the cases cited *supra*, III. l.

7. *Texas.*

The Texas statutes regulating marital rights do not abrogate the common-law doctrine that a husband is responsible for the torts of his wife. See *McQueen v. Fulgham* (1864) 27 Tex. 463, wherein it was held that in an action against the wife for slander the husband must be joined, the court saying: "The common-law rule holding the husband responsible for the wife's torts does not rest entirely upon the ground that he takes by marriage all of her personal property, and that she is presumed to have no separate estate. It rests perhaps mainly upon the supposition that her acts are the result of the superior will and influence of the husband. Owing to the intimate relation between husband and wife, and to the nature of the control given him by law and social usage, over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance and when she was guided by his dictation. While our statutes are framed with the view of securing to the wife her separate property, and of sedulously protecting her with reference to it, against the recognized and controlling influence of the husband over her conduct, it would be a stretch of judicial authority to hold that the common-law responsibility attaching to him for the

acts of the wife is by mere implication abolished."

See also *Whitney Hardware Co. v. McMahan* (1921) — Tex. —, 231 S. W. 694, a case dealing with the liability of the wife.

So, it was held in *Zeliff v. Jennings* (1884) 61 Tex. 458, that while many changes from the common law have been made by statute with reference to property rights of married women, no statute has changed or altered the liability of the husband for the torts of the wife from that imposed by the common law, and "the husband is liable to the same measure of pecuniary responsibility for the torts of the wife as though the act were his own."

In *Patterson v. Frazer* (1906) — Tex. Civ. App. —, 93 S. W. 146, reversed on other grounds (1906) 100 Tex. 103, 94 S. W. 324, a husband was held to be liable in exemplary as well as actual damages, for slanderous words spoken by the wife.

8. *West Virginia.*

In West Virginia, under the married women's laws relating to the separate property of the wife and her rights and powers concerning the same, the husband is not relieved from liability for the torts of the wife. See *Kellar v. James* (1907) 63 W. Va. 139, 14 L.R.A. (N.S.) 1003, 59 S. E. 939, wherein the court said: "One object of these statutes is to enable a married woman to have the absolute, free, and unrestrained control of her property.

. . . The evils intended to be suppressed, and the purposes and objects to be promoted, are all mentioned in the statutes, and the rule of liberal construction requires no more than that they shall be so interpreted and applied as to suppress the named evils and effectuate the specified purposes and objects. It does not authorize the court to add other supposed evils, purposes, and objects. By the decided weight of authority, these statutes are held not to have relieved the husband from his common-law liability for the wife's torts." See also *Withrow v. Smithson* (1893) 37 W. Va. 757, 19 L.R.A. 762, 17 S. E. 816; *Gill v. State* (1894) 39 W. Va. 479, 26 L.R.A.

655, 45 Am. St. Rep. 928, 20 S. E. 568; Poling v. Pickens (1911) 70 W. Va. 117, 73 S. E. 251, Ann. Cas. 1913D, 995.

9. England.

In England, the Married Women's Property Act provides that "a married woman shall be capable of . . . suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." In *Seroka v. Kattenburg* (1886) L. R. 17 Q. B. Div. 177, it was held that this statute does not abolish the liability of a husband for the wrongful acts of his wife, and that he is jointly liable with her for her torts committed after marriage, the court saying: "The words of the section . . . 'need not be joined,' . . . do not discharge the husband from his old liability; they are intended to give to a plaintiff the option of suing husband and wife together or suing the wife alone; judgment may be entered against the wife, and execution issued against her separate property, if she has any; but where she has none, the plaintiff is entitled to add the husband as a codefendant."

The foregoing case was held in *Earle v. Kingscote* [1900] 2 Ch. 585, 69 L. J. Ch. N. S. 725, 49 Week. Rep. 3, 83 L. T. N. S. 577, 16 Times L. R. 511, to have been well decided. See also *Beaumont v. Kaye* [1904] 1 K. B. 292, 73 L. J. K. B. N. S. 213, 52 Week. Rep. 241, 90 L. T. N. S. 51, 20 Times L. R. 183. But compare *Cuenod v. Leslie* [1909] 1 K. B. 880, 16 Ann. Cas. 375, wherein the court criticizing the rule laid down in *Seroka v. Kattenburg*, supra, and approved in *Earle v. Kingscote*, supra, said: "It is still open to a plaintiff to join the husband as defendant in an action for a tort committed by the wife, . . . but, in my opinion, it is most desirable that the matter should be reviewed by the

final court of appeal, because the present state of things is highly anomalous. I cannot believe that the Married Women's Property Act 1882, which drew such a clear line of separation between the husband's and wife's property and liabilities, and arranged them in other respects so fairly on the lines of separate personal responsibility, could have intended to leave such a blot on the legislation as would follow from permitting a plaintiff to recover damages from a husband in respect to torts of the wife either before or during coverture, although he was not liable for the torts or any participation in them, and was not needed as a party to the action. . . . The provision that 'any damages or costs recovered against her in any such action or proceeding'—i. e., an action or proceeding taken against her—'shall be payable out of her separate property, and not otherwise,' . . . makes it clear that the husband's property is not longer to be a source from which the damages or costs of an action of tort against the wife are to be satisfied."

In *Burdett v. Horne* (1911) 28 Times L. R. 83, wherein it appeared that while a husband and wife were living together, she, by fraudulent representations, made without his instigation but with his knowledge and acquiescence, obtained a large sum of money, in a part of which he shared, the husband was held to be liable for the full amount procured, despite the fact that he had been judicially separated from his wife.

A husband is not liable, however, for a tort of his wife arising out of a contract entered into by her with another. *Cole v. DeTrafford* [1917] 1 K. B. 911, 86 L. J. K. B. N. S. 764, 117 L. T. N. S. 224, 61 Sol. Jo. 354, 33 Times L. 249.

The following cases decided prior to the act cited held the husband to be liable under the common law for the torts of his wife: *Paget v. Read* (1682) 1 Vern. 143, 23 Eng. Reprint, 375; *Bachelor v. Bean* (1688) 2 Vern. 61, 23 Eng. Reprint, 649; *Head v. Briscoe* (1832) 5 Car. & P. 484; *Palmer*

v. Wakefield (1840) 3 Beav. 227, 49 Eng. Reprint, 88; Wainford v. Heyl (1875) L. R. 20 Eq. 321, 44 L. J. Ch. N. S. 567, 33 L. T. N. S. 155, 23 Week.

Rep. 848; Bahin v. Hughes (1886) L. R. 31 Ch. Div. 390, 55 L. J. Ch. N. S. 472, 54 L. T. N. S. 188, 34 Week. Rep. 311. L. F. C.

PETERSBURG GAS COMPANY, Plff. in Err.,

v.

CITY OF PETERSBURG et al.

Virginia Supreme Court of Appeals—February 2, 1922.

(— Va. —, 110 S. E. 533.)

Rates — pre-war prices as basis for rates.

1. The reproduction value of a gas plant for rate-making purposes cannot be based exclusively on the pre-war unit of prices.

[See note on this question beginning on page 555.]

Constitutional law — gas rate — just compensation.

2. A gas company cannot be compelled to furnish gas at less than a reasonable compensation under a constitutional requirement that property shall not be taken for public use without just compensation.

[See 12 R. C. L. 900; 2 R. C. L. Supp. 1505.]

Rates — foundation for.

3. The just compensation to which a gas company is entitled for gas furnished is founded upon the fair value of the property used for the purpose, and not upon the amount of stock it has issued, or the debts it may owe.

[See 12 R. C. L. 901.]

— what determines amount.

4. The rate of return which a gas company shall be allowed to receive shall be fair and just to the company, and such as will make its securities attractive to investors when the company is prudently and carefully operated.

— reproduction cost of property.

5. In fixing the value of property for rate-making purposes the reproduction cost, less observed depreciation, may be taken.

[See 12 R. C. L. 902, 903; 2 R. C. L. Supp. 1507.]

— fair valuation — failure to state facts.

6. A valuation of property by a public service commission for rate-making purposes is not shown to be fair where the facts upon which it is founded are not stated.

— presumption of reasonableness of commission's finding.

7. The court cannot presume that the findings of the public service commission fixing rates for public service are correct, if the facts on which they are based are not stated as required by the Constitution.

— how value ascertained.

8. Value for rate-making purposes must be measured by the sound judgment and common sense of impartial tribunals charged with the ascertainment of such values.

— cost of operation — necessity.

9. In any estimate of rates to be paid by a consumer for gas it is essential to ascertain the costs of operation.

[See 12 R. C. L. 901.]

— method of determining rate of commodity.

10. The cost of gas to the consumer is fixed by determining the rate of return which the producer is entitled to receive on the valuation of his property and the cost per 1,000 cubic feet of operation, and dividing the aggregate by the number of 1,000 cubic feet of gas to be sold.

— amortizing loss.

11. If a loss has been inflicted upon a gas company by a rate fixed by the commission, it should be amortized and spread over a term of years which will be fair to the producer and not too burdensome to the consumer.

— allowance for profit tax.

12: A tax imposed upon the profits of a gas company should be taken into

consideration in fixing the percentage of return it is to receive on investment.

ERROR to the State Corporation Commission to review its decision fixing the rates for gas which plaintiff was allowed to charge its patrons, in a proceeding by it for an increase in gas rates. *Remanded.*

The facts are stated in the opinion of the court.

Messrs. Mann & Townsend, for plaintiff in error:

The commission erred in its method of determining depreciation.

Consolidated Gas Co. v. Newton, P.U.R.1920F, 483, 267 Fed. 231; Passaic Rate Case, 1 N. J. P.U.R. 491; Landon v. Kansas Ct. of Industrial Relations, P.U.R.1921A, 807, 269 Fed. 433.

Rates based upon a pre-war valuation are confiscatory and unconstitutional.

Elizabethtown Gaslight Co. v. Public Utility Comrs. 95 N. J. L. 18, 111 Atl. 729; Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454; St. Joseph Light, Heat & P. Co. v. Public Service Commission, P.U.R.1921A, 540, 268 Fed. 267; Joplin & P. R. Co. v. Public Service Commission, 267 Fed. 584; United States ex rel. Kansas City Southern R. Co. v. Interstate Commerce Commission, 252 U. S. 178, 64 L. ed. 517, 40 Sup. Ct. Rep. 187; Consolidated Gas Co. v. Newton, P.U.R.1920F, 483, 267 Fed. 231; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Willcox v. Consolidated Gas Co. 212 U. S. 52, 53 L. ed. 399, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Any loss suffered by applicant should be amortized and spread over a term of years.

Mr. R. Bolling Willcox, for defendant in error city:

The commission did not err in its method of arriving at the value of appellant's property for rate-making purposes.

Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Buffalo Gas Co. 4 Comm. Leaflets, 319; Re Chesapeake & P. Teleph. Co. (Md.) P.U.R.1916C, 946; Re Bay State Rate Case (Mass.) P.U.R.1916F, 221; Fuhrmann v. Cataract Power & Conduit Co. 3 P. S. C. (2d Dist. N. Y.)

656; Re Potomac Electric Power Co. (D. C.) P.U.R.1917D, 563; Re Roanoke Waterworks Co. (Va.) P.U.R.1920C, 745; Re Culpeper Teleph. Co. (Va.) P.U.R.1920D, 305; Re Chesapeake & P. Teleph. Co. (Va.) P.U.R.1920F, 49; Re Virginia R. & Power Co. (Va.) P.U.R.1921C, 193; Re Laporte Gas & E. Co. (Ind.) P.U.R.1921A, 824; Re Central Union Teleph. Co. (Ind.) P.U.R.1920B, 824; Brooklyn Borough Gas Co. v. Public Service Commission, 17 N. Y. Dept. R. 81, P.U.R.1918F, 335; Re Tutwiler (Tenn.) P.U.R.1920C, 315; Potomac Electric Power Co. v. Public Utilities Commission (D. C.) P.U.R.1920C, 341; Tyrone v. Home Electric Light & S. Heating Co. (Pa.) P.U.R.1920C, 565; Re Milton & M. J. Teleph. Co. (Wis.) P.U.R.1920C, 110; Davis v. Pennsylvania Gas Co. (N. Y.) P.U.R.1921B, 358; Re Public Service Co. (Ill.) P.U.R.1921B, 443; Re Mountain States Teleph. & Teleg. Co. (Idaho) P.U.R.1921B, 739; Re Southwestern Bell Teleph. Co. (Ark.) P.U.R. 1921B, 516; Re Two States Teleph. Co. (Ark.) P.U.R.1921B, 405; Re Southern Nebraska Power Co. (Neb.) P.U.R. 1921C, 691.

The burden of proof was on the gas company to justify the rate it was asking for, and if it failed to do so it should not complain of the result.

Re Pacific Electric R. Co. (Cal.) P.U.R.1920B, 652; Re Clarence Teleph. Co. (Mo.) P.U.R.1920E, 365; Sawyer v. Mays (Ark.) P.U.R.1920D, 797; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 452, 51 L. ed. 1563, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Burks, J., delivered the opinion of the court:

This is an appeal from a decision of the state corporation commission fixing rates which the Petersburg Gas Company was allowed to charge to its patrons for gas. The record is not made up in the chronological order of events as they occurred before the commission (as it should

have been), and it is only after searching through the record that we are able to state the case in that order.

On February 13, 1920, the gas company filed a new schedule of rates before the corporation commission, effective March 15, 1920, by which there was an increase in the maximum rate allowed for regular meters from \$1.15 per 1,000 cubic feet to \$1.60 per 1,000 cubic feet. This increase was asked in view of the increased cost of labor and materials, and because the operating expenses for the year 1919 more than consumed the total income of the gas company. On June 29, 1920, the engineer of the commission filed a report, in which, among other things, he stated: "That the services rendered by the Petersburg Gas Company may be considered as a fair average compared with other cities in Virginia and in the eastern United States."

On July 21, 1920, the said engineer filed a second report, in which he gave his estimate of the net value of the plant for rate-making purposes at \$209,000. The gas company was contending for a valuation of \$481,000, and had no information as to the filing of this second report. On August 2, 1920, the state corporation commission delivered an opinion based upon the second report of its engineer, fixing the maximum rate for regular meters at \$1.50 per 1,000 cubic feet, and criticizing the gas company for attempting to collect rates based on an excessive valuation of its property. The opinion also suggested a careful examination of the company's property by an expert engineer. Upon the filing of this opinion the gas company promptly asked for a valuation of its property for the purpose of rate making by an expert engineer, and furnished the names of a number of such experts, stating that it was perfectly willing to have the valuation made by any one of those named, or any other competent expert that might be selected by the commission. The commission se-

lected from the list thus furnished the firm of Forstall & Robison, of New York city, engineers of wide experience and very decided ability. On August 23, 1920, the commission addressed a communication to Forstall & Robison, in the following language:

"In view of your employment by the Petersburg Gas Company, with the approval of the commission, for the purpose of making an inventory and appraisal of its property so as to ascertain its fair value, this is written for the purpose of outlining the commission's views.

"It is desired to ascertain the value of the company's property on the 1st day of January, 1917, based on the average unit price of the preceding five years. This does not, of course, prevent the company from advancing any other basis of arriving at the value that it desires to present in connection with this case. In arriving at depreciation the commission wishes, in addition to any basis used by you in determining this element, to be advised as nearly as you can do so of the age and wear of the various elements composing the property and ascertainable as far as possible from the records, and the probable age of any property that may have been bought secondhand.

"To the value as of January 1, 1917, there is, of course, to be added the purchases at cost since that date to the most recent available date, July the 1st, if practicable.

"The commission also desires the financial history of the company, in the main, as outlined on pages 4 and 5 of the paper filed to-day by the Young Men's Business Club and the Gas Consumers' League of Petersburg.

"We assume that report will include, as usual, a statement as to the general condition of the plant in its relation to its public service, and such suggestions as may occur to you for improvement and efficiency."

Pursuant to the foregoing instruction, Mr. Forstall, of the firm of For-

stall & Robison, made the valuation based on the average unit price for the five years 1912-1916, and ascertained the net fair valuation of the property on the pre-war basis for rate-making purposes at \$405,130. At the request of the gas company Mr. Forstall filed a second report on December 11, 1920, using the average unit price for the five years 1915-1919, inclusive, and arrived at the depreciated value of the property with intangibles of \$620,880. He testified that the value of the property based on the average price for the year 1920 would be 25 to 30 per cent higher than the figures stated in the last-mentioned report. On December 29, 1920, he filed a third report, fixing the value based on the financial history of the company in accordance with the letter of instructions of August 23, 1920, of the commission, in which he ascertained the value of the plant as of June 30, 1920, to be \$453,700. Hearings were had by the commission on these various reports on January 13, 14, 27, and February 21, 1921. Pending these hearings the gas company filed a new schedule of rates, in which they asked that the rate for regular meters be raised to \$2.35 per 1,000 cubic feet. After these hearings and argument by counsel, the commission rendered its opinion on March 24, 1921, in which it fixed the value of the property for rate-making purposes at \$318,350, and the rate allowed to be charged for regular meters at \$1.75 per 1,000 cubic feet. It is from this decision that the present appeal is allowed.

The chief objections to the decision are (1) that the commission, in valuing the property of the gas company, fixed the value entirely with reference to the average pre-war unit price for the years 1912-1916, inclusive, and (2) that the commission erred in applying the depreciation of 26½ per cent to the valuation of the gas property based upon the age of the various component parts of the plant. The commission fixed the value of the plant at \$318,350,

20 A.L.R.—35.

but the opinion does not show how this valuation was arrived at. There was conflict of testimony as to what portions of the real estate of the company were used, or useful, for the business of the company, and, while the opinion shows that it had not accepted Mr. Forstall's report and testimony on the subject, it failed to show what portion of said real estate was not so used, or useful, or the value thereof. It also fails to state what rate of return it allowed upon the valuations fixed by it, or the rate of annual depreciation, or the fair cost of operation—facts which, if found and stated, would be helpful to an intelligent review of its holding. The opinion does not show, and we are unable to ascertain from it, the reasons which justified the commission in fixing \$1.75 as a fair rate to be charged per 1,000 cubic feet.

The Constitution, § 156 (f), requires the chairman of the commission to "certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify."

It will be observed from this quotation from the Constitution that the commission is required to certify the facts above mentioned, and not merely all the evidence that was introduced before it. It was never intended that the appellate court should have to examine a large amount of conflicting testimony, and ascertain therefrom the facts upon which the commission based its conclusions. The gas company insists that it applied time and again for this certificate of facts, but without avail.

Both the state and Federal Constitutions forbid the taking of private property for public use without

making just compensation therefor, and the common law forbids the taking of private property of one person and giving it to another with or without just compensation. If,

Constitutional law—gas rate—just compensation.

therefore, the gas company is compelled to furnish its customers gas at less than "reasonable compensation," the requirement is illegal.

The subject of rate making should be approached by commissions and courts with a view to doing what is fair and just between the parties under all the circumstances of the particular case. That for which the utility company is entitled to "just compensation" is the use of its property appropriated to the public benefit, and the value of that use is

Rates—foundation for.

founded upon the fair value of the property so used, and not upon the amount of stock it has issued or the debts it may owe. The rate of return on such "fair value" which the utility company should be allowed to receive should be fair and just to the company, and such as will make its securities attractive to investors when the company is prudently and carefully operated.

—what determines amount.

"The utility is entitled to ask a fair return upon the value of that which it employs for the public convenience, but, on the other hand, the public is entitled to demand that no more be exacted from it than the services rendered are reasonably worth." *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* 291 Ill. 209, P.U.R.1920C, 640, 125 N. E. 895, and cases cited.

In *Re Potomac Electric Power Co.* (D. C.) P.U.R.1917D, 563, it is said that the return allowed should be one "which will be fair to the investor, who has directed his energies and devoted his substance to the creation of this instrumentality, and fair and just likewise to the consumer, who, under modern conditions, is compelled to use the

product of the utility in his daily business and social and domestic life."

While the utility enjoys a monopoly which it should not be permitted to use to the public detriment, at the same time it has invested its skill and capital in an enterprise that is essential to the comfort and convenience of life, and which requires large sums of money for the payment of operating charges, repairs, replacements, improvements, interest charges, taxes, sinking fund, and other purposes connected with the necessary and proper operation of its plant. These sums are to be obtained from the lending public on the faith of the security offered by the utility company. In fixing a rate, therefore, which will be just and reasonable, it must be borne in mind that the utility shall be allowed to realize such a net income upon the value or amount of its investment as will, when prudently managed, render its securities attractive to the investing public. Otherwise, there will result inferior service to the public, and ultimately bankruptcy of the utility, and disaster as well to the public as the utility.

In *Elizabethtown Gaslight Co. v. Public Utility Comrs.* 95 N. J. L. 18, P.U.R.1920F, 1001, 111 Atl. 729, in referring to an undervaluation of a gas plant, it was said: "This suffices to show that the amount of return allowed to the companies would probably be insufficient, under present circumstances, to attract capital to the business, and this was one of the important tests of the justice and reasonableness of the rate as decided in the *Passaic Case*." (Italics supplied.)

See also *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* supra; *Passaic Rate Case* (Public Service Gas Co. v. Public Utility Comrs.) 84 N. J. L. 463, L.R.A.1918A, 421, 87 Atl. 651. The disastrous effect of failure to allow just and reasonable compensation to public service

companies is well summed up by the Supreme Court of the United States in *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 154, as follows: "Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence."

If the plant was much larger than necessary, a different question would arise as to the valuation, but it is not claimed that the plant was any larger than was necessary for the purpose for which it was used, and the duties devolved upon the state corporation commission in the case in judgment were: (1) The ascertainment of the fair value for rate-making purposes of the property of the gas company, used or useful in furnishing gas to its patrons; (2) the fixing of the rate or per cent the gas company should receive on said fair valuation, after deducting costs of operation and any other legitimate expenses; and (3) the amount per 1,000 cubic feet to be paid by consumers in order to raise the necessary funds to pay all costs and expenses and the compensation to be received by the gas company. Compare *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co. supra.*

Several methods have been suggested as helpful in ascertaining the value of property for rate-making purposes. One of these is to take the reproduction cost, less observed depreciation. As a general rule, and where the utility has not been allowed to earn in the past a depreciation reserve greater than the observed depreciation, this seems to be the fairest

method and the one best supported by authority, and as the state corporation commission attempted no other, and apparently adopted this method,—in part, at least,—it is unnecessary to make further reference to other methods. The costs of labor and materials were greatly inflated by the World War; and have not yet receded to pre-war rates, nor is it probable that they will so recede in the near future, if ever. The result is that it has been found difficult to determine as of what date the unit of prices shall be fixed. In the letter of instructions to the engineers the commission directed them to take the average unit price for the five years preceding January 1, 1917. Its reason therefor finds expression in the case of *Re Chesapeake & P. Teleph. Co. (Va.) P.U.R.1920F, 49*, cited in its opinion in this case, where it was said: "It seems to the commission that a reproduction value as of normal times at pre-war prices, plus the actual sums necessarily expended during the period of inflation, less the deductions discussed above, . . . is a fair and reasonable basis."

And so far as we can gather from the opinion of the commission, this is the basis upon which it fixed the value of the property of the gas company for the purpose of fixing the rate. It apparently refused to consider values as of any other time, on the ground that they were not normal. Referring to the contention of the gas company that the value of the property should be ascertained by "using unit prices as of the time when the valuation was made," the commission said:

"This commission has time and time again pointed out the essential unfairness and impracticability of such a proposition. References may be made to the opinions of this commission in *Re Roanoke Waterworks Co. (Va.) P.U.R.1920C, 745*; *Re Culpeper Teleph. Co. (Va.) P.U.R.1920D, 305*; *Re Chesapeake & P. Teleph. Co. supra*; *Re Rosslyn Co. (not reported)*; *Re Bristol Gas & E. Co. (not reported)*; *Re Virginia*

—reproduction
cost of prop-
erty.

R. & Power Co. (Va.) P.U.R.1921C, 193, decided March 18, 1921.

"Unquestionably some recent court decisions tend to unhold the view advanced by the Petersburg Gas Company."

After repudiating these "recent court decisions," and making lengthy quotations from the Indiana public service commission in the La-porte Case, P.U.R.1921A, 824, hereinafter mentioned, the commission says:

"We stand by the method of valuation outlined in our instructions to Forstall & Robison, believing it conforms to the standard laid down by the United States Supreme Court in the Consolidated Gas Case—"the reasonable value of the property at the time it is being used for the public."

"The commission knows, and knew when it authorized the Petersburg Gas Company to employ any one of the list of engineers submitted by it, that the firm of Forstall & Robison is entirely reputable and reliable. Any student of public utilities reports also knows that, in addition to the entirely trustworthy reports of physical values made by engineering firms, the engineers invariably advance theories as to additional values. Such student also knows that in most cases the engineering theories are materially reduced by commissions in accordance with their conception of reasonable values, taking into consideration, as laid down in the master case of *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, 'all the elements.'

"There is also room for exercise of judgment in the degree of accrued depreciation to be deducted from the rate base.

"Under the circumstances, the commission adheres to its opinion that the reproduction cost theory, applied at the time the property is being used in the public service, does not reasonably mean that unit prices as of that date must be accepted. A valuation made to-day would show lower figures than the valuation made June 30 last. However much

it might suit the engineers, it would be destructive of every theory of regulation if the utilities, the public, and commissions were forced to keep on having new reproduction cost valuations with each change in unit prices.

"So we say that, if the present trend of court decisions is to be taken as requiring the ascertainment of reproduction costs as of the particular date on which the calculation is made, the entire reproduction theory must go into the discard and be succeeded by the historical method with all of its obvious defects.

"It is evident that in this case there should be some deduction from Forstall's figures of land values covering property in use or useful to the public; further, that paving over street mains must be deducted, and also value of property turned over to the Interstate Appliance Corporation, together with most of the value of the trestle. Under all the circumstances surrounding the history of this company, 10 per cent of the construction value is sufficient allowance for overheads, including engineering, supervision, legal expenses during construction, taxes, interest, and insurance during construction. Materials and supplies with working capital must, of course, be allowed in accordance with the experience of the company. A fair deduction for accrued depreciation on the physical property would, it seems to the commission, with all the light before it, be 26.5 per cent. Going value is given its due weight.

"We thus arrive at a fair valuation of the property of the Petersburg Gas Company for rate-making purposes, as of June 30, 1920, at \$318,350."

Even if we concede the premises, we are unable to draw the conclusion stated in the last paragraph. The value of the real estate used or useful in the operation of the plant is universally conceded to be not subject to any reductions, but the value thereof is not stated. The amount estimated for paving over streets and the value of the prop-

erty turned over to the Interstate Appliance Company had already been deducted from Forstall's statement, and the depreciation on the different portions of the physical property was most probably not the same, and we have no means of knowing on what sum the 26.5 per cent of depreciation was calculated.

-fair valuation
-failure to state facts.

The opinion does not state the facts upon which its calculation is based. Hence it does not thus appear that \$318,350 is a fair valuation. The commission apparently adopted substantially Forstall's pre-war unit valuation of \$504,130, except as to the real estate, but it differed from him, as did its engineer, Dickerman, as to the amount to be deducted for depreciation. If, however, we take 26½ per cent off of Forstall's valuation (\$132,594), we would have left \$371,536, and not \$318,350 fixed by the commission. It is impossible to tell from the record how the commission arrived at its valuation. In

-presumption of reasonableness of commission's finding.

the absence of the facts required by the Constitution to be stated, we cannot presume, *prima facie*, that the findings of the Commission are correct. As said in the Springfield Case, *supra*: "Where it appears from the finding of the commission that only a certain proportion of the actual value of the whole, or any considerable part of the property of the utility, is to be taken into consideration, then such value must be stated by the commission, or the proportion considered must be stated; otherwise, this court will be helpless in an effort to review the reasonableness of the commission's findings and order."

But there is fundamental error in taking the pre-war unit of prices as practically the sole basis for ascertaining the reproduction value of

-pre-war prices as basis for rates.

the property of the gas company for rate-making purposes. What is said in the opinion of the commission with reference to the costs of producing gas is equally

applicable to the costs of reproducing the plant. It is there said: "In any event, there seems little possibility of a return to a general pre-war level. The natural resources of the country are approaching depletion, and when it costs more to mine a ton of coal because it is farther back in the mountain, and where there is less lumber in the country every year, and when the oil supply will inevitably decrease, and when the general level of labor will likely be above that of pre-war years, evidently the prices of the past cannot be realized."

These seem to be good reasons why pre-war prices of reproduction should not be adopted.

We have no case from the Supreme Court of the United States involving rate making as affected by the inflated prices of the war period, but there are several cases involving a variation of prices from other causes.

In *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, it is said: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the *reasonable value of the property at the time it is being used for the public.*" (Italics supplied.)

The commission emphasized the word "reasonable" in the foregoing quotation, and claimed to follow that holding, but departed from it by holding that a value based on a pre-war unit price gave the "reasonable value," although it admitted that there was "little possibility of a return to a general pre-war level."

In *Willcox v. Consolidated Gas Co.* 212 U. S. 52, 53 L. ed. 399, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 200, 15 Ann. Cas. 1034, it is said: "And we concur with the court below in holding that the value of the property is to be *determined as of the time when the inquiry is made regarding the rates.*" (Italics supplied.)

Three years have elapsed since the close of the war, and neither labor nor materials have declined to any-

thing like the pre-war prices. When, if ever, they will, no one can foretell. It would seem that time enough had elapsed to furnish a basis for calculating reproduction costs.

In *Consolidated Gas Co. v. Newton* (Southern Dist. New York) P.U.R.1920F, 483, 267 Fed. 236, Judge Hand said that, so far as he had found in the books, a test of two years was enough, and cited *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, and *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, P.U.R.1919C, 364, 121 N. E. 772. On the same subject he further said: "The master has taken complete evidence over a period of twenty months, from January 1, 1918, to August 31, 1919. Since that time eleven more months have passed, during which there has been no fall in price levels. The record has some evidence of this down to a later day, but, of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obtrusive a fact of daily life, and it is quite fair to say that the condition which the master found as of August 31, 1919, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production and the 'rate base' for a future time long enough to call for some judicial action."

On the subject of the computation of the "rate base," the same distinguished judge said: "The rule of the present reproduction cost, which is a necessary consequence of the foregoing argument, appears to me to have been either expressly or implicitly recognized in all the cases in which the Supreme Court has passed on these matters. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Des Moines Gas*

Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 10, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 434, 454, 455, 57 L. ed. 1511, 1555, 1563, 1564, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571; *Darnell v. Edwards*, 244 U. S. 564, 568, 61 L. ed. 1317, 1320, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701. It is true that its application has not distinctly arisen since the recent rise in prices, but it is not possible that it should have general application, and yet not cover this its most glaring illustration."

In *St. Joseph R. Light, Heat & P. Co. v. Public Service Commission* (Dist. Ct. W. D. Mo. C. D.) P.U.R. 1920A, 540, 268 Fed. 267, it is said: "The commission took the original cost when obtainable, and, when not obtainable, average prices for a fixed period of five years before war prices prevailed, going back approximately to the year 1910. . . . It is my judgment that the great weight of authority is against the adoption of a standard of original cost as a controlling basis for determining present value. *The present fair value is the object to be attained. Nor do I think it permissible substantially to restrict the inquiry to a period antedating present cost prices.*" (Italics supplied.)

In *Elizabethtown Gaslight Co. v. Public Utility Comrs.* 95 N. J. L. 18, 111 Atl. 729, the commission adopted as a standard of value the average prices prevailing for five years preceding January 1, 1916. Swayze, J., speaking for the supreme court of New Jersey, said: "I think it entirely clear that the failure to allow for prices at the time to which the rates apply—July 1,

1919—was an error. It is not denied that prices were very much higher in 1919, and are very much higher now, than the average for the years 1911 to 1916. So notorious is this that the Supreme Court of the United States has referred to it in an opinion as a matter of common knowledge. *Lincoln Gas & E. L. Co. v. Lincoln*, 250 U. S. 256, at page 268, 63 L. ed. 968, 976, 39 Sup. Ct. Rep. 454. In that case, on its own responsibility, the court suggested that in its opinion the decree ought to be modified to permit the complainant to make another application to the courts for relief. It would be manifestly unjust to apply to a gas company a standard of value different from that applied to others. To what extent the increase in prices may be due to an inflation of the currency, or to any other particular cause, we do not know. What we do know is that the dollar of 1919 and the dollar of 1920 are worth less than the dollar of 1916, and still less compared with the dollar of the average year from 1911 to 1916. If it were proposed to value the property of the gas company in 100-cent dollars, and allow them a return only on that, while other values were on the basis of 50-cent dollars and just double in number, everyone would see the injustice; so far as the increase in prices is due to inflation of the currency, the illustration is a perfect one."

In *Smyth v. Ames*, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 433, Mr. Justice Harlan, speaking for the court on the subject of railroad rates, said:

"The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. . . .

"What the company is entitled to ask is a fair return upon the value of that which it employs for the

public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The word "value" has a peculiar meaning when applied to rate making. In *Re Potomac Electric Power Co.* (D. C.) P.U.R.1917D, 563, 694, it is said: "The use by the courts and commissions in rate cases of the expressions that public service corporations are entitled to 'a reasonable return upon the fair value of their property,' or 'a reasonable return upon the reasonable value of their property,' and similar pronouncements, and the methods adopted by the different commissions and courts in arriving at this fair or reasonable value, clearly indicate that the object and purpose of every valuation upon which rates are to be based is an ascertainment of but one thing—not what the property is worth as an income-producing instrumentality, not for what it would sell or could be bought, not its worth because of its being a monopoly or the holder of rights, easements, franchises, privileges, and benefits accorded it over others, to enable it to perform its public duty, but 'a determined amount, an ascertained and fixed sum, upon which the owners may earn a fair and reasonable return. The sum so arrived at should be one upon which a return may be allowed which will be fair to the investor, who has directed his energies and devoted his substance to the creation of this instrumentality, and fair and just likewise to the consumer, who, under modern conditions, is compelled to use the product of the utility in his daily business and social and domestic life.

"If the word 'amount' is substituted in place of the word 'value,' in § 7 of the Public Utilities Law, and, in the judgment of the commission, such a substitution not only does no violence to the word 'value,' but gives to it a meaning which Con-

gress intended it should convey, it would follow that it is the duty of this commission to ascertain the fair amount which should represent a just basis for rates of this particular utility, as of the time so determined.

"If this view is taken, the determination of fair value becomes the determination of that just and equitable amount upon which, under all the facts, circumstances, and conditions of the utility's construction up to the time of valuation, the return allowed to the utility should be computed."

In *Re Central Union Teleph. Co. (Ind.)* P.U.R.1920B, at page 825, it is said: "Moreover, even assuming normal costs and usual and ordinary conditions, cost of reproduction is not necessarily controlling, for consideration and weight must be given to all other elements entering into the fair value of the property."

The subject of rate making, especially as applied to a gas company, is discussed with marked ability and a very full citation of authority by the supreme court of Illinois in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* 291 Ill. 209, P.U.R. 1920C, 640, 125 N. E. 891. It is there said:

"The difficulty is that which is always present—to ascertain a standard by which this justice and reasonableness shall be gauged. The necessity of public regulation of rates arises out of the monopoly of the public service company. The unregulated price of the service ceases, except so far as some substitute for the particular service may be found, to be determined by competition, and the individual consumer is unable to contract on equal terms. Fixing rates by public authority may secure to each individual the advantage of collective bargaining by or in behalf of the whole body of consumers, and result in such a rate as might properly be supposed to result from free competition if free competition were possible. A just and reasonable

rate, therefore, is necessarily a question of sound business judgment rather than one of legal formula, and must often be tentative, since exact results cannot be foretold. *Public Service Gas Co. v. Public Utility Comrs.* 84 N. J. L. 463, 87 Atl. 651. Like so many other questions in the law that involve reasonableness of conduct, it is a question of fact to be settled by the good sense of the tribunal it may come before. That it is not a question of legal formula is shown by a decision of the United States Supreme Court in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571, that a rate may be reasonable although it fails to produce an adequate return to the public service company, owing to the fact that the business had not developed sufficiently to be remunerative, or to the fact that the plant is on a larger scale than is justified by the present demand. The real test of the justice and reasonableness of any rate seems to be that it should be as low as possible, and yet sufficient to induce the investment of capital in the business and its continuance therein. This, also, is a business question, and depends on the opportunities that may be offered for more profitable investments and the risk involved. In determining the justice and reasonableness of rates, perhaps no better test can ordinarily be found than the rates customarily charged in localities similarly situated. And yet this test is not by any means infallible. What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense. *Duluth Street R. Co. v. Railroad Commission*, 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887.

"Appellee contends that the only equitable basis for determining value for rate-making purposes is the cost of reproduction new, less depreciation. This contention cannot be sustained. The basis of all calculations as to the reasonableness

of rates to be charged by a corporation maintaining a public utility under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the present cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. *Smyth v. Ames*, supra; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470; *Duluth Street R. Co. v. Railroad Commission*, supra."

The subject is beset with difficulties, and no hard and fast rule can be safely laid down for fixing values for rate-making purposes. Many of the items which enter into the determination of values are mentioned in the cases we have cited, and the commission seems to have given the subject careful consideration. It has, however, emphasized the pre-war unit of valuation, but the reasoning of the opinion seems to indicate that it has not given due weight to the present costs of reproduction and the probable costs thereof during the near future, or for the time during which the rate fixed will probably be in force; and hence we cannot presume that it has. These are important items to be considered, and it should not be left in doubt whether or not they have been taken into consideration.

It may be said of valuation what has been said of the return to be allowed: "What is a reasonable return is a question of fact, the solution of which calls for the exercise

of sound judgment and common sense."

We are constantly measuring ordinary care by the conduct of the "ordinarily careful man," and so, here, after hearing all that is said affecting value, we must measure value by the "sound judgment and common sense" of impartial tribunals charged with the ascertainment of such value.

—how value
ascertained.

The *Laporte Case*, so largely relied on by the commission and by counsel for the appellee in their brief, loses much of its force by reason of the fact that the opinion was concurred in by only three out of five of the commissioners. The opinion of Commissioner Haynes is an able one, but Commissioner Johnson only concurred in the order to be made in that case, "but not in the opinion," and Van Auken, commissioner, dissented. The case furthermore does not accord with the cases we have cited.

Counsel for the appellee also rely upon the finding of Mr. Justice Hughes, as referee, in *Brooklyn Borough Gas Co. v. Public Service Commission*, 17 N. Y. Off. Dept. R. 81, P.U.R.1918F, 335, but the facts of that case are entirely different from those in the case in judgment. In the *Brooklyn Borough Gas Co. Case* there were three different valuations: One based on the original costs or investment; another upon reproduction upon the average unit prices prevailing from 1912 to 1916, inclusive; and the third upon an official valuation made in 1914 and acquiesced in by the company. The third valuation was selected. As the official valuation had been so recently made, it seems manifest that it was the proper valuation to be adopted.

The opinion of the commission does not state what amount was allowed for operating expenses, nor what per cent on the value fixed it considered a fair and reasonable return on the ascertained valuation. It simply fixed the price of gas per 1,000 cubic feet to be paid by the

consumer. Operating expenses are accruing from day to day, and are determined by the prices of to-day, and not of some future date. In any estimate of rates to be paid by

the consumer of gas, it is essential to ascertain the costs of operation, for the gross receipts, less the costs of operation, is what the gas company gets for its service.

"The actual cost of its operation must always be taken into consideration in determining whether or not it receives a fair compensation above that cost." *Brooklyn Borough Gas Case*, supra; *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* 291 Ill. 209, P.U.R.1920C, 640, 125 N. E. 891.

In 1920 the actual operating expenses of the gas company were \$1.668 per 1,000 cubic feet, and this amount was not called in question by the commission. The highest rate to the consumer was fixed at \$1.75 per 1,000 cubic feet, and the probable average rate at \$1.70. This would leave to the gas company only from 4 to 9 cents per 1,000 cubic feet, which, upon a consumption of 100,000,000 cubic feet per year, is not a fair compensation for the service furnished. The gas plant was not larger than necessary, and the commission, after fixing the value thereof for rate-making purposes, should have determined the rate of return the company should receive on such valuation, and the costs per 1,000 cubic feet of operation. The aggregate of these two sums divided

—method of determining rate of commodity.

by the number of thousand cubic feet of gas to be sold would give the price to be charged to the consumer. For example, assuming the plant to be valued at \$300,000, the return to the company to be 10 per cent, and the amount of gas sold to be 100,000,000 cubic feet:

Ten per cent on \$300,000	\$ 30,000 .
Cost of producing 100,000,000 cubic feet at \$1.66	166,000
	<hr/>
	\$196,000
Cost to consumer per 1,000 cubic feet	\$1.96

These figures are given merely by way of illustration and are not intended to intimate any opinion upon either valuation or percentage. It is manifest that the commission either did not take into consideration the costs of operation, or did not accept the company's estimate of such costs. No suggestion of the latter is found in the opinion of the commission.

For reasons stated by the commission we do not think that the losses sustained by the gas company prior to its application for an increase of rates should be amortized, but if, upon further investigation, it is ascertained that a loss has been sustained since that date, in consequence of the rate

fixed by the commission, such loss —amortizing loss.

should be amortized and spread over such a term of years as will be fair to the gas company and not too burdensome to the consumers.

If in any rate fixed the gas company should make a profit upon which a tax is imposed, that should be taken into consideration in fixing the per cent of return it is to receive on its investment. —allowance for profit tax.

There was evidence before the commission that the service furnished to many customers was of a very inferior character and of no practical value. The regulation of the character of service to be furnished to customers is fully within the powers of the commission, and we shall assume, until the contrary is made to appear, that the commission will exercise that power whenever a proper case is made before it.

In the absence of any statement

of facts found by the commission or any tabulation of figures, we are unable to say what rate of charge to the consumer would be fair and reasonable to both the consumer and the gas company, and this case will therefore be remanded to the State Corporation Commission, with directions to reconsider the same upon the evidence already before it, and

such additional evidence, if any, as it shall permit to be introduced, and to conform its findings to the views hereinbefore expressed, and, in the event of another appeal to this court, to state the facts found by it, and to tabulate the figures so as to show clearly how it arrived at its conclusion, so far as dependent upon such figures.

ANNOTATION.

Public utility rate valuations as affected by advance in price conditions due to World War.

I. Scope and introduction, 555.

II. Rules in general:

- a. War or post-war prices not necessarily the controlling factor, 556.
- b. Higher price levels due to war conditions not to be ignored, 559.

I. Scope and introduction.

As indicated in the above title, the annotation includes, in general, only cases involving valuations for rate-making purposes. Several cases are referred to where the valuation was for other purposes, which are indicated in connection with the citation of the case. But in order to avoid confusion it is desirable to confine the scope of the annotation, in general, to rate valuations.

Reproduction cost has, of course, long been regarded by the courts and commissions in many states as a factor in determining present fair value for rate-making purposes. Average unit prices for a period of years have been frequently taken in computing this cost, even before war conditions prevailed. The annotation does not treat the specific question whether prices should be computed as of the particular time of the valuation, or over a series of years; but is, in the main, limited somewhat strictly to consideration of the effect of the recent abnormal advance in prices brought about by the World War. The cases in which this particular

II.—continued.

- c. Additions and betterments constructed at war or post-war prices, 560.

III. Particular holdings and applications:

- a. General statement, 560.
- b. Decisions of the courts, 561.
- c. Decisions of utility commissions, 568.

element has been considered begin to appear about 1916.

The subject under annotation should not be confused with the question whether abnormally high operating costs, due to war conditions, should be considered in determining the return to which the utility is entitled. It is obvious that, even though a public utility is allowed its actual increased operating expenses in the abnormal times during which the country has recently been passing, this does not mean that, after paying operating expenses, it is necessarily entitled to a return on the increased value of its property based on higher unit costs of labor and materials arising from conditions brought about by the late war. The importance of keeping in mind this distinction is pointed out by former Justice Charles E. Hughes, as referee, in *Brooklyn Borough Gas Co. v. Public Service Commission* (1918) 17 N. Y. Off. Dept. R. 81, P.U.R.1918, 335, infra, III.

The present annotation should not be regarded as an attempt to set forth the rules or factors to be considered in valuing utility property.

In fact, it has been frequently pointed out that there are no fixed rules or formulas by which courts of commissions are to be guided, but that the matter of determining a rate-base valuation is one calling for judgment and discretion, with due consideration of all the circumstances of the particular case; and many elements enter as factors into the calculations. There are various theories, of course, of valuation, as the original cost or investment theory, the present "fair value" theory, and the cost of reproduction theory. It is not the purpose of the annotation to go into these various theories or fundamental principles of valuation. Of course, if a court or commission should adopt the actual cost or investment theory as its exclusive guide in valuation, and the plant was constructed prior to the late war, the distinctive question under annotation does not arise, provided its conclusion was not affected by the recent abnormal increase in prices of labor and commodities. Usually, however, even where the actual cost theory has been given controlling consideration, attention has been called to this method as fairer, in view of the prevailing abnormal war prices, and such cases are in point in the annotation. Where the "fair value" theory is adopted, cost of reproduction is considered as one of the elements or factors, and in such cases the question arises whether unit prices should be taken as at the time of the valuation, representing, often, many times the original cost, or whether pre-war prices should be accepted, or a medium view taken; and the same is true, of course, in those states where cost of reproduction is regarded as controlling in fixing valuation.

The recent abnormally high prices have served to emphasize the desirability of some more permanent basis of valuation than the cost of reproduction, and it may be stated generally that a number of the commissions have called attention to the necessity of finding some more satisfactory basis of valuation, even if this method, in times past, was equitable. See, for

example: *Re York County Water Co.* (1920; Me.) P.U.R.1921A, 439; *Re Lewiston Gaslight Co.* (1920; Me.) P.U.R.1921A, 561; *Re United R. & E. Co.* (1919; Md.) P.U.R.1920A, 1; *Maires v. Flatbush Gas Co.* (1918; N. Y.) P.U.R.1920E, 931; and *Re Longporte Gas & E. Co.* (1920; Ind.) P.U.R.1921A, 824, under III. c, *infra*. The original cost or investment theory has sometimes been regarded as affording a more satisfactory, because a more permanent, basis—at least, so as to entitle it to the major consideration.

II. Rules in general.

a. War or post-war prices not necessarily the controlling factor.

While the decisions, both of the courts and of the various utility commissions, generally recognize the doctrine that in determining rate valuations there should be taken into consideration the fact that a higher level of prices and materials has been brought about by conditions due to the World War, and that this higher level will probably continue for an indefinite period, yet it is held in almost all the cases that, with respect to plants constructed at pre-war prices, the prevailing abnormally high prices of labor and materials, due to war conditions, should not be taken as the sole criterion or controlling element in fixing valuations of a public utility for rate-making purposes. This view is supported by the following court decisions: *Houston Electric Co. v. Houston* (1920) P.U.R.1920F, 328, 265 Fed. 360; *Galveston Electric Co. v. Galveston* (1921) P.U.R.1921D, 547, 272 Fed. 147, affirmed in (U. S. Adv. Ops. 1921-22, p. 382) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 351; *Winona v. Wisconsin* (1921) P.U.R.1921D, 547, 272 Fed. 147, affirmed in (U. S. Adv. Ops. 1921-22, p. 382) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 351; *Winona v. Wisconsin* (1921) P.U.R.1921D, 547, 272 Fed. 147, affirmed in (U. S. Adv. Ops. 1921-22, p. 382) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 351; *Minnesota Light & P. Co.* (1921) 272 Fed. 996; *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* (1919) 291 Ill. 209; *Potomac Electric Power Co. v. Public Utilities Commission* (1920; D. C.) P.U.R.1920C, 326; *State ex rel. Southern Bell Teleph. Co. v. Public Service Commission* (1921) — Mo. —

233 S. W. 425; New York Interurban Water Co. v. Mt. Vernon (1920) 110 Misc. 281, P.U.R.1920D, 515, 180 N. Y. Supp. 304; Kings County Lighting Co. v. Lewis (1920) 110 Misc. 204, P.U.R.1920D, 145, 180 N. Y. Supp. 570; Municipal Gas Co. v. Public Service Commission (1920) 113 Misc. 748, 186 N. Y. Supp. 541; People ex rel. Iroquois Natural Gas Co. v. Public Service Commission (1921) 194 App. Div. 578, P.U.R.1921B, 485, 186 N. Y. Supp. 177; People ex rel. Adirondack Power & L. Corp. v. Public Service Commission (1922) 200 App. Div. 268, 193 N. Y. Supp. 186.

Consolidated Gas Co. v. Newton (1920) P.U.R.1920F, 483, 267 Fed. 231, cited under III. a, *infra*, does not appear entirely in accord with the above cases.

The rule above indicated that prevailing prices of labor and materials, which are abnormally high because of conditions brought about by the late war, should not be taken as the sole criterion or controlling element in determining valuation of the property of a public utility for rate-making purposes, where the plant has been constructed at pre-war prices, is supported, also, by numerous decisions of the various utility commissions.

Arkansas.—Re Rogers Light & Water Co. (1920) P.U.R.1920E, 311; Re Two States Teleph. Co. (1920) P.U.R.1921B, 405; Re Southwestern Bell Teleph. Co. (1920) P.U.R.1921B, 516.

California.—Sherman v. California-Michigan Land & Water Co. (1918) P.U.R.1918D, 93; Re Moore Park Water, Light & P. Co. (1918) P.U.R.1919B, 679; Re Southern Sierras Power Co. (1920) P.U.R.1921C, 218 (abstract); Re Southern California Edison Co. (1921) P.U.R.1921D, 65.

Colorado.—Re Mountain State Teleph. & Teleg. Co. (1917) P.U.R.1917B, 198; Re Denver Tramway Co. (1918) P.U.R.1919E, 211 (abstract).

Connecticut.—Danbury v. Danbury & B. Gas & E. L. Co. (1921) P.U.R.1921D, 193; Stamford v. Stamford Gas & E. Co. (1921) P.U.R.1922A, 303.

District of Columbia.—Re Potomac Electric R. Co. (1917) P.U.R.1917D,

563; Re Capital Traction Co. (1919) P.U.R.1919F, 779.

Georgia.—Re Georgia R. & P. Co. (1921) P.U.R.1921A, 165.

Idaho.—Re Mountain States Teleph. & Teleg. Co. (1921) P.U.R.1921B, 739.

Illinois.—Re Union Gas & E. Co. (1918) P.U.R.1918C, 248 (abstract); Re Southern Illinois Light & P. Co. (1919) P.U.R.1919D, 489; Re Springfield Gas & E. Co. (1919) P.U.R.1920A, 446; Re Springfield Consol. R. Co. (1920) P.U.R.1920E, 474; Re Illinois Northern Utilities Co. (1920) P.U.R.1920E, 908; Re Public Service Co. (1920) P.U.R.1921B, 438; Re Metropolitan West Side Elev. R. Co. (1921) P.U.R.1921B, 229.

Indiana.—Princeton v. Princeton Light & P. Co. (1918) P.U.R.1918E, 300; Re United Public Service Co. (1918) P.U.R.1918F, 316; Re Home Teleph. Co. (1919) P.U.R.1919C, 209; Re Central Union Teleph. Co. (1920) P.U.R.1920B, 813; Re Laporte Gas & E. Co. (1920) P.U.R.1920F, 586; Re Mt. Vernon Waterworks Co. (1920) P.U.R.1921C, 219 (abstract); Re Laporte Gas & E. Co. (1920) P.U.R.1921A, 824; Re Kokomo Gas & Fuel Co. (1921) P.U.R.1921E, 390; East Chicago v. East Chicago & I. Harbor Water Co. (1921) P.U.R.1922A, 193.

Maine.—Re Guilford Water Co. (1918) P.U.R.1918C, 916; Re Lewiston Gaslight Co. (1918) P.U.R.1919B, 423 (abstract); Re Lewiston Gaslight Co. (1920) P.U.R.1921A, 561; Re New York County Water Co. (1920) P.U.R.1921A, 439.

Maryland.—Salisbury v. Salisbury Light, Heat & P. Co. (1918) P.U.R.1918E, 331; Westminster v. Consolidated Public Utilities Co. (1919) P.U.R.1919E, 506; Re United R. & E. Co. (1919) P.U.R.1920A, 1; Re Chesapeake & P. Teleph. Co. (1920) P.U.R.1920F, 417.

Michigan.—Holland v. McGuire (1919) P.U.R.1920B, 149; Re Cole (1921) P.U.R.1921C, 385; Re Lansing Fuel & Gas Co. (1921) P.U.R.1921C, 465; Re Lansing Fuel & Gas Co. (1921) P.U.R.1921D, 387; Re Sault Ste. Marie (1921) P.U.R.1922B, 149.

Missouri.—Re Kansas City Electric

Light Co. (1917) P.U.R.1917C, 728; Re Southwestern Bell Teleph. Co. (1918) P.U.R.1919B, 422 (abstract); Re Joplin & P. R. Co. (1919) P.U.R.1919B, 366; Springfield City Water Co. v. Springfield (1919) P.U.R.1919D, 853; Re Missouri Gas & E. Co. (1919) P.U.R.1919E, 210 (abstract); Re St. Joseph Water Co. (1919) P.U.R.1919E, 211 (abstract); Re Lead Bell Teleph. Co. (1919) P.U.R.1919E, 211 (abstract); Re St. Joseph R. Light, Heat & P. Co. (1919) P.U.R.1920A, 542; Re Kansas City Gas Co. (1920) P.U.R.1920C, 41; Re Memphis Teleph. Co. (1921) P.U.R.1921E, 145 (abstract).

Nebraska.—Re Omaha & C. B. Street R. Co. (1918) P.U.R.1919A, 845; Re Central Teleph. Co. (1920) P.U.R.1921B, 461; Re Southern Nebraska Power Co. (1921) P.U.R.1921C, 678; Re Stanton Independent Teleph. Co. (1921) P.U.R.1921D, 240.

New Hampshire.—Re Grafton County Electric Light & P. Co. (1916) P.U.R.1916E, 879; Re Concord Gaslight Co. (1921) P.U.R.1921C, 169; Re Franklin Light & P. Co. (1921) P.U.R.1922A, 506.

New Jersey.—Re Public Service R. Co. (1921) P.U.R.1921D, 593.

New York.—Brooklyn Borough Gas Co. v. Public Service Commission (1918) 17 N. Y. Dept. R. 81, P.U.R.1918F, 335; Re Westchester Electric R. Co. (1919) P.U.R.1920B, 250; Whitehead v. Niagara Falls Gas & E. L. Co. (1920) P.U.R.1920C, 264; Maires v. Flatbush Gas Co. (1918) P.U.R.1920E, 931; Re Sea Cliff & G. C. Gas Co. (1920) P.U.R.1921A, 211; Davis v. Pennsylvania Gas Co. (1920) P.U.R.1921B, 342; Hoffman v. Elmira Water, Light & R. Co. (1921) P.U.R.1921C, 409; Re New York State R. Co. (1921) P.U.R.1921C, 496; Buck v. New York Teleph. Co. (1921) P.U.R.1921E, 798; Re Long Island Lighting Co. (1921) P.U.R.1922B, 2; Re New York State R. Co. (1921) P.U.R.1922B, 75.

North Dakota.—Fargo v. Union Light, Heat & P. Co. (1919) P.U.R.1920A, 764; Patterson v. Hughes Electric Co. (1920) P.U.R.1921A, 1.

Ohio.—Re Union Gas & E. Co. (1918) P.U.R.1918E, 934.

Oregon.—Re Douglas County Light & Water Co. (1920) P.U.R.1920E, 667.

Pennsylvania.—Fox v. Pine Grove Electric Light, Heat & P. Co. (1919) P.U.R.1920B, 380; Tyrone v. Home Electric Light & Steam Heating Co. (1920) P.U.R.1920C, 562; Verona v. Verona Suburban Water Co. (1920) P.U.R.1920F, 942; Frackville v. Mountain City Water Co. (1921) P.U.R.1921C, 820.

South Dakota.—Re Salem Teleph. Co. (1919) P.U.R.1919B, 734.

Tennessee.—Re Ramier (1921) P.U.R.1921C, 121.

Utah.—Re Utah Gas & Coke Co. (1919) P.U.R.1919D, 645; Re Utah Light & Traction Co. (1920) P.U.R.1920B, 262; Re Utah Gas & Coke Co. (1920) P.U.R.1920C, 854; Re Mountain States Teleph. & Teleg. Co. (1921) P.U.R.1921E, 145 (abstract); Re Utah Power & Light Co. (1921) P.U.R.1922A, 436; Re Telluride Power Co. (1921) P.U.R.1922B, 168.

Vermont.—Re Colonial Power & Light Co. (1919) P.U.R.1920A, 215; Milne v. Montpelier & B. Light & P. Co. (1920) P.U.R.1920E, 558.

Virginia.—Re Roanoke Waterworks Co. (1920) P.U.R.1920C, 745; Re Culpeper Teleph. Co. (1920) P.U.R.1920D, 305; Re Chesapeake & P. Teleph. Co. (1920) P.U.R.1920F, 49; Re Virginia R. & Power Co. (1921) P.U.R.1921C, 193; Re Virginia R. & Power Co. (1921) P.U.R.1921D, 268; Re Lynchburg Traction & Light Co. (1921) P.U.R.1921E, 87.

Washington.—Public Service Commission v. Spokane Falls Gaslight Co. (1921) P.U.R.1921C, 519; Spokane v. Washington Water Power Co. (1921) P.U.R.1921D, 762.

West Virginia.—Re Light, Fuel, & P. Co. (1917) P.U.R.1918C, 248 (abstract); Re Bluefield Waterworks & Improv. Co. (1921) P.U.R.1921E, 655; Re Moundsville Water Co. (1921) P.U.R.1922B, 28.

Wisconsin.—Racine Water Co. v. Railroad Commission (1918) P.U.R.1919A, 913; Re Wisconsin Traction, Light, Heat & P. Co. (1918) P.U.R.1919B, 224; Re Milton & M. J. Teleph. Co. (1921) P.U.R.1920C, 110.

b. Higher price levels due to war conditions not to be ignored.

According to the weight of authority, the higher prices of labor and materials which have prevailed during and since the World War are not to be entirely ignored in determining the valuation of the property of a public utility for rate-making purposes, since it is generally recognized that a higher general level of prices is likely to prevail for an indefinite time; and, while it would be unfair to the public to fix a valuation based merely on consideration of abnormally high war prices, which are already to some extent receding, yet it would be equally unfair to the utility entirely to disregard the general higher level of prices existing since the war, and consider merely pre-war prices. This view is supported by the following decisions of the courts: *Houston Electric Co. v. Houston* (1920) P.U.R. 1920F, 328, 265 Fed. 360; *Joplin & P. R. Co. v. Public Service Commission* (1919) 267 Fed. 584; *Landon v. Kansas Ct. of Industrial Relations* (1920) P.U.R.1921A, 807, 269 Fed. 433; *Winona v. Wisconsin-Minnesota Light & P. Co.* (1920; Fed.) P.U.R. 1921A, 146 (on motion for temporary injunction); *Galveston Electric Co. v. Galveston* (1921) P.U.R.1921D, 547, 272 Fed. 147; *Potomac Electric Power Co. v. Public Utilities Commission* (1921) — App. D. C. —, 276 Fed. 327; *Winona v. Wisconsin-Minnesota Light & P. Co.* (1921) 276 Fed. 996 (on exceptions to master's report); *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* (1919) 291 Ill. 209, P.U.R.1920C, 640, 125 N. E. 891; *State ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission* (1921) — Mo. —, 233 S. W. 425; *Elizabethtown Gaslight Co. v. Public Utility Comrs.* (1920) 95 N. J. L. 18, P.U.R.1920F, 1001, 111 Atl. 729; *People ex rel. Iroquois Natural Gas Co. v. Public Service Commission* (1921) 194 App. Div. 578, P.U.R. 1921B, 485, 186 N. Y. Supp. 177; *PETERSBURG GAS CO. v. PETERSBURG* (reported herewith) ante, 542.

And the doctrine above indicated,

that war and post-war prices should be considered in determining valuation for rate-making purposes, is supported by the decisions of various utility commissions.

Connecticut.—*Stamford v. Stamford Gas & E. Co.* (1921) P.U.R.1922A, 303.

Georgia.—*Re Georgia R. & Power Co.* (1921) P.U.R.1921A, 165.

Illinois.—*Re Springfield Consol. R. Co.* (1920) P.U.R.1920E, 474; *Re Illinois Northern Utilities Co.* (1920) P.U.R.1920E, 908; *Re Metropolitan West Side Elev. R. Co.* (1921) P.U.R. 1921B, 229.

Indiana.—*Re Central U. Teleph. Co.* (1920) P.U.R.1920B, 813; *Re Laporte Gas & E. Co.* (1920) P.U.R.1921A, 824; *East Chicago v. East Chicago & I. Harbor Water Co.* (1921) P.U.R. 1922A, 193.

Maine.—*Re Lewiston Gaslight Co.* (1920) P.U.R.1921A, 561.

Michigan.—*Re Houghton County Traction Co.* (1919) P.U.R.1920E, 350; *Re Cole* (1921) P.U.R.1921C, 385; *Re Lansing Fuel & Gas Co.* (1921) P.U.R. 1921C, 465; *Re Sault Ste Marie* (1921) P.U.R.1922B, 149.

Missouri.—*Re Kansas City Electric Light Co.* (1917) P.U.R.1917C, 728.

Nebraska.—*Re Southern Nebraska Power Co.* (1921) P.U.R.1921C, 678; *Re Central Teleph. Co.* (1920) P.U.R. 1921B, 461.

New Hampshire. — *Re Franklin Light & P. Co.* (1921) P.U.R.1922A, 506; *Re Concord Gaslight Co.* (1921) P.U.R.1921C, 169.

New Jersey.—*Re Public Service R. Co.* (1921) P.U.R.1921D, 593.

New York.—*Buck v. New York Teleph. Co.* (1921) P.U.R.1921E, 798; *Re Long Island Lighting Co.* (1921) P.U.R.1922B, 2.

Oregon.—*Re Douglas County Light & Water Co.* (1920) P.U.R.1920E, 667.

Utah.—*Re Mountain States Teleph. & Teleg. Co.* (1921) P.U.R.1921E, 145 (abstract).

Vermont.—*Milne v. Montpelier & B. Light & P. Co.* (1920) P.U.R.1920E, 558.

Virginia.—*Re Lynchburg Traction & Light Co.* (1921) P.U.R.1921E, 87.

c. Additions and betterments constructed at war or post-war prices.

The rules above laid down, that valuation of a public utility for rate-making purposes is not to be determined solely by taking unit prices which have arisen to an abnormally high point due to war conditions, but that the higher war and post-war level of prices should be given consideration, and not entirely ignored, have been somewhat modified with respect to necessary extensions and additions to the physical property of the utility, made during or since the war at the prevailing high prices. The courts and commissions have held that such betterments or additions do not stand in the same class as construction made at pre-war figures, and have given greater consideration to actual costs, even though unit prices were abnormally high. Generally, the actual cost of such war or post-war improvements, where reasonable and necessary, has been allowed. Of course, owing to the small amount of construction of utility property during the past few years, this point has been a minor one, and has been little discussed. As supporting the views above indicated, see the following cases:

California.—*Re Southern California Edison Co.* (1921) P.U.R.1921D, 65.

District of Columbia.—*Re Capital Traction Co.* (1919) P.U.R.1919F, 779.

Georgia.—*Re Southern Bell Teleph. & Teleg. Co.* (1921) P.U.R.1921C, 833.

Idaho.—*Re Mountain States Teleph. & Teleg. Co.* (1921) P.U.R.1921B, 739.

Illinois.—*Re Southern Illinois Light & P. Co.* (1919) P.U.R.1919D, 489 (recognizing rule).

Indiana.—*East Chicago v. East Chicago & I. H. Water Co.* (1921) P.U.R.1922A, 193.

Maryland.—*Re Chesapeake & P. Teleph. Co.* (1920) P.U.R.1920F, 417.

Missouri.—*State ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission* (1921) — Mo. —, 233 S. W. 425; *Re Missouri Gas & E. Co.* (1919) P.U.R.1919E, 210 (abstract); *Re St. Joseph Water Co.* (1919) P.U.R.1919E, 211 (abstract); *Re St. Joseph R. Light, Heat & P. Co.* (1919) P.U.R.

1920A, 542; *Re Kansas City Gas Co.* (1920) P.U.R.1920C, 41.

Nebraska.—*Re Southern Nebraska Power Co.* (1921) P.U.R.1921C, 678.

New Hampshire.—*Re Franklin Light & P. Co.* (1921) P.U.R.1922A, 506. And see *Re Concord Gaslight Co.* (1921) P.U.R.1921C, 169.

New York.—*Municipal Gas Co. v. Public Service Commission* (1920) 113 Misc. 748, 186 N. Y. Supp. 541; *Re Long Island Lighting Co.* (1921) P.U.R.1922B, 1.

Ohio.—*Re Alliance Gas & P. Co.* (1918) P.U.R.1919B, 423 (abstract).

Utah.—*See Re Tulluride Power Co.* (1921) P.U.R.1922B, 163.

Virginia.—*Re Roanoke Waterworks Co.* (1920) P.U.R.1920C, 745; *Re Virginia R. & Power Co.* (1921) P.U.R.1921C, 193; *Re Virginia R. & Power Co.* (1921) P.U.R.1921D, 268; *Re Lynchburg Traction & Light Co.* (1921) P.U.R.1921E, 87.

Washington.—*Public Service Commission v. Spokane Falls Gaslight Co.* (1921) P.U.R.1921C, 519; *Spokane v. Washington Water Power Co.* (1921) P.U.R.1921D, 762.

West Virginia.—*Re Bluefield Waterworks & Improv. Co.* (1921) P.U.R.1921E, 655. And see *Re Moundsville Water Co.* (1921) P.U.R.1922B, 28.

III. Particular holdings and applications.

a. General statement.

The statements already made in the annotation regarding the effect of war and post-war prices in rate valuation, to the general effect that, as to pre-war construction, valuation should not be determined solely by the abnormally high unit costs during or since the war, but that the prevailing higher level of prices should be given consideration, leave the matter somewhat indefinite. This has been felt, and sometimes expressed, by the courts and commissions. It should be kept in mind, however, as already indicated, that valuation is a matter of judgment, in view of all the circumstances in the particular case and the necessity of doing justice, as far as possible, both to consumers and to the utility, and that fixed rules cannot,

and should not, be laid down. For practical purposes it is desirable to show how the courts and commissions have treated the higher prices resulting from the war in determining valuation, and to indicate some of the various other elements they have considered, and methods they have used. But the point of view should be kept in mind that the annotation does not deal with methods or theories of valuation in general, but merely with the question of the effect and place of the war and post-war prices in a utility rate valuation.

The most practical, and it is believed the most helpful, method, is to arrange the decisions according to jurisdictions, giving first the decisions of the courts on the matter.

b. Decisions of the courts.

The United States Supreme Court, while holding that a public utility is entitled to earn a fair return upon the value of its property, determined as of the time of the inquiry, has not indicated that such value is to be determined at abnormally high post-war costs of labor and material. Its decisions point rather to the acceptance of the majority rule that, while higher post-war levels of prices are to be considered in determining present value, prevailing prices are not necessarily controlling.

In *Lincoln Gas & E. L. Co. v. Lincoln* (1918) 250 U.S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454, the court, in holding that a complaint against a gas-rate ordinance should be dismissed without prejudice to the bringing of a new action, if the rate proved confiscatory, said that it is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and that annual returns upon capital and enterprise have materially increased.

In a suit attacking a street railway rate ordinance as confiscatory, the Federal Supreme Court, in *Galveston Electric Co. v. Galveston* (U. S. Adv. Ops. 1921-22, p. 382) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 351, affirmed 20 A.L.R.—36.

ing (1921) P.U.R.1921D, 547, 272 Fed. 147, appears, in effect, to have given approval to the doctrine that prices prevailing at the time of the hearing are not necessarily controlling as a basis in determining reproduction costs. In this case both the master and the court refused to adopt as a basis the prices prevailing at the time of the hearing, which had risen to 110 per cent above those of 1913; and the calculation of reproduction costs was based on prophecy as to the future general price level of commodities and labor, which the company contended should be 60 to 70 per cent above 1913 prices, but which the master found—and this finding the court accepted—would be 33½ per cent above the pre-war level. The Supreme Court held that it could not say that it was erroneous, in fixing the base value, to assume the lower percentage of increase above historical reproduction value, instead of the percentage claimed by the utility.

The Federal district court, in the last case, said that, in determining the present value for the purpose of a rate base, the reproduction method should be applied reasonably, and, as applied to the inflated values which have arisen since and because of the war, it must appear that the level of prices is not transitory; that there can be no doubt that the criterion is the present value of the plant; but that there can be equally no doubt that the legislature cannot, in periods of acute depression, reduce rates on the theory that a valuation of land has been fixed thereby, and, on the other hand, that it cannot be compelled to raise rates in periods of enormous and temporary inflation, on the theory that the value of the plant, for rate-making purposes, has been thereby increased.

The Federal Supreme Court, in a case decided previously to the beginning of the late war, held that the valuation of the property of a gas company, upon which it was entitled to a fair return, must, as a general rule, be determined as of the time when the inquiry is made regarding the reasonableness of rates fixed by

statute, giving the company the benefit of any increase in the value of the property since it was acquired. *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034. It was said: "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question, when, if ever, it should be necessarily presented."

The above case has been often referred to in the class of cases under consideration, but the ruling that the value of the property is to be determined as of the time when the inquiry is made regarding rates has not been construed as requiring a valuation based on unit prices, abnormally high since the war. Rather, the courts and commissions have followed the suggestion in the above quotation regarding a possible exception in cases where there has been such an enormous increase in value that a return based upon it would be unfair to the public.

Thus, in *Winona v. Wisconsin-Minnesota Light & P. Co.* (1921) 276 Fed. 996, the Federal district court, after citing the above and other Federal cases, stated that the ruling of those decisions was that the utility was entitled to a fair return on the reasonable value of the property used and useful in rendering the service; but

that this did not mean that the reasonable value was necessarily the same as the cost of reproduction new, less depreciation, estimated as of the time of the inquiry, with additions for overheads, etc., nor did it mean that the reasonable value was necessarily the same as the original cost of construction, less depreciation, with similar additions; also, that it did not mean that cost of reproduction new, less depreciation, based on average prices for any series of years, was necessarily controlling; but that it did mean that all of these methods, and others, might be resorted to as aids in forming a judgment as to what is the present reasonable value. And the court took the view that, in determining reasonable value, it was not confined in the inquiry to unit prices prevailing on any given date, but might include consideration of unit prices of the past as well of those of the present, and the trend of unit prices, with the probability or improbability of a change of trend, as well as the financial history of the utility, the original cost of the property, and the invested capital.

And in *Winona v. Wisconsin-Minnesota Light & P. Co.* (Fed.) supra, it was held that the master, in taking as his basic figures for valuation of the physical property of the company an estimate representing the cost of reproduction new, based on prices prevailing May 1, 1919, less depreciation, plus various additions, as for overheads, cost of financing, etc., had arrived at a final valuation higher than could be considered reasonable, in view of all the facts. It was said that apparently the master went upon the theory that cost of reproduction new should be the controlling factor, whereas this was only one of the elements which should be considered with all the relevant facts in determining reasonable present values. The court was of the opinion that the high prices since 1914, should be considered, but also that the more recent decline in prices, even since the hearing before the master, should be noted, this decline being so continuous

and marked that the court would take judicial notice of the same.

It was held, also, in *Winona v. Wisconsin-Minnesota Light & P. Co.* (Fed.) supra, that a valuation by the municipality of the physical property as of May 1, 1919, based on so-called "normal pre-war construction costs depreciated," adding to this estimate 25 per cent in order to obtain present value, with further additions for actual items purchased subsequent to that time, and for land and working capital, was not a fair and reasonable valuation. The court said the inherent vice in this method was the assumption that there was such a thing as a "normal construction cost;" that this term was misleading; that it meant construction at normal prices of labor and materials, whereas a study of prices extending over a long period of years was convincing that there was not now and never had been such a thing as normal prices in this sense; and that such a valuation represented neither the average prices for a certain period nor prices at a particular date, but simply an opinion as to what should have been "normal" prices during the selected period.

Original cost, less theoretical accrued depreciation, was held in *Landon v. Kansas Ct. of Industrial Relations* (1920) P.U.R.1921A, 807, 269 Fed. 433, not to be a proper standard to adopt as the "controlling basis" of valuation. The court said that cost of reproduction new, at the present time, and at prevailing prices, should not be rejected, but carefully considered, together with the other elements, in reaching a reasonable adjustment having its basis in a proper consideration of all relevant facts.

And original cost of construction and present cost of reconstruction were both considered in *Houston Electric Co. v. Houston* (1920) P.U.R. 1920F, 328, 265 Fed. 360, in fixing valuations for rate-making purposes. As to the cost of reproduction, it was said that the evidence showed that prevailing prices were approximately 100 per cent above the pre-war level, but that present prices were not used,

on the supposition that the existing level would be gradually lowered, and for that reason percentages of present prices varying from 60 to 70 per cent were taken. It was said that it seemed to be a fair assumption that, as concerns a public utility for rate-making purposes, the price level would remain 50 per cent above that obtaining at the beginning of the war, and would do so for an indefinite period of time; but that it would be manifestly unfair to the public to require it to pay upon a valuation based upon the existing prices under the unsettled conditions.

That consideration must be given to the advanced war prices was the view expressed in *Joplin & P. R. Co. v. Public Service Commission* (1919) 267 Fed. 584, where the court said that it appeared that great, if not undue, emphasis was laid upon the original cost of the property at a period greatly antedating that of the investigation; that the court could not say that the present period of high prices was so temporary or abnormal that it might be disregarded in arriving at the value of the property; that no one could say what degree of depression might ultimately come, but that it was reasonably certain that the cost of the property under consideration would never again approximate figures prevailing in the year before the World War.

And it was held in *St. Joseph R. Light, Heat & P. Co. v. Public Service Commission* (1920) P.U.R.1921A, 540, 268 Fed. 267, that the method of valuation adopted by the Missouri commission, in taking the original cost, when obtainable, and, when not obtainable, the average prices for a period of five years before war prices prevailed, going back approximately to the year 1910, was erroneous, reducing the valuation so substantially that rates based thereon would be inadequate and practically confiscatory. The court said that the great weight of authority was against the adoption of a standard of original cost as a controlling basis for determining present values, which was the object to be attained; and that it was not

permissible substantially to restrict the inquiry to a period antedating present cost prices.

There can be no doubt, it was said in *Galveston Electric Co. v. Galveston* (1921) P.U.R.1921D, 547, 272 Fed. 147, that the legislature cannot, in periods of acute depression, reduce rates on the theory that a valuation of the plant has been fixed thereby, and, on the other hand, that it cannot be compelled to raise rates in periods of enormous and temporary inflation, on the theory that the value of the plant for rate-making purposes has been thereby increased. And it was held that in fixing the present value of the property of a street railway company for rate-making purposes, the reproduction method should be applied reasonably, and, as applied to the inflated values which have arisen since and because of the war, it must appear that the level of prices is not transitory; and that the finding of the master in this case that the prices obtaining at the time of the valuation in 1920 were transitory, and not likely to continue thereafter, and that a price level of 33½ per cent above the pre-war cost is a fair estimate in arriving at the rate base, should be approved.

It must appear that the valuation in prices is not merely transitory; but once it appears that the new price levels since the war are not transitory, they may serve as a basis for valuation in rate making, and it is no objection that at some future time prices may fall, since when that time comes the property must again be revalued. *Consolidated Gas Co. v. Newton* (1920) P.U.R.1920F, 483, 267 Fed. 231.

And it was held in *Consolidated Gas Co. v. Newton* (Fed.) *supra*, that a period of two years following the World War was, despite its unusual character as to enhanced prices, sufficient, in view of the probability of a continuance, for some time at least, of a higher price level, to furnish a basis for the calculation of a rate base for a future time long enough to entitle a utility to call for judicial action. The court recognized the doc-

trine that constant readjustment as prices varied was impracticable, and temporary variations in price did not warrant relief, but said that in this instance the utility was faced with a condition which permitted it to receive much less than the return contemplated by statute, and that this condition, though probably not permanent—at least, in its present exaggerated form—was bound to exist over a period of some years.

And in *Consolidated Gas Co. v. Newton* (Fed.) *supra*, the court held that in determining the rate base the utility was entitled to profit by the general rise in prices and to obtain a proportionate increase in profit based upon the enhanced value of the capital, the return not, in fact, being greater, because of the reduced value of the dollar. In other words, the court, contrary, apparently, to what appears to be the weight of authority, took the view that the present reproduction cost was the controlling factor, and criticized as an abandonment of any attempt to deal intelligibly with the question the doctrine that cost of reproduction and the original cost were each elements to be considered. It is said that this doctrine could mean nothing unless it was accompanied by a rule which would establish some standard; that it would be understandable to say that the two estimates should be averaged, but that the latter view could obviously command no support; and that merely to leave the question with a caution that several elements were to be considered was to abandon any effort to solve it.

It was said, regarding the above case, by the Nebraska commission in *Re Southern Nebraska Power Co.* (Neb.) P.U.R.1921C, 678, that the court held specifically that reproduction new at the time of the inquiry, properly depreciated to represent the condition of the property, is the basis on which to compute rates, and declared that such conclusion was entirely justified by the consideration of the decisions of the Supreme Court of the United States; that the decision was rendered in August, 1920, at

which time there appeared to be no promise of change in the high-price levels then in effect.

The court in *New York & Q. Gas Co. v. Newton* (1920) P.U.R.1921A, 530, 269 Fed. 277, held that the year 1919 was "a sufficient basis for the calculation of the cost of production and the 'rate base' for a future long enough to call for some judicial action."

It may be observed, however, that the annotation does not deal with the question of costs of operation during abnormal times, and excludes such holdings as that in *Kings County Lighting Co. v. Nixon* (1920) P.U.R. 1921A, 737, 268 Fed. 143, to the effect that the eighteen-month period following the World War, though conditions were abnormal, was not too short a period to enable a court to pass judgment as to the confiscatory nature of a statutory public utility rate.

In *Potomac Electric Power Co. v. Public Utilities Commission* (1921) — App. D. C. —, 276 Fed. 327, the court of appeals of the District of Columbia held that the public utilities commission of the District of Columbia had erred in ignoring the increase in value of utility property between 1914 and December 31, 1916, the time of the valuation, and in taking as a basis the fair value of the property as of July 1, 1914, with allowance for net additional expenditures on the property subsequent to that date. The commission had stated that prices had so advanced under the artificial stimulus produced by the European War, with such rapidity and to such an extent, as to prevent the formation of a reliable opinion as to their permanency of future effect, and, the court said, had declined to find the present value of the property, because not satisfied as to how long existing conditions would continue. It was said that, in assuming this position, the commission overlooked the provision of the statute authorizing it at any time, of its own initiative, to make a revaluation of the property of any public utility; that it was the duty of the commission to consider and give due

weight to evidence as to the existing value of the property, and, as conditions changed and values were substantially affected, it would have been its further duty to exercise its discretion and revalue the property; that while existing conditions were world wide, and their duration and future effect were problematical, there was no immediate prospect of a return to normal conditions; and that there was sufficient substantial evidence before the commission as to the rise in values so that its action could not be justified on the ground that there would be practical difficulty in attempting to ascertain the increase in value of the property between 1914 and 1916. The court said that the principal object of valuation was to provide a rate base, and that the statute clearly contemplated that the commission should ascertain the value as of "the time of said valuation, and not as of some anterior date;" and that it has been ruled many times that there must be a fair return to the utility "upon the reasonable value of the property, at the time it is being used for the purpose."

However, the court in *Potomac Electric Power Co. v. Public Utilities Commission* (D. C.) supra, pointed out that there was a very substantial difference between considering the present cost of reproduction as one of the essential and important elements in the determination of present value, and the acceptance, as conclusive evidence of such value, of mere expert evidence of present cost of reproduction. And the case appears to be authority for the view that the increase in cost should be considered, but not necessarily for the proposition that such increase is a controlling element, it being said that the present cost of reproduction is one of the necessary elements for consideration, along with other relevant facts, in fixing the fair and reasonable value of the property.

The Illinois supreme court in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.* (1919) 291 Ill. 209, P.U.R.1920C, 640, 125 N. E. 891, held that, in de-

termining value for rate-making purposes, the existing cost of reproduction new, less depreciation, did not furnish an equitable basis, and that the doctrine that the valuation is to be determined as of the time the inquiry is made, and that the utility is entitled to the benefit of increases in value of the property since it was acquired, could not be applied where the property had increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. It was said that, in order to ascertain the fair value of the property, there must be taken into consideration the original cost of construction, the amount expended in permanent improvements, the present cost of construction, probable earning capacity, and the sum required to meet operating expenses.

The court in *State Public Utility Commission ex rel. Springfield v. Springfield Gas & E. Co. (Ill.) supra*, took the view, which is apparently supported by the weight of authority, that the increased cost of reproduction at the time of the valuation should be taken into consideration, but that this is only one of many elements, and that fixed rules cannot be laid down. It was said: "It would be equally as unfair to the consumer to fix the rate at a figure which would produce a reasonable income on a value determined by the cost of reproduction new at a time when cost of construction was abnormally inflated, as it would be unfair to the public utility to compel it to serve the public for a rate that would produce a reasonable income on a value determined by cost of reproduction new at a time when the cost of construction was abnormally low. Therefore it cannot be laid down as a rule without qualifications that cost of reproduction new, less depreciation, is the only basis of valuation for rate-making purposes. It is equally true that the original cost of construction, less depreciation, cannot be held to be the only proper basis for determination of valuation for rate-making purposes. As we have pointed out heretofore in

this opinion, the weight of authority is that every element having any bearing on the situation must be considered in the investigation, and then sound business judgment applied to the determination of a valuation that is fair and just to the consumer and the utility. Each case must be considered on its own merits, and such result of value arrived at as may be just and right in each case. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. We consider any value a fair value which fair and reasonable men would say ought to be attached to the property, under all the circumstances of the particular case, for the purpose of measuring a return which the public should pay to the owner."

In *Detroit v. Michigan R. Commission* (1920) 209 Mich. 395, P.U.R. 1920D, 867, 177 N. W. 306, the court held that, in determining the valuation of utility property for rate-making purposes, it was proper to take the present market value of the land, with reproduction costs, less depreciation, but does not discuss the matter of abnormally high unit prices since the war, and was apparently intended merely to overrule the contention that the original cost to the utility should control.

In *State ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission* (1921) — Mo. —, 233 S. W. 425, the court, in holding that rates should not be based upon reproduction cost new, less depreciation, estimated at a time when prices were abnormally high and rapidly fluctuating, but that the valuation should be based on a consideration of various elements, including original cost, cost of reproduction, working capital, etc., said that in determining reproduction cost as a factor in valuation for rate-making purposes, commissions had uniformly used normal pre-war prices in estimating the cost of labor and material; that money actually spent and materials purchased at war-time prices had been allowed, as was done in the present case; but that a valua-

tion based upon war-time or abnormal prices had been considered as grossly unjust, and had not been followed.

It was held in *Elizabethtown Gas-light Co. v. Public Utility Comrs.* (1920) 95 N. J. L. 18, P.U.R.1920F, 1001, 111 Atl. 729, that, in determining the value of the property of a gas company for rate-making purposes, the commission had erroneously adopted as the standard of value the average prices prevailing for five years preceding January 1, 1916, and did not allow for the increased prices in 1919. See quotation from this decision in the reported case (*PETERSBURG GAS CO. v. PETERSBURG*, ante, 542).

In the recent case of *People ex rel. Adirondack Power & L. Corp. v. Public Service Commission* (1922) 200 App. Div. 268, 193 N. Y. Supp. 186, it was held that the utility commission could not be charged with acting arbitrarily, in entire disregard of reproduction cost new, less depreciation, in determining a fair value for rate-making purposes, although it had not, in the particular case, adopted this basis as the controlling element in fixing a temporary price for gas. It was said: "The legislature did not contemplate that there should be constant fluctuations in rates, based upon the constant fluctuations in costs. It did not contemplate that during a period of high prices the company should struggle for increased rates, and during the succeeding period of low prices the public should, in turn, struggle for low rates. The statute intends an average rate. Except where there has been an actual, considerable, and more than temporary, increase in values and in costs, the actual investment shown upon the books of the corporation, fully, fairly, and honestly kept, is a more certain and more true guide to that 'reasonable return upon the capital expended' which the statute contemplated, than is the fluctuating uncertainty which attends upon the attempt to apply the reproduction cost, less depreciation, as the sole or the controlling element in determining fair value. The years 1919 and 1920 were

a period of abnormally high prices, as the result of war conditions—high prices not only of new construction, but also in the expense of operations in producing gas. We do not find in the record evidence, which the commission was bound to accept, showing that there had been an actual, considerable appreciation above the capital expended, in value of the plant of the relator."

In *New York Interurban Water Co. v. Mt. Vernon* (1920) 110 Misc. 281, P.U.R.1920D, 515, 180 N. Y. Supp. 304, the court, in determining the present fair value of waterworks property for rate-making purposes, said there were many elements to be taken into account; that the cost of reproduction, less accrued depreciation, could not alone control in fixing such present value, because reproduction costs at prevailing high prices would not be fair to the public, and the question of the permanency or duration of present high prices was so problematical that present cost of reproduction could not be taken as the principal or controlling element; but resort must be had to some fairer method of determining the present value of the property.

So, in a proceeding to determine the alleged confiscatory character of a statutory gas rate, the court in *Municipal Gas. Co. v. Public Service Commission* (1920) 113 Misc. 748, 186 N. Y. Supp. 541, although stating that the value of the property of a gas company is the value at the time when the inquiry is being made regarding the reasonableness of the rates fixed by statute, and that the corporation should be given the benefit of any increase in the value of the property since it was acquired, took into consideration various elements or factors in determining valuation, and, as it appears, rejected current reproduction costs as a proper standard. It was said: "In making these calculations, I have made no allowance for the enormous increase in cost for new construction, as I do not believe that that is the proper basis in arriving at the rate base in this action. This is not an exchange price. The plaintiff

is not suing to be permitted to sell its property to the highest bidder. It has a monopoly of the gas business in the city of Albany, and the figures I have placed upon its property represent, in my view, the real value thereof, for the purposes for which it was constructed, at the time of this litigation, realizing, of course, that for all new construction the gas-operating capital will be increased by the amount of the expenses thereof, and for which the company should be allowed.

And it was held in *Kings County Lighting Co. v. Lewis* (1920) 110 Misc. 204, P.U.R.1920D, 145, 180 N. Y. Supp. 570, that a valuation of a utility for rate-making purposes based upon the abnormal war prices of 1917 was wholly untenable; and that leases executed during this period for war purposes were not a fair criteria of value of the utility's real estate.

It was held in *People ex rel. Iroquois Natural Gas Co. v. Public Service Commission* (1921) 194 App. Div. 578, P.U.R.1921B, 485, 186 N. Y. Supp. 177, that determination of values as of the time the property was acquired in 1912, without reference to possible appreciation in value at the present time, would be unjust to the utility, but that in determining the rate base various elements must be considered, as original cost, permanent improvements, depreciation, present economic conditions, and evidence as to present value.

In the reported case (*PETERSBURG GAS CO. v. PETERSBURG*, ante, 542), the decision of the state corporation commission fixing rates of a gas utility was reversed by the Virginia court, on the ground that, in determining the "fair value" of the company's property, it did not appear that the commission had given proper consideration to the present reproduction costs, and had apparently based its decision upon the pre-war unit valuation of the property. The decision does not hold necessarily that the pre-war valuation is not to be taken into consideration, but holds that the pre-war unit of prices should not be taken as practically the sole basis for

ascertaining the reproduction value of the property for rate-making purposes. In other words, the present unit of prices furnishes a standard of value entering into the basis of valuation in fixing the rates.

c. Decisions of utility commissions.

As would naturally be expected in a matter governed not by fixed rules or formulas, but resting in the exercise of sound judgment and discretion in view of all the circumstances of the particular case, the commissions, while adhering in general to the principles, already stated, that the new higher level of prices during and since the war should be considered in determining valuation for rate-making purposes, but should not be the sole criterion or the necessarily determining element, have varied greatly in the methods used to determine what was just in the particular case. And the decisions are not all harmonious from a theoretical point of view, especially in sometimes apparently ignoring the recent advance in prices.

In *Re Central Arizona Light & P. Co.* (1921; *Ariz.*) P.U.R.1921D, 164, the commission adopted a valuation of gas and electric utilities made in 1914, with book additions to date. But the question of the effect of war prices is not discussed.

The Arkansas commission in *Re Arkansas Light & P. Co.* (1920; *Ark.*) P.U.R.1921A, 461, adopted as a reasonable basis in arriving at the value of the property, unit prices averaging over a five-year period previous to 1920.

And the commission in *Re Southwestern Bell Teleph. Co.* (1920; *Ark.*) P.U.R.1921B, 516, held that it is not fair to the consumer to fix the rate on present-day cost unit prices; and that the spreading of unit costs over a five-year period, and obtaining the average, is more nearly just than the using of abnormal cost unit prices of the preceding year.

To a similar effect is *Re Two States Teleph. Co.* (1920; *Ark.*) P.U.R.1921B, 405, where it is said: "This commission has adopted the policy of finding

the reproduction new, less depreciation value, by using the five-year average unit costs, and it is further of the opinion that value ascertained in this manner closer reflects that fair value that the utility is entitled to have a return upon, than any other method yet used."

The Arkansas commission in *Re Rogers Light & Water Co.* (1920; Ark.) P.U.R.1920E, 311, held that a proper method of valuation of a light and water company was to take the average cost of the various units entering into the plants over a period of ten years previous to 1920, it being said that the commission deemed this fairer and more equitable than to take the present prices of the units, which, under prevailing economic conditions, were conceded to be abnormally high.

The California commission in *Re Southern California Edison Co.* (1921; Cal.) P.U.R.1921D, 65, held that reproduction costs based upon price conditions existing during the years 1919 to 1921 was not a reasonable basis for rate-fixing purposes, except in so far as applied to those portions of the property as were, of necessity, constructed during this period of high prices.

It was held in *Monahan v. Pacific Gas & E. Co.* (1915; Cal.) P.U.R.1916B, 609, that, in determining reproduction cost as a factor in a rate valuation, it would be unfair and unreasonable to use present-day wages in fixing the cost of reproducing property that was built by cheap convict labor.

And it was held in *Re Moore Park Water, Light & P. Co.* (1918; Cal.) P.U.R.1919B, 679, that valuation of land of a water company, for the purpose of rate making, should not be based upon war prices, it being held that in this instance consumers should not be required to pay upon a larger valuation than the cost of the land.

So, the California commission, in *Sherman v. California-Michigan Land & Water Co.* (1918; Cal.) P.U.R.1918D, 93, said that the present condition has resulted in abnormally high

prices, making the use of present prices in a reproduction-new method of valuation manifestly unfair to the consumer. And in this case the commission used prices averaged over a period of years, thus compensating for periods of abnormally high or low prices.

The California commission in *Re Southern Sierras Power Co.* (1920; Cal.) P.U.R.1921C, 218 (abstract), in approving the "reasonable historical cost" rather than the "present value" theory in determining a rate base, apparently considered the latter term as referring to value at the existing prices; and the commission rejected the contention that rates should be based upon estimated reproduction cost depreciated, or so-called "present value" of the properties.

That to use present-day prices in determining the cost of reproduction of the property as a factor in valuation for rate-making purposes would bring about an improper result, as would the use of prices during a period of financial depression, was held in *Re Mountain States Teleph. & Teleg. Co.* (1917; Colo.) P.U.R.1917B, 198. The commission said that in arriving at the value by the cost of reproducing method, as understood by the commission and its engineers, the term was not used in a strict sense, but was so modified as to bring before the commission the cost of reproducing the property under normal or average conditions, due regard being given to the conditions under which the property had been actually constructed, and the prices paid for labor and materials.

And the Colorado Commission in *Re Denver Tramway Co.* (1918; Colo.) P.U.R.1919E, 211 (abstract), stated that its findings as to the value of property for purposes of rate-making would be based entirely upon the cost of reproducing the property under normal or average conditions; that whether or not the property of the company had actually enhanced in value on account of conditions brought about by the war would depend to a large extent upon the period of time that labor and material

costs remained at their present level, and was a matter which could not be determined at that time.

It was held in *Stamford v. Stamford Gas & E. Co.* (1921; Conn.) P.U.R.1922A, 303, that current prices at the time of the valuation, in December, 1920, while evidence of value, were not of controlling influence, and should not be adopted as a basis of valuation. The commission held, also, that a basis obtained by taking the average between the cost of reproduction at current prices and the approximate weighted average of historical costs and prices, while more nearly correct than the former alone, was not conclusive as a rate basis.

And in *Danbury v. Danbury & B. Gas & E. L. Co.* (1921; Conn.) P.U.R.1921D, 193, the Connecticut commission refused to accept the figures submitted as the present fair value of the utility's property, where the valuation was made on peak unit prices, and included municipally paid-for improvements and maximum percentages on theoretical values, representing a valuation between 300 and 400 per cent more than the invested capital or the conceded original costs. It was said that while there were many court and commission decisions holding that a utility company was entitled to a fair return on the value of its property, based upon prevailing prices at the time of the inquiry, yet the inequality of considering reproduction new, less depreciation, under recent high and inflated war production prices, as the fair value, was being more and more recognized, and the principle modified in conformity with sound business judgment.

While recognizing the fact that war prices would be slow in receding, and that the pre-war level would not be reached for many years, if ever, the commission in *Re Capital Traction Co.* (1919; D. C.) P.U.R.1919F, 779, took the view that these higher prices should not control in ascertaining the fair value of the property of the public utility as a basis for rates, as applied to plants constructed at pre-war prices, it being said: "Can it be logical to hold that the users of the

service of a public utility, at the very time when called upon to make great sacrifices because of a world-wide war, should also be required to pay higher rates merely to enable such a utility, without the corresponding expenditure of a single dollar by way of increase of its pre-war investment, to reap a profit from the high level of prices which the very conflict has brought about?" And in this case the commission held that in ascertaining the fair value as of July 1, 1914, the date agreed upon at the beginning of the valuation, and in allowing the utility the full benefit of all added costs actually incurred at higher prices since that day, full justice would be rendered.

And it was held in *Re Potomac Electric Power Co.* (1917; D. C.) P.U.R.1917D, 563, that an estimate of the cost of reproduction of utility property should be based on normal costs representative of average past conditions, rather than on prices which a competent contractor, asked to bid on construction, would use at a time of highly abnormal world-wide war conditions, in making his estimate of cost.

In *Re Georgia R. & P. Co.* (1921; Ga.) P.U.R.1921A, 165, the commission said it was satisfied that it would be unfair to the public to prescribe rates exclusively upon a basis of value determined by the cost of reproduction new at a time when such cost is abnormally inflated; but that consideration of reproduction cost, it was true, should be had, just as should the original cost of acquisition and construction; that the weight of authority is that every element having any bearing on the situation must be considered in the inquiry, and then sound business judgment applied in the determination of a valuation that is fair and just to the public and to the utility.

The amount expended in additions to telephone property during 1920 was added by the Georgia commission in *Re Southern Bell Teleph. & Teleg. Co.* (1921; Ga.) P.U.R.1921C, 833, in determining the physical value of the property. The commission does not,

however, discuss the question of war prices.

The Idaho commission in *Re Mountain States Teleph. & Teleg. Co.* (1921; Idaho) P.U.R.1921B, 739, in finding the physical factor as an element of valuation, considered the pre-war period of prices as fair and just for that portion of the plant installed prior to 1917.

As to replacements, betterments, and extensions of the plant during the years 1917 to 1919, a period of abnormally high prices, the Idaho commission in *Re Mountain States Teleph. & Teleg. Co.* (Idaho) supra, stated that it believed it was fair and just to add to the value of the physical property as it existed on January 1, 1917, the actual capital additions to the system from that date to August 31, 1919, at the prices prevailing when such additions and betterments were made.

The Illinois commission in *Lincoln v. Lincoln Water & Light Co.* (1916; Ill.) P.U.R.1917B, 1, held that in a rate valuation failure to take as a criterion the appreciated value of the property is not necessarily confiscation, reproduction cost new, or less depreciation, being only one of the elements to be considered in fixing value for rate-making purposes.

And in *Re Union Gas & E. Co.* (1918; Ill.) P.U.R.1918C, 248 (abstract), it was said: "At this time it is not conceived, or conceded, to be the duty of the commission to calculate a fair return to the company on theoretical values of properties which are invariably inflated on account of war conditions, where appraised according to almost any of the theories of the cost to reproduce them new, less accruing depreciation."

In determining the value of real estate for rate-making purposes, the Illinois commission in *Re Tri-City R. Co.* (1919; Ill.) P.U.R.1919E, 836, held that it would give consideration not only to original costs, but to the present value of the land, and the value of adjacent lands of like character. Appreciation by reason of war prices is not, however, referred to.

The Illinois commission in *Re*

Southern Illinois Light & P. Co. (1919; Ill.) P.U.R.1919D, 489, said that it could not subscribe to a valuation based upon war-time prices in a case where substantially no investment had been made under war-time conditions; that to do so would result in burdening a public, already carrying a heavy load of war-time prices, with increased costs of service received from plant and equipment which had experienced no added usefulness because of the war-time situation.

Re Public Service Co. (1920; Ill.) P.U.R.1921B, 438, is also to the effect that it would be unfair to the consumer to fix a rate at a figure which would produce a reasonable income on a value determined by the cost of reproduction new at a time when the cost of construction was abnormally inflated, where the plant under consideration was constructed many years before the war, when the cost of labor and material was much lower.

And it was held in *Re Springfield Gas & E. Co.* (1919; Ill.) P.U.R.1920A, 446, that the average unit prices during a series of years prior to 1917 should be taken, to compute the cost of reproduction new of the utility, rather than the subsequent abnormally high war prices.

So, in *Re Springfield Consol. R. Co.* (1920; Ill.) P.U.R.1920E, 474, the Illinois commission, in considering the valuation of street railway property for rate-making purposes, said that the main question was to determine the extent to which the pre-war values of plants and equipment constructed before the war are to be modified by giving effect to the scale of values resulting from the war. The commission said it was clear that some effect must be given to the latter element, but that it was equally clear that a rate base for future rates, to have any degree of durability, could not be obtained by using valuations based solely upon abnormal war prices; that it was manifestly to the interest of both the public and the utility that the rate base should not fluctuate violently; and that the commission must apply business judg-

ment, and endeavor to reach a conclusion in the light of past experience as to the extent to which the upheaval in prices resulting from the war will persist, and will operate in producing a permanent advance in the scale of values. To the same effect is *Re Illinois Northern Utilities Co.* (1920; Ill.) P.U.R.1920E, 908.

Viewing the present situation in the light of the history of the period following the Napoleonic Wars and the Civil War, the Illinois commission in *Re Springfield Consol. R. Co. and Re Illinois Northern Utilities Co.* (Ill.) supra, in determining the probable permanence of increased prices which should be considered for valuation purposes, said that it had no reasonable doubt that the great loss of life and property in the late war would have an effect upon prices for many years to come, and that a substantial part of the shock would persist probably, with diminishing effect, for a decade or more.

The commission in *Re Metropolitan West Side Elev. R. Co.* (1921; Ill.) P.U.R.1921B, 229, held that it could not adopt as a rate base a valuation determined by applying to the physical property, other than land, the average of the unit prices in the ten-year period ending June 30, 1916, since there were various elements to be considered in determining the valuation, as the original cost of the property and the present value, including depreciated reproduction cost and going value.

The Indiana Commission in *East Chicago v. East Chicago & I. H. Water Co.* (1921; Ind.) P.U.R.1922A, 193, took the view that a utility is not entitled to earn necessarily in the future on a cost of reproduction as of the time of the inquiry, when that cost at such time is abnormally high or abnormally low; that the value of the property should be fixed on the basis of the level of prices which would probably prevail for three or four years in the future. And it was held that a valuation based on the level or average of prices and wages prevailing during the five-year period which ended December 31, 1919, could not be

approved on the theory that such level fairly reflected the wages and prices which would probably prevail for a period of several years in the future, but that there should be a reduction from such prices of 12 per cent in making the valuation. The commission said it was not inclined to agree that the average level of wages and prices made for the next five years would be as high as the average level for the five years ending December, 1919.

Certain necessary additions, however, made during the war period, it was held in *East Chicago v. East Chicago & I. H. Water Co.* (Ind.) supra, should be valued at cost price, without deduction for probably reduced future prices.

And the commission in *Re Kokomo Gas & Fuel Co.* (1921; Ind.) P.U.R.1921E, 390, said that it did not believe the law authorized a valuation for rate-making purposes based upon the abnormal and extravagant prices of 1920; and that an excessive claim of value of that kind was of little or no assistance to the commission.

Present-day extreme prices, it was said in *Re Laporte Gas & E. Co.* (1920; Ind.) P.U.R.1920F, 586, should not be given undue weight as applied to property installed and constructed before such prices became prevalent.

The Indiana commission in *Re Central U. Teleph. Co.* (1920; Ind.) P.U.R.1920B, 813, reached the following conclusion: "This commission is of the opinion that, until sufficient time has elapsed to demonstrate conclusively that a new and fairly permanent higher price level has been reached, normal cost of reproduction should be determined by costs prevailing immediately before the outbreak of the European War, with a consideration, perhaps, of what may reasonably be calculated to be a natural trend of prices had the war and other abnormal conditions not occurred." The commission said, also, that, generally speaking, it would appear that in determining the fair value of the utility property, the weight to be given to cost of reproduction should depend in large measure upon whether

it is calculated upon what ought to be considered normal prices and usual or ordinary conditions; and that the weight given to the cost of reproduction new should vary with the degree of departure of cost of reproduction from normal costs,—the greater the departure, the less weight.

In *Re United Public Service Co.* (1918; Ind.) P.U.R.1918F, 316, the Indiana commission used a five-year average of prices, instead of the unit prices submitted by the utility for a shorter period, which, the commission said, unduly reflected the present abnormal cost of materials and equipment.

A cost of reproduction less depreciation of a utility plant, of \$180,434, based upon average unit prices unduly reflecting abnormally high war costs, was reduced by the Indiana commission in *Re Home Teleph. Co.* (1919; Ind.) P.U.R.1919C, 209, to \$160,000, in a tentative valuation for emergency rate making, where the plant had been constructed at a prior period of lower investment costs and values.

It was held in *Re Laporte Gas & E. Co.* (1920; Ind.) P.U.R.1921A, 824, that, in determining the value of utility property for rate-making purposes, the commission would not accept the theoretical cost of reproducing the property under prevailing excessive prices as the principal factor; that it would not be disregarded, but its weight would not be decisive. It was said: "Considering the present chaos and uncertainty of prices, the commission believes that the apparent tendency of the courts to accept the present cost of reproduction as the controlling or important factor tends to subject the great agencies of public service to hazardous speculation, extreme financial uncertainty, and obvious inequities—inequities which bid fair to react in a manner fully as hurtful to the utilities themselves as to the public."

It does not logically follow that, because the value of a public utility for rate-making purposes must be ascertained at the time of the inquiry, such value is determined by the cost of re-

production of the prices prevailing at that time, although it does follow that a present inventory must be used. *Ibid.*

And the Indiana commission in *Re Laporte Gas & E. Co.* (Ind.) *supra*, said that the surest and most equitable method of insuring stability of values is to consider prudent investment as the primary factor of value; that, facing, as the country does, a period of economic uncertainty, there is dire need for stabilization of utility values; and that the investment principle insures the utility against the evil effects of recurrent fits of economic fortune, which under any other theory of valuation must, in varying degrees, be suffered by public service companies.

And in *Re Mt. Vernon Waterworks Co.* (1920; Ind.) P.U.R.1921C, 219 (abstract), the Indiana commission stated that it could not adopt a policy which would permit values based upon the present high peak cost of production; that the evidence showed that most of the construction was in years of low cost, and it would be unfair to patrons, and ultimately detrimental to the utility, to accept a "reproduction to-day" theory. It was further said: "Not only would rates be set skyrocketing, but, with falling prices of materials and supplies, the assault by patrons would bring distress to the utility. Such a course ultimately must produce a chaotic condition for utilities, many of which, should regulatory bodies permit such practice, would be loaded down with obligations issued on the basis of inflated valuations which none expect to be maintained. Such a course, also, would make valuations of utilities as valuable as prices of pipe, meters, pumps, and other materials." Public utility regulation does not contemplate such instability. Neither utilities nor patrons could survive the complications and bad relations that would attend the adoption of reproduction as of to-day."

In *Ft. Wayne v. Home Teleph. & Teleg. Co.* (1920; Ind.) P.U.R.1920D, 83, the commission said that the application of an average of construction

costs for the ten-year period ending January 1, 1919, resulted in the attachment of enhanced values by reason of the inclusion in the average of the exceedingly high war prices of 1917 and 1918; and, bearing in mind the fact that only about 10 to 15 per cent of the plant was constructed in those years, the commission was of the opinion that the application of the average prices for the ten-year period indicated would result in values at least 10 to 20 per cent higher than the actual cost of the property.

The Indiana commission in *Re Indianapolis Water Co.* (1917; Ind.) P.U.R.1917E, 556, held that the unit cost per ton of cast-iron water mains should be determined by taking an average of prices per ton for a period of ten years.

The Maine commission in *Re York County Water Co.* (1920; Me.) P.U.R. 1921A, 439, took the view that the amount of money actually invested in an honest and prudent manner by the utility in its property was entitled to much consideration in determining its fair value for rate-making purposes, and that such investment affords, in nearly all instances, a better basis for the ascertainment of fair value than an attempt to apply the reproduction less depreciation theory, in view of the present era of high costs. In this instance, however, the commission adhered to the reproduction less depreciation theory, in view of the fact that the valuation resulting from taking average unit prices, during the five-year period selected, yielded a result almost exactly the same as the result obtained by applying the investment theory.

To the same effect is *Re Lewiston Gaslight Co.* (1920; Me.) P.U.R.1921A, 561, where the commission said: "For some years commissions and courts have been pretty generally committed to the reproduction less depreciation method of arriving at fair value. This method is now very generally understood and, as practised, involves the assumption that a particular public utility plant is wiped out of existence, and that it has to be reproduced exactly as it has existed,

and in the exact condition in which the several units constituting the plant had existed. In order to determine the cost of reproduction new engineers at first applied the prices prevailing in the particular year when the valuation was to be made. This was found to be inaccurate, and engineers then sought and obtained as a unit price the cost of reproduction new averaged over a period of five years immediately preceding the valuation. This method was fairly accurate until the very high costs of the last four or five years. It was then recognized that to base reproduction cost upon an average for the five years immediately preceding 1920 would result in a ridiculously high figure, and engineers sought to somewhat equalize this error by going back to 1911 and 1912, and coming forward five years from that time. This was thought to embrace some period of low cost as well as some period of high cost, and would constitute as nearly an average figure as possible. This method of valuation has never been entirely satisfactory, and is becoming more and more unsatisfactory as we progress through this period of exceedingly high prices."

And in *Re Lewiston Gaslight Co.* (Me.) supra, the valuation fixed by the commission in 1916, with allowances for capital additions after that time and increased value of the company's property in present use, was included in determining the present fair value. The commission said that there must be something added to the 1916 valuation which would represent the difference in the value of the property in use in 1916, and the property in use in 1920, although it realized that this amount was not possible of exact ascertainment, and that a variety of circumstances must be considered, and, finally, judgment and discretion used. And the commission in this case declined to adopt, as a method of determining present fair value, the reproduction cost at prices prevailing October 1, 1921, or the average of prices for five years ending

on that date, with allowance for depreciation.

And the Maine commission in *Re Lewiston Gaslight Co.* (1918; Me.) P.U.R.1919B, 423 (abstract), said, in reply to the suggestion that the plant was entitled to a very much greater valuation because of increased cost of materials and labor, that it would not adopt present unit prices; that no one would undertake to build a plant under present conditions, and no one would purchase a completed plant on the basis of what it would cost to construct it to-day, although present conditions and reasonable predictions as to the future might justify some consideration.

And in *Re Guilford Water Co.* (1918; Me.) P.U.R.1918C, 916, the Maine commission said that the reproduction less depreciation was one of the ways by which the commission sought to inform itself as to the probable present fair value of the property; that if the amount so ascertained was manifestly greater than a fair value, it must be reduced to a proper amount; that the ultimate question was one addressed to the sound judgment of the tribunal charged with the duty of fixing fair value, and no hard and fast rules could be laid down; but that in the present case it could not lose sight of the fact that the high prices prevailing during 1916 and 1917 very materially inflated the average of a five-year period including those two years. And, taking into account the probable original cost of the property and the probable cost of reproducing the plant under existing abnormally high prices, the commission fixed a valuation considerably below that based on reproduction costs less depreciation determined by average prices during the preceding five years.

The Maryland commission in *Westminster v. Consolidated Public Utilities Co.* (1919; Md.) P.U.R.1919E, 506, used the normal pre-war prices obtaining over an average of five years for construction preceding 1916, with increase of 20 per cent in determining the cost of construction during that year, and 70 per cent in appraising

the work done in 1918. It was said that the practice of using normal prices in an appraisal of property such as the one in question had ample support in precedence and in justice; that it was true that the construction at the present time could be accomplished only at the abnormal prices now obtaining, but that the major portion of the plants under consideration was built under normal conditions, and at normal prices; and that if a valuation were made at a time when, due to a panic or other financial disaster, prices had fallen to a point far below normal, and lower than the existing value of the particular materials or services, no one could seriously contend that the valuation should be predicated upon the depressed prices then prevailing.

And the Maryland commission in *Salisbury v. Salisbury Light, Heat & P. Co.* (1918; Md.) P.U.R.1918E, 331, in determining reproduction costs new, less depreciation as of January 1, 1917, used unit costs based on a fair average of costs obtaining for four or five years prior to that date, and not of the relatively high costs obtaining at that time.

The commission in *Re Chesapeake & P. Teleph. Co.* (1920; Md.) P.U.R.1920F, 417, in computing reproduction cost new of a telephone company, used in its calculations, not the existing high prices, but the value as of June 30, 1914, with additions at their actual cost.

And the suggestion that, in view of the present abnormal prices, some other basis or rule than the reproduction cost method should be adopted in determining valuation for rate-making purposes, is found in *Re United R. & E. Co.* (1919; Md.) P.U.R.1920A, 1, in which the Maryland commission said that, if rates are to be based upon value, they must be based upon "fair present value," but that conditions are so far from normal that it would be unwise, for the present, to revert to the former method of fixing rates solely upon the basis of valuation; that rates for service of public utilities, being ordinarily fixed in the hope that they will continue in

force without change for long periods of time, and present costs being abnormal, the commission should, in the interim of unrest and uncertainty, find some more satisfactory basis of fixing rates than either war emergencies or valuations.

The Michigan commission in *Re Lansing Fuel & Gas Co.* (1921; Mich.) P.U.R.1921D, 387, said that, while a utility was entitled to a fair return upon a fair value of the property devoted to public use, yet the commission was not ready to follow the few who contended that the utility was at all times entitled to a fair return upon a valuation representing the cost of reproduction new, less depreciation; and that a rate base should not be built upon reproduction costs during abnormal times, or upon the lowest possible amount of money which may have been expended on the property, but rather upon a fair and honest reflection based upon the cost of labor, materials, and other items entering into the physical property of the utility at a time which best reflected a conservative and normal cost.

In *Holland v. McGuire* (1919; Mich.) P.U.R.1920B, 149, where a gas company claimed that a 20 per cent increase should be allowed in the cost of reproduction because of the rise in commodity and labor prices since 1915, the commission, admitting that the great rise in commodity and labor costs caused by the late war were not materially receding, would be slow to recede, and doubtless would never fall to the pre-war level, but that a new normal of price level on a higher plane would exist, nevertheless expressed the opinion that it was not logical that consumers of a public utility should be required to pay higher rates merely to enable the utility, without the corresponding expenditure of a single dollar toward an increase in capital investments, to profit from a high level of prices. The commission, however, appears in this case, in reaching a conclusion as to the fair valuation of the property, to have given consideration to reproduction costs depreciated, with vari-

ous other items, such as original costs, going value, and working capital.

And in *Re Sault Ste. Marie* (1921; Mich.) P.U.R.1922B, 149, where objection was raised by a municipality that the commission, in fixing the value of gas and electric property for rate-making purposes, was guided largely by reproduction costs during 1920, when the prices of materials and labor were at their highest peak, the commission said that, if this were true, there would be merit in the objection; but that the fact was that the commission considered the cost of reproducing the property in 1920, as the law required it to do, but that such cost of reproduction was not a guiding or controlling factor in fixing the value; that the courts had uniformly held that the commission must consider reproduction costs, original costs, and all other evidence of value, in arriving at a fair value of the property for rate-making purposes.

In *Re Cole* (1921; Mich.) P.U.R.1921C, 385, the commission held that the property of a telephone utility should be valued on the basis, as near as possible, of original costs, with consideration, also, of the present cost of reproduction, less depreciation.

In *Re Lansing Fuel & Gas Co.* (1921; Mich.) P.U.R.1921C, 465, the Michigan commission, in fixing the value of the physical property of a gas company, took into consideration various factors, including book values, original costs, reproduction costs based on past prices, prices current at the time of the 1920 reproduction cost new appraisal, the present trend of prices, and the existing condition of the property.

In *Muskegon Traction & Lighting Co. v. Grand Rapids, G. H. & M. R. Co.* (1921; Mich.) P.U.R.1921E, 548, the Michigan commission adopted a valuation somewhat below the average between the original cost and the prevailing cost of reproduction new of the property. But the commission does not discuss the question of war prices.

We believe, said the Missouri commission in *Re Kansas City Electric*

Light Co. (1917; Mo.) P.U.R.1917C, 728, that some consideration should be given to the recent increases in prices in arriving at value from consideration of the estimate of the cost of reproduction, though not to the extent of using abnormal recent prices.

And the Missouri commission in *Springfield City Water Co. v. Springfield (1919; Mo.)* P.U.R.1919D, 853, held that an appraisal based upon unit prices obtained by taking an average of prices for ten years preceding the period of present high war costs, and approximating the level of prices prevailing when the utility in question was actually constructed, was a better guide to a fair value for rate-making purposes than an appraisal at average unit prices for the three-year period from 1915 to 1917, which reflected the abnormal prices brought about by the World War. The commission called attention to the statute in that state, providing that in determining the price to be charged the commission might consider all relevant facts, with due regard "to a reasonable average return upon capital actually expended," and said that it was certain that the method approved tended more accurately to show the capital actually expended in constructing the plant in question.

In *Re Joplin & P. R. Co. (1918; Mo.)* P.U.R.1919B, 366, the commission said that, rate making being an attempt to make an equitable adjustment between producer and consumer, it certainly was not equitable to adopt an appraisal for rate-making purposes built on unit prices 100 to 250 per cent in excess of the costs actually incurred; and that commissions in general had adopted the average of normal prices, rather than current prices, in appraising property for rate-making purposes. The contention was accordingly overruled that war prices as of May, 1917, were a proper basis for an appraisal, it being said that if average normal unit prices prior to the war were adopted, and such excessive war-time costs as were actually incurred were used in making an appraisal, the commission

20 A.L.R.—37.

could see no good ground for complaint by the company.

In *Re Missouri Gas & E. Co. (1919; Mo.)* P.U.R.1919E, 210 (abstract), the Missouri commission said that it had never appraised utility property on war unit prices, except for additions actually made at such prices.

And in *Re St. Joseph Water Co. (1919; Mo.)* P.U.R.1919E, 211 (abstract), it is said that rate making should be an attempt to make an equitable adjustment between producer and consumer; that there is no foundation in equity or law for using abnormally high current prices, or using the same to the extent of creating abnormally high average prices in fixing the value for rate-making purposes; that present high costs should be considered in fixing the plant value only to the extent that they were actually incurred. And in this case, where the company's appraisal was based upon five-year average prices, beginning with 1914, the commission called attention to the fact that, during at least 50 per cent of this five-year period, there were used as a basis for computing average prices abnormally high prices due to the war; and that an examination of this appraisal showed that the average prices used were unreasonably excessive.

Also, in *Re Lead Bell Teleph. Co. (1919; Mo.)* P.U.R.1919E, 211 (abstract), the Missouri commission said that the increase in prices, due to the war, of materials similar to those purchased and placed in its plants by the company under normal price conditions, did not entitle the company to add such percentage of higher prices to its investment costs, or to earn a return thereon by increasing its rates solely for that purpose; that theoretical reproduction costs under war prices are not a proper standard for a valuation for rate making.

The Missouri commission in *Re Missouri & K. Teleph. Co. (1918; Mo.)* P.U.R.1919B, 423 (abstract), in determining the cost new of a utility plant, took what it regarded as "the trend average" as the price of copper, and

for other materials used an average of three to five year prices.

In *Re Southwestern Bell Teleph. Co.* (1918; Mo.) P.U.R.1919B, 422 (abstract), where, on an application for an increase in telephone rates, the company based its appraisal upon present war costs, the commission found that these costs were 25 per cent higher than pre-war prices, and reduced the company's figures of reproduction costs less depreciation, by that per cent.

And the Missouri commission in *Re Memphis Teleph. Co.* (1921; Mo.) P.U.R.1921E, 145 (abstract), refused to accept unit values taken at the peak of high prices incident to the World War economic conditions, as a basis for valuation by the reproduction cost method.

The commission in *Re St. Joseph R. Light, Heat & P. Co.* (1919; Mo.) P.U.R.1920A, 542, reaffirmed its position that the public should only be required to contribute an investment return upon the value of the utility based upon an average unit price covering normal periods of from one to ten years preceding the abnormal economic conditions covered by the war, subsequent construction being valued at unit prices prevailing at date of construction. The increased value due to the war was regarded as unearned increment upon which consumers should not be required to pay a return.

In *Re Kansas City Gas Co.* (1920; Mo.) P.U.R.1920C, 41, it is said that the allowance of abnormally high prices in the valuation should be limited to the amount actually expended during the period of such high prices.

The Nebraska commission in *Re Omaha & C. B. Street R. Co.* (1918; Neb.) P.U.R.1919A, 845, rejected a valuation based entirely on existing war prices, stating that it could not use this as a proper basis of valuation, it being conceded that prices were extraordinarily high. The commission, it was said, was committed to the doctrine that unit prices could not be fixed by taking prices at the time of the investigation, and being governed solely by them.

And the commission in *Re Southern Nebraska Power Co.* (1921; Neb.) P.U.R.1921C, 678, said that "if rates were fixed to-day on a valuation arrived at by the use of reproduction as of the present time, and at present abnormal prices, those rates would soon be unreasonable and require further attention; and that, with so many industries involved, the regulating body could not handle matters on such a basis, nor was it to the best interest of the utility, or of the public, to have rapidly fluctuating scales of rates. The commission said further that in so far as it recognized the measure of physical property as an important element in arriving at fair value, it would consider that trend prices more nearly represented sound judgment in arriving at fair value; that conclusions arrived at in this manner reflected the highest measure of ultimate advantage to the utility, and at the same time approximated equity to the public.

And it was held in *Re Southern Nebraska Power Co.* (Neb.) *supra*, that the commission should add 12½ per cent to all items, except land, which were in existence before the outbreak of the World War, and that, in order that in matters of doubt a solution might be in the interests of the higher levels, it would include in that computation all construction completed before 1918; that land should be included at actual value as measured by the present value of surrounding lands. In reaching this percentage, the commission took into view the fact that commodity prices of 1900 to 1915 advanced less than one point per year as an average; that if the upward trend were projected through the war period, without the intervening factor of the war, it was reasonable to expect that the price trend would not have exceeded 5 per cent above pre-war construction costs; but that past experience indicated that the price level during the next decade would hardly reach the same plane as if projected pre-war prices were extended.

But the commission in *Re Southern Nebraska Power Co.* (Neb.) *supra*, allowed the actual cost of property.

built during the period from 1918 to 1920, inclusive.

In computing the valuation of a telephone company, the commission in *Re Stanton Independent Teleph. Co.* (1921; Neb.) P.U.R.1921D, 240, took the price level which would presumably have existed in July, 1920, had the abnormal situation brought about by the World War not occurred, by taking the average commodity price line from 1900 to 1914, and projecting it on the same proximate plane, thereby cutting off the high peak of the war-time prices.

In *Re Central Teleph. Co.* (1920; Neb.) P.U.R.1921B, 461, the Nebraska commission held that the relevant facts which it was its duty to take into consideration in determining a fair value of telephone property for earning purposes obviously included, not only the original construction cost and present condition of the property, but a reasonable consideration of advanced levels of property values. And in this case the commission added to the actual value, based on original cost less depreciation, an amount approximately one third of the increased present construction costs.

Although the valuation was being determined for security issue purposes, attention is called, also, to *Re Monroe Independent Teleph. Co.* (1917; Neb.) P.U.R.1917E, 471, in which the Nebraska commission held that the prices of labor and materials covering a period of years should be used as a basis for valuation, rather than the prevailing high prices, where the properties were bought during the period of normal prices, and the prices were very low during a portion of their history.

The value of public utilities, upon which rates are based, cannot be regarded as in a state of constant fluctuation, keeping pace with speculative changes in the price of materials. *Re Grafton County Electric Light & P. Co.* (1916; N. H.) P.U.R.1916E, 879. And in this case it was held that, in ascertaining the unit price for materials in a valuation proceeding, the average price for a reasonable period

and not the prevailing price, should be used.

And the New Hampshire commission in *Re Twin State Gas & E. Co.* (1917; N. H.) P.U.R.1917F, 435, held that it would not approve the sale price of public utilities property on a valuation based on current unit prices, which are abnormally high, but would make its appraisal on prices covering a period of years.

In *Re Concord Gaslight Co.* (1921; N. H.) P.U.R.1921C, 169, the commission said that, in fixing the value of utility property, current prices or the appreciated value must be considered; that how much weight should be attached to present-day prices is a question that cannot be determined by any hard and fast rule; that certainly sufficient consideration must be given them to indicate that they have not been ignored, but, on the other hand, it would manifestly be unjust to make them the test of fair value; that a value found in this way would be obviously unfair, unless the property was actually constructed during the prevalence of present prices; and that, while present-day prices must be considered as evidence in fixing the value, it is also proper to consider the cost of reproduction new on pre-war prices, as well as the original costs.

And the New Hampshire commission in *Re Franklin Light & P. Co.* (1921; N. H.) P.U.R.1922A, 506, said that, taking the pre-war cost as a basis, proper allowance must be made for the enhancement of values at present and in the near future. But it was said, also, that it would seem unreasonable to mark up or down the valuation of all electric and other plants to correspond to the fluctuation in the cost of materials and labor, especially in such abnormal times as the present, although a permanent change in values might fairly be considered.

It is only fair, said the commission in *Re Franklin Light & P. Co.* (N. H.) *supra*, where additions and extensions have been made to meet urgent public needs, to allow the actual cost as a capital investment, even though the expenditures were made at a time

when labor and materials were abnormally high.

A case from which the commissions and courts frequently quote, because of the high authority of the writer of the opinion, former Supreme Court Justice Charles E. Hughes, who was referee, is *Brooklyn Borough Gas Co. v. Public Service Commission* (1918) 17 N. Y. Off. Dept. R. 81, P.U.R.1918F, 335, in which, in determining the valuation of the property of a gas company for rate-making purposes, the position was taken that actual cost of reproduction at the present time, or within a year or so, could not be taken, because it would be an abnormal cost, and that the appraisal made by the public service commission in 1918, based on reproduction costs before the outbreak of the European War, with proper consideration of actual investments since that time, afforded a fairer basis than a valuation based upon average unit costs over a period of five years ending December 31, 1916. The statement of former Justice Hughes, which is set out below, has been referred to as authority in many decisions. It was said: "While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it cannot be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time, regardless of circumstances. To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices, due to exceptional conditions, would be manifestly unfair to the public; and likewise, to base rates upon an estimated cost of reproduction far lower than the actual bona fide and prudent investment, because of abnormally low prices, would be unfair to the company. This question of taking the hypothetical reproduction cost under abnormal conditions as a rate base should, of course, not be confused with the necessity of recognizing actual costs of operation, even though abnormal. A public

service corporation is entitled to be reasonably compensated for its service, and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed, and the question is as to the compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return, not only on actual investment, but upon a normal reproduction cost, in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula. It has constantly been pointed out that the rate base must be what is called 'the fair value of the property,' and that, as to this, there must be a reasonable judgment based on a proper consideration of all relevant facts."

In *Maires v. Flatbush Gas Co.* (1918; N. Y.) P.U.R.1920E, 931, the New York commission said that to fix a valuation based on the cost of reproduction at present-day prices would lead to startling consequences; that without a dollar of additional investment, in the face of adversity and suffering, the value of the utility's property would be deemed to have vastly increased, and the amount taken from consumers greatly increased merely because the World War had demoralized market conditions; and that upon the restoration of normal conditions investments made at war-time market prices would shrink in value; that the present and prospective situations of property values emphasized the unreliability, unfairness, and fiscal dangers of computing return on estimates of reproduction

costs, less depreciation; that a standard so oscillating and fluctuating could not offer any permanency or security, either to the patronizing public or to the investors, and was unjust.

The New York commission in *Re Sea Cliff & G. C. Gas Co.* (1920; N. Y.) P.U.R.1921A, 211, in considering the valuation of a gas plant for rate-making purposes, denied an allowance of 25 per cent claimed on account of present higher construction costs, stating that the return which the company was entitled to was upon the capital actually expended, under the statute providing that "in determining the price to be charged for gas or electricity the commission may consider all facts which, in its judgment, have any bearing upon a proper determination of the question . . . with due regard, among other things, to a reasonable average return upon capital actually expended." The commission said that, even if not prohibited by statute, it would hardly be just to charge the ratepayer for an increase in the cost of construction which would come under the present high prices, but which was not incurred by the company in question.

And the New York commission in *Whitehead v. Niagara Falls Gas & E. L. Co.* (1920; N. Y.) P.U.R.1920C, 264, took the view that claims for increased investment, within the meaning of the New York statute, based on advanced costs of present-day reconstruction, had not been sustained. It was said that if the utility were able to show that it could, if so desired, secure for its property the alleged increased value, either by selling it as a going concern, or by disorganizing the plant and selling it piece-meal, then it might be claimed with some force that by leaving the property in the public service a sacrifice of the realizable values was being made which should be the just measure of present value for rate-making purposes; but that, when such was not the case, it was difficult to see where the claimed enhancement in value had any existence in fact.

In *Re Long Island Lighting Co.*

(1921; N. Y.) P.U.R.1922B, 2, the commission said that, in determining the fair value of property for rate-making purposes, it was its duty to consider carefully reproduction costs new, less depreciation; but that the cost of reproducing the entire physical property new, at war figures, was not necessarily a controlling element in the present valuation of the property, unless it was made to appear that such a property would be planned and constructed at the present time, under present conditions, and at present prices, by reasonably prudent investors; that otherwise the valuation was wholly theoretical and supposititious, changing as prices changed, from day to day and from month to month. The commission, in fixing valuations, considered book costs, securities outstanding, previous valuations by the commission on which securities had been allowed and issued, the additions to such valuations from year to year, and the cost of reproducing the property in 1921, as compared with pre-war costs of 1914. The valuations, the commission said, were made not as of pre-war costs, but as of an intermediate period between 1914 and 1920, and contained a recognition to a very considerable extent of the increase in costs which had resulted during the war period.

However, it was said in *Re Long Island Lighting Co.* (N. Y.) *supra*, that the high prices for material and labor must be allowed for current construction of additions in the physical property, made since the war conditions began to prevail.

It would be grossly unfair to the public to use the extraordinary dislocation in prices due to the World War as the groundwork for the fixation of a proper rate basis. *Re New York State R. Co.* (1921; N. Y.) P.U.R. 1922B, 75. It was said that the courts have repeatedly ruled that the estimated cost of reproduction is merely one method of reaching just decisions; that it cannot be used without reason; and that its use in a period when prices have been subject to such violent fluctuations as have characterized the past five years would leave

little of fairness in the term "fair value," which means, essentially, the just amount on which a public utility is entitled to earn a return.

That reproduction cost new as a factor in valuation for rate-making purposes should not be based on prevailing abnormal, excessive prices, was held, also, in *Davis v. Pennsylvania Gas Co.* (1920; N. Y.) P.U.R. 1921B, 342, where there was evidence that the cost of reproduction was approximately \$1,400,000, but the commission reduced this to \$1,000,000, as ample to cover fully present value for rate-making purposes, as regards tangible property.

In *Hoffman v. Elmira Water, Light & R. Co.* (1921; N. Y.) P.U.R. 1921C, 409, the commission, while taking the view that the utility was entitled to a return upon the present value of its property, said that it was not claimed, nor could it be reasonably claimed, that the property was worth its present cost of reproduction new; that, although costs of building had arisen enormously in war time, the value of the utility property had not risen in proportion, the securities and stocks having actually depreciated. But, in view of the increase in value over original costs, it was held that a fair value to be taken as a rate base would be held to be, as contended for by the utility, its cost, without depreciation.

In *Re New York State R. Co.* (1921; N. Y.) P.U.R. 1921C, 496, the commission, in determining the rate base of street railway property, said that a marked distinction exists between the cost of reproduction new at the present time, and the present-day value; that the property in this instance was not worth by any means what it would cost to reproduce it new at the present time, even with a substantial depreciation. In this instance it was held that the tangible property of the company should be valued, for rate-making purposes, at its actual original cost, without deduction for depreciation.

That consideration should be given to the reproduction cost new, but that it is only one element to be considered in fixing the valuation, was held in

Buck v. New York Teleph. Co. (1921; N. Y.) P.U.R. 1921E, 798. The commission said that, while the high prices of the present period may or may not continue, yet, until a general period of average costs can be checked by the figures of experience, all elements of valuation, actual individual cost, replacement value, and reproduction cost, less depreciation, must be considered, in order that, on the one hand, the utility may not, without a dollar of additional investment, but because of economic upheaval, claim vastly increased valuations upon which to base its return, and that, on the other hand, the valuations and returns may not be so restricted as to keep capital and enterprise out of the public utilities field, and so deprive consumers of service. In other words, the commission said, rates should be based upon the reasonable fair value of the property existing at the time of the hearing, and neither original costs nor reproduction costs new, considered separately, are determinative; but consideration must be given these with all the other facts and circumstances, in arriving at a fair present value; and each case must be considered on its own merits, controlled by its own circumstances, and such results as to value arrived at as may be just and right.

The New York commission in *Re Westchester Electric R. Co.* (1919; N. Y.) P.U.R. 1920B, 250, held that a valuation based on an assumed average of prices for the succeeding ten years, which were placed at about 40 per cent above pre-war prices, with a deduction for depreciation, could be given no recognition, and must be entirely rejected as a basis for rate making.

The North Dakota commission in *Patterson v. Hughes Electric Co.* (1920; N. D.) P.U.R. 1921A, 1, in determining the valuation of an electric utility, used as a basis the original cost, with a consideration of the attendant circumstances and conditions in the building up of the plant and property, rather than the company's valuation based on a scale of unit

prices, including the peak period of prices during the war years since 1915.

And it was held in *Re Public Service R. Co.* (1921; N. J.) P.U.R.1921D, 593, that, in determining the "fair value" upon which the utility was entitled to a reasonable return, abnormal present-day prices should not be taken as the standard, or given the greater weight, these being regarded, however, as elements to be considered in fixing the value for rate-making purposes.

In *Fargo v. Union Light, Heat & P. Co.* (1919; N. D.) P.U.R.1920A, 764, the contention was overruled that the unit price fixed by the city's engineer in computing the valuation of a gas utility did not properly show a fair range of increase covering existing high prices, it being said that it appeared from the record that a five-year period with 1916 as the index had been used, and this, in the opinion of the commission, included a fair consideration of the existing high prices, and the increase claimed by the company should not be allowed.

The Ohio commission in *Re Union Gas & E. Co.* (1918; Ohio) P.U.R.1918E, 934, said: "It is a mistake to assume that, when the value of the investment has once been obtained, it should continually rise and fall, following the waves of fluctuation in the market prices of labor and material. Once fixed, it should remain constant, only as it is added to by capital charges, or reduced by withdrawals, in the future; for it is the value of the investment upon which the company should receive and the consumer should pay a return, whether in times of prosperity or in times of adversity. The value having been once determined, there is no more reason for changing it from time to time, following the rise and fall of the cost of labor and material, than there would be for changing the face value of a bond issued to construct a plant, or for changing the face value of a promissory note given in the ordinary course of business, causing their face value, as a basis for earning interest,

to fluctuate with the fluctuations in the purchasing power of a dollar."

Unit prices were taken as of August 1, 1916, in fixing the permanent value of a public utility plant for rate-making purposes, in *Re Alliance Gas & P. Co.* (1918; Ohio) P.U.R.1919B, 423 (abstract), with allowance for additions since that date at actual cost.

In ascertaining the reproduction cost of the physical value of a public utility, the Oregon commission, in *Re Portland R. Light & P. Co.* (1916; Or.) P.U.R.1916D, 976, held that normal average prices should be used, rather than momentary prices which were abnormally high or low, and, with respect to additions made between 1912 and 1915, applied actual construction costs as deduced from vouchers, which were assumed to represent reproduction costs as well.

And in *Re Douglas County Light & Water Co.* (1920; Or.) P.U.R.1920E, 667, the Oregon commission held that the use of a valuation of the property of a light and water company, based upon present-day prices, for rate-making purposes, was not in conformity with the generally accepted theory of public utility operation and regulation. It was said: "Every public utility is delegated the duty and right of performing a particular public service. As compensation for the service performed, the utility is entitled to a reasonable return upon the amount of money prudently invested in the public service. The utility should thus be assured against the uncertainty that confronts a private concern, and speculative features should be almost entirely eliminated. The public reaps the benefit from this arrangement in the form of constant and continuous service at more stable and lower rates. Under the theory advanced by the applicant, when construction material and construction labor prices rise, the rate-base value must also increase correspondingly; when these prices decrease, the rate-base value must fall. The return to the utility thus becomes speculative, the compensation demanded by the investor increases correspondingly, and the utility is placed on the plane

of a private speculative enterprise. While the figures presented by the applicant are of importance in this proceeding, and merit the consideration of the commission, yet they are but an element in the determination of a rate base."

The Pennsylvania commission in *Fox v. Pine Grove Electric Light, Heat & P. Co.* (1919; Pa.) P.U.R. 1920B, 380, said that a valuation based solely upon unit prices of 1918, without other supporting data, furnished a comparatively limited measure of value for rate-making purposes.

And in *Tyrone v. Home Electric Light & Steam Heating Co.* (1920; Pa.) P.U.R. 1920C, 562, it was said that the high unit prices now prevailing in the market of labor and materials warranted the conclusion that the fair value of a property, for rate-making purposes, would generally fall below a reproduction estimate based upon such prices, on a fair inventory and appraisal, where due regard is paid to all the interests and economies concerned.

And in determining the basis for interest during the construction period of a plant, 90 per cent of which was built prior to 1914, the commission in *Frackville v. Mountain City Water Co.* (1921; Pa.) P.U.R. 1921C, 820, held that it would be improper to take the cost of reproduction at current prices, since that would unduly inflate the amount which should be allowed. In determining the valuation, the commission held that unit prices during the ten-year period ending December 31, 1918, as applied to the inventory of property as of January 1, 1919, would be a more accurate and equitable measure of the reproduction cost of the property, and should be adopted in preference to the average unit prices for labor and material prevailing during the five-year period ending on that date.

In *Verona v. Suburban Water Co.* (1920; Pa.) P.U.R. 1920F, 942, the commission said that reproduction costs based upon a fair average price of materials, property, and labor was one of the elements which the Public

Service Company Law set forth as an element to be given due consideration by the commission in reaching fair values; and that, if the intent and purpose of the act was to be carried out, such cost should be arrived at as therein provided, based upon the fair average price of materials, property, and labor; that by this was meant a price fair to the company as well as to patrons, and not an abnormally high price resulting from unusual conditions; neither did it contemplate the use of low prices depressed on account of stringency in financial affairs, or for other reasons; and that the commission was not prepared to state that the basis on which the reproduction cost of the property in this instance was arrived at, to wit, an average of five years ending April 1, 1917, during a part of which period there were reflected the advanced prices resulting from war conditions, was either unfair to the public or to the company.

The South Dakota commission in *Re Salem Teleph. Co.* (1919; S. D.) P.U.R. 1919B, 734, held that, in valuing telephone property for rate-making purposes, the adoption of the company's method of basing value upon current prices as applied to labor and materials, reflecting prices and abnormal conditions brought about by the war, which, at best, must be considered as temporary, would be unfair to consumers; and that a more equitable method was to adopt, as unit costs, the average costs as determined from a study of prices actually paid during a period of years.

The reproduction cost of the existing properties, upon the basis of the average prices of the five-year period ending December 31, 1919, less depreciation, as one of the elements considered by the Tennessee commission in *Re Ramier* (1921; Tenn.) P.U.R. 1921C, 121, in determining the rate-making value of the property, the historical cost, earnings, and operating expenses, outstanding stock and bonds, and other elements, also being considered.

The Utah commission in *Re Utah Gas & Coke Co.* (1919; Utah) P.U.R.

1919D, 645, held that an appraisal based on average unit prices during the five-year period from 1913 to 1917, inclusive, unduly reflected the rise in prices on certain items caused by the World War, and that the normal reproduction cost of such items was less, due regard also being given to the condition under which the plant was actually constructed, and reduced the appraisal accordingly.

And the commission, in *Re Mountain States Teleph. & Teleg. Co.* (1921; Utah) P.U.R.1921E, 145 (abstract), in valuing a telephone utility, allowed a value somewhat higher than that of the pre-war level, but lower than that of the war level.

So, the commission in *Re Telluride Power Co.* (1921; Utah) P.U.R.1922B, 168, said that it was not inclined to accept as controlling a value based upon the maximum of war and post-war prices, applied to property that was constructed and placed in operation before radically increased prices became effective; but that this view was not intended to exclude consideration of such prices applied to property constructed during the war period.

And in *Re Utah Power & Light Co.* (1921; Utah) P.U.R.1922A, 436, the commission said that while it had considered reproduction cost new, based upon present prices, in finding the fair value of the utility, it could not accept such prices as controlling in finding such value. And in this case the court approved actual unit costs, where available and shown to be reasonable, and selected unit prices for the remainder of the inventory to reflect average prices as of the period preceding the World War.

That reproduction cost new based upon prices obtaining during a period of unusual inflation, does not reflect actual present worth for rate-making purposes, was held, also, in *Re Utah Gas & Coke Co.* (1920; Utah) P.U.R.1920C, 854, where the contention was overruled that the valuation of the property of a gas company should be obtained by the application of current prices for labor and material during an assumed construction peri-

od of 1918-1919, to the units of physical property shown by the inventory; or, in other words, that the present value was the reproduction cost new, less depreciation of the property. It was said that the authority conferred by statute upon the commission to make a revaluation of the property of the utility did not contemplate a disturbing of valuations theretofore fixed every time a change occurred in unit prices, particularly during times when violent fluctuations take place.

It was said in *Re Utah Gas & Coke Co.* (Utah) supra, that if the property was constructed during a period of unusual prices, whether above or below the normal, the actual or book costs would not necessarily govern.

In *Re Utah Gas & Coke Co.* (Utah) supra, the Utah commission accepted the average price level of the period of 1913-1917, as reflecting the increment of value justly accruing to the property by reason of the upward trend of prices to present levels.

And it was held in *Re Utah Light & Traction Co.* (1920; Utah) P.U.R.1920B, 262, that the normal cost new, in fixing the valuation of a utility for rate-making purposes, should be based on the cost of reproduction under conditions prevailing during and prior to April, 1917, and not on the cost new of reproducing the property at prices prevailing in 1918. It was said that whether or not the property of the company had permanently enhanced in value on account of conditions brought about by the World War, could only be determined after a lapse of time, and therefore could not be intelligently passed upon by the commission.

In *Milne v. Montpelier & B. Light & P. Co.* (1920; Vt.) P.U.R.1920E, 558, the Vermont commission held that, in determining valuation for rate-making purposes, reproduction new with unit costs as of the present time would not be an equitable method; neither would it be fair to consider reproduction new based upon prices current in the pre-war period. But it was held that, assuming that existing prices were approximately at the peak, and that future decline was like-

ly to be in some degree comparable to the past rise in prices, a valuation based upon average prices for a period of ten years, including the war period, ought to produce as fair results as possible. The commission, therefore, determined the cost of reproducing new the property devoted to public use according to unit prices which should be an average of those prices for a period of ten years ending December 31, 1919, as one of the elements in arriving at the valuation of the property.

The commission in *Milne v. Montpelier & B. Light & P. Co. (Vt.) supra*, took the view that, in determining present value for rate-making purposes, there should be taken into consideration the fact that the price fixed was not strictly for present-day application, but for the future, and that it would not be just to fix rates upon present-day values which were either abnormally high or low; because, if rates were based on inflated values, the public in the future, as long as such rates remained in force, would pay a return on such values, whereas, if based upon unusually depressed values, the corporation would not be likely in the future to receive a just return upon the fair value of its property. And the commission took the view that it was fair to assume that existing prices were abnormally high, and that before the lapse of any great length of time there would be a substantial reduction in such prices.

That unit prices for material which are abnormally high during war times are not a proper standard for valuation of the property is held, also, in *Re Colonial Power & Light Co. (1919; Vt.) P.U.R.1920A, 215*.

In *Re Roanoke Waterworks Co. (1920; Va.) P.U.R.1920C, 745*, the Virginia commission said that however fair and equitable may have been the reproduction cost basis calculated in years just prior to the World War, especially when account was taken of average unit prices for a period of from three to five years preceding the date of valuation, the commission was not willing to agree to a valuation based, on present reproduction costs

at the greatly inflated prices brought about by reason of war conditions; that a return based upon any such value would be grossly unfair to the public, and that the utility was by no process of reasoning entitled to a return on the same. And the commission took the appraisal made in 1913, adding thereto the probable actual cost of additions to the plant since that time at war prices, less depreciation, in reaching what it considered the fair value of the property for rate-making purposes.

And the Virginia commission in *Re Virginia R. & Power Co. (1921; Va.) P.U.R.1921C, 193*, stated that it would not recognize valuations made on unit prices of the years 1918 and 1920, which prices it considered as inflated and as affording no reasonable basis for valuation for rate-making purposes. The commission in this case took the 1914 reproduction value, adding a normal appreciation for the succeeding years,—since, had there been no war, there would have been, presumably, a gradual rise in prices due to increasing costs of production,—with allowance for actual additions made at war prices.

The Virginia commission in *Re Chesapeake & P. Teleph. Co. (1920; Va.) P.U.R.1920F, 49*, reaffirmed its position, declining to arrive at a fair valuation based on reproduction at inflated war values.

And, while stating that it saw no reason why the utility should not profit by increasing property values in normal times, the same as other property owners, the commission in *Re Culpeper Teleph. Co. (1920; Va.) P.U.R.1920D, 305*, said that it would not have accepted as a rate base a valuation on the basis of reproduction at inflated war costs, had the utility attempted such a valuation. In this case, however, the utility had adopted the unit price of 1916 and prior years.

In *Re Virginia R. & Power Co. (1921; Va.) P.U.R.1921D, 268*, the commission took the 1914 unit prices and allowed for normal appreciation of property values based on the average advance in prices between 1896 and 1914, rejecting the abnormal ap-

preciation as reflected in 1920 unit prices.

In *Re Virginia R. & Power Co. (Va.) supra*, it was held, also, that the utility was entitled to earn a return on the amount actually necessarily expended at war prices in making additions to the property during the period from 1914 to 1920.

Where average unit prices during a series of years preceding the war were taken in valuing the property, the commission in *Re Lynchburg Traction & Light Co. (1921; Va.) P.U.R.1921E, 87*, held that there should be added thereto, as a basis for fixing rates, a normal appreciation in value, in order to comply with the rule that utilities are entitled to earn a return upon the reasonable fair value of their property at the time it is being used by the public. But it was said that, rather than calculate the fair value upon inflated costs represented by war-time prices, the commission attempted to estimate what might have been a normal appreciation in the value of the property had there been no war. And the commission allowed 10.8 per cent of normal depreciation from 1916 to 1921, the valuation having been made as of the former date, subsequent actual costs of additions to the property being added. In this case the unit prices used were the average prices of material and labor during the years 1912 to 1916. The company realized, it was said, that the commission would not recognize reproduction costs using unit prices as of the inflated cost period.

The Washington commission in *Public Service Commission v. Spokane Falls Gaslight Co. (1921; Wash.) P.U.R.1921C, 519*, held that a valuation once made of a utility's property did not change as prices fluctuated, but should be adhered to as a rate base unless it later appeared that culpable error had been committed, with allowance for additions and betterments at their cost to the utility. It was said that if a plant unit was actually and necessarily purchased at war prices, such cost was added to, and became a part of, the rate base;

but that ordinarily there was no sounder method of fixing a valuation upon which to base rates than to arrive as nearly as possible at the prudent investment of the utility in property devoted to public use; that the commission was aware of the fact that a number of courts had recently held that rates should be based chiefly upon the cost of reproducing the property at prices prevailing at the time of the hearing; but that the commission would not accept the theory unless compelled to do so by the courts of that state. The commission regarded the theory of a fluctuating rate base as dangerous and unsound, and likely to result in insolvency and bankruptcy in case of a decline in prices. And, accordingly, the commission overruled the contention that the former valuation of the property as of 1917 should be disregarded and that it should be revalued as of 1920 prices.

And the Washington commission in *Spokane v. Washington Water Power Co. (1921; Wash.) P.U.R.1921D, 762*, said that, during the period of high prices, it would not consider or allow prevailing prices as a basis for arriving at the rate base, but had in all instances taken prices which prevailed over a series of years preceding the war, except that expenditures or additions for betterment actually made during that period are allowed at the prices paid for them.

The West Virginia commission in *Re Moundsville Water Co. (1921; W. Va.) P.U.R.1922B, 28*, said that for the purpose of ascertaining present fair value little weight should be given to reproduction costs based upon average prices prevailing during the war period, except in cases where a substantial part of the construction work was done during that period.

In *Re Bluefield Waterworks & Improv. Co. (1921; W. Va.) P.U.R.1921E, 655*, the commission in valuing a water utility's property, on an application for increase in rates, said that the applicant's plant was originally constructed more than twenty years ago, and had been added to from time to time as the development

of the community required; that it would, therefore, be unfair to consumers to use as a basis for present fair valuation the abnormal prices prevailing during the recent war period, but that when, as in this case, a part of the plant had been constructed or added to during that period, in fairness to the utility, consideration must be given to the cost of such expenditures made to meet the demands of the public.

In *Re Light, Fuel & P. Co.* (1917; W. Va.) P.U.R.1918C, 248 (abstract), it was held that reproduction value of a utility plant, based upon prevailing abnormal high prices of labor and material, should not be regarded in arriving at the value of the plant for rate-making purposes.

In *Re West Virginia Water & E. Co.* (1920; W. Va.) P.U.R.1920D, 409, the West Virginia commission accepted a valuation of the property as of January 1, 1914, as the present fair value for rate-making purposes as of that date, stating that in the absence of the books of a public utility showing the true investment in and costs of the plant or property, the reproduction cost new, less depreciation, is the most equitable method of arriving at present fair value, especially if made under normal conditions when the prices of material and labor are not inflated, as was true with respect to this valuation.

The Wisconsin commission in *Re Milton & M. J. Teleph. Co.* (1920; Wis.) P.U.R.1920C, 110, held that the term "reproduction costs," as a factor in determining valuation for purposes of rate making, meant the approximate cost of reproducing or rebuilding the plant at average prices prevailing for some time prior to the appraisal date, and not the amount which it would cost to reproduce it under prevailing high prices. In this case it was contended that to reconstruct the plant under prevailing prices would result in a valuation of at least 75 per cent greater than the book value; but the commission said that, when such capital expenditures had been incurred, rates should be sufficient to pay fixed

charges upon them, but that at the present time rates should not be established at such a level.

In *Re Racine Water Co.* (1917; Wis.) P.U.R.1917D, 277, the commission took the view that in fixing unit costs of materials, especially in the case of those liable to violent fluctuations, it cannot be said that there is any particular number of years that should be invariably selected to obtain an average price, since the period should be chosen to throw light on prices normally to be expected; that an average price for ten years, rather than for five years, should be taken in fixing a unit cost for cast-iron water mains, the price being subject to violent fluctuations; and that, in fixing a unit cost for laying such mains, allowance must be made for the trend of higher labor costs.

And the commission in *Racine Water Co. v. Railroad Commission* (1918; Wis.) P.U.R.1919A, 913, said that in arriving at reproduction cost new, less depreciation, as an element in determining ultimate value, it took unit costs considering a series of years and also considering certain trends, especially in labor costs, which it regarded as fair; and that certain estimates as to reproduction costs based on unit prices arrived at by consideration of two eighteen-month periods—the one period ending in December, 1918, and the other in April, 1917—were not, especially under the circumstances of this case, of any material weight.

In *Re Wisconsin Traction, Light, Heat & P. Co.* (1918; Wis.) P.U.R. 1919B, 224, where the utility contended that the valuation should at least be based upon the average cost of materials and labor during the preceding five years, it was said that the commission's engineers, during the present period of abnormally high prices, adopted a ten-year average in determining unit costs, in order to smooth out the price curve in those instances where the investment cost basis could not be used, due to lack of adequate and reliable records.

In *Milwaukee v. Railroad Commis-*

sion (1920; Wis. Cir. Ct.) P.U.R. 1920B, 976, the Wisconsin commission held that appreciation in the value of land devoted to the purposes of the utility was proper for recognition in the appraisal; but the increase in value, it appears, was for a period preceding the war.

Although the valuation was for the purpose of municipal purchase, attention is called to *Re Bloomer Electric Light & P. Co.* (1918; Wis.) P.U.R.

1919B, 481, in which it was held that an appraisal based on unit costs on a ten-year average preceding 1914 did not fully reflect the value of the property, where it appeared that considerable construction had taken place since 1914. It was said that under any circumstances the actual increased costs of actual construction during the period following 1914 should be recognized, if equity was to be done,
R. E. H.

R. L. ABLES et al., Plffs. in Err.,
v.

STATE OF OKLAHOMA EX REL. BEN F. SAYE.

Oklahoma Supreme Court — October 12, 1920.

(79 Okla. 282, 193 Pac. 969.)

Bail — termination of appearance bond.

1. Where the principal on a criminal appearance bond, requiring the defendant to appear before the district court on the first day of the next term and there remain from day to day, and term to term, until discharged by due course of law, appears for trial, and is found guilty of the charge preferred against him, he does not, by virtue of § 5931, Rev. Laws 1910, immediately pass into the custody of the law, and thereby discharge the sureties on his bond, unless he is committed into the custody of the proper officer to await the judgment of the court.

[See note on this question beginning on page 594.]

Officer — power — duty.

2. Where power is granted in permissive language to public officers for the benefit of the public or of individuals, it is generally held that the intent of the legislature, which is the true test, was not to devolve a mere discretion, but to impose a positive and absolute duty.

[See 22 R. C. L. 457.]

Bail — declaration of forfeiture — effect.

3. Where the court forfeiting an ap-

pearance bond has jurisdiction to declare a forfeiture, such forfeiture is conclusive evidence of its breach, and cannot be impeached by extrinsic evidence.

Trial — questions not available.

4. Record examined, and held, that the remaining propositions presented for review were not available to defendant in an action on the bond under the rule announced by this court in *Andrews v. State*, 80 Okla. 20, and other cases cited in the opinion.

Headnotes by KANE, J.

ERROR to the District Court for Jefferson County (Jones, J.) to review a judgment in favor of plaintiff in an action on an appearance bond. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Green & Pruet and Bridges & Vertrees, for plaintiffs in error:

The judgment of the trial court in forfeiting the appearance bond was void, for the reason that the liability of the sureties terminated with the conviction of the accused.

3 R. C. L. 42; *Southwestern Surety Ins. Co. v. United States Fidelity & G. Co.* 75 Okla. 232, 182 Pac. 522; *State ex rel. Vigg v. Romaine*, 47 Okla. 138, 148 Pac. 79; *Miller v. State*, 158 Ala. 73, 20 L.R.A.(N.S.) 861, 48 So. 360; *Fortenberry v. State*, 47 Tex. Crim. Rep. 84, 79 S. W. 538; *State v. Charles*, 207 Mo. 40, 105 S. W. 609, 13 Ann. Cas. 565; *State v. Dorr*, 59 W. Va. 188, 5 L.R.A.(N.S.) 402, 115 Am. St. Rep. 915, 53 S. E. 120, 8 Ann. Cas. 1016; *Suggs v. State*, 129 Tenn. 498, 167 S. W. 122; 3 R. C. L. 42; 6 C. J. 1031; *United States v. Cerecedo*, 6 Porto Rico Fed. Rep. 622.

If sentence is postponed the sureties are discharged.

6 C. J. 1031; *State v. Charles*, 207 Mo. 40, 105 S. W. 609, 13 Ann. Cas. 565; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318.

The testimony excluded by the court was competent and material.

State ex rel. Vigg v. Romaine, 47 Okla. 138, 148 Pac. 79; *State v. Rosseau*, 39 Tex. 614; 6 C. J. 1032; 23 Cyc. 784; *Walters v. American Bridge Co.* 234 Pa. 7, 82 Atl. 1103; *Chambers v. Mesta Mach. Co.* 251 Pa. 618, 97 Atl. 101; *Mercer v. Natchez, B. & S. R. Co.* 136 La. 187, 66 So. 74; *Parker v. Hamilton*, 49 Okla. 693, 154 Pac. 65.

Mr. Ben F. Saye in propria persona.

Kane, J., delivered the opinion of the court:

This was an action upon an appearance bond, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below. The action was prosecuted in the name of the state of Oklahoma ex rel. Ben F. Saye, county attorney, against R. L. Ables and the principals and sureties on said bond. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendant," respectively, as they appeared in the trial court. Upon trial the court judgment was rendered in favor of the plaintiff, to reverse which

this proceeding in error was commenced.

Counsel for defendant present their grounds for reversal under three propositions as follows:

"First Proposition.—The judgment of the court in forfeiting the appearance bond in the case of the *State of Oklahoma v. R. L. Ables* was void, for the reason that the liability of the sureties terminated with the conviction of the accused. Upon conviction the defendant (R. L. Ables), being present in court, was directly in the custody of the court; and, even if there was no direct order to the sheriff to take the prisoner into custody, there is always an implied order that the sheriff shall do so, and the defendant was therefore as legally in the custody of the sheriff as if the bail had delivered him. If the sheriff failed under such circumstances to take the defendant into custody, the bail was discharged by operation of law.

"Second Proposition.—The court was without jurisdiction to order a forfeiture of a bond for failure of R. L. Ables to appear before the court for sentence on a day the court was not in session and on a day when the court could not have sentenced the said R. L. Ables had he appeared. The record discloses that the defendant R. L. Ables was ordered to appear on the 30th day of March, 1917, for sentence, and the minutes of the court disclose that the court was not in session on that day. No day was ever set subsequent to the 30th day of March, 1917, for the passing of sentence, nor was the matter continued to any later date. On the 9th day of June an order is made forfeiting the bail in this cause for failure of the said R. L. Ables to appear on the 30th day of March, 1917, a day the court was not in session. It would be as reasonable for the court to set the first Monday in March as the first day of the term, and later, and before the first Monday of March, make an order continuing the first day of the term till the third Monday, and then make an order forfeit-

ing all bonds for failure of the defendants to appear on the first Monday. Can the court even say that the defendant, R. L. Ables, failed to appear before the court on a day when the court was not in session?

"Third Proposition.—The court excluded competent and material testimony. The offer to prove that motion for new trial had not been disposed of at the time sentence was passed, the offer to prove from the minutes of the court that an attempt was made to forfeit this bond when the court was not in session, the testimony offered to the effect that R. L. Ables left the court with the sanction and consent of the district judge and the county attorney, was admissible to show that the court was without jurisdiction to render the order of forfeiture. Such testimony was not open to the objection that such evidence was a collateral attack. Such testimony, if admitted, would have shown that the court was without jurisdiction to render the judgment forfeiting said bail, and that the judgment upon which this suit is predicated is void. Such testimony tended to establish that the court was without jurisdiction to forfeit said bond at the time and in the manner herein, and such proof would have been a complete defense to the suit."

The first proposition is based upon the assumption that when the principal upon the bond appeared for trial, and was convicted, he immediately passed into the custody of the law, and therefore his failure to appear for judgment and sentence did not constitute a breach of his appearance bond, by the terms of which he was required to appear before the district court "on the first day of the next term, and there remain from day to day and term to term until discharged by due course of law."

The statute (Rev. Laws 1910, § 5931) which provides that by virtue of which it is claimed the principal passed into the custody of the law immediately upon conviction

provides: "If a general verdict is rendered against the defendant he must be remanded if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the court upon the verdict."

It is contended that the word "may," as used in the second line of this section, should be construed to mean "shall," and that, when thus construed, the case at bar falls within the rule announced in *State ex rel. Vigg v. Romaine*, 47 Okla. 138, 148 Pac. 79, wherein it was held that, "upon judgment being rendered and sentence passed, the custody of the defendant under the law passed from his bail to the proper officer, and the court was not at liberty to vary or enlarge the terms of their undertaking."

We are unable to agree with this contention. It is quite true that, where power is granted in permissive language to public officers for the benefit of the public or of individuals, it is generally held that the intent of the legislature, which is the true test, was not to devolve a mere discretion, but to impose a positive and absolute duty. *Rock Island County v. United States*, 4 Wall. 435, 18 L. ed. 419. But in the statute now under consideration the permissive word "may" was undoubtedly used for the benefit of defendants, who are on bail at the time of their conviction, and to give it the construction contended for would clearly militate against their interest. The statute contemplates that when a general verdict is rendered against the defendant he must be remanded if in custody. Here, it will be observed, the peremptory "must" is used. But if he is on bail he "may" be committed, etc. If the legislature intended the words "must" and "may" to be peremptory under the two circumstances stated in the statute, surely they would have used mandatory language in both instances; or they would have omitted the latter entirely, and merely pro-

Officer—power
—duty.

vided that, if a general verdict is rendered against the defendant, he must be committed to the custody of the proper officer to await the judgment of the court on the verdict.

In *State ex rel. Vigg v. Romaine*, supra, the principal on the appearance bond disappeared after conviction and judgment, and the statute under consideration (Rev. Laws 1910, § 5963) provides: "If the judgment be imprisonment, or fine and imprisonment, . . . the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment be complied with."

When these differences between the two cases and the statutes construed are considered, the distinction between the principal case and the case at bar becomes quite apparent.

The case of *Glasgow v. State*, 41 Kan. 333, 21 Pac. 253, is more nearly in point. That was an action upon an appearance bond conditioned that said defendant shall appear before the district court on the first day of the next term thereof, to answer the complaint in said cause alleged against him, and not depart the same without leave. The defendant appeared at the next term of said district court and entered a plea of not guilty. A jury was impaneled, a trial had, and the jury returned a verdict of guilty. Afterwards, and before sentence or judgment was pronounced, the defendant disappeared, and did not appear for judgment and sentence. The trial court rendered judgment against the sureties upon the bond for the full amount thereof. The sureties took an appeal to the supreme court, where they claimed that, under the statutes of Kansas, an examining magistrate was authorized to take bail only in such cases as in the opinion of the magistrate will secure the appearance of the person charged with the offense, at the court where such person is to be tried. The magistrate in the pre-

liminary examination made an order, and entered it upon his docket, requiring the defendant to give bond to appear and answer the charge made against him at the next term of the district court. The bond itself provided that he shall appear at said court and answer to the charge, and not depart therefrom without leave.

The contention of the sureties was that the statute only authorized the examining magistrate to take bail for the appearance of the defendant, and because the bond provided not only for the appearance, but that he was to answer the charge made against him, and not depart from the court without leave, it was more onerous than the provisions of the statute, and for that reason was a nullity, and could not support the judgment based upon it. It was also contended, as in the case at bar, that the conditions of such bond, even if it had been authorized by the statute, were fully complied with by the defendant McGuire; that he did appear at the term of court, and therefore his sureties on the bond were released from all liability. The court, in discussing the proposition of law presented, says: "We think, when a party is required to appear at the district court after a preliminary examination has been had or waived, that the use of the word 'appear' implies that he is to appear for the purposes of a trial of the charges made against him. . . .

It is not enough for the party to be there for the first day, and then slip off without leave, in order to comply with the conditions of the bond; the very fact of the condition of his appearance is that he shall appear for a certain purpose; he appears for the trial of the charges made against him, and if he departs before the trial and judgment are had, without leave of the court, his bond is forfeited. He appeared for trial, he departed before judgment. The statute provides that, if without sufficient excuse he neglect to appear for trial or judgment, the court must direct the fact to be entered

upon its minutes, and declare the forfeiture of the bond."

The Glasgow Case seems to pass on the identical question involved in the case at bar, and, as the Kansas statutes construed are identical with our own statutes on the same subject, we are constrained to follow the rule announced by the Kansas court. Our statute nowhere prescribes the form of the bond, but the form in this case follows the customary form, and requires the principal to appear on the first day of the next term, and there remain from day to day and term to term of said court, until discharged by due course of law.

In *Shriver v. State*, 32 Okla. 507, 122 Pac. 160, the court held that: "The condition in a bond that the principal will appear before the district court to answer a charge is not fulfilled by appearing for arraignment and moving to set aside the indictment, demurring, or pleading thereto. He must stay until the case is disposed of and he is discharged by the court."

In *State ex rel. Buckley v. Drake*, 40 Okla. 538, 139 Pac. 976, it was held that the authorities do not sustain the proposition that the appearance of an accused for trial, where a conviction results, releases his sureties from further liability on his bond. Since he has not complied with the condition of his bond requiring his attendance "until discharged by due course of law," that condition of the bond requires his attendance upon and presence before the court as much as the provision "that he will not depart without leave," or that "he will abide the judgment of the court."

In *Shriver v. State*, supra, it was contended by the defendant that it was the duty of the court to place the defendant in custody when the indictment or information was filed in the district court, even though he may have already given bail, but the court held that such contention could not be upheld, but that it was a matter left solely to the discretion of the court. In both of these Okla.

20 A.L.R.—38.

homa cases the rule announced in *Glasgow v. State*, supra, was approved. We think that these authorities conclusively show that the first contention of counsel for the defendant is without merit.

Bail—termination of appearance bond.

Moreover, we are unable to perceive, although counsel does not urge it in his brief, why this and the remaining propositions presented for review were not foreclosed as defenses by the rule announced by this court in the following cases: *Andrews v. State*, 80 Okla. 20, 193 Pac. 873, recently decided; *State v. Hines*, 37 Okla. 198, 131 Pac. 688, Ann. Cas. 1915B, 431; *Hines v. State*, 39 Okla. 638, 136 Pac. 592; *Edwards v. State*, 39 Okla. 605, 136 Pac. 577.

Trial—questions not available.

It is conceded that the order of forfeiture was made by the court while in session, upon the ground that the principal had absconded before judgment and was a fugitive from justice, and that the forfeiture has not been set aside by the court in which it was entered.

The rule is well established that, where the court forfeiting an appearance bond has jurisdiction to declare a forfeiture, such forfeiture is conclusive evidence

Bail—declaration of forfeiture—effect.

of its breach, and cannot be impeached by extrinsic evidence. 5 Cyc. 149; *State ex rel. Voyles v. Pierce*, — Okla. —, 166 Pac. 132; *Melton v. State*, 46 Okla. 487, 149 Pac. 154.

In the case at bar the principal was required by the terms of the bond itself to appear from term to term and day to day, etc., and the order of the court, requiring him to appear on some special day fixed by the court, in or out of term time, did not excuse him from appearing in accordance with the terms of the bond. The finding by the court in term time that the principal was a fugitive from justice conclusively showed a breach of the terms of the bond, which justified the forfeiture.

In *Andrews v. State*, *supra*, the defendants Andrews and Tucker offered to prove by witnesses that Andrews was taken into custody by the sheriff of Jefferson county, and placed in the county jail of said county sometime in the month of June, 1916, by virtue of a commitment issued out of the county court of said county on the judgment in the case in which said bond was given, and that said defendant was kept in the jail five or six days, and was permitted to depart therefrom by the sheriff's force of said county, or that they turned him out. The court excluded this evidence, and its action in this respect is the principal assignment of error.

In passing upon this question, the chief justice, who delivered the opinion for the court, said: "This evidence would doubtless have authorized the court in which the forfeiture was taken to discharge the forfeiture, but such a defense was not available in an action on the bond, for it has been repeatedly held in this jurisdiction that the final order of the trial court, declaring a forfeiture of a bail bond, cannot be collaterally attacked in a subsequent action against the principal and sureties on the bond."

In *Edwards v. State*, *supra*, the sureties offered to prove by parol testimony that the principal voluntarily surrendered himself to the

sheriff of Okfuskee county prior to the entry of the default of the bond, and that the sheriff had taken him into custody. With reference to this defense, Galbraith, commissioner, speaking for the court, said: "It does not appear from an examination of the record in this case that the plaintiff in error appeared in the county court when the forfeiture of the bonds was taken, or afterwards made application to that court to vacate or set aside the forfeiture, or made any effort in that court to relieve himself from the consequences of the forfeiture. He seemed to have remained passive until after action was commenced in the district court, when he attempted to show as a defense, by oral testimony, a surrender of the principal. This could not avail him as a defense in such action. He might have secured his discharge by complying with the provisions of the statute above quoted, by proper steps taken in the county court. That he did not do this seems to have been his own fault, and he should not now complain of the result."

As we are unable to distinguish the case at bar from the cases just cited, it follows that the judgment below must be affirmed.

Pitchford, Johnson, McNeill, and Bailey, JJ., concur.

ANNOTATION.

Bail: stage of proceeding at which sureties are discharged in criminal case.

- I. Scope, 595.
- II. In general, 596.
- III. Preliminary examination before committing magistrate, 597.
- IV. Failure to indict, 597.
- V. Vacation or destruction of indictment:
 - a. In general, 600.
 - b. Vacation on motion of state:
 - 1. In general, 600.
 - 2. Nolle prosequi, 602.
 - c. Vacation on motion of defendant:

V. c—continued.

- 1. In general, 604.
- 2. Quashal, 604.
- d. Destruction, 607.
- VI. Appearance at time named, 607.
- VII. Failure to hold term at which defendant bound to appear, 609.
- VIII. Appearance from term to term, 610.
- IX. Plea to indictment, 615.
- X. Failure to try defendant, 617.
- XI. Commencement of trial, 618.
- XII. Discharge of jury, 623.
- XIII. Retirement of jury, 623.

XIV. Return of verdict:

- a. Conviction, 624.
- b. Acquittal, 627.

XV. Appearance to receive sentence, 628.**XVI. Judgment or sentence, 629.****XVII. Submission to judgment or sentence, 632.****I. Scope.**

The object of this annotation is to set out the cases showing the time at which the liability of the sureties in bail bonds or recognizances terminates by reason of the complete fulfillment of the conditions of the bond or recognizance, as distinguished from cases where the bail are held to have been discharged, or excused from fulfilling such conditions by events or acts happening or done during the progress of the prosecution of the accused. It therefore includes cases as to the termination of the liability of the bail by the vacation of the indictment on demurrer, by motion, by quashal, by entry of nolle prosequi, by filing away, by destruction, or otherwise; cases as to the continuation of the liability of the sureties for the appearance of the accused from term to term, and during the trial and its adjournments; cases as to the termination of their liability by the ending of the trial with the acquittal, conviction, or sentence of the defendant; cases as to the effect on the continuation of their liability, of an appeal; cases as to the termination of the liability of sureties in bail bonds or recognizances given on appeal or writ of error; and cases as to the continuation of their liability through appeal, and to a retrial in the lower court. It excludes cases as to the discharge of the bail by a failure to find an indictment, or a return of no indictment found, where such failure or return occurs after the forfeiture of the bond or recognizance, by reason of the failure of the defendant to appear or otherwise, and is made a ground for a remission of the forfeiture; but cases as to the termination of the sureties' liability by such failure to indict before forfeiture are included. Cases as to the discharge of the sureties by the indictment of the

XVIII. Appeal from conviction:

- a. In general, 635.
- b. Revival of liability of bail on dismissal of appeal, 636.

XIX. Bail bonds given on appeal:

- a. In general, 636.
- b. Reversal of conviction, 637.

accused for another offense than that named in the bond or recognizance are excluded, except where the original indictment is set aside, and a new indictment found, and the question is whether the liability of the bail extends to the appearance of the defendant to answer the new indictment. Cases as to the effect on the liability of the sureties of the failure to notify them of the indictment of their principal, or of the court in which to produce him; cases as to the remission of a forfeiture of the bond or recognizance by a subsequent vacation of the indictment; cases as to the discharge of the sureties from further liability by a change of venue; and cases as to their discharge by the continuance, adjournment, or postponement of the case without their consent or knowledge—are also excluded. The annotation further excludes cases as to discharge of the bail by the arrest of the accused for another crime, or his rearrest for the same offense, by his surrender by his bail, or by the taking of him into custody by the sheriff or other officer, except where he is taken into custody after conviction and the issue is whether an order of the court to do so is necessary to terminate the liability of the sureties. Cases as to the discharge of the bail by the execution of a new bond or recognizance by the defendant are not included, except where the execution of an appeal bond is claimed to mark the termination of the trial bail bond. Bastardy bonds, and recognizances without sureties, are also excluded. While, as stated in 3 R. C. L. 32, there is a distinction between a bail bond and a recognizance, but, as further stated therein, the terms seem to be used without distinction in most of the cases, and the rules laid down ordinarily are applicable to both, these terms have been treated in the anno-

tation as synonymous, and used interchangeably.

II. In general.

No general rule can be laid down upon this subject because the conditions of bail bonds or recognizances vary in different jurisdictions, and in different courts, and have changed from time to time in the same jurisdictions or courts. This is so for the further reason that such conditions are frequently prescribed by statute, and sometimes the termination of the liability of bail depends upon the construction of still other statutory provisions. But as the sole purpose of a bail bond or recognizance is to secure the enlargement of the principal, and its effect is to place him in the custody of his bail, who are under the duty of producing him before the court to answer the charge against him, it may be generally stated, as will appear from a consideration of the following cases hereinafter set out in this annotation, that the liability of his sureties terminates at any stage of the proceedings at which the prosecution is ended by the discharge of the defendant by the court or by operation of law, or his custody is retransferred to the proper officers of the law.

United States. — *United States v. Cercedo* (1914) 6 Porto Rico Fed. Rep. 622.

Alabama. — *Goodwin v. Governor* (1832) 1 Stew. & P. 465; *Rogers v. State* (1885) 79 Ala. 59; *Ex parte Chandler* (1896) 114 Ala. 8, 22 So. 285.

Arkansas. — *State use of Independence County v. Glenn* (1883) 40 Ark. 332; *Ford v. State* (1911) 100 Ark. 515, 140 S. W. 734.

Georgia. — *Lamp v. Smith* (1876) 56 Ga. 589; *Colquitt v. Smith* (1880) 65 Ga. 341; *Roberts v. Gordon* (1890) 86 Ga. 386, 12 S. E. 648; *Sampson v. Harris* (1917) 147 Ga. 426, 94 S. E. 558; *Collins v. State* (1910) 7 Ga. App. 653, 67 S. E. 847; *Atlanta v. Turner* (1910) 8 Ga. App. 213, 68 S. E. 847; *Brock v. Slaton* (1916) 18 Ga. App. 175, 89 S. E. 156.

Idaho. — *State v. McLeod* (1918) 31 Idaho, 536, 173 Pac. 496.

Illinois. — *Ogden v. People* (1871) 62 Ill. 63; *Wilson v. People* (1882) 10 Ill. App. 357; *Spillman v. People* (1884) 16 Ill. App. 224.

Indiana. — *Lyons v. State* (1824) 1 Blackf. 309; *State v. Clerk* (1896) 16 Ind. App. 137, 44 N. E. 813.

Iowa. — *State v. Zimmerman* (1900) 112 Iowa, 5, 83 N. E. 720.

Kansas. — *Moorehead v. State* (1888) 38 Kan. 489, 16 Pac. 957; *Jackson v. State* (1893) 52 Kan. 249, 34 Pac. 744; *State v. Buis* (1912) 86 Kan. 562, 121 Pac. 365; *Lane v. State* (1897) 6 Kan. App. 106, 50 Pac. 905.

Kentucky. — *Com. v. Coleman* (1859) 2 Met. 382; *Askins v. Com.* (1864) 1 Duv. 275; *Bryant v. Com.* (1867) 3 Bush, 9; *Com. v. Blinco* (1867) 3 Bush, 12; *Mitchell v. Com.* (1876) 12 Bush, 247; *Ramey v. Com.* (1885) 6 Ky. L. Rep. 524 (abstract); *Hall v. Com.* (1895) 17 Ky. L. Rep. 231, 30 S. W. 877.

Louisiana. — *State v. Bugg* (1843) 6 Rob. (La.) 63; *State v. Wilson* (1859) 14 La. Ann. 446; *State v. Doane* (1878) 30 La. Ann. 1194.

Maryland. — *State v. Murphy* (1839) 10 Gill & J. 365.

Michigan. — *People v. Kennedy* (1885) 58 Mich. 372, 25 N. W. 318.

Missouri. — *State v. Mackey* (1874) 55 Mo. 51; *State v. Murmann* (1894) 124 Mo. 502, 28 S. W. 2; *Allen v. Cape Brewery & Ice Co.* (1906) 196 Mo. 435, 95 S. W. 417; *State v. Charles* (1907) 207 Mo. 40, 105 S. W. 609, 13 Ann. Cas. 565; *McKensie v. Missouri P. R. Co.* (1887) 24 Mo. App. 392; *State v. Cobb* (1891) 44 Mo. App. 375.

Nebraska. — *Hesselgrave v. State* (1902) 63 Neb. 807, 89 N. W. 295.

New York. — *People v. Felton* (1860) 36 Barb. 429; *People v. Hainer* (1845) 1 Denio, 454.

Ohio. — *Swank v. State* (1854) 3 Ohio St. 429.

Oklahoma. — *State ex rel. Vigg v. Romaine* (1915) 47 Okla. 138, 148 Pac. 79.

Oregon. — *Hyde v. Cross* (1894) 25 Or. 543, 37 Pac. 59; *State v. Turpin* (1909) 54 Or. 367, 103 Pac. 468.

Pennsylvania. — *Keehaver v. Com.* (1830) 2 Penr. & W. 240; *Com. v.*

Somers (1893) 14 Pa. Co. Ct. 159, 3 Lack. Jur. 185.

Tennessee.—Beasley v. State (1915) 134 Tenn. 660, 185 S. W. 687; Suggs v. State (1914) 129 Tenn. 498, 167 S. W. 122.

Texas. — Fossett v. State (1901) 43 Tex. Crim. Rep. 117, 67 S. W. 322; Fortenberry v. State (1904) 47 Tex. Crim. Rep. 84, 79 S. W. 538.

West Virginia. — State v. Dorr (1906) 59 W. Va. 188, 5 L.R.A. (N.S.) 402, 115 Am. St. Rep. 915, 53 S. E. 120, 8 Ann. Cas. 1016.

Wisconsin.—State v. Becker (1891) 80 Wis. 313, 50 N. W. 178.

England. — Rex v. Spenser (1752) 1 Wils. 315, 95 Eng. Reprint, 637.

Canada. — Reg. v. Hamilton (1899) 12 Manitoba L. R. 507, 3 Can. Crim. Cas. 1; Rex v. Edwards (1914) 23 Can. Crim. Cas. 296, 19 D. L. R. 207.

III. Preliminary examination before committing magistrate.

The liability of sureties in a recognizance conditioned that defendant appear on a certain day before a committing magistrate for examination, and not depart without leave, is not terminated by his appearance at the time named, and if he abscond during the examination the sureties are liable. Com. v. Ross (1821) 6 Serg. & R. (Pa.) 427.

A recognizance conditioned that the defendant shall appear before a city police magistrate for examination, during the examination, and on each and every day to which it may be adjourned, until the same is fully completed, is not fulfilled by the appearance of the defendant after the first day of examination, and the sureties are liable if he fails to appear on the day to which the examination is adjourned. People v. Newman (1905) 100 App. Div. 436, 91 N. Y. Supp. 811.

And a recognizance requiring the defendant to appear in court at a time certain, to proceed with his examination, and from day to day as ordered by the court, and not depart without leave, requires him to appear at a time to which the examination is lawfully adjourned by the magistrate, and to remain in attendance during the full

examination, and the bond, therefore, remains in full force and effect during the entire examination, and the failure of the accused to appear at any time to which the examination is properly adjourned renders the sureties liable. People v. Gordon (1878) 39 Mich. 259.

But it was held in State v. Bobb (1890) 39 Mo. App. 543, that the sureties on a recognizance taken by a justice of the peace to bind the defendant to appear before him on a named day, and not to depart without leave, are discharged, where the defendant appears on such day, pleads not guilty, is examined, and the justice announces his finding, and thereafter the justice and the constable permit the defendant to leave the court room to secure bail for the circuit court, upon the ground that, by statute, the justice is only authorized to require a bond for the appearance of the defendant for examination, and a provision of the bond that the defendant shall not depart without leave, if interpreted to mean during the examination, does not add anything to the force of the bond, and, if taken to mean after the examination, is not authorized by the statute, and should be rejected as surplusage.

As to effect of commencement of trial, see *infra*, XI.

IV. Failure to indict.

Liability of bail is not terminated by the failure to find an indictment against the principal, where the case is continued for resubmission to the grand jury.

Thus, the simple fact that no indictment or presentment has been found against the defendant will not, per se, discharge his sureties, as there may be cases that will require the principal still to be held to answer to the charge, although no bill has been found against him. State v. Cooper (1879) 2 Blackf. (Ind.) 226. The court, however, said in this case that if the defendant appeared, and no indictment or presentment had been found against him, and no legal reason was given why he should be longer held to answer to the charge, the

court might discharge him and his bail from their recognizance.

The sureties are liable where the defendant fails to appear on the day named in the bond, the first day of the term, although no indictment be found against him. *Adair v. State* (1822) 1 Blackf. (Ind.) 200.

Liability of the sureties is not terminated by the failure of the grand jury to find an indictment against the defendant at the term to which he is bound over, where the court orders the charges against the defendant to be continued for investigation by the grand jury; but the liability of the sureties continues from term to term, until the defendant is discharged by law. *State v. Fuller* (1900) 128 Ala. 45, 30 So. 506.

And it was held in *Pack v. State* (1861) 23 Ark. 235, that the failure to find an indictment against the defendant does not terminate the liability of his sureties to produce him at the term of the court specified in the bail bond, and that the bond cannot be discharged in any other way than by the direct order of the court. In this case the court said: "The recognizers are not concerned in the question of there being an indictment against their principal, or in his guilt or innocence of any charge. If there should be no indictment, it might be a good reason for the court to order his discharge, or if he were innocent, or could make a good legal defense to an indictment, that might procure his acquittal and consequent discharge; but these and kindred reasons are no cause for the absence of the principal, are no defense to his securities for not compelling his attendance. *State v. Stout* (1829) 11 N. J. L. 133; *Archer v. Com.* (1854) 10 Gratt. (Va.) 633. The condition of the recognizance, as set forth in the scire facias, was not only to appear and answer to the charge specified, but not to depart from the court without leave thereof. The meaning of that clause is to detain the party to answer charges that may be made against him, other than the particular one mentioned in the recognizance. The law contemplates that the particular charge may not be

sustained—that it may not be the one that he will be called to defend, but that out of the transaction some other charge may spring up for which his presence will be needed, or that, for some good reason, he ought to be subject to the action of the court, upon other grounds than the main specification, and hence this precautionary clause is inserted."

Under a bail bond containing a stipulation by the defendant not only to appear, but also to "appear from day to day and term to term of said court, and not depart the same without leave," it is his duty, upon appearing at the proper time, to remain in attendance until given leave to depart, and the fact that no indictment or information is filed against him does not make the liability of his sureties terminate with his appearance. *West v. State* (1918) 75 Fla. 342, 78 So. 275.

And the sureties on a bond conditioned for the appearance of the defendant at the next term, and from term to term until discharged by law, are liable upon defendant's failure to appear at the next term, and they are not discharged by the failure to find an indictment against him at such term, where the case is regularly entered on the docket and continued, and no order is made discharging them from their undertaking. *State v. Kyle* (1892) 99 Ala. 256, 13 So. 538. In this case, however, the court said: "It may be that if there had been no order made in reference to the bond, such as calling the principal obligor and declaring a forfeiture upon his failure to appear, or docketing the case against them and continuing it for future action, such omission might have worked a discontinuance of the case, which would have authorized the discharge of the obligors. But the action of the court, as shown by the agreed facts, clearly shows that the state had not discontinued the prosecution, and had made no order discharging the bail."

By a bond for the appearance of the principal on the first day of the next term, and from day to day thereafter until discharged by the court, and to

abide the order of the court, and not to depart without leave, the sureties bind themselves, by becoming his bail, that the principal shall perform these several acts, and the failure of the principal to appear at the term to which he has bound himself to appear is ground for the forfeiture of the bond, although no indictment be presented to the grand jury. *Garrison v. People* (1859) 21 Ill. 535.

And the fact that the grand jury returns "No true bill," where the case is continued, and again submitted to a grand jury, does not work a discharge of the defendant in the absence of a formal discharge by the court; and his failure subsequently to appear, when called in open court, renders liable the sureties on his bail bond, conditioned for his appearance, and to abide the order of the court and not depart without leave. *Com. v. Harvey* (1908) 36 Pa. Super. Ct. 235.

But the liability of the sureties on a bond for the appearance of the defendant at the next term, and from term to term until discharged by law, is terminated where no indictment is found at such term, and no order is made continuing the case, although no order discharging the sureties is asked for, or made, and they are not liable for his nonappearance to answer an indictment found at a subsequent term. *Rogers v. State* (1885), 79 Ala. 59. The court said: "The practice on this subject was settled in the case of *Goodwin v. Governor* (1832) 1 Stew. & P. (Ala.) 465, which was decided as early as the year 1832, and has never been since overruled. It was there held that when a party was recognized to appear at a particular term of the circuit court to answer for an offense with which he was charged, and the grand jury failed to find an indictment against him, and the cause was not continued for further investigation, this operated as a discontinuance, and discharged the accused; in the absence, at least, of any forfeiture being taken for sufficient reasons at such term of the court. There are cases in other states which hold that the accused is not discharged until the court enters of

record an order of exoneration to this effect. But we see no harm to ensue from adhering to the rule settled in *Goodwin's Case* (Ala.) supra. If the accused is not called at the term of the court at which he was to appear by the express stipulation of his bond, and no indictment is found against him by reason of the grand jury's ignoring the bill, and the circuit court makes no order authorizing a continuance of the investigation at the ensuing term, the sureties have a right to believe that they are discharged from the obligation of their undertaking. If one term of the court can be passed without action by the grand jury, or the court, why not another? And, if more than one, when are the sureties to know that the legal custody of the accused, with the power to arrest and deliver him into the hands of the sheriff, has ceased, or been abrogated? The safer practice, perhaps, to prevent misunderstanding, is for the court to have the accused discharged by proclamation, and by entering of record an exoneration; though this course is not deemed necessary, nor is it believed to be customary in this state. But, where it is desired to authorize a continuance of the investigation by the grand jurors, the court, in order to hold the sureties, should make an order to this effect, showing a refusal to discharge the principal."

Where an indictment signed by the attorney for the commonwealth is returned into court by the grand jury, indorsed with the word "Ignored," and no order is made by the court directing a resubmission of the case to the grand jury, the liability of the sureties is terminated, although the defendant is not discharged, and they are not responsible for his subsequent appearance. *Bryant v. Com.* (1867) 3 Bush (Ky.) 9. The court said that the failure of the judge, as required by statute, to discharge the defendant, unless he was of the opinion that the charge should again be submitted to another grand jury, should not be allowed to prejudice the sureties.

And in *Com. v. Blincoe* (1867) 3 Bush (Ky.) 12, it was held that where, at the appearance term, the grand jury

ignored the successive indictments presented to them by the prosecuting attorney, and no further prosecution of the charge against defendant was attempted, or was either indicated or probable, the sureties were not liable for the defendant's failure to appear on a subsequent day, the court saying: "When the grand jury refused to find any indictment, the principal cognizor and his sureties had a right to presume that the prosecution was ended, and that his formal appearance afterwards would be an idle and unnecessary act."

The sureties on the appearance bond of one committed on a felonious charge are entitled to be released from their bond by the discharge of the grand jury at the first term of court after the execution of the bond, without finding a true bill. *State v. Doane* (1878) 30 La. Ann. 1194. In this case the court said: "The state opposed their discharge for the reason that, although the grand jury had not found a true bill against Doane at that term, non constat that a subsequent grand jury would not find such a bill at some subsequent term, and, the crime being imprescriptible, Doane was liable always to an indictment. The state also contended that the sureties must be held bound until the grand jury had acted on the charge, and returned 'Not a true bill.' If the sureties to a bond of this kind must be held bound until a second term of the court is held, and a second grand jury has been impaneled and discharged, they may be held until any subsequent term of court, or forever. They were entitled to a discharge from the appearance bond after the discharge of the grand jury at the first term after the execution of the bond, without finding a true bill. The failure of the grand jury to indict the accused does not, of itself, relieve him of liability to a future prosecution. That can only be done by the jury acting on the charge, and returning 'Not a true bill.' But that is not the question here, but solely whether the sureties to his appearance bond should be released by a judgment of court under

the facts shown. We think they were properly released from their bond."

And in upholding a forfeiture of a recognizance upon the failure of the defendant to appear on the day named therein, as against the objection that no indictment was subsequently found against the defendant, the court, in *Fleece v. State* (1865) 25 Ind. 384, said: "If he had appeared as required by his recognizance, the court, after the grand jury was discharged without having found an indictment against him for the offense charged, would doubtless have discharged him and his sureties from the recognizance, unless some proper reason existed why such discharge should not be entered; and until then it was the duty of the accused to be in attendance on the court."

V. Vacation or destruction of indictment.

a. In general.

As appears from the cases under this subdivision, while there is some conflict of authority, the weight of authority is to the effect that the vacation of the indictment terminates the liability of bail, but its loss or destruction is held, without contradiction, not to do so.

b. Vacation on motion of state.

1. In general.

The vacation, on the motion of the district attorney, of a valid indictment, terminates the liability of the sureties on the bail bond of the person indicted. *Hyde v. Cross* (1894) 25 Or. 543, 37 Pac. 59. The court gave the following reasons for its decision: "The judgment appealed from rests upon the power of a court, on motion of the state, to set aside a valid indictment upon which the defendant has been admitted to bail, resubmit the case to the grand jury, and hold the bail liable for the appearance of defendant to answer a new indictment, if one be found. The only provision of law making bail liable for the appearance of a defendant to answer a new indictment is to be found in §§ 1317 and 1328 of Hill's Code, which provides that when the original indictment is set aside on motion of the de-

fendant, for any of the reasons specified in § 1314, or a demurrer thereto is sustained, the court may order that the case be resubmitted to the same or another grand jury, and in such case the bail remains answerable for the appearance of the defendant to answer a new indictment, if one be found. But in this case no motion or demurrer was interposed by the defendant. The indictment was set aside by the court, on motion of the district attorney. Indeed, the record does not show that there was any defect in the indictment which could have been taken advantage of by a motion or demurrer on the part of the defendant, or that it was resubmitted to the grand jury for the purpose of correcting some formal defect, but presumably it was resubmitted so that the state might change a material allegation, and thereby relieve itself from some possible embarrassment in being compelled to prove that the animal stolen was a gelding, as charged in the first indictment. The act of the court in thus resubmitting the matter to the grand jury at the instance of the state, in our opinion, amounted to a dismissal of the indictment specified in the bail bond, and clearly operated as a discharge of the sureties. By their undertaking the sureties covenanted with the state that the defendant should appear and answer an indictment therein stated; and when he did appear in fulfilment of that undertaking, and the indictment was set aside or dismissed on motion of the district attorney, it was, in effect, a discharge of the recognizance and the exoneration of his bail. The agreement or contract of the sureties was that the defendant should answer a particular charge as specified in the indictment then pending against him, and the condition that the defendant would appear to answer said indictment, 'and at all times render himself amenable to the orders and processes of the court,' was fulfilled and satisfied by an appearance and a dismissal of the particular indictment mentioned and described in the undertaking, and cannot be construed into an obligation that the accused should appear and

answer some other indictment which might be found against him. What the rule may be in the case of an undertaking for the appearance of a defendant before indictment, or when the indictment is resubmitted to a grand jury for the purpose of correcting some formal defect therein, it will be time enough for us to consider when the question is presented; but no such question is made on this record."

The filing away of the indictment, on the motion of the commonwealth's attorney, subject to another indictment in the same case, releases the surety in the bail bond, and the surety is not liable for the failure of the defendant to appear at a subsequent term, since, the indictment being filed away, there is no prosecution pending in law at such term. *Hall v. Com.* (1895) 17 Ky. L. Rep. 231, 30 S. W. 877.

And an order of the court, upon the motion of the attorney for the commonwealth, that the defendant be discharged without day, until the case is set for trial by the clerk after notice to defendant, which has the effect of filing away the indictment with leave to reinstate, releases the sureties, and they are not liable upon the failure of the defendant to appear at a future day set by the clerk, especially where the defendant is not personally notified, notice being given only to his attorneys. *Miller v. Com.* (1921) 192 Ky. 709, 234 S. W. 307.

And the vacation of the indictment upon the motion of the prosecuting officer, and in the presence of the accused while there to answer, is a discharge of the obligation, releasing the surety and authorizing the prisoner's departure from court without any special permission or order therefrom. *People v. Felton* (1860) 36 Barb. (N. Y.) 429. The court discussed this point as follows: "The condition of the undertaking was that the accused should appear at a time and place specified, to answer an indictment therein stated; and when the accused appeared in fulfilment of that undertaking, and that indictment was quashed in open court in his presence, on motion of the district attorney, it

was a discharge of the recognizance, and a permission for the prisoner to depart. An acquittal of such indictment, on trial, would most certainly operate as a discharge of the recognizance, and no special leave for the prisoner to depart would need be asked of the court, in order to release the surety from his obligation; and this would be so even though the undertaking, as in this case, contained the clause that the accused should not depart the court without leave, etc. In a recognizance to answer an indictment, that clause has no force, beyond answering the particular charge named (*People v. Stager* (1833) 10 Wend. (N. Y.) 434); while in a matter before indictment it has force, and is important, to detain the accused until the court shall know what charges are to be brought against him, and in order that the prosecuting officer may have the same control over him, for all offenses brought against him, as the prosecutor would, had the accused remained in the custody of the sheriff. In the one case the recognizance is to answer a particular charge; in the other it is to answer what may be alleged against him before the grand jury. In this case the grand jury had investigated the complaint, presented their finding in the form of an indictment, the prisoner had been arraigned, the charges read to him, and he had pleaded thereto, thus forming an issue which was placed upon the record for the court to try; and a recognizance that the 'prisoner should appear and stand trial upon that indictment, and not depart the court without leave, but abide its order and decision,' was satisfied by an appearance and discharge of the indictment, and cannot be converted into an obligation that the accused should remain to see if any other indictment was to be found, unless formally discharged by the court. The surety, at least, assumed no such responsibility; as to him the obligation was single in its purpose, and fully satisfied when the indictment was discharged."

2. Nolle prosequi.

The entry by the district attorney

of a *nolle prosequi* terminates the liability of the sureties on a bond for the appearance of the defendant. *State v. Bugg* (1843) 6 Rob. (La.) 63.

A *nolle prosequi* is a termination of the case, so as to discharge the sureties, and the force of the bond does not continue so as to render the sureties liable for the defendant's failure to appear and answer a new bill for the same offense. *Lamp v. Smith* (1876) 56 Ga. 589. In this case the court said: "When the first bill was *nol. pros'd* that case was terminated, and with it ended all incidents to it, including any bond connected with it. The security on any such bond was relieved at that moment, as much as he would have been by the verdict of a jury. The new bill was a new case, for which and upon which a new recognizance should have been taken with new security—Camp, or someone else. The solicitor, before he *nol. pros'd* the old bill, could have held Camp bound to cause defendant to answer and appear, but the moment he *nol. pros'd* it, he lost his power over Camp. Before he *nol. pros'd* that bill and got the new one, he should have called the defendant and bound him over again. If the defendant had not appeared, Camp would have been liable then, because the case was pending on which he was surety, but when that case was *nol. pros'd* Camp was released."

But the entry of a *nolle prosequi* does not terminate the liability of the surety on a bond conditioned that the defendant shall personally appear, and abide the final determination of the case. *State v. Haskett* (1835) 21 S. C. L. (3 Hill) 95.

Nor does such entry terminate the liability of the sureties on a bail bond for the appearance of the defendant, which provides that he will not depart from the court without leave. *Silvers v. State* (1896) 59 N. J. L. 428, 37 Atl. 133. This point is discussed by the court as follows: "In the brief of counsel, the problem is thus formulated: 'The entry of a *nolle prosequi* by the order of the court, on motion of the prosecutor, is a discharge of the bail.' But this

court is of opinion that this contention is a manifest fallacy. In order to sustain the proposition, it would be necessary to suppress an important and clearly expressed stipulation in the recognizance itself. As appears from the pleading in the case, this instrument now in question is in the proper and customary form, and imposes a twofold objection—that is to say, that the defendant in the indictment will first appear and stand to and abide 'the order and judgment of the court in the premises, and, in the second place, will not depart the said court without leave.' In the present instance, this latter stipulation was admittedly violated, as there is no pretense that the withdrawal of the defendant from the court had been judicially sanctioned. And it is also to be noted that this engagement that the defendant will not depart the court without leave is not merely ancillary to the promise that he will abide the judgment of the court, but it is an additional and independent term of the contract. In its absence, our criminal procedure would be radically imperfect. It is intended to provide, and does provide, for the occasion when a particular form of prosecution may be terminated, but when, in another mode, the prosecution is to be continued. In the case before the court, a nolle prosequi was entered, the effect of which was, if it remained in force, to vacate and annul the then-existing indictment; but it did not conclude the prosecution for the offense, for another indictment could have been found. And if, in that condition of things, the prosecutor had stated to the court that the state intended to present the matter to the next grand jury, it is obvious that the court, if applied to, would not have ordered an exoneration to have been entered on the bailpiece. The importance, therefore, of the requisition that the defendant in the prosecution cannot be discharged until he has obtained formal judicial consent to such result, is plainly apparent. In the present instance, there is much reason to believe that, if the motion had been made to

discharge the prisoner on the ground that a nolle prosequi had occurred, such motion would have been rejected, inasmuch as the rule for judgment on the abandonment of the existing procedure was ordered to be erased from the minutes, the implication being that the entry had been made by mistake, or without authority. If this were a case in which a judgment putting an end absolutely to the prosecution for the offense, such as would ensue in a verdict of acquittal or conviction, an entirely different question from that we are now considering would have been presented; for, in view of such a final determination, the stipulation not to depart from the court without leave would have been bereft of all substantial force. What the effect of such a course of law would be it is not necessary to consider. All that the court at present decides is that the cessation of the criminal proceeding in a certain form, leaving a potentiality of its further prosecution in a different method, does not, ipso facto, discharge the defendant from the obligation of his recognizance."

And the surety on a bail bond is not released by the fact that a nolle prosequi was entered, on the motion of the district attorney, because of irregularity in finding the indictment, and the surety is bound for the appearance of the defendant to answer to another indictment returned in lieu of the bad indictment. *State v. Brooks* (1896) 48 La. Ann. 855, 19 So. 739. In this case the court said: "The question for our decision is whether the surety is bound by recognizance that an accused shall appear to answer to a particular indictment against him, after the district attorney enters a nolle prosequi as to that indictment, and the grand jury brings in another for the same offense? In our view, if the defendant fails to appear to answer to the second indictment, the recognizance is forfeited. The defendant, having been held to bail, is deemed to be in custody of the court (as if imprisoned) to answer for the charge against him. The indictment may be

bad, and yet he may be held to answer to the charge as set forth in another indictment. We are of opinion that the district court correctly held that the bond had been forfeited. The provisions of the bond were not only to appear, but also not to depart without leave in matter of the crime charged."

c. Vacation on motion of defendant.

1. In general.

The liability of the bail is terminated where, in accordance with a bond providing that the defendant shall appear at a stated time, and not depart without leave, he appears, and demurs generally to the indictment, in which demurrer the state joins, and the court adjudges that the defendant be dismissed and discharged of the indictment, and that he go thereof without day, although from such judgment the state sues out a writ of error, and the judgment is reversed, and the state adjudged to be restored to all things which, by reason of such judgment, it has lost, and the cause is remanded to the lower court with directions to proceed in the prosecution thereof, and to a trial thereof, in the same manner as if no judgment had taken place, or any writ of error had been prosecuted. *State v. Murphy* (1839) 10 Gill & J. (Md.) 365.

But the condition in a bond that the principal shall appear before the district court to answer a charge is not fulfilled by his appearing for arraignment, and moving to set aside the indictment, demurring, or pleading thereto, but he must stay until the case is disposed of, and he is discharged by the court. *Shriver v. State* (1912) 32 Okla. 507, 122 Pac. 160.

And the sureties on a bond conditioned, as required by statute, that the defendant shall appear and answer the charge, are not discharged by the sustaining of a demurrer to the information because of its failure to state some of the statutory elements of the offense, where the court, on sustaining the demurrer, allows the filing of an amended information, but the bail

bond attaches to the amended information. *State v. Warden* (1922) — Wash. —, 205 Pac. 372.

And where the defendant appeared and pleaded "not guilty," but, before a jury had been impaneled, moved to set aside the indictment, and the court sustained the motion, and ordered that the charge against the defendant be submitted to another grand jury, and that the defendant be permitted to stand upon his bail bond, and another indictment was returned against him, but he failed to appear, the liability of the sureties is not discharged by his former appearance and the order of the court permitting him to stand on his bail bond. *Brewer v. Com.* (1858) 3 Bush (Ky.) 550. The court said: "According to § 160 of the Criminal Code, the liability of the appellants would not have been affected by setting the indictment aside and resubmitting the case to the grand jury, if no order had been made allowing Brewer to stand on his bond. The order, therefore, allowing what the law permitted without it, in the absence of any other order or direction of the court, and which did not impair the rights of the bail to release or indemnify themselves in any of the modes prescribed by law, did not, in our opinion, discharge them from liability."

2. Quashal.

A recognizance is discharged, and becomes *functus officio*, by the quashing of the indictment to answer which the defendant is bound by the recognizance to appear, and the liability of his sureties is thereby terminated, although no formal entry discharging the bail is entered. *McKensie v. Missouri P. R. Co.* (1887) 24 Mo. App. 392.

And where the court, upon quashing the information, directs the matter to be again submitted to the committing magistrate, and the prosecuting attorney files another complaint, the sureties are not liable for the failure of defendant to appear to answer such new complaint. *State v. McLeod* (1918) 31 Idaho, 536, 173 Pac. 496. By the bond in this case

the sureties undertook that the defendant would appear and answer the charge mentioned in the bond, and would at all times hold himself amenable to the orders and process of the court, and, if convicted, would appear for judgment and render himself in execution thereof.

The liability of the sureties is terminated by the quashing of the indictment, and the discharge of the defendant, the bail bond being thereby canceled and becoming inoperative and void; and the filing of an affidavit and information against the defendant on the same charge, during the same term of court, does not rehabilitate and make effective the bond, since the filing of the affidavit and information is the commencement of a new action, requiring the rearrest of the accused. *State v. Clerk* (1896) 16 Ind. App. 137, 44 N. E. 813.

And a subsequent reversal of the judgment, quashing the indictment upon demurrer and discharging the defendant, does not revive the sureties' liability. *State use of Independence County v. Glenn* (1883) 40 Ark. 332. In this case the court said: "The test of the continuing obligation of the bail is this: After the entry of the order quashing the indictment and dismissing Watts without day, had his bail the right to rearrest him and surrender him into the custody of the law? For bail hold their principal always in a string, and may at any time exonerate themselves by giving him up. And whatever deprives them of the right to surrender him discharges them. Now it is plain to our minds that, after the final judgment in the circuit court, his sureties had no further control over the person of Watts. And the reversal of that judgment did not revive their right to arrest him, nor, consequently, their obligation to produce him in court."

And in *State v. Buis* (1912) 86 Kan. 562, 121 Pac. 365, holding the same, where the recognizance provided that the defendant should appear at the next term of the court to answer the charge in the information against him, and abide the judgment of the

court, and not depart without leave. the state submitted the question whether the language of the bond did not require the defendant to abide the final judgment after it had been reversed by the appellate court, but the court answered this question in the negative.

But a recognizance to attend from day to day to answer to the charge, and not depart without leave of the court, was held not discharged by the quashing of the indictment, in *United States v. White* (1837) 5 Cranch, C. C. 368, Fed. Cas. No. 16,678.

And in *State v. Hancock* (1892) 54 N. J. L. 393, 24 Atl. 726, likewise holding that the liability of the sureties on a bail bond for the appearance of the defendant, and providing that he shall not depart from the court without leave, is not terminated by the quashing of the indictment, the court discussed this point as follows: "In order to understand this argument the circumstances are to be borne in mind. One Bush, being under an indictment for a statutory offense, entered into the recognizance now under consideration, with the defendant, Hancock, as his surety, the same containing a condition 'for the appearance' of the culprit 'to answer said indictment on November 18, 1890, and not to depart the court without leave.' Before the day thus designated this indictment was quashed, and a motion was thereupon made to discharge Bush's bail. That motion was refused. Subsequently, Bush having been again indicted under the same statute in a different form, notice was given to his surety to produce him before the court on a given day, and, default being made at the time specified, the recognizance was duly forfeited of record. From this brief summary of the facts it will be observed that the position now taken in behalf of this defendant is that one of the express stipulations of the obligation entered into by him should be held by the court to be of no binding force whatever. He stipulated that Bush should 'not depart the court without leave.' That stipulation has been broken, and it

is now asserted that such breach is nugatory, inasmuch as the stipulation itself has no legal efficacy. That a stipulation of this kind was valid and obligatory at common law is not to be doubted. . . . But there is another aspect of it which has laid the ground for the principal argument in behalf of the defense. It is argued that our statute relating to recognizances has annulled the condition usually contained in them, to the effect that the culprit shall not depart the court without leave. The statutory language thus relied on is this: "That every recognizance entered into, before any court having criminal jurisdiction in this state, shall remain in full force and effect until the cause in which said recognizance shall be entered into shall be finally determined or the same discharged by the order of the court." In the application of this statute to the case before the court, it was insisted by the counsel of the defendant that, the present recognizance having been given in a proceeding under the indictment in question, when that indictment was quashed there was within the purview of the act a final determination of the cause to which the recognizance related. It was argued that the only cause pending before the court was the indictment, and that to annul it was to annul, and consequently to determine, such cause. It will be observed that in this course of reasoning it is assumed that the indictment is synonymous with 'the cause,' but this is not to be admitted. The indictment is not 'the cause;' the accusation of criminality is the cause, and the indictment is an incident in pursuing the accusation. It is true that the term 'cause' sometimes expresses a suit or action, but it has a broader signification which comprises the prosecution of a purpose or object, and it seems to me that the word 'cause,' in this act, is used in the sense expressed by the word 'prosecution.' Taken in this signification, the cause cannot be said to be finally determined when the indictment is quashed, for the in-

dictment is but a formal part of the prosecution. All rational intendment is adverse to the narrower and special meaning of the word 'cause,' as employed in the statute, for it is hardly conceivable that it was the legislative purpose to absolve a criminal who was under bail from all obligation to render himself in court in the event of the existence of a flaw in the indictment. In that way criminals of the highest grade and of the most dangerous character would often escape the pursuit of justice. In my opinion, the quashing of this indictment did not finally determine the cause—that is, the prosecution of this culprit."

The liability of the sureties is not terminated by the quashing of the indictment upon a general demurrer where, by the order of the court, the case is again referred to the grand jury and the defendant released upon the bail bond already given, but the sureties are liable for the appearance of their principal, upon his subsequent indictment for an offense of a higher grade, which includes the offense described in the bail bond, or which grows out of the same act or transaction. *Hortsell v. State* (1885) 45 Ark. 59. In this case the defendant was indicted for disturbing the peace and for an assault and battery, in the first indictment, and for an aggravated assault in the second indictment, and the court said: "The appellants urged that they did not undertake by their bond to answer for the appearance of their principal upon the charge of aggravated assault. Their bond was in the common statutory form. It was conditioned that Thompson should appear and answer the charge of disturbing the peace, and that he should at all times render himself amenable to the orders and process of the court in the prosecution of the charge. One of the contingencies provided for by the statute when the bond was executed was an order quashing the indictment and holding the defendant to answer another charge, and it is also provided that, in case such order is made when the accused is on bail,

his sureties shall answer for his re-appearance. Mansfield's Rev. Stat. 2158, 2169. These provisions were a part of the appellants' obligation. *White v. Prigmore* (1874) 29 Ark. 208. The precautionary clause that the defendant shall render himself amenable to the orders of the court was inserted to guard such a contingency."

d. Destruction.

Liability of the sureties is not terminated by the loss or destruction of the indictment, as, for example, by the burning of the courthouse, and if a new indictment is found against the defendant for the same offense, they are bound for his appearance to answer such new indictment, since they, in legal effect, undertook that the defendant should appear from day to day and from term to term, until legally discharged, the bond being conditioned that he appear from day to day and from term to term, and render himself, at all times, amenable to the orders and process of the court in the prosecution of the charge. *Price v. State* (1883) 42 Ark. 178.

And in *People v. Dennis* (1857) 4 Mich. 609, 69 Am. Dec. 338, where, prior to the term of the court at which the defendant was to appear, the indictment against him was similarly destroyed by the burning of the office of the clerk of the court in which it was on file, it was held that such destruction of the indictment was no defense to an action on a recognizance conditioned that he should appear at a specified term of the court to answer the indictment, and then to abide the order of the court, upon the ground that, until discharged by the order of the court, he must appear to answer to any other indictment that might be found against him for the offense.

VI. Appearance at time named.

The appearance of the defendant before the court at the time specified in the bail bond for him to appear to answer the charge against him does not, generally, as shown by the cases under this heading, terminate the li-

ability of his sureties. It will be observed that this is also held as assumed in cases cited under other headings, which deal with the effect of steps or events subsequent to appearance.

There can be no question but that the liability of the sureties is not terminated before the appearance of the defendant, and that the recognizance may be forfeited for the defendant's failure to appear for trial. *United States v. Fidelity & C. Co.* (1919) 169 C. C. A. 460, 258 Fed. 444.

The surety in a recognizance providing that the defendant shall appear and answer what shall be objected against him is not discharged by the defendant appearing, and being ready to answer, and the defendant is not at liberty to depart after making his appearance in court, but he must remain until duly discharged. *People v. Stager* (1833) 10 Wend. (N. Y.) 431.

The obligation of a recognizance is not fully discharged by the appearance of the defendant at the time named, where a further condition of the bond requires him to abide the judgment of the court; and when, therefore, the defendant fails to respond to an order of the court requiring him to enter into a new recognizance for his appearance before another justice of the peace, his sureties are liable. *Fowler v. State* (1883) 91 Ind. 507.

The liability of the surety on a bail bond conditioned that the accused will appear on a specified date, and will, at all times, render himself amenable to the orders and process of the court, does not terminate with his appearance on the day named, and the surety is liable if the accused fails to deliver himself into custody, upon the order of the court, on the following day. *Lawrence v. Com.* (1903) 25 Ky. L. Rep. 455, 76 S. W. 10.

The sureties, by producing the defendant in court at the time the trial is ordered to proceed, are not discharged from liability upon a bail bond containing, among other conditions, the condition that the defendant shall not depart from the court without leave, and they are liable, where the defendant appeared with his coun-

sel on the day of the trial, but, before the trial commenced, left the court without leave. *People v. Petry* (1858) 2 Hilt. (N. Y.) 523.

But where the defendant appears on the day named in the bond, and pleads to an indictment for a felony, and is thereupon put upon trial, and, by order of the court, is placed in the custody of the sheriff during the progress of the trial, but, after the jury have retired and are considering their verdict, escapes, and fails to appear for judgment upon the verdict, his sureties are not liable for his escape. *Com. v. Coleman* (1859) 2 Met. (Ky.) 382. The court said, however, that the mere appearance of the defendant in discharge of his recognizance, without an order of the court placing him in the custody of the sheriff, would not terminate the liability of the sureties. In explaining the reasons for its holding in this case, the court said: "Section 77 of the Criminal Code provides that the bail bond shall contain substantially the following covenants: (1) That the party in custody and about to be admitted to bail 'shall appear in the ——— court, on the ——— day of its ——— term, to answer the charge against him;' (2) that he shall, at all times, render himself amenable to the orders and process of said court; and (3) if convicted, shall render himself in execution thereof. Now it must be borne in mind that this form was provided for all cases in which a party charged with a public offense can be held to bail—for misdemeanors of the lowest, as well as felonies of the highest, bailable grade. It must be remembered, also, that the Criminal Code (§ 69) provides that, 'during the trial of an indictment for felony, the defendant shall be kept in custody; but, for misdemeanors, may remain on bail during trial.' The propriety, as well as necessity, of the undertakings of the bail that the party accused shall not only appear, but render himself amenable to the orders and process of the court, and, if convicted, surrender himself in execution of the judgment, in cases of mere misdemeanor, is obvious. In such cases, after appearance, he is, or may be al-

lowed, to stand upon his bail, and, without the stipulations referred to, might escape with impunity and without subjecting his bail to any responsibility whatever. With the stipulations, however, their liability continues until the case is disposed of and the defendant surrenders himself in execution of the judgment; and, though not in custody of the court, he is subject to their control, and may be at any moment, by them, or their order, arrested and surrendered to the court. Being thus answerable for him, they have the power to control his movements, and it is their duty to see that he complies with the undertakings of his bond. Suppose, however, that on a trial for misdemeanor the court should, as it may do, refuse to allow the accused to stand on his bail, and, by an order to that effect, place him in the keeping of the sheriff or jailer, and whilst thus in his custody, and necessarily beyond the control of the bail, he should escape—would it be insisted that the bail should be held liable? This, however, was an indictment for felony, and upon the trial, in such cases, the law requires that the defendant shall be kept in actual custody. The circuit court, in discharge of its duty, made an order placing the prisoner in the actual custody of the sheriff, and whilst thus in the sheriff's keeping, and before the return of the verdict, he escaped. Can it, with propriety, be contended that the bail should answer for him, after he is taken by law from their control? We think not. When the court took charge of the accused and placed him in the custody of its own officer, the power of the bail over him ceased. They had no longer any control over him, and, having been deprived thereof by the act of the court, they were no longer answerable for his appearance for any purpose whatever. Such has been the law for time immemorial (*Bacon, Abr.* title "Bail"), and we cannot believe that the authors of the Criminal Code intended to change it. The case of *Com. v. Ray* (MS. opinion, June, 1859) differs materially from this. In that case there was simply an appearance

of the defendant in discharge of his recognizance, and no order taking or placing him in custody of the officer of the court. He was still under the control of his sureties, and they were, therefore, liable for his not remaining until disposed of by the court. The fact that he appeared in discharge of his recognizance, without an order of court taking charge and control of him, did not relieve them."

But it was held in *Askins v. Com.* (1864) 1 Duv. (Ky.) 275, contrary to the dictum in the preceding case, that the appearance of the defendant to answer an indictment for felony terminated the liability of his sureties, although there was no order of the court placing him in the custody of the sheriff, upon his being put upon trial, and that, if he escaped during the progress of the trial, his bail were not liable. The court said: "Is *Askins* liable for the escape? In the case of *Com. v. Coleman* it was said, upon the authority of a manuscript opinion (*Com. v. Ray*) therein cited, that the fact that the defendant in a felony case appears in discharge of the recognizance, without an order of court taking charge and control of him, does not relieve the bail. 2 Met. (Ky.) 386. But that is a dictum, and, in our opinion, is not supported by the decision in the case of *Com. v. Ray*. In that case there was no trial of the defendant at the appearance term, and, in the absence of an order taking him from the custody of the bail, the bail remained bound that he should again appear and answer the indictment. There was no evidence or reason for a presumption that such an order had been made. But, in the case under consideration, *Farris*, after appearing, was put upon trial. The Criminal Code declares that, 'during the trial of an indictment for felony, the defendant shall be kept in actual custody; but for misdemeanor, may remain on bail during trial' § 69. Any attempt by *Askins* to control the prisoner during the trial would have been illegal. It was the duty of the officers of the court to keep him in their custody. If an order of court was necessary for that purpose, as it was the duty of the

20 A.L.R.—39.

court to make the order, we must presume that it was made in the absence of a bill of exceptions showing the contrary. Our opinion, therefore, is that the appearance of *Farris*, and putting him upon trial, discharged the bail. For obvious reasons, a different rule would apply to misdemeanor cases."

VII. Failure to hold term at which defendant bound to appear.

Liability of bail is not terminated by the failure of the court, for any reason, to hold the term at which the accused is required by the bond or recognizance to appear.

Thus, sureties on a bond for the appearance of the defendant at the next term of court, and providing that he shall not depart without leave, are not discharged from liability by the failure of the court to hold such term by reason of the illness of the judge, and the defendant is required to appear at the next term to which the court is adjourned, and his failure to appear at a subsequently held special term renders his sureties liable. *State v. Horton* (1898) 123 N. C. 695, 31 S. E. 218. This case was based upon statutory provisions which, by operation of law, carried all matters over to the next regular term, and which also applied to special terms.

And it was held in *Gentry v. State* (1861) 22 Ark. 544, that a recognizance, likewise conditioned, binds the defendant, where, for the same reason, the term named therein was not held, to appear at each succeeding term thereafter, until acquitted, or otherwise legally discharged, or, if found guilty, until sentence is passed on him, if not permitted to depart sooner by leave of the court, and that the liability of his sureties does not terminate until such time.

And in *State v. Brown* (1864) 16 Iowa, 314, holding that the liability of the sureties is not terminated by the failure to hold the term of the court at which the defendant is required to appear, the court said: "At common law the conditions of a recognizance of bail were that the accused should appear at the place of trial, and an-

swer the charge against him. 1 Chitty, Crim. Law, 108. The apparent conflict of authority cited by the respective counsel in this case grows out of the fact that each state has, by statute, provided the conditions of the recognizance of bail; and the cases cited simply define the extent of the obligation under the particular statute or practice involved. The conflict is, therefore, only seeming, not real. Under our statute (Rev. § 4968) the conditions of the bond are not only that the accused shall appear at the place of trial, and answer the charge against him, but also that he shall abide the orders and judgment of the court, and not depart without leave. The bond in this case follows the statute. A man's bail are the jailers of his own choosing, and they are bound to have him as much in the power of the court as he would be if in custody of the proper officer. If the trial of the accused is continued until the next term, it is the duty of the bail to have him at the place of trial at that time, without any order of the court therefor. . . . Under our statute the undertaking of bail is a continuing one, from which the obligors may be discharged by the surrender of the accused, as provided by statute, or by obtaining leave of court for the accused to depart."

Where the court fails to sit at the term at which the defendant is bound to appear, the bail bond continues to be operative and binding on the sureties for the appearance of the defendant at the succeeding term of the court. *Com. v. Branch* (1866) 1 Bush (Ky.) 59.

The liability of the sureties is not terminated by the failure of the court to hold the term at which the defendant is bound to appear, where the recognizance is continued by virtue of a statute providing that if from any cause the court shall not sit at any term, or shall not sit until all of the business of the term shall be disposed of and determined, all matters and causes pending in the court and undetermined shall stand continued until the next succeeding term. *Norfolk v. People* (1867) 43 Ill. 9.

And in *Bartling v. State* (1903) 67 Neb. 637, 93 N. W. 1047, affirmed on rehearing in (1903) 67 Neb. 643, 97 N. W. 443, where the failure to hold the term, and its adjournment to a future date, were due to the prevalence of smallpox in the county, the liability of the sureties was held to be extended to the time to which such term was adjourned, under a statute providing that no recognizance shall be rendered invalid by reason of there being a failure of the term, and, in case of an adjournment, persons recognized or bound to appear at the regular term which has failed shall be held bound, in like manner, to appear at the time so fixed, and their sureties shall be liable, in case of their nonappearance, in the same manner as though the term had been held at the regular time, and they had failed to make their appearance thereat.

A recognizance, though for the appearance of the defendant in a district court on a day certain, and not for his appearance from day to day or term to term, continues in force, where on such day there is a vacancy in the office of district judge for the district, until the first day of the next term after the filling of the vacancy, by virtue of the statutory provision that, "when the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor," and the failure of the defendant to appear on such day is ground for the forfeiture of the recognizance. *United States v. Murphy* (1897) 82 Fed. 893.

VIII. Appearance from term to term.

The bail continues liable for the appearance of the accused from term to term, when the bond or recognizance requires such appearance, and they, generally, though there is authority to the contrary, continue so liable, in the absence of such requirement, where the bond or recognizance provides that the accused shall abide the orders of the court, and not depart without

leave, or the case is continued, or the accused directed to appear subsequently by order of the court.

Thus, a recognizance binding the defendant to appear on the first day of each and every term of the court in which the cause is pending, and to which the cause may be continued, and not depart thence without leave of court, is not discharged by an appearance at the first term thereafter. *State v. Ritter* (1877) 3 Mo. App. 562.

And a bail bond requiring the defendant to appear before the court "instantly and from time to time thereafter to which the case may be continued" binds his sureties for his attendance from term to term, and, in the absence of an order of the court continuing the case, the continuance is by operation of law, and a judgment forfeiting the bond may be entered upon the defendant's nonappearance at any time when called until discharged. *United States v. Fletcher* (1922) 279 Fed. 160.

And a recognizance for the appearance of the defendant at the next term, and to abide the order of the court, and not depart therefrom without leave, requires him to appear from day to day during the term, and from term to term, and from day to day of each term, until the final sentence or order of the court, and the liability of the sureties continues during such time. *Gallagher v. People* (1878) 88 Ill. 339.

The sureties in a recognizance conditioned that the defendant shall appear at the next term of court and answer all matters that shall be objected against him, and abide the order of the court, and not depart without leave, are not discharged by the appearance of the defendant at the next term of the court after the recognizance was taken, but the defendant is bound to appear before the court at all times, until discharged. *Gildersleeve v. People* (1850) 10 Barb. (N. Y.) 35.

And it was held in *Stokes v. People* (1872) 63 Ill. 489, that the power to take a forfeiture of a recognizance was not limited to the term at which the accused had been recognized to ap-

pear, but that a forfeiture could be taken at the next or any succeeding term.

A continuance of the case continues the liability of the principal and sureties on the recognizance, and the rule is the same where the case stands continued by mere operation of law. *State v. Merrihew* (1877) 47 Iowa, 112, 29 Am. Rep. 464.

And the surety in a recognizance for the appearance of the defendant at a particular term will be liable, though no proceedings were had against the defendant at such term, where an order was made at that term continuing all cases not disposed of, and at the succeeding term the defendant failed to appear. *State v. Plazencia* (1844) 6 Rob. (La.) 417.

And such a recognizance binds the sureties therein for the accused's appearance at the succeeding term, although no action is taken or order made in the case at the term specified in the bond. *State v. Ryan* (1867) 23 Iowa, 406.

A recognizance conditioned that the defendant shall appear at a given term, and abide the order of the court, requires his appearance from time to time, and from term to term, so long as the proceeding in which he was charged is continued. *Gallagher v. People* (1879) 91 Ill. 591.

The sureties in a recognizance binding the defendant to appear at the next term, and not to depart without leave, are not relieved from liability by the appearance of the defendant at such term and the continuance of the case, and, where the defendant fails to appear at the subsequent term to which the case is continued, the sureties are liable. *State v. Smith* (1872) 66 N. C. 622.

And a bail bond similarly conditioned, is forfeited, where the case, on motion of the state, is continued, and the defendant fails to appear at the next term, since by such bond the defendant is bound to appear not only at the term mentioned in the bond, but at each succeeding term thereafter until acquitted or otherwise legally discharged, or, if found guilty, until sentence is passed on him, if not per-

mitted to depart sooner by leave of the court. *Moore v. State* (1873) 28 Ark. 480.

And the sureties in a bond conditioned that the accused shall appear at the next term of the court, and not depart without leave until discharged by due course of law, are not discharged by the continuance of the case to the next term following that at which the accused is bound by the bond to appear, since the condition of the bond requires the accused to appear from day to day, or from term to term, until discharged. *People v. Hanaw* (1895) 106 Mich. 421, 64 N. W. 328.

The liability of the sureties on a recognizance requiring the defendant to appear on a certain day before a city police justice, and not to depart without leave, is not terminated by the appearance of defendant on such day, but the recognizance requires him to remain subject to the order of the court until his trial takes place, or he is otherwise finally discharged, and where the hearing on the appearance day is continued to a later date, and the defendant fails to appear on such date, the sureties are liable. *St. Louis v. Young* (1911) 235 Mo. 44, 138 S. W. 5. The court held that the giving of this meaning to such a recognizance was required by a reasonable construction of the provision of the statute that "judgment for forfeiture shall not be prevented on account of any omission of recital or condition, so that it appears from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the surety undertook that the defendant should appear before a court or magistrate at a term or time specified for trial." The court distinguished the case of *State v. Mackey* (1874) 55 Mo. 51, set out *infra*, in this subdivision, upon the ground that it was passed before the enactment of this statute.

A recognizance conditioned that defendant shall appear at a named term,

and do what shall be enjoined by the court, and not depart without leave, may be extended to any subsequent term of the court by a continuance of the cause to such term, and if the defendant fails to appear at such subsequent term, his sureties are liable. *Knight v. State* (1912) 35 Okla. 375, 1. 1.1916F, 261, 130 Pac. 282.

And where, on the appearance of the defendant at the term named in such a bond, the cause is continued by order of the court until the succeeding term, the liability of the sureties continues until such time, and the failure of the defendant then to appear renders the sureties liable. *Wal-dron v. Harrison* (1863) 2 Or. 87.

The sureties in a bond conditioned that the defendant shall appear and answer the charge against him, and at all times render himself amenable to the orders and process of the court, and, if convicted, appear for judgment and render himself in execution thereof, are not relieved from liability until the defendant appears, and is discharged, or serves under the judgment of the court, and where he appears, and the case is adjourned, but he fails to appear on the adjourned date, the sureties are liable. *St. Lawrence County v. Goldberg* (1916) 175 App. Div. 88, 35 N. Y. Crim. Rep. 297, 161 N. Y. Supp. 641.

And a recognizance conditioned that the defendant shall appear at a named term to answer a charge of assault and battery, and do what shall be enjoined by the court, and not depart therefrom without leave, continues in force without any special order until the following term, where an indictment is returned at the previous term, and the recognizers are bound to produce their principal at the later term, and they are not relieved from liability by the omission to call out the recognizance at the earlier term. *Ellison v. State* (1845) 8 Ala. 273.

But the condition in a recognizance which binds the principal to appear at a particular term of the court, and does not contain the further condition, commonly incorporated in such a bond, that he appear from term to

term to abide the judgment of the court, and not depart without leave, does not extend his appearance from term to term, so as to make the sureties liable for the failure of the defendant to appear at a term, to which the case is continued, subsequent to that named in the bond. *Colquitt v. Smith* (1880) 65 Ga. 341.

And although a recognizance binds the defendant to appear before a justice of the peace on a named day, and from day to day thereafter until discharged by order of the court, the liability of the sureties terminates with the appearance of the accused on the day named, and his failure to appear on a subsequent day to which the case is adjourned does not constitute a ground for the forfeiture of the recognizance, where the justice is, by statute, only given authority to enter the accused's default upon his nonappearance at the time named in the recognizance. *Ogden v. People* (1871) 62 Ill. 63.

It was held in *Goodwin v. Governor* (1832) 1 Stew. & P. (Ala.) 465, that the liability of the sureties on a recognizance to keep the peace, requiring the defendant to appear at a certain term, terminates with such term, where the state fails to proceed at such term, and no indictment was found or continuance had at such term, and a forfeiture cannot be taken on the recognizance at a subsequent term. The court, on this point, said: "The uniform practice is, if the prosecutor appears, and on oath makes a satisfactory showing that his reasonable fears still continue, the defendant is rebound. But if the prosecutor fail to appear, or, appearing, fail to satisfy the court that there is good reason to continue the defendant under recognizance, he is discharged. In this case, it does not appear that the prosecutor appeared at the first term, or that the defendant was ever called. But at the second term after the date of the recognizance, the security is called upon to bring in the defendant, and failing to do so, a forfeiture is rendered against him. This is clearly error, as there did not then appear to be any pro-

ceeding against him." It appeared, however, from this case, that if an indictment had been found at the first term, and the case had been regularly continued, the recognizance would have continued in force until the next term, the court saying on this point: "My own opinion is that, had this been a recognizance to answer the state upon some charge exhibited against the defendant, and an indictment or presentment had been found at the first term, and the case had been regularly continued by either the state or defendant, and a forfeiture taken at a term subsequent to the one at which the cause had been so regularly continued, the proceedings would have been regular, although the recognizance did not, in terms, require the defendant to appear from term to term, but only at the first term. The obligation to appear and answer would continue in all its force, while the prosecution was regularly going on, and it would be unnecessary for the recognizance to be renewed to secure this object."

The liability of the sureties on a recognizance conditioned that the defendant shall appear at the next term, and abide the judgment of the court, terminates upon the adjournment of the court at the end of such term without any proceeding being taken in the case. *State v. Becker* (1891) 80 Wis. 313, 50 N. W. 178.

A recognizance conditioned that the defendant shall appear on the first day of the next term, naming it, and not depart without leave, is not a continuing bond, and the defendant is only required to be in attendance at such term until the end thereof, unless sooner charged, and after the end of such term no liability exists against his sureties, the court saying: "Where the recognizance is conditioned for the appearance of the accused at the next term, and contains nothing about succeeding sessions, the surety is entitled to be discharged at the end of the term." *Lane v. State* (1897) 6 Kan. App. 106, 50 Pac. 905.

And the same was held in *Com. v. Somers* (1893) 14 Pa. Co. Ct. 159, 3 Lack. Jur. 185; *Keefhaver v. Com.*

(1830) 2 Penr. & W. (Pa.) 240, and *State v. Dorr* (1906) 59 W. Va. 188, 5 L.R.A.(N.S.) 402, 115 Am. St. Rep. 915, 53 S. E. 120, 8 Ann. Cas. 1016.

A recognizance for the appearance of the defendant before a justice of the peace on a named day, and providing that he shall not depart without leave of the justice, is discharged, where the defendant appears on such day, and the case is postponed without any steps being taken to secure his appearance on the day to which the case is postponed, and his sureties are not liable for his failure to appear on such later day, since it is provided by statute that the justice, on postponing a case, shall require the defendant to renew a recognizance, conditioned that he will appear at the time appointed, and that if the defendant fails or refuses to enter into such a recognizance the justice shall commit him to jail until the day fixed for the trial. *Allen v. Cape Brewery & Ice Co.* (1906) 196 Mo. 435, 95 S. W. 417.

And where the defendant, in accordance with the requirement of his bail bond that he appear on the first day of the next term, and not depart from the court without leave thereof, appeared at such term, and remained in court the whole term, ready to obey the order of the court until the term is adjourned, and no measures are taken by the court to convict him, or otherwise secure his appearance at any subsequent term of the court, the bond is discharged upon the adjournment of such term of the court, and is of no further effect, and cannot be forfeited by the failure of the defendant to appear at some subsequent term of the court. *State v. Mackey* (1874) 55 Mo. 51.

A recognizance conditioned to be void, if the defendant shall appear on the first day of the next term to answer the indictment, not departing without leave of court, does not bind the sureties for the appearance of the defendant after the term specified. *Ramey v. Com.* (1885) 6 Ky. L. Rep. 524 (abstract).

A recognizance conditioned that the defendant shall appear at the next term, and abide the judgment of the

court, and not depart without leave, binds the sureties for the appearance of the defendant during the first term only, and if the court adjourns without making any order, the surety is released from liability. *Swank v. State* (1854) 3 Ohio St. 429.

And a recognizance, so conditioned, does not bind the accused to appear from term to term, but the conditions of the bond are fulfilled by his appearance at the first term of the court next after the execution of the bond, and by his standing ready to answer to any call of his case which may be made by the court at such term; and the sureties are not liable if he fails to appear at a subsequent term. *Hesselgrave v. State* (1902) 63 Neb. 807, 89 N. W. 295.

And in *People v. Hainer* (1845) 1 Denio (N. Y.) 454, holding the same, it was stated that the court might, at the term at which the defendant was bound to appear, make an order requiring him to appear at a future day, and, if the court did so, the sureties would be liable for the failure of the defendant to appear at such future day, by reason of the condition of the recognizance that the defendant should obey the order and direction of the court.

And in *United States v. Backland* (1887) 33 Fed. 156, an application to the Federal circuit court in South Carolina to discharge a surety, where the condition of the recognizance was that the defendant should appear at the next circuit court, to answer, etc., and to do and receive what should be enjoined by the court, and not to depart the court without license, and the defendant appeared, but the court took no action whatever with regard to the case, and the surety was discharged because an agreement was made, without his consent, between the commissioner and the defendant, that the case should not be sent up until the following term, the court said: "In *Swank v. State* (Ohio) supra, it is held that when a defendant is bound over for trial, and appears at the trial term, although the cause be continued on his motion, the surety on his recognizance is discharged,

and a new bond should be taken. *Keefhaver v. Com.* (1830) 2 Penr. & W. (Pa.) 241, is quoted, and sustains the position. 1 Bishop, *Crim. Proc.* 264g, states the same doctrine as supported by abundant authority. But he says that the rule varies in the different states. In South Carolina this is not the practice. *State v. Haskett* (1836) 22 S. C. L. (Riley) 97. At the end of the term certain general orders are passed, and, among these, one providing 'that all recognizances which have not been specially discharged be continued over to the next regular term.' This is also the practice of the courts of the United States in this district. Had this been done here, there would be little question. The practice seems to be justified by the terms of the recognizance, 'to do and receive what shall be enjoined by the court.' It was not done."

A bail bond providing that the accused shall appear in a certain court now in session, on a specified date, binds the accused to appear in such court on such day during the term "now in session," and not to the term of such court that will convene in the month named of the next year. *Sampson v. Harris* (1917) 147 Ga. 426, 94 S. E. 558.

And the condition of a recognizance that the defendant shall appear at the next regular term and at any subsequent term of the court does not bind the sureties for his appearance at a term, years later, to which the case has been postponed to await the final determination of another case. *Reese v. United States* (1869) 9 Wall. (U. S.) 13, 19 L. ed. 541. In this case the court said: "The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. It was inserted to obviate the necessity of renewing the bail every time the cases were, from any cause, continued from one term to another. It was not intended to apply to any distant future term to which either party might be disposed to postpone the trials, without reference to any intervening term. The

principal and sureties by their recognizance covenanted with the United States that the principal should appear before the court and answer all such matters as might be objected against him at the next term, and from term to term, until the cases were disposed of; not that he should appear at the next term, and then at a term years later, depending for its designation upon the happening of a contingent event."

IX. *Plea to indictment.*

The liability of bail is not terminated by the appearance of the defendant, and his entry of a plea to the information or indictment against him.

Thus, the liability of the sureties in a recognizance conditioned that the defendant shall appear on a certain day, and not depart without leave of the court, is not terminated by the defendant's appearing on the day named and pleading not guilty, and they are liable where the case is partly tried on such day, and adjourned to the next day, and the defendant fails to appear on the latter day. *Allen v. Com.* (1893) 90 Va. 356, 18 S. E. 437.

Nor is the liability of the sureties on a bond, conditioned that the defendant shall appear at the next term of court, and at all times render himself amenable to the orders and process of the court, and, if convicted, appear for judgment and render himself in execution thereof, terminated by the appearance of the defendant, and the entry of a plea of not guilty; but where the case is continued to a succeeding term, and the defendant fails to appear at such term, the sureties are liable. *State v. Green* (1895) 6 S. D. 537, 62 N. W. 135.

And the appearance of the defendant, and his plea of not guilty, were held, in *State v. Tambara* (1916) 140 La. 412, 73 So. 250, not to release the surety on his bail bond, because of certain statutory provisions. The court set out the statutory provisions applicable, and discussed this point as follows: "Relator's counsel in the brief argue that defendant's said appearance and plea of not guilty to the information satisfied the appearance

bond. Such a construction is not admissible, because it would nullify the force and effect of appearance bonds given pursuant to Rev. Stat. § 1010. Rev. Stat. § 1032, relative to the forfeiture of bonds in criminal cases, provides for the call of the accused and his surety. Rev. Stat. § 1033, reads, in part, as follows: 'The appearance and answer of any defendant or party accused, upon call made as provided for in the preceding section, shall not operate as a discharge or release of any surety from his responsibility and no such surety shall be discharged or released from his responsibility until the final trial and conviction or acquittal of such defendant or party accused.' The bond given in this case was conditioned for the personal appearance of the defendant in the district court from day to day, and from term to term, to answer the charge, and not to depart the court without leave first had been obtained. This condition was violated by the nonappearance of the defendant on the day fixed for his trial."

The liability of sureties on a recognizance binding defendant to appear and answer, to stand and abide the judgment of the court, and not to depart without leave, is not terminated by the defendant appearing and pleading guilty, and his sureties are liable, where the defendant, before sentence—which the court does not impose on the day of the plea, but allows to remain undisposed of for a few days—is pronounced, departs from the court without leave. *State v. White* (1913) 164 N. C. 408, 79 S. E. 297.

And under a recognizance providing that the defendant shall abide the order and sentence of the court, and not depart without leave, the sureties are liable where the defendant appears and pleads guilty, but, when called for sentence, fails to appear. *Com. v. Teevens* (1887) 143 Mass. 210, 58 Am. Rep. 131, 9 N. E. 524.

But the sureties on a bail bond, conditioned that the defendant shall appear to answer and defend the information, and not depart the court without leave, are discharged by his

appearance and entry of a plea of guilty, and if thereafter his sentence is postponed to a certain day, and he fails to appear on such day, the sureties are not liable. *State v. Charles* (1907) 207 Mo. 40, 105 S. W. 609, 13 Ann. Cas. 565. In this case the court said: "The conditions of the bond in the case at bar required the principal to appear in court, 'to answer and defend the information.' Now, while it must be conceded that the mere appearance in court would not fully meet the conditions of the bond, yet if when the case is called and he is arraigned upon the information and enters his plea of guilty, or if he enters a plea of not guilty, and upon the trial the jury returns a verdict of guilty, in our opinion, he has fully satisfied the conditions of his bond 'to answer and defend the information.' Under the conditions of the bond he cannot absent himself during the progress of the trial or before he has entered his plea of guilty, for it is by the entry of his plea of guilty to the offense charged in the information, or return of a verdict of guilty by a jury upon trial, that places him directly within the power of the court. When, as in the case at bar, the principal, in obedience to the requirements of his bond, appears before the bar of justice and says to the court, upon the call of his case for hearing, 'Here I am; I waive formal arraignment and enter a plea of guilty; do with me as the law directs,' this was, as was said by Hawkins, in his 'Pleas of the Crown,' as completely and effectually putting himself under the power of the court as if he had been in the custody of the proper officer, and the power and duty of the court to exercise such power in dealing with a principal who had submitted himself to the control of the court began at that time, and if this court in *State v. Murmann* (1894) 124 Mo. 502, 28 S. W. 2, announced the correct rule, that it was the duty of the court upon the return of the verdict of guilty to order the defendant into the custody of the sheriff, it must logically follow that the power and duty of the court to exercise that power began upon the

return of the verdict of guilty, or, in the case at bar, upon the entering of a plea of guilty, and the powers and duties of the sureties in respect to such principal ceased. In our opinion the appearance of the principal before the court, entering his plea of guilty to the offense charged in the information, thereby putting himself under the power and control of the court, substantially met and satisfied the conditions of the bond which required him to 'appear and answer the information.' At least, we are unwilling to take the advanced step, and announce the rule that the risk of the sureties should be increased by holding that the term 'answer and defend an information' shall be interpreted to mean, not only answering the information, but as well to render obedience to the judgment and sentence of the court which may be rendered in the cause. As to the recital in the recognizance, 'not depart the court without leave,' it is sufficient to say that in our opinion it has no application to the main proposition involved."

X. Failure to try defendant.

Failure to try the defendant at the term at which he demands trial, or at the next succeeding term (the necessary statutory requisites appearing), operates as a complete discharge and acquittal, whether an order discharging him be granted or not, unless the demand has been waived by some acts of the defendant, and such discharge and acquittal terminate the liability of the sureties. *Collins v. Smith* (1910) 7 Ga. App. 653, 67 S. E. 847. In this case the court said: "The only question that can arise is whether, although the effect of the state's failure to try the accused was equivalent to an acquittal so far as the criminal charge was concerned, such right of discharge on his part would relieve the surety upon his bond, in the absence of an order formally discharging and acquitting the accused. We are of the opinion that when the state failed to try the defendant, and the term of the court at which he should have

been tried was adjourned, he was as completely discharged as he would have been by a verdict of acquittal at the hands of the jury, or (so far as the bond is concerned) as if he had been surrendered by his surety in the event of his conviction. . . . Nor was it necessary to his acquittal that any formal order of discharge or acquittal should have been entered by the court. The formal entry of discharge upon demand can be made at any time, *nunc pro tunc*, and should be made whenever justice requires it. This being true, the criminal recognizance becomes *functus officio*, and the surety is released."

The entire report of the case of *Brock v. Slaton* (1916) 18 Ga. App. 175, 89 S. E. 156, is contained in the following syllabi by the court: "After an indictment by a grand jury has been returned to a superior court, and the case so originating has, by order of that court, been legally transferred to a county court having jurisdiction to try the defendant for the offense charged, the case is no longer pending in the superior court, but in the county court to which it had been so transferred.

"Where in such a case the defendant made a demand for trial, which was entered on the minutes of the superior court prior to the transfer of the indictment, and he was present at the first term of the county court thereafter, held more than ten days after the transfer, and was not then put upon trial, he was entitled to his discharge at a subsequent term of the county court, notwithstanding the fact that, by reason of the failure of officers of the county court to serve the defendant with notice of the transfer, the county court was without authority, under the provisions of § 752 of the Penal Code of 1895 (6 Park's Anno. Penal Code, § 790 (s)), to force the accused to trial at the first term subsequent to the transfer of the indictment. . . .

"The defendant's plea setting up these facts was good and sufficient in a proceeding to forfeit the bond for his appearance to answer for the crime charged in the indictment."

XI. Commencement of trial.

The liability of the sureties on a bail bond or recognizance does not terminate with the commencement of the trial of their principal, except where it is so provided by statute.

Thus, the liability of the sureties on a bail bond, conditioned that the accused shall appear from term to term, and from day to day, until discharged by due course of law, is not terminated by his appearing and being placed on trial, and they are liable where, during the trial, he makes his escape. *Lee v. State* (1875) 51 Miss. 665.

And in *Hawk v. State* (1887) 84 Ala. 466, 4 So. 690, holding a bond for the appearance of the defendant at a specified term, and from day to day and term to term thereafter, until discharged by law, forfeited by his escape during the progress of the trial, the court said: "The question raised for decision by this record is whether the undertaking of bail, which is here in writing, is forfeited by the absconding of the defendant during the progress of the trial, and after his appearance to answer an indictment for felony. Or, to state the question differently, whether the defendant, upon the commencement of the trial, is at once placed by operation of law in the custody of the sheriff, without any order of court to that effect, or whether he is to be considered as in the continued custody of his sureties until the coming in of the verdict of the jury. The plain language of the statute would seem to leave no doubt on this point. It declares that the undertaking of bail binds them for the appearance of the defendant, 'until he is discharged by law.' This discharge can take place after the trial is begun, in the absence of a surrender by the sureties, only by an order of discharge based on a nolle prosequi of the indictment, a verdict of acquittal, or a verdict of conviction followed by the sheriff's taking custody of the defendant by the implied or express order of the court, which includes any necessary custody taken to prevent his escape. The obligation, therefore, ordinarily binds the sureties for the continued appearance of the defend-

ant during every stage of the trial, from the time it is entered on, at least, until the rendition of the verdict of the jury."

And the sureties in a recognizance conditioned that the defendant shall appear at the next term of court, and not depart without leave, and abide the order and decision of the court, are not discharged by the defendant appearing to answer the indictment and entering upon his trial, and where, before the trial is finished, the defendant departs from the court without leave, and never returns again, the sureties are liable. *People v. McCoy* (1862) 39 Barb. (N. Y.) 73. The court in this case said: "It is contended that the condition of the recognizance has been fulfilled. That the prisoner placed himself under the power and control of the court, and in the custody of its officers, by appearing to answer the indictment, and entering upon his trial, and he was thereby surrendered, and the surety became discharged. The condition of the recognizance was not only to appear at the next court of oyer and terminer, to answer to an indictment for burglary and larceny, but also that he should 'not depart without leave of the court,' and that he should 'abide its order and decision.' The prisoner did depart without leave, and did not appear to abide the order and decision of the court, and his recognizance was duly forfeited. . . . It can scarcely be said that he had placed himself entirely in the control of the court because the trial had commenced, when he had not been either surrendered by his bail, or ordered into the custody of the sheriff. He was not called to answer under the recognizance, and was not substantially in the power of the officer or court to whom the appearance was due, within the meaning and intent of the condition. The recognizance does not intend that he shall simply submit to a trial, but that he shall at all times, until surrendered or ordered into custody, submit himself to the jurisdiction or authority of the court. It is intended to hold the prisoner to answer during the whole term of the

court, and until the trial is ended. Such is the uniform practice, and it would be extraordinary to compel a prisoner to renew his recognizance at the commencement of his trial, for the remainder of the term. In fact, if this practice should obtain, I see no reason why the same process should not be required at the opening of the court on each day. He is not only bound to appear and answer the indictment, but 'he is not to depart without leave, and is to abide its order and decision.' Can it be said that he fulfils these requirements when he leaves before the trial is ended, and when he is not present to abide the order and decision of the court upon the final termination of the trial? The object of the recognizance has not been answered. The condition has not been performed. The appearance of the prisoner has not been secured, and the surety is liable to pay the penalty."

And a bond for the appearance of the defendant in a justice's court binds him not only to appear on the day named in the bond, but also to remain in attendance at the court until the trial is terminated, or he is discharged by the court, and where the trial is not completed on the date set, and is postponed to a subsequent day, failure to appear on such day renders the sureties liable. *State ex rel. Solicitor v. Jenkins* (1897) 121 N. C. 637, 28 S. E. 413.

But the liability of the sureties on the bail bond of one charged with a felony was held, in *Willis v. Com.* (1887) 85 Ky. 68, 2 S. W. 654, to terminate with the commencement of his trial. The bond provided that the defendant should appear to answer the charge, and at all times render himself amenable to the orders and process of the court in the prosecution of such crime. The important question in such case is, when does the trial commence, and the trial was held not to begin until the issue was formed and the jury sworn, to try it. In this case the court said: "It appears that the motion for a continuance at that term was overruled, and the accused required to go into the

trial, and ten jurors were selected and accepted by the commonwealth and the accused. But the court adjourned for the day without completing the formation of the trial jury, and the next day the court, on its own motion, discharged the ten jurors and continued the case until the next term, because the officer in whose charge they were placed permitted them to separate, contrary to law and the injunction of the court. Section 229 of the Code provides that during the trial of an indictment for felony the defendant shall be committed to, and remain in, the custody of the proper officer. But by § 183 it is provided that, if the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial, unless his bail appear personally in court and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. After the trial has commenced, the defendant is in custody of the proper officer of the court, and the bail is no longer answerable for his appearance unless, as provided in § 183, they appear personally in court and consent that he remain on bail.

... The decisive inquiry, then, is, When does the trial of an indictment for felony, in the meaning of § 229, begin? It seems to us it cannot, with propriety or accuracy, be said to begin until the issue is formed and the jury sworn to try it. For, as has been held by this court, the defendant cannot be regarded as being in jeopardy of his life or liberty until then. Everything done previously is merely preliminary to the trial."

And in *Fossett v. State* (1901) 43 Tex. Crim. Rep. 117, 67 S. W. 322, where the principal was indicted for murder, holding that the liability of his bail terminated, by reason of statutory provisions, upon the commencement of his trial, it appeared from the record that the accused was present in court when his case was called for trial, and that he thereupon made a motion for a change of venue, which was denied; that, on the denial of such motion, he presented an applica-

tion for continuance, which was overruled, that he then demurred to the jurisdiction of the court to try the case, and the court overruled the demurrer, and that, during the argument of the demurrer, the accused escaped, and his recognizance was forfeited. The question as to whether the trial had commenced so as to discharge the sureties was discussed at length by the court, as follows: "It is insisted on the part of the sureties, who are appellants in this case, that the contingency had arrived under our statutes which discharged defendant Fossett from the custody of his bail; and that, the trial having commenced, he was then in the custody of the court or the sheriff. In support of this contention, we are cited to the following articles of the Code of Criminal Procedure, to wit, articles 635, 640, and 641. Said articles read as follows: 'Art. 635. When the defendant in a case of felony is on bail he shall, before the trial commences, be placed in the custody of the sheriff and his bail be considered as discharged.' 'Art. 640. In all cases less than capital the defendant is required, when his case is called for trial, before it proceeds further, to plead by himself or counsel whether or not he is guilty.' 'Art. 641. By the term, "called for trial," is meant the stage of the case when both parties have announced that they are ready, or when a continuance having been applied for has been denied.' We understand that particular stress is laid on the last article as construing the preceding article; and that the facts show the contingency marked out by this latter article, which discharged the sureties, had occurred; that is, that the case had been called for trial, and the state had announced ready, and a continuance, which had been applied for on the part of defendant, had been presented, and had been overruled by the court. While this is literally true in one sense, still there are other articles of our Code of Criminal Procedure which are to be taken into consideration in determining the question as to whether the recognizance had ful-

filled its purpose under the law, and is no longer binding on the recognizers. Among others, we refer to articles 303 to 310, inclusive, which define bail and recognizance, and lay down some of the rules applicable thereto; and articles 569, 570, 575-577, and 617, which relate to the plea of not guilty and other pleas and motions of a defendant; and article 476, which relates to the forfeiture of bail. Now it will be observed that bail, as prescribed by our statutes, obligates the sureties that their principal will appear and answer before the proper court the accusation brought against him; and the bail, in this instance, follows, as it should, the terms of the statute. What answer is referred to? Evidently, this is provided for in article 640; that is, in every case the bail requires a defendant to appear and answer before the proper tribunal, whether or not he is guilty. Of course, there are special pleas and answers that he can make, but this is the final answer, and his bail goes with him until he has entered his final plea. True, he is required to be present on other occasions. Indeed, no important step can be taken in his case, if it is a felony, unless he is present; but his bail holds him in custody, and requires him to be present at each stage of the procedure, including and up to the last stage, when he is required to enter his plea of guilty or not guilty. And when articles 635 and 641 say that before the trial commences he shall be placed in custody of the sheriff, and his bail be considered as discharged, and that this stage is reached when both parties have announced ready, or when a continuance, applied for by a defendant, has been overruled, it clearly means that marks the stage of the case when the jury trial is to begin. But it does not mean that defendant can stand by and hear the court announce his continuance overruled, and then dodge out and escape, and thus relieve his bail; but he must, in accordance with the terms of his and their contract, remain until he has entered his plea. This may be, and, under the statute, should be, before

the jury is impaneled. See art. 640, Code Crim. Proc. Of course, it does not follow that his bail may not surrender him under other articles of the statute before this juncture; but it implies that there is no interregnum between his bail and his trial—that is, his final plea. The law did not intend to furnish a loophole for his escape before his final answer. This construction is further borne out by reference to those articles of our statute which relate to the hearing of motions. These may be heard and determined at any time before trial upon the plea of not guilty is entered upon, but not afterwards. See art. 577, Code Crim. Proc. Article 591, Code of Criminal Procedure, provides: 'Judgment shall in no case be given against the defendant where his motion, exception, or plea is overruled, but he shall in all cases be allowed to plead not guilty. If he refuses to plead it shall be considered as if the plea were offered and be noted accordingly.' From these articles—indeed, from every provision of the Code—it is evident that all motions of every character must be disposed of, and that these are preliminary to the main trial; and when that stage is reached, and when he is ready to plead to the accusation, he is then placed in custody of the sheriff and his bail discharged, but not before. It appears that, after the court had announced what disposition he would make of the motion for continuance, defendant did not then enter his plea to the indictment, but craved leave to present another motion, which motion, indeed, should have come before the motion for continuance, as it went to the jurisdiction of the court—still it could be offered at any time; and the permission granted by the court to allow the same to be presented was tantamount to holding his ruling on the motion for continuance in abeyance until he had made his ruling on the motion to recuse himself (and he certainly had authority over his own orders during the term). If the court had held that he was not qualified to try the case, this would have been a postponement or continuance of the

case until some other judge should be authorized to try it. The motion was not a joinder of issue, but was evidently intended to cut off an announcement of 'ready' at that time. Suppose, when the court announced he would overrule the motion for continuance, he had then ordered defendant to come forward and enter his plea, and had then announced that his bail was released, and the sheriff would take custody of him, and defendant had then stated he was not ready to proceed with the trial; that he had another motion to present. Could the court have refused to hear his motion, or to have discharged his bail pending the preparation and hearing of that motion? Unquestionably, under the terms of the law, he could present such motion, and he was in the custody of his bail pending its preparation, the motion itself being in the nature of a request of the court to hold up his ruling on the motion for continuance, and to forbear pressing him to trial, until such other motion should be disposed of. The court was asked to hear a preliminary motion—a motion set up to avoid a trial altogether; and, until this was disposed of, the case could not be called for trial proper, and, until this could be done, the trial before the jury could not commence. In the meantime his bail, which required him to answer the state's charge, and, in order to do so, to be there when the trial should begin, was operative; and he could no more evade the terms of his recognizance, as was attempted in this case, than he could had he remained present during the reading of his motion for continuance and the overruling by the judge of the same, and then, instead of remaining and pleading to the indictment, have immediately fled from the courtroom and made his escape. We apprehend it will not be seriously contended by appellant that he could have avoided the obligation of his bail in this manner. . . . We accordingly hold that the proper construction of the articles of our Code of Criminal Procedure, bearing on the question as to when the bail of the

prisoner terminates and the custody of the court or the sheriff begins, is when such defendant appears in court and enters his plea of guilty or not guilty to the indictment. This is in accordance with the terms of the contract of himself and his sureties with the state, and the articles which appellants have invoked are to be construed in accordance with this contract and other statutes regulating the trial."

It appears, however, from *Wiseman v. State* (1913) 70 Tex. Crim. Rep. 477, 156 S. W. 683, that, under a statute enacted subsequently to the one construed in the preceding case, the liability of the sureties on a bail bond does not terminate with the commencement of the trial, but with the return of a verdict, and it was held that where his conviction was set aside, and a new trial awarded, and the sheriff instructed to discharge the defendant from custody on the original bail bond, the sureties were liable on his failure to appear at the next term of the court. The distinction between the effect of the former statute and the later one was discussed as follows: "Appellant went upon his trial, and was convicted. This conviction was at a subsequent day of the term, by the trial judge, set aside and a new trial awarded. Section 2 of the Act of the 30th Legislature, page 31, provides that where the defendant in cases of felony is on bail when his trial commences, the same shall not thereby be considered as discharged until the jury shall return into court a verdict of guilty and the defendant taken into custody by the sheriff, and he shall have the same right to remain on bail during the trial of his case, and up to the return into court of such verdict of guilty, as under the law he now has before the trial commences; but immediately upon the return into court of such verdict of guilty, he shall be taken into custody by the sheriff, and bail 'be considered as discharged.' By the terms of the bail bond or recognizance, it requires the principal to appear before that court from day to day, and from term to term, until discharged by order of

the court, etc. Before the enactment of this statute, when the accused was placed upon trial he was taken from his bondsmen during the trial, and they were no longer responsible for his attendance upon that trial. If acquitted he was discharged; if convicted, he was placed in jail. Under the statute as it then was, if he was awarded a new trial, or his case was reversed on appeal, he was entitled to his discharge under the bond he was placed under prior to his trial and conviction. In either event, whether a new trial was awarded him by the trial court or by the appellate court, upon granting of that new trial he was entitled to his discharge under his bond, unless the sureties had surrendered him, and in that event the sureties were considered discharged until the new trial was awarded or the reversal occurred, and they would not be responsible for his appearance while he was in jail awaiting the order of the court on motion for new trial, or the action of the appellate court, but would be if a new trial was awarded. With reference to the appeal in felony cases, where the conviction is for less than fifteen years, he may give an appeal bond or recognizance, and go out under that bond. Whether the appeal bond would discharge the sureties from all subsequent liabilities is not necessary here to discuss, not being involved, but under the old law, as before stated, when the case went to trial, he was taken from his bondsmen by virtue of that fact and placed in custody of the officers pending the disposition of his case, and to that extent the bondsmen were considered as discharged of liability until the new trial was awarded. The only difference, as we understand the present and former statutes, is that the sheriff cannot now take the principal in charge until after a verdict of guilty has been rendered against him, and the defendant is then taken into custody, and his sureties are then considered as discharged from further liability on the bond, until a new trial has been awarded him, or some action is taken by the court which liberates him from that

conviction; whereas, under the old law, he was taken into custody upon going to trial. The only relative difference in the two statutes is, it permits the defendant, under the Act of the 30th Legislature, to go at large during his trial, whereas, under the previous law, he was taken into custody immediately upon the announcement of ready for trial."

XII. Discharge of jury.

Where the defendant appears, pleads not guilty, and the issue is brought before a jury and all the evidence taken, and the court then dismisses the jury and discharges the defendant and permits him to depart, the liability of the sureties terminates with his departure, and they cannot be held liable for his nonappearance upon being called later upon the same day. *Lyons v. State* (1824) 1 Blackf. (Ind.) 309.

The court in the preceding case distinguished the case of *Winscott v. State* (Ind.) the report of which has not been found, in the following words: "This case is clearly distinguishable from the case of *Winscott v. State*, decided at this term. It seems that *Winscott* was one of the bail named in this recognizance. The reasons given by him why the state should not have execution against him are, to a certain extent, the same as are set forth in this plea. He states the appearance of *Lyons*, the answer to the charge, the impaneling and swearing of the jury, the hearing of the evidence, and the discharge of the jury by the court; but he does not pretend that *Lyons* was discharged by the court, or departed with their leave. He contends that *Lyons* was discharged by the operation of law, that the dismissal of the jury amounted to an acquittal, and that the court could not require him to answer any further to the charge. But it was there evident that *Lyons* departed without leave of the court. Whether the discharge of the jury amounted to a discharge of *Lyons*, or not, was not to be determined by the party accused, but by the court. They had a right to adjudicate upon that

subject, and it was within the terms of the recognizance that *Lyons* should remain in court until that matter was determined. His departure without leave put an end to the adjudication, and was a violation of his recognizance. Here the plea expressly states the discharge of *Lyons* by the court, and his departure with the court's permission; so that, taking the plea to be true, the subsequent calling of *Lyons*, and forfeiting the recognizance on account of his failure to appear, were incorrect."

And it was held in *State v. Turpin* (1909) 54 Or. 367, 103 Pac. 438, that where the court adjourned during the progress of the trial of the defendant, and, by reason of a statutory provision, stood adjourned for the term, this operated as an acquittal under the rule that the discharge of the jury without legal necessity therefor, before verdict, has the legal effect of an acquittal, and the defendant was not required by his bail bond thereafter to appear in court, and the bond could not be forfeited for his failure to do so.

Where the defendant is put on trial, and, the jury not agreeing, a mistrial is ordered, but no order is made placing the defendant in custody or discharging him, and the court is adjourned sine die, the liability of the sureties on his bail bond, with the usual conditions to appear at court and not depart without leave, is not thereby terminated, and, on the failure of the defendant to appear at the next term of court, his sureties become liable. *State v. Eure* (1916) 172 N. C. 874, 89 S. E. 788. In this case the court said: "An appearance bond by its terms, and under the uniform ruling of the courts, requires that the defendant appear term after term, until he is discharged on a verdict of acquittal, or by order of the court."

XIII. Retirement of jury.

The sureties are liable where the defendant flees while the jury are considering their verdict. *Cook v. State* (1890) 91 Ala. 53, 8 So. 686. In this case the court said: "The defendants sought to set up, in answer

to the *scire facias*, that their principal appeared at the term of the court at which the judgment nisi was taken against them, was arraigned, entered upon his trial, and appeared from day to day during the progress of the trial, and until the jury retired to consider of their verdict. The pleas to this end did not aver that their principal was present in court when the jury appeared therein to deliver their verdict, on the morning after their retirement, nor that, prior thereto, he had been placed in the custody of the sheriff, either by his bail, or under an order of court. The pleas were fatally defective. Disclosing that the trial had been entered upon, they should have disclosed, further, that the defendant had remained in attendance to respond to the judgment that should result therefrom, or that the sureties were discharged by reason of the defendant being taken in custody. The demurrers which were addressed to this infirmity were properly sustained; and, it appearing in evidence that the defendant fled while the jury were considering their verdict, and failed to appear when they were ready to return their finding, judgment final was properly rendered against his sureties."

Nor do they comply with the condition of their bond, and terminate their liability by producing their principal at the first call, where the bond contains the condition that he shall not depart the court without leave, and they are liable where he is put upon trial, and, while the jury are out to consider a verdict, escapes. *State v. Martel* (1842) 3 Rob. (La.) 22. In this case the court said: "The act of the legislature, passed in 1837 (Acts 1837, p. 99, § 2), is conclusive against the defendants. It says expressly that the appearance and answer of the party accused shall not operate as a discharge or release of the security from his responsibility, until after the trial, and conviction or acquittal, of the accused, unless the surety make a formal surrender of the accused in open court, or in the prison of the parish, and not

otherwise. This was not done in the present case."

The liability of the sureties on a bail bond, conditioned that the accused shall appear to answer the charge brought against him and not depart from the court without leave, is not terminated by the appearance of the accused for trial, but the sureties must produce their principal to answer to the sentence, and his departure without leave, while the jury are considering their verdict, and prior to the return of a verdict against him, renders them liable. *State v. Ruhing* (1897) 49 La. Ann. 909, 22 So. 199.

But see *Com. v. Coleman* (1859) 2 Met. (Ky.) 382, *supra*, VI.

XIV. Return of verdict.

a. Conviction.

It is generally held that the liability of bail is not terminated by the return of a verdict against the accused.

Thus, the liability of sureties on a bond conditioned that the defendant appear on the first day of the next term of the court, and not depart without leave, is not terminated by the appearance of the defendant at the time named in the bond, and if he appears and enters a plea of not guilty, and a trial is had, and the jury return a verdict of guilty, and afterwards, and before sentence of judgment is pronounced, he leaves the court room, and is not thereafter seen or heard from, the sureties are liable. *Glasgow v. State* (1889) 41 Kan. 333, 21 Pac. 253. In this case, it was unsuccessfully contended that the statute did not authorize the bond to require that the defendant should not depart the court without leave, but the court held that the word "appear" in the bond implied that the defendant was to appear for the purposes of a trial of the charges made against him, and in this connection said: "It is not enough for the party to be there for the first day, and then slip off without leave, in order to comply with the conditions of the bond; the very fact of the condition of his appearance is that he shall appear for

a certain purpose; he appears for the trial of the charges made against him, and if he departs before the trial and judgment are had, without leave of the court, his bond is forfeited. He appeared for trial, he departed before judgment. The statute provides that, if without sufficient excuse he neglects to appear for trial or judgment, the court must direct the fact to be entered upon its minutes, and declare the forfeiture of the bond."

Thus, the liability of the sureties on a bail bond providing that the defendant shall appear at court, and not depart without leave, is not terminated by his appearance, trial, and conviction, but they are liable for his subsequent disappearance without leave. *State v. Norment* (1838) 12 La. 511.

And where the principal in such a bond, after conviction and before being called for sentence, departs without leave, and fails to appear when called, the sureties are liable. *Magie's Appeal* (1886) 1 Sadler (Pa.) 496, 4 Atl. 737.

The surety on such a bond is not discharged by the appearance of the defendant at the time required therein, but the bond is reached where the defendant flees without leave of the court, after the rendition of a verdict against him. *Chilton v. People* (1873) 66 Ill. 501.

And under such a bond, the defendant, after appearing at the term named, must continue to appear until acquitted, or in some legal way discharged, or, if tried and found guilty, until the sentence of the court is passed upon him, unless he is permitted to depart sooner by leave of the court. *Dennard v. State* (1847) 2 Ga. 137. In this case the defendant continued in attendance on the court until the verdict of guilty was rendered, but departed from the court before sentence was passed, and the court said that the bond was intended to insure the appearance of accused to answer not only to the charge, but also to the judgment, and that the sureties, in order to terminate their liability, must have their principal to answer to the sentence of the court.

20 A.L.R.—40.

It was held in *Ewing v. United States* (1917) 153 C. C. A. 167, 240 Fed. 241, that the liability of the sureties is not terminated upon the conviction of the defendant, where such conviction is not immediately followed by the sentence because of the statement of counsel that a motion for a new trial would be made, but that their liability continues until the pronouncement of the sentence, and the failure of the defendant to appear therefor is ground for the forfeiture of the bail bond. In this case the court said: "The bond was to be void if the principal should make his appearance before the district court 'then and there to answer,' etc., 'and continue in attendance at said term of said court from day to day, and term to term, until discharged, and abide the decision of the said court in the premises.' When the accused was convicted by the verdict of the jury, he was, upon the statement of his counsel that a motion for a new trial would be filed, and upon his counsel's request in his presence, instead of being remanded into the custody of the marshal, permitted to go upon his old bond; the court being of opinion that it was a 'continuing' bond. If the court had pronounced sentence, a different question might be presented, or, if the court had ordered the defendant into the custody of the marshal, perhaps the question would not be, in legal effect, the same as the question under consideration. But in this case the accused was not discharged, nor did he 'abide the decision' of the court, since no judgment was rendered on the verdict, or upon the motion for a new trial. Whether or not, on principles of estoppel, applied also to this phase of the case, the surety could be held, need not be decided; for, under the terms of the bond as given, the responsibility of the surety was not brought to an end and completed by the conviction itself. The supreme court of Tennessee (*Suggs v. State* (1914) 129 Tenn. 500, 167 S. W. 123) discusses the difference between the rights and obligations of the surety after conviction, but before sentence, and after sen-

tence, and says: 'Where a bail bond stipulates that the principal is not to depart without leave of the court, the sureties are not exonerated by the mere conviction of the principal. . . . But when a conviction is followed by a pronouncement of sentence, such pronouncement, it has been held, has the legal effect of a direction to the sheriff to hold the convicted defendant in custody, and operates to exonerate the sureties.' A number of cases are cited in support of each of these conclusions. No case has been cited, and we have found none, in which, upon a mere conviction, without sentence pronounced thereupon, it has been held that the custody of the accused passed from the surety to the officer who, under the law, would take the accused into his custody. If the case is to be assimilated to the mode of proceeding in Tennessee, all debate on the subject is foreclosed by the Statute of Tennessee of 1903 (Acts 1903, chap. 99; Shannon's Code Supp. 852), which provides that, when such a bond as this has been executed, it 'shall be valid and binding upon the defendant and his sureties thereon, for the defendant's personal appearance before the court from term to term until the case is finally terminated or stricken from the docket, and the defendant discharged by the court; and the defendant shall not be required to renew said bond or recognizance, unless ordered to do so by the court because of the insufficiency of said bond in amount, or the insolvency of the same, or on forfeiture of bail, or for other good and sufficient causes; provided that the sureties on said bond may surrender the prisoner and be released on said bond as now provided.' Of course, that provision of the statute is as much a part of the bond as if written into it. If it were so written, however, it would not add to the express agreement of this bond that the accused should attend 'until discharged,' and 'abide the decision of the said court in the premises.' The surety, by failing to produce the accused, must pay the penalty for his default."

And in *State v. Baldwin* (1888) 78 Iowa, 737, 36 N. W. 908, where it appeared that the principal in the bond was tried and convicted on the indictment, and two years afterward a default upon the bond was taken, the court said: "A default may be taken upon a bail bond if the principal fail to appear, at any time when his personal appearance may be lawfully required. Code, § 4596. The court may at any time require one convicted to appear and surrender himself, or perform the judgment. Having been required to appear, and having failed to do so, the default was entered against the defendant's principal. The principal in the bail bond may be required to appear at any term subsequent to the term at which he is required by the language of the bond to appear, without notice to him or his sureties, and his former appearance to answer to the charge does not discharge the sureties. *State v. Brown* (1864) 16 Iowa, 314. It will be presumed, if the forfeiture was taken at a subsequent term, that the cause was continued by operation of law to the term when default was taken. *State v. Merrihew* (1877) 47 Iowa, 112, 29 Am. Rep. 464. . . . It cannot be doubted that, after conviction, the person indicted may be ordered by the court to surrender himself upon the judgment; and upon nonperformance of such order default may be taken upon his bond, which is conditioned that the principal 'shall abide the order' of the court."

The sureties on a bail bond, conditioned that defendant shall at all times render himself amenable to the orders and process of the court, and, if convicted, appear for judgment and render himself in execution thereof, are not discharged from liability by the conviction of the defendant, and where, after conviction, the court adjourned to a future time for the purpose of passing sentence and judgment upon the defendant, and he failed to appear at such time, the sureties are liable. *People v. MacGregor* (1911) 147 App. Div. 438, 131 N. Y. Supp. 783. The lower court in this case held the sureties discharged upon the theory that the bond had no

force or effect after the verdict of conviction, because § 5 of the Code of Criminal Procedure declares that, after the conviction of a crime, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail; but the appellate court held that the word "conviction" in such section did not mean the verdict of conviction, but meant the sentence or judgment of the court rendered upon the verdict.

Where the principal on a criminal appearance bond, requiring the defendant to appear before the district court on the first day of the next term, and there remain from day to day, and term to term, until discharged by due course of law, appears for trial, and is found guilty of the charge preferred against him, he does not, by virtue of § 5931, Rev. Laws 1910, which provides that if a general verdict is rendered against the defendant he must be remanded, if in custody, or, if on bail, he may be committed to the proper officer of the county to await the judgment of the court upon a verdict, immediately pass into the custody of the law, and thereby discharge the sureties on his bond, unless he is committed into the custody of the proper officer to await the judgment of the court. *ABLES v. STATE* (reported herewith) ante, 589.

And the liability of sureties on a bail bond, conditioned that the defendant shall appear and answer the indictment against him, abide by any and all orders of the court, and attend the sessions of the court from day to day thereafter, until the final adjudication of the case, is not terminated by his appearance for trial, and presence during the trial until a verdict of guilty is rendered, and they are liable where he fails to appear at the time set by the court for the pronouncement of sentence against him. *United States v. Reyes* (1908) 3 *Porto Rico Fed. Rep.* 299.

But it was held in *State v. Wilson* (1859) 14 *La. Ann.* 446, that where the condition of the bond is that the accused shall appear at the next term, and not depart without leave of the court until his final trial and conviction

or acquittal, the liability of the sureties is at an end when a verdict of guilty is found against him, and the accused, being then present in court, is, after the conviction, in the custody of the sheriff, and the sureties cannot be made liable on the bond because he afterwards makes his escape.

And in *United States v. Cerecedo* (1914) 6 *Porto Rico Fed. Rep.* 622, it was held that an appearance bond, the form of which does not appear, did not apply between verdict and sentence, and the sureties were not liable for the defendant's appearance after verdict of conviction; that the appearance bond provided for defendant's appearance from day to day until final adjudication; but that the verdict of conviction was not something incidental to the trial from day to day, but a final adjudication on the facts, and the sentence resulted as a matter of law.

And the surety is discharged, where he produces the defendant in court for his trial, and after the return of a verdict of guilty, the sheriff lays his hands on him and starts with him to the jail, although no order is made by the court placing the prisoner in the custody of the sheriff. *State v. Murmann* (1894) 124 *Mo.* 502, 28 *S. W.* 2.

b. Acquittal.

Where the bail bond is conditioned for the appearance of the defendant to answer an indictment for rape, and to abide the judgment and orders of the court, and not depart without leave, and he is discharged and acquitted of the alleged rape, but convicted of an assault and battery with attempt to commit a rape, his acquittal of rape does not excuse him from appearing further in the case, and where, pending a motion for a new trial after his conviction for assault and battery with intent to commit rape, he fails to appear, the sureties are liable. *Campbell v. State* (1862) 18 *Ind.* 375, 81 *Am. Dec.* 363.

But it was held in *Rex v. Spenser* (1752) 1 *Wils.* 315, 95 *Eng. Reprint*, 637, that the bail should be discharged upon the acquittal of the de-

fendant, as against the contention that the course of the court was not to discharge the bail until the acquittal of the defendant was entered upon record.

XV. Appearance to receive sentence.

Where, after the conviction of the defendant, the pronouncement of sentence upon him is deferred by the court, and he is directed to appear on a certain day to receive his sentence, and he appears on such day and finds no court in session, his bondsmen are relieved, and the defendant is absolved from any further attendance upon the court. *People v. Kennedy* (1885) 58 Mich. 372, 25 N. W. 318.

The liability of sureties on a bail bond, conditioned that the defendant shall appear before the court to receive judgment and sentence, and abide the judgment of the court, and not depart without leave, is terminated, where the defendant appears to receive sentence, and thereafter presents himself to the sheriff for the purpose of being taken into custody. *Jackson v. State* (1893) 52 Kan. 249, 34 Pac. 744. In this case the sheriff declined to take the defendant, and asked him to wait till the next day, and the court said: "The liability of the sureties terminated when the defendant had fully complied with the terms of the recognizance. Section 256 of the Criminal Code provides: 'Where any convict shall be sentenced to any punishment, the clerk of the court in which sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general or usual deputy, cause such convict to receive the punishment to which he was sentenced.' The sheriff made two excuses for not taking the prisoner into custody at the time he offered to surrender himself; namely, that he had no papers by which to hold him, and no place to keep him overnight. Neither of the excuses was good. The law makes it the duty of the clerk to forthwith deliver the sheriff a certified copy of the judg-

ment; and where the party himself raised no objection to being taken into custody on the ground of want of papers, we do not think the sheriff himself can make it. But a very brief time would be required for the clerk to make up the record and certified copy thereof required by the statute. As to the other objection, it is the duty of the sheriff to take prisoners into his custody and keep them. If he has no convenient place for doing so, he must use one that is not so convenient. Sureties on criminal recognizances are not bound to answer for the conduct of a prisoner after it becomes the duty of the sheriff to take him into custody, after judgment, and after the defendant has submitted himself for that purpose. The words 'not depart without leave' in the bond do not mean that the defendant will not escape from the custody of the sheriff. The 'leave' means leave of the court. So far as the record shows, the sentence was final, and to be executed at once. There is nothing showing that the court granted any stay, or directed the defendant to appear in the court at any future time. Under the ruling in *Re Strickler* (1893) 51 Kan. 700, 33 Pac. 620, the operation of the sentence began at once, and it was the duty of the sheriff to carry it into effect."

And it was held in *State ex rel. Vigg v. Romaine* (1915) 47 Okla. 138, 148 Pac. 79, that where an accused, who has given a recognizance with sureties to appear and answer the charge preferred against him, and abide the order of the court until said charge has been disposed of, and to do and receive what shall be enjoined by said court upon him, was in court after conviction to receive the judgment and sentence pronounced against him, he immediately passed from the custody of his bail to the custody of the sheriff, by an implied order of the court, by which his bail was discharged. Nor could they thereafter be bound by an order of the trial court, entered after the pronouncement of judgment and sentence, which permits the accused to

depart from custody for the purpose of procuring an appeal bond, and provides that in the meantime the sureties on the bail bond shall remain bound unto the state of Oklahoma. In this case the court said: "The demurrer was sustained upon the theory that, upon a person charged with a felony being convicted and sentenced, he is no longer in the custody of his bail, but in the custody of the proper officer of the law, and if he thereafter escapes or departs without leave of court his bail is discharged, without a formal order to that effect. We think this position is well taken. Section 5931, Rev. Laws 1910, provides that: 'If a general verdict is rendered against the defendant, he must be remanded, if in custody, or, if on bail, he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed his bail is exonerated, or if money is deposited instead of bail it must be refunded to the defendant.' Section 5963, Rev. Laws 1910, provides that 'if the judgment be imprisonment, or fine and imprisonment, until such fine be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with, unless the sentence be suspended.' Section 5992 provides for the method of taking appeal from the judgment of conviction. It will be observed that § 5963, *supra*, makes it the duty of the trial court upon judgment immediately to commit the defendant, if the judgment be imprisonment, or fine and imprisonment, to the custody of the proper officer until the judgment be complied with. It is the further duty of the trial court, in passing sentence in accordance with § 5992, *supra*, to fix a reasonable time within which bail may be given, and during such time to hold the defendant in custody. Instead of following this statute, the court, after overruling the defendant's motion for new trial, rendering judgment, and passing sentence upon him, ordered him to be set at liberty for the purpose

of giving him an opportunity to procure an appeal bond. His failure to return did not constitute a breach of the conditions of his bond. The sureties upon this bail bond did not undertake to return Romaine after his departure with leave of court, under the circumstances disclosed by the record before us. In our judgment the liability of the sureties could not be enlarged by an order of court made in plain contravention of the foregoing statutes. Upon judgment being rendered and sentence passed, the custody of the defendant, under the law, passed from his bail to the proper officer, and the court was not at liberty to vary or enlarge the terms of their undertaking."

XVI. Judgment or sentence.

The weight of authority seems to hold that the liability of bail terminates with the pronouncement of judgment or sentence upon the defendant, especially where the bond or recognizance does not contain a condition requiring the latter to abide the final order or judgment of the court, or, if convicted, to render himself in execution thereof.

Thus, the liability of the sureties on a bail bond conditioned that the defendant shall appear at a certain time, and not depart from the court without leave, and appear from term to term until final termination of the case, is terminated by the pronouncement of the final judgment in the trial court, and the liability of the surety does not continue until the termination of the case on appeal, or after remand. *Beasley v. State* (1915) 134 Tenn. 650, 185 S. W. 687.

And the liability of sureties upon a bond conditioned that the defendant shall appear on a date fixed, and not depart the court without leave, is terminated, where the defendant appears, is tried, found guilty by the jury, and sentence pronounced by the court to the effect that he be confined in the state penitentiary for a specified time, and that he be remanded to the county jail to await the proper authorities to take him to the penitentiary, since such judgment

operates to place the defendant within the custody of the sheriff, and where the sheriff permits the defendant to go without custody for several days during which he escapes, the sureties are not liable. *Suggs v. State* (1914) 129 Tenn. 498, 167 S. W. 172.

And where the defendant is present in court, and pleads guilty, and the sentence of the court is pronounced, he is no longer in the custody of the bail, but is in the custody of the proper officers of the law, and his sureties are thereby discharged by the operation of the law without a formal order to that effect, because the condition of the bond will then have been fully complied with. *Ford v. State* (1911) 100 Ark. 515, 140 S. W. 734.

And in *Ex parte Williams* (1896) 114 Ala. 29, 22 So. 446, denying the right of one, convicted and sentenced, to be released, after reversal of such conviction, by virtue of a bail bond executed before his conviction and sentence, the court said: "Whenever a party is convicted and sentenced, he is no longer in the custody of his bail, but is in the custody of the proper officer of the law, and the bail are thereby discharged by the operation of law without a formal order to that effect. The condition of the bond then will have been fully complied with. The mere appearance of the defendant at court for trial, or his presence during trial, or a mistrial, will not operate to discharge the bail. The obligation of a proper bail bond binds the sureties, at least, until after the verdict of the jury; but when the sentence of the law is pronounced, the officer of the law is charged with its due execution. The bail have no further control over the custody of their principal, and cannot be longer held responsible."

A bail bond conditioned for the appearance of the defendant at a named term of the county court becomes *functus officio* when the defendant appears as required, and is tried, and the bond cannot be forfeited after the defendant has been convicted, and has appealed, and the appeal has been dismissed. *Forten-*

berry v. State (1904) 47 Tex. Crim. Rep. 84, 79 S. W. 538.

Upon a recognizance for the appearance of the principal from term to term, and not to depart without the leave of the court, but not containing any stipulation to abide the final order or judgment of the court, the sureties are not bound for the appearance of the principal at a term of the court subsequent to that at which he was tried, convicted, and sentenced. *Roberts v. Gordon* (1890) 86 Ga. 386, 12 S. E. 648. In this case the defendant left after being sentenced, and did not return, and the court said: "There can be no doubt that, as soon as the sentence was pronounced, the sheriff, and not the bail, was the proper custodian of the convict. The legal effect of the sentence was equivalent to a special order directing the sheriff to hold him in custody. This being so, it was not necessary to enter an exoneretur on the minutes of the court in order to discharge the bail. The sentence itself operated as an exoneretur. . . . The bail was not bound by the stipulations of the bond for the appearance of his principal at any time after final sentence."

And the liability of the sureties on a bond, conditioned that the defendant shall appear before a police magistrate on a certain day to answer the charge preferred against him, and be further on treated according to law, is terminated by the appearance of the defendant at such time, a plea of guilty, and pronouncement of sentence, the statute providing that the arraignment or conviction of any person charged and bound shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence as the case may be, and therefore the sureties are not liable, where the defendant appears, pleads guilty, and is sentenced to imprisonment and to a fine, and to further imprisonment on default of payment of the fine, and the constable takes him in charge, but before his imprisonment, the sentence is modified by the court by striking off the term of imprison-

ment, and limiting the sentence to the fine and imprisonment in default of payment thereof, and the defendant is allowed to depart from the court room, and he fails to return or pay the fine. *Rex v. Edwards* (1914) 19 D. L. R. 207, 23 Can. Crim. Cas. 296.

But the liability of the sureties on a bail bond, conditioned for the defendant's appearance at the next term, and not to depart without leave, is not terminated by the appearance, conviction, and sentence, of the defendant, since the conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff, but to accomplish this an order from the court is necessary. *State v. Schenck* (1905) 138 N. C. 560, 49 S. E. 917, 3 Ann. Cas. 928. The court gave another reason for its holding as follows: "But there is another sufficient reason why the appellants should be held bound by the recognizance or bail bond and to be now liable for the penalty thereof. All the proceedings of the court are in fieri until the expiration of the term, and during the term the record remains completely under the control of the court. It may strike out its judgment and enter a different one. In other words, the court has the whole term during which to consider its action and modify or reverse it. The principle is supported by abundant authority. *Penny v. Smith* (1866) 61 N. C. (Phill. L.) 36; *Halyburton v. Carson* (1879) 80 N. C. 16; *Turrentine v. Richmond & D. R. Co.* (1885) 92 N. C. 642. This being so, why could not the court strike out the verdict and judgment and award a new trial, and then continue the cause to the next term, in which case the sureties would remain liable (*State v. Smith* (1872) 66 N. C. 620), and if it could do this, why did it not also have the power to direct that the defendant should not be taken into custody until it could come to a final determination in the matter, or, as in this case, suspend execution of the judgment for a proper reason. The conviction and sentence were not

final and irrevocable until the end of the term, which was after the default of the defendant and the entry of the forfeiture. If the court could set aside the judgment, it could a fortiori postpone its enforcement. We conclude that the recognizance binds the sureties for the continued appearance of their principal, from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for the term or without day. He must answer its calls at all times and submit to its judgment. In no other way can the criminal law of the state be well administered."

And the pronouncement of sentence upon the defendant does not terminate the liability of the sureties on his bond, conditioned for his appearance at a certain term of court, and to abide and not depart from the court without leave, and therefore they are liable, where the defendant appears, is tried and sentenced, but, owing to the absence of the clerk and the criminal docket, no entry thereof is made on the record, and the defendant subsequently disappears before entering the security provided by the sentence. *Com. v. Limber* (1914) 42 Pa. Co. Ct. 678.

And for the same reason, where the defendant appears in court, and pleads guilty, and is sentenced just before the adjournment at noon, and neither a sheriff nor any of its officers are present, and immediately upon the reassembling of the court after dinner the defendant is called, and fails to appear, his sureties are likewise liable. *Com. v. Casper* (1888) 6 Pa. Co. Ct. 382.

In *State v. Thompson* (1878) 62 Ind. 367, where it appeared on a prosecution for surety of the peace, that the defendant gave a bond to appear on a certain date before the justice of the peace, that he appeared at such time, and was tried, and ordered by the justice to enter into a bond to keep the peace, but he, without leave of the justice, departed without executing such bond, it was held that his sureties were liable on the bond, which provided that the defendant should

appear on a named day to answer a charge for surety of the peace, and abide the order of the court, and not depart without leave.

And where the accused is convicted and fined, after trial by a jury, and, after the overruling of a motion for a new trial, the court passes judgment upon the verdict of the jury, but he does not appear to pay the fine, the sureties are liable. *State v. Whitson* (1846) 8 Blackf. (Ind.) 178. The court said: "It is set up in bar of this scire facias that the recognizance was discharged by the appearance and submission to trial of the said Harman on the first day of the term. We think otherwise. By the condition of the recognizance he was not only to appear, but he was not to depart without leave of the court, and was to abide the order and judgment thereof. He did depart without the leave of the court, and did not abide the order and judgment thereof. He forfeited his recognizance. The object in taking bail in these cases is not simply to secure the appearance of the accused at the trial, but also the performance and satisfaction of the judgment that may be given against him."

And where the defendant, indicted for a misdemeanor, was tried, found guilty and fined, and, after the judgment was rendered against him, went to the clerk in reference to the payment of the fine, and was allowed to go home for the purpose of making arrangements to do so, but did not afterwards return, the liability of the sureties upon his bail bond, providing that the defendant, if convicted, shall render himself in execution thereof, was not terminated by the defendant's appearance, trial, and conviction, and they are liable for his failure to appear further to pay the fine. *Com. v. Turpin* (1895) 98 Ky. 9, 32 S. W. 133. In this case the court said: "It seems to us that the conditions of this undertaking are not fully met, nor its obligations, as against the surety, fully discharged, merely by the appearance in court of the principal at the time fixed, or by his trial and conviction. By the terms of the bond, appellee has undertaken that Portwood, 'if con-

victed, shall render himself in execution thereof,' and, by the further express terms of the obligation, appellee is to be responsible 'if he shall fail to perform either of these conditions.' It is to be borne in mind, too, that this prosecution against Portwood was for a misdemeanor, and that the trial and conviction could have been had in his absence, and in this respect is unlike a prosecution in a felony case. If he had not appeared in court at all, the fine could still have been imposed, and appellee would clearly have been liable. Does the fact that he was voluntarily present in court, even when coupled with the fact that he conversed with the clerk about replevying the fine, and left with the promise to return the next day and execute a satisfactory replevin bond, exempt the surety in the bail bond from further liability?"

XVII. Submission to judgment or sentence.

The liability of the sureties on a bond conditioned that the defendant will appear before the court on the first day of the term, and not depart without leave, is terminated, where the defendant was present during the trial, and the rendition of the verdict, and the pronouncement of sentence against him, and immediately thereafter was taken into the custody of the sheriff, since the bond is not conditioned that the defendant or his sureties shall pay or satisfy the judgment, or fine imposed, and therefore, when, after the sheriff has taken him into custody, and, upon the day of the sentence, he is permitted to depart with leave of the court and the sheriff, the sureties are not liable. *Moorehead v. State* (1888) 38 Kan. 489, 16 Pac. 957.

And where a defendant who has entered into a recognizance for his appearance, which further provides that, if he shall pay all sums of money adjudged against him by the court, the bond will be void, appears when his case is called for trial, and pleads guilty, and is adjudged to pay a fine, but fails to pay the fine, and thereafter, at a subsequent term of the

court, fails to appear when called, a judgment of forfeiture cannot be entered against the sureties, because there is no authority to make the payment of the fine a condition of the bond, and his appearance, plea of guilty, and submission to sentence discharge the obligation of the sureties. *State v. Cobb* (1891) 44 Mo. App. 375. The court said: "No authority exists in this state for exacting from a prisoner under indictment for a bailable offense, in addition to a bond for his appearance to answer the indictment, a bond to pay any fine that may be adjudged against him by the court. He cannot be compelled, at the price of his liberty between the date of his arrest under the indictment and the close of his trial, to give a bond to pay the fine that may be adjudged against him. The limit of the authority conferred upon the judge, under such circumstances, is to let the prisoner to bail. This authority is conferred by the following statute: 'When the defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail and take his bond or recognizance.' Rev Stat. 1889, § 4123; Rev. Stat. 1879, § 1829. Nor does any statutory authority exist for forfeiting such a recognizance after the prisoner has been discharged from his original custody by the judgment of the court upon his trial; and this takes place when he is sentenced to pay a pecuniary fine without imprisonment. It is then the duty of the officer having him in charge to commit him to the proper custody until the fine and costs be paid, or until he is otherwise discharged by due course of law. But this custody is a new custody. It is not a custody for the purpose of answering, but it is a custody for the purpose of execution. He is held in execution of his sentence, in default of payment of the fine and costs. The statute authorizing the forfeitures of recognizance in criminal cases confirms this view. It is as follows: 'If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion

when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited,' etc. There is here no authority to forfeit, after trial and sentence, a recognizance given to secure the presence of the prisoner in court; and the authority here given can only be exercised when the defendant fails to appear according to the condition of his recognizance. He did so appear, when he appeared and pleaded guilty and submitted to sentence, and this discharged the obligation of his sureties."

And where, after giving a recognizance to appear at the next term, and to abide the final sentence or order of the court, and not to depart without leave, the accused pleads guilty, and is sentenced to pay a fine, and is ordered committed to the custody of the sheriff until the fine is paid, but the court suspends the order of commitment, and the accused is permitted to depart from the court, the recognizance became functus officio when the accused submitted himself to the judgment of the court, and the sureties are no longer bound. *Spillman v. People* (1884) 16 Ill. App. 224.

In *State v. Zimmerman* (1900) 112 Iowa, 5, 83 N. W. 720, the following facts appeared: The judge who held the term of court at which the defendant pleaded guilty fixed a day for sentencing all who had been convicted of crime. All the prisoners who were not out on bond were brought into the court room by the sheriff, and were seated on one side of the room, while those who were out on bond were in another part of the room. They were first sentenced, and the judge said to the sheriff that he wished him to take charge of them as soon as sentenced. The defendant was present, and as soon as sentenced went over and took his seat with the prisoners who were not out on bond. After the sheriff had thus taken the defendant into his custody, the trial judge gave the defendant permission to go and get the money with which to pay the fine, and notified the sheriff of his order. The

defendant, instead of getting the money to pay his fine, left the state, and thereafter, and before the adjournment of court, an order was made requiring him to appear and surrender himself to perform judgment, and upon his failure to appear the bail bond was forfeited. It was held that the liability of the surety was terminated. The court said: "The bond contained the usual conditions—'to appear and answer the indictment, and abide the orders and judgment of the court, and not depart without leave of same.' This undertaking is a continuing one, and can only be discharged by the surrender of the accused as provided by statute (Code, §§ 5528, 5529), or by obtaining leave of court for the accused to depart. *State v. Brown* (1864) 16 Iowa, 314. There is no pretense that Houser surrendered the defendant to the sheriff in accordance with the statute, and no claim that the court directly discharged him. It is said, however, that what occurred at the time judgment was pronounced amounted to a discharge by the court. . . . The bond, as we have said, was in the statutory form, conditioned to 'appear and answer the indictment, and submit to the order and judgment of said court, and not depart without leave of same.' Such a bond does not obligate the surety to pay the fine imposed. In a sense, the surety is simply a jailer for the defendant, charged with the duty of producing him when his personal presence is required, or of surrendering him in execution of the judgment. When once that duty is performed, the liability of the surety is extinguished. And whenever the court orders a defendant out on bail into the custody of the sheriff, in execution of the judgment pronounced against him, and the sheriff, in pursuance of that order, takes possession of the prisoner, the liability of the surety ceases, for he has lost all control of his principal, and can no longer direct his movements. In the instant case there can be no doubt that the court ordered Zimmerman into the custody of the sheriff, in execution of the judgment, and that the sheriff took him into custody pursuant to that or-

der. His subsequent departure was with leave of court, for the purpose of obtaining the money whereby to pay his fine, and there was no breach of the conditions of the bond in his failure to return. The surety did not undertake to return Zimmerman after his departure, with leave of court, under the circumstances disclosed by the record before us."

And it is stated in *Ex parte Chandler* (1896) 114 Ala. 8, 22 So. 285, that the sureties on a bail bond are released when the defendant is committed to jail under sentence of the law.

In *Wilson v. People* (1882) 10 Ill. App. 357, where the defendant appeared at the time named, and pleaded guilty, and the court assessed a fine and ordered that he be committed to the common jail until the fine and costs were paid, it was held that under a recognizance condition for his appearance at a certain time, then and there to answer and abide the order and judgment of the court, and thence not depart without lawful permission, the undertaking of the sureties was completed when the principal appeared and submitted to the jurisdiction of the court. In this case the court said: "The judgment was that he stand committed until the fine and costs were paid, and it must be presumed that the sheriff, in the performance of his duty, immediately took the defendant into his custody, and placed him in jail pursuant to the judicial mandate. The statement that five days afterward it appeared he had departed without leave, not having paid said fine and costs, is, to say the least, ambiguous. The allegation must be taken most strongly against the pleader, as it is presumed he will state the case as favorably as the facts will warrant. From the statement thus made the fair inference would be that Wilson escaped from the custody of the sheriff. We think the sureties would not be bound in that case. If they secured his presence and submission to the court, their obligation was performed, and they ought not to be responsible for the failure of the sheriff to retain him till the fine was paid. When he went into the custody of that

officer, he went by operation of law beyond their control; though up to that point he had been constructively in their custody, and subject to arrest and surrender by them at any moment. This legal right to control him being gone, it would be unreasonable to hold them bound to produce him."

Under a bail bond the conditions of which are that the defendant shall appear in court, and, at all times, render himself amenable to its orders and process in the prosecution of the charge, and, if convicted, shall render himself in execution of the judgment, the sureties are not liable for the failure of the defendant to satisfy the fine imposed upon him on conviction. *Mitchell v. Com.* (1876) 12 Bush (Ky.) 247. The court said: "The forfeiture in this case is based on the idea that the failure of Arthur to pay the fine adjudged against him is a violation of one of the stipulations of the bail bond. We do not so regard it. The bail did not undertake that the accused should pay any fine that he might be adjudged to pay, nor does the Criminal Code authorize the forfeiture of the bond because of his failure in that regard. The covenant is that, if fined, Arthur shall render himself in execution of the judgment, and the statute provides for a forfeiture in case he violates this stipulation by failing to surrender himself to the proper officer. He did render himself in execution of the judgment, by surrendering to the sheriff, and remaining in confinement, as provided for by § 283 of the Criminal Code. This was a full and complete compliance with the covenants of the bail bond, and exonerated Mitchell from all liability."

And in *Atlanta v. Turner* (1910) 8 Ga. App. 213, 68 S. E. 847, where it appeared that a prisoner was convicted in a municipal court, and sentenced to pay a fine, and additionally to serve a term under the chain gang, and, on seeking certiorari, gave a bond conditioned that he should "personally appear to abide the final order, decree, judgment, or sentence" in the case, and the certiorari was dismissed, and the prisoner surrendered himself into custody, and, served out the chain

gang portion of the sentence, but did not pay the fine, it was held that the condition of the bond was complied with by the prisoner's having duly surrendered himself into custody, and that no action could be maintained on the bond.

XVIII. Appeal from conviction.

a. In general.

A bail bond remains in force after the reversal of the conviction of a felony and the remand of the case for a new trial, and the sureties are liable for the subsequent appearance of the defendant in the lower court. *Ex parte Guffee* (1880) 8 Tex. App. 409. It was contended in this case that the law was changed in this respect by a change in the Code to the effect that, when a felony case on appeal is reversed and remanded for a new trial, the defendant shall be released from custody upon his giving bail as in other cases where he is entitled to bail, but the court held that this provision of the Code was for the benefit of any defendant who, having been denied bail in the first instance, was subsequently convicted of a bailable offense, and upon appeal obtained a reversal and a new trial. The court also held that the change in the statutory provision relating to the construction and effect of bail bonds did not affect the question at issue, saying: "The former statute provided that a recognizance or bail bond, entered into by a defendant, and which binds him to appear at a particular term of the district court, shall be construed to bind him and his sureties for his attendance upon the court from term to term, and from day to day, until his final acquittal, or conviction and sentence. The change in the law provides that he and his sureties shall be so bound for his attendance until discharged from further liability on the bond according to law. The concluding phrase in the new law is more comprehensive than in the old, and the change was necessary in view of the change made in the time of passing sentence upon a prisoner. Had the law remained as it was, a sentence of the principal might have ab-

solved the sureties from liability, notwithstanding the defendant might prosecute his appeal and obtain a new trial."

b. Revival of liability of bail on dismissal of appeal.

The liability of the sureties upon a bail bond given for the appearance of the defendant before the mayor of a city, terminated by the execution of an appeal bond, is not revived by the dismissal of the appeal from the conviction of the defendant in the mayor's court. *Bailey v. State* (1903) 71 Ark. 498, 76 S. W. 551. In this case the court said: "The main question presented is whether the execution and approval of the appeal bond did not supersede the bail bond given for the appearance before the mayor, and relieve the sureties on that bond from any further liability on account of the acts of the defendant, so far as that bond was concerned. The object and purpose of the law in allowing the defendant to give the appeal bond superseding the judgment of the justice or mayor was, we think, not only to supersede the collection of that judgment, but also to permit the defendant to remain at large during the pendency of his appeal, and to secure his presence in the circuit court on the trial there. If he had not executed the appeal bond, the judgment of the mayor would not have been superseded, and he would no doubt have been taken into custody in execution of the judgment, as he was present there at the trial. But he took an appeal, and gave the bond which the statute provides shall act as a supersedeas of the judgment of the mayor. He was, by virtue of this bond, entitled to remain at large pending his appeal; and the sureties on his former bond had no further power to take him into custody or surrender him, for the reason that the object and purposes for which their bond had been given had been attained, and the bond was, therefore, as we think, *functus officio*. After the appeal bond was executed, the sureties on the former bail bond lost their authority over him, and their liability ended with their control. The dis-

missal of the appeal, though it left the judgment of the mayor in full force, did not operate to revive the defunct bail bond. If the defendant had failed to appear in the circuit court, the sureties on his appeal bond might have been held liable. As he appeared in that court, and was there when his appeal was dismissed, he could have been placed in custody by the court, and turned over to the town authorities in execution of the mayor's judgment, for which he is still liable."

XIX. Bail bonds given on appeal.

a. In general.

A bond, given by the defendant on appeal to the circuit court from a conviction in the justice's court, conditioned that defendant shall appear at the next term of the circuit court, and not depart the court without leave, is complied with by the sureties, when they see that the defendant appears, and remains through the next term of the circuit court following the execution of the bond, and they are not liable for his failure to appear at a subsequent term, since the bond covers only the term named in it, and does not reach to a succeeding term. *State v. Moore* (1894) 57 Mo. App. 662.

And a bond given on appeal to the superior court from a conviction in a police justice's court is discharged by a verdict of not guilty in the superior court. *State ex rel. Gabe v. Main* (1911) 66 Wash. 381, 119 Pac. 844.

And an appeal bond given on appeal from a conviction in a justice's court to the county court becomes *functus officio* upon the appearance, fine, and imprisonment of the defendant by the judgment of the county court until the fine and costs are paid, and the bond is of no further binding force upon the sureties, and they are discharged from further liability. *Phipps v. State* (1888) 25 Tex. App. 660, 8 S. W. 929.

And where, upon the conviction of the accused by a jury, a case being reserved upon a question of law arising at the trial, he is released on giving a bail bond conditioned that he will appear at the next sitting of the court

to receive sentence, the liability of his bail is terminated, where, after the hearing of the reserved case, the court quashes the conviction and orders a new trial, and his bail are not liable for his failure to subsequently appear at the next sitting of the court, since the accused could not properly be sentenced after his conviction had been set aside. *Reg. v. Hamilton* (1899) 12 *Manitoba L. R.* 507, 3 *Can. Crim. Cas.* 1.

But the sureties on a bond taken in the court of common pleas to prosecute exceptions in the supreme court, and abide the sentence of the latter court, are liable, where, after the exceptions have been overruled and the case remitted to the court of common pleas, the defendant fails to appear in such court. *Com. v. Austin* (1858) 11 *Gray (Mass.)* 330.

And when a question of law in the case of an indictment for a misdemeanor is reserved for the determination of the appellate court, by the defendant upon his conviction, and he gives bail for his appearance at the next term of the trial court to answer the judgment, the suspension of the judgment so obtained expires at the commencement of the term of the trial court, unless, before that time, the defendant procures in the appellate court a reversal of the judgment, or an order extending its suspension; and, where the suspension of a judgment so expires, the failure of the defendant to appear in the trial court at the term specified is ground for the forfeiture of the bail. *State v. Lowry* (1856) 29 *Ala.* 44.

And where, on conviction, the defendant, in order to suspend the execution of the judgment, pending appeal, until the next term of the trial court, gives bail to appear at that term and abide the judgment rendered, the legal effect of the undertaking is that the defendant shall appear at the next term of the trial court to abide the judgment rendered, if that is affirmed on the appeal, and if such judgment is reversed, and he is not discharged, to abide such other judgment as may be rendered in the trial court, and the liability of the sureties is not termi-

nated by his appearance at the term specified in the undertaking; but, if the case is continued until the next term, the defendant is bound to appear then, and the liability of the surety continues. *Williams v. State* (1876) 55 *Ala.* 71. The defense to the enforcement of the forfeiture of the bail bond, that the liability of the sureties had been terminated because of the reversal of the judgment of conviction by the appellate court, was held unavailable, but the court stated that the defense would probably be good, saying in this connection: "The undertaking would have shown that it required the defendants, not (according to the directions of the statute) to appear and 'abide the judgment rendered,' but to appear 'and abide the judgment rendered at this, the spring term, 1875,' and if that judgment had been shown to have been in fact reversed, and not affirmed, the defense would probably have been made out. For the stipulation of the undertaking being thus special, and not in the terms of the act, it may be that the sureties would not have been bound to answer for the defendants abiding any other judgment in the cause."

b. Reversal of conviction.

A recognizance, given on appeal from a conviction, for appearance in the appellate court, requires the defendant to appear in the trial court after the reversal of its judgment and the granting of a new trial, although no order is made directing him to do so; and the sureties are liable if he fails so to appear. *State v. Heed* (1876) 62 *Mo.* 559. The court said: "When the judgment of the circuit court was reversed by this court, no direct or specific order was made that the defendant should appear in the circuit court and undergo a new trial, but this was necessarily implied in the order remanding the cause to that court for another trial. The judgment of this court was that the defendant had been illegally convicted and should be tried again, and this was as binding upon the defendant as upon the state. The defendant was not thereby discharged. The order re-

manding the cause was one which, in its very nature, required the parties to that cause to appear before the circuit court for further proceedings in accordance with the opinion of this court. It was the duty of the defendant, in rendering obedience to that order according to the conditions of his bond, to appear at the circuit court and submit himself to trial. The record recites that he failed so to appear, and such failure was a breach of his recognizance, for which the defendants are liable."

And the sureties in a recognizance on an appeal from the district court to the supreme court are not discharged from liability by the reversal of the conviction and the remand of the case to the district court for another trial, where the condition of the recognizance is that the defendant shall appear before the district court, and not depart without leave, in order to abide the judgment of the supreme court; and the sureties are, therefore, liable, where the defendant fails to appear after the reversal of the conviction in the district court. *Weaver v. State* (1875) 43 Tex. 386.

And it was held in *Riviere v. State* (1879) 7 Tex. App. 55, following the preceding case that the sureties on a recognizance given on appeal from a conviction of misdemeanor continue liable, after the reversal of the conviction and the remand of the case for a new trial, for the failure of the defendant subsequently to appear in the lower court. The contention unsuccessfully made by the surety against his liability was that the reversal of the case placed the cause "as it would have stood in case a new trial had been granted in the district court," and that "the effect of a new trial [in the district court] is to place the cause in the same position in which it was before the trial had taken place," and that it followed therefrom that the effect of the reversal was also to render the recognizance *functus officio*, and that the state must look to and forfeit the appearance bond and that alone, on the failure of the defendant subsequently to appear in the court below.

But the cases of *Weaver v. State* (1875) 43 Tex. 386, and *Riviere v. State* (Tex.) *supra*, were stated to be overruled by *Wells v. State* (1886) 21 Tex. App. 594, 2 S. W. 806, in *Sanders v. State* (1913) 70 Tex. Crim. Rep. 532, 158 S. W. 291, holding the liability of the sureties on an appeal bond given by the defendant after conviction of a felony is terminated by the reversal of the judgment and the remand of the cause, and the sureties are not liable for the failure of the defendant to appear at the next term of the lower court, but it was considered in the latter case that, had the court affirmed the judgment, the sureties would be liable on his failure to appear in the lower court.

And in *Wells v. State* (1886) 21 Tex. App. 594, 2 S. W. 806, holding that a recognizance given on appeal to the court of appeals from a conviction in the county court becomes *functus officio* on the reversal of the case and its remand to the county court, and that the sureties are not liable for the failure of the defendant subsequently to appear in the county court for trial, the court said: "It is only in the case of an affirmance of the judgment of conviction by this court that the defendant's recognizance, given on appeal, can be forfeited. When the judgment of conviction is reversed, and this court awards a new trial to the defendant, the cause stands as it would have stood in case the new trial had been granted by the court below. Code Crim. Proc. arts. 875, 876. In such case the recognizance given on appeal has served its purpose, and is *functus officio*. The bail bond, or original recognizance of the defendant in such case, still has full force and effect, and it is upon such obligation, and not upon his recognizance on appeal, that he is bound. *Ex parte Guffee* (1880) 8 Tex. App. 409. Prior to the adoption of the Revised Statutes it was held that the recognizance given by the defendant on appeal could be forfeited in the trial court, after the judgment of conviction had been reversed and the cause remanded by the appellate

court. *Weaver v. State*, and *Riviere v. State* (Tex.) *supra*. These decisions were based upon the statutes then in force. Article 876 of the Revised Code of Criminal Procedure was not then enacted, but is a new article inserted by the revisers. We think this article settles the question, and that the decisions above referred to are no longer applicable. There is no question but that, in the case of an affirmation by this court of the judgment

of the trial court, the recognizance on appeal is still binding, and may be forfeited upon a breach of its conditions. Code Crim. Proc. art. 875; *Thompson v. State* (1884) 17 Tex. App. 318. We conclude, therefore, that the recognizance of the defendant on appeal was no longer of any binding force after the reversal of the judgment and the awarding of a new trial by this court, and cannot support the judgment of forfeiture." G. V. I.

P. D. HUGHES, Plff. in Err.,

v.

STATE OF TENNESSEE.

Tennessee Supreme Court — February 27, 1922.

(— Tenn. —, 238 S. W. 588.)

Arrest — without warrant — commission of offense — evidence.

1. That one is engaged in violation of the law in the presence of officers does not justify his arrest without warrant, if the officers are not aware of such violation until the search made after his arrest.

[See note on this question beginning on page 652.]

Constitutional law — necessity of pointing out specific provision infringed.

2. To raise the question of admissibility of evidence because of alleged violation of a constitutional right it is not necessary to specify the particular section alleged to have been violated, but it is sufficient to call attention to the particular right alleged to have been infringed.

Search — after unlawful arrest — utilization of evidence discovered.

3. Where police officers arrest one on the highway without a warrant or evidence of commission of crime in their presence, evidence discovered by the search of his person and conveyance subsequently to the arrest cannot be utilized to secure his conviction.

[See 2 R. C. L. 467; 8 R. C. L. 196; 2 R. C. L. Supp. 572.]

Arrest — information of offense — justification for arrest.

4. Information justifying an officer in the belief that an offense is being committed is not sufficient to justify

arrest of the suspected person without warrant.

[See 2 R. C. L. 450.]

Breach of peace — transportation of intoxicating liquor.

5. It is a breach of the peace to transport intoxicating liquor, or have it in possession.

Arrest — breach of peace.

6. Under a statute authorizing an officer to arrest for breach of peace threatened in his presence, he may arrest one who is reputed to be engaged in the unlawful sale of liquor, and who from actions and surrounding circumstances he believes to be engaged in transporting such liquor, where such transportation is a breach of the peace.

Evidence — secured by search after arrest — admissibility.

7. Evidence of possession of intoxicating liquors, secured by search of one arrested by officers for breach of the peace threatened in their presence, may be admitted against him upon trial for possession and transportation of such liquor.

ERROR to the Criminal Court for Putnam County (Gardenhire, J.) to review a judgment convicting defendant of violating the prohibition law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Worth Bryant and V. E. Bockman for plaintiff in error.

Mr. William H. Swiggart, Jr., for the State.

L. D. Smith, Special Judge, delivered the opinion of the court:

Plaintiff in error, P. D. Hughes, was convicted in the criminal court of Putnam county on an indictment charging him with violating the provisions of chapter 12 of the Acts of 1917, prohibiting the receipt, possession, and transportation of intoxicating liquors. By consent the trial was had before the trial judge without the intervention of a jury, who, after hearing the evidence, found the plaintiff in error guilty, and after overruling motion for new trial entered judgment against him for a fine of \$50 and a sentence of six months in the workhouse.

The questions presented for our determination arise upon the action of the trial court on exceptions to the testimony introduced by the state. The state introduced three witnesses, namely, C. N. Gracey, a United States deputy collector, W. M. Stout, sheriff of Putnam county, and Bill Gailbreath, who seems not to have held any official position. The testimony of each of these witnesses, to which exception was taken, is substantially that given by Sheriff Stout, and is as follows:

W. M. Stout, sheriff of Putnam county, in which county this offense was committed, if at all, testified that he, in company with Gracey, Tyler, and Gailbreath, was on the Buffalo valley road west of Baxter, and saw plaintiff in error and one Stone come out of a road toward the Buffalo valley road carrying a nail keg. He says: "We decided probably that they had whisky," and that, after running their car around the hill out of sight of the plaintiff in error, he, Gailbreath, and Tyler went back toward where the car of the plaintiff in error was standing, near the side of the road. Plaintiff

in error had gotten into his car and started toward Baxter. "We got in the road in front of them and made them stop, and we searched their car, and found in this nail keg 1 gallon of whisky in a long dark bottle."

He says further: "We were not out looking for these boys on this occasion, but just happened to see them, and suspicioned that they had whisky. We had no warrant to search or seize the car or whisky, or for the arrest of either of the defendants. I had had some reports that the defendant, Hughes, was engaged in some way in whisky traffic, and seeing them come into the road with the keg, and from their actions and conduct and the reports I had received, I had reason to believe that it was whisky, and when I made a search it proved to be whisky."

The grounds of the exception to this evidence are "that the parties in question had no right to hold him up while traveling upon a public highway, and seize and search his car without a search warrant, and without knowing that he had whisky, either on his person or in the car; by so doing they violated defendant's constitutional rights against unreasonable seizure and search."

This exception was overruled by the court, and due exception was taken to the court's action thereon. The court's ruling, as stated in the bill of exceptions, is: "The court was of the opinion that it was not an unreasonable search, that the offense was committed in the presence of the officers, and that they were justified in making the arrest, as the search resulted in finding whisky."

The evidence introduced by the state unquestionably made a case of violating the liquor laws of the state against the plaintiff in error, and the only question for our determination is whether this evidence can be rightfully made the basis of conviction.

tion, having been obtained and procured in the manner indicated. This involves the consideration of two questions: First, whether the act of the officers in arresting the plaintiff in error and in searching his car was a violation of the constitutional rights of the plaintiff in error, which protect him against unlawful searches and seizures; and, second, if the method of making evident this violation of the law was of itself unlawful, and violated the constitutional rights of the plaintiff in error, was the evidence nevertheless admissible, and can it properly be made the basis of a conviction?

A negative answer to the last question stated is based by counsel for plaintiff in error upon the provisions of §§ 7 and 9 of article 1 of the Constitution.

Section 7 provides that "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures, and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted."

Section 9 provides that "in all criminal prosecutions the accused hath the right to be heard by himself and his counsel; to demand the nature . . . of the accusation against him, . . . and shall not be compelled to give evidence against himself."

In his exception to the testimony the plaintiff in error did not specify that the admission of this testimony violated any of his rights under § 9 of article 1 of the Constitution, nor did he, in making exceptions, specify the particular clause of the Constitution which he claimed was or would be violated by the admission of this testimony; but his exception was based upon the ground that the conduct of the witnesses was unlawful and violated his consti-

tutional rights against unreasonable search and seizure. It was not necessary, in order to raise the question, for the plaintiff in error to specifically point out by numbers the particular sections of the Constitution which he claimed were being violated; nor are we justified in assuming, as is argued by the attorney general, that the plaintiff in error, in his exceptions, referred only to the provisions of the Federal Constitution which are similar to those found in our state Constitution. It was sufficient to raise the question to call attention to

the particular right which is guaranteed to the citizen under our own Constitution. If any constitutional right of plaintiff in error has been violated in this case, it is referable to § 7, and therefore it will be unnecessary to consider whether his rights under § 9 were also violated.

There is much apparent, if not actual, conflict in the decisions, with respect to the admissibility of testimony obtained by unlawful arrest and search. This court had occasion to review the subject quite fully in the case of Cohn v. State, 120 Tenn. 61-75, 17 L.R.A. (N.S.) 451, 109 S. W. 1149, 15 Ann. Cas. 1201. The question has more recently come under review by the Supreme Court of the United States in the case of Amos v. United States, 255 U. S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266, decided February 28, 1921, published by Lawyers' Co-operative Publishing Company in Advance Sheets of April 1, 1921, and in Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261, decided at the same time and published in the same number of the Advance Sheets.

There is no conflict of authority upon the proposition that the constitutional provisions relied upon can only be invoked in this way to protect the citizen against the activities of the government. For example, the provisions of the Federal Constitution can only be in-

Constitutional law—necessity of pointing out specific provision infringed.

voked as against the activities of the agencies of the Federal government, and likewise the rights of the citizens involved in the constitutional provisions referred to are only protected against the actions of officers of the state government. It is only when persons are acting under color of authority from the government that evidence developed in violation of the law can be at all rejected. *Cohn v. State*, 120 Tenn. 61, 17 L.R.A. (N.S.) 451, 109 S. W. 1149, 15 Ann. Cas. 1201; *Boyd v. United States*, 116 U. S. 619, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Adams v. New York*, 192 U. S. 586, 48 L. ed. 577, 24 Sup. Ct. Rep. 372. None of the cases go to the extent of holding that because evidence has been obtained by unlawful means it is therefore inadmissible; it is only when evidence has been obtained by means of unlawful conduct of government officials, in violation of the provisions of the Constitution referred to, that it has been held inadmissible in any of the cases.

In the *Cohn Case*, *supra*, *Cohn* had been convicted for the offense of selling liquors and cigarette papers on Sunday, contrary to the statute. The case was made out against him by the testimony of John Yeaman, a deputy sheriff of Davidson county, and another witness. He testified in substance: That he and two deputies went to *Cohn's* place about 6 o'clock on Sunday morning, January 13, 1907, and mounted a stairway leading up by the side of the saloon, and, after they had reached a point about half up the stairway, they stopped and removed some bricks from the wall, and the mortar along with them, being careful to draw the bricks and the mortar out upon the stairway, so as to give no indication, in the saloon, of what they were doing on the stairway; that the hole thus made was smaller on the inside of the saloon than on the outside; that, having made this peephole, they sat and watched occurrences in the saloon; that they saw Lem Horton and Charles Per-

kins enter the barroom by a rear door, and they were soon followed by a crowd; that witness and those who were with him watched the persons inside for an hour; that Lem Horton and Charles Perkins sold, and received money for, a great many drinks of whisky and beer, certainly more than three; that they saw a large box of cigarette papers, and saw Lem Horton reach under the bar, take out this box, and sell a book of them to a customer, one Henry Ewing; that he rang up this sale of the cigarette papers, just as he did the drinks, in the cash register; that the witness and the others with him got the cigarette papers and the sale book and brought them to court. It was further testified that Horton and Perkins worked for *Cohn*.

When this evidence was given, *Cohn*, by his counsel, moved the court to strike out the entire testimony, because it was inadmissible and incompetent upon the ground that it was obtained illegally and contrary to the laws of the state and to the state and Federal Constitutions. The trial court overruled the exception, and his action thereon was the basis of the appeal to this court. The court sustained the action of the trial court, and held that the evidence thus obtained was not in violation of the constitutional provisions against unreasonable searches and seizures, nor violative of the constitutional inhibition against compelling a party in criminal cases to give testimony against himself. In so holding the court said: "We think the evidence was competent. The unreasonable search and seizure against which the constitutional provision was designed to operate was that made through governmental agency, and has no bearing upon the unauthorized acts of private persons, or of petty officers of the law. Nor has the inhibition against compelling a person charged with crime to incriminate himself any more bearing upon the present controversy, since the plaintiffs in error were not re-

quired to testify. Nor was any presumption indulged or permitted against them because of their silence. Nor were the plaintiffs in error required to produce any private papers that would so speak as to incriminate them. It is true that the act of Yeaman and his companions in making a hole in the wall and spying upon the inmates of the building was an unlawful one, for which they were subject to punishment. Still, although the evidence was thus procured, it would not be rejected by the court, if relevant to the issue. 4 Wigmore, Ev. §§ 2183, 2264; 1 Greenl. Ev. § 254a; 2 Elliott, Ev. § 1013."

In support of the conclusion above quoted the court referred to quite a number of cases from different jurisdictions. In some of the cases the testimony was held admissible upon the theory that, the evidence being proper in itself, the court could take no notice of how it was obtained. In other cases it was held that the restrictions of the Constitution were intended to operate only upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every reasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. In still other cases the theory of admissibility was that, when an official of the state exceeded his authority, he would be deemed as acting, not for the state, but for himself only, and therefore he alone, and not the state, should be held accountable for his acts.

The reasoning of the cases referred to in the Cohn Case is not necessarily established by the decisions upon the facts of that case. In that case the officer of the law

went about discovering the evidence in an unlawful way; but it was not a case in which the citizen was compelled to produce evidence of his own guilt, nor one in which an unlawful act of the officer itself disclosed the unlawful act of the defendant. It was a case in which the officers of the law themselves violated the law in order to place themselves in a situation to testify as to the facts, and not one in which the officers produced and disclosed a violation of the law by an invasion of the defendant's constitutional right against unlawful search and seizure. Many of the cases may be reconciled by observing the distinction just indicated. This distinction is illustrated by the case of *Burdeau v. McDowell*, decided by the Supreme Court of the United States, June 1, 1921, and reported in 256 U. S. 465, 65 L. ed. 1048, 13 A.L.R. 1159, 41 Sup. Ct. Rep. 574.

It is pointed out in the dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, that the distinction made by the majority of the court in that case is one without a difference. Nevertheless, this may account for the apparent conflict in the cases themselves. It was held by the majority of the court in that case that the constitutional guaranties against unreasonable searches and seizures and self-incriminations are not violated, where Federal prosecuting authorities, to whom incriminating papers stolen by private persons have been delivered, retain them with a view to their use in subsequent investigations, where said papers will be part of the evidence against the accused, and may be used against him on the trial, should an indictment be returned; the government having had no part in the wrongful taking.

But in cases where the action of the governmental authorities is unlawful and violative of the constitutional rights of the citizen, and directly developed and disclosed the facts of the violation of the law, the government cannot rely upon the

evidence thus unlawfully obtained by its agents. The cases of *Amos* and *Gouled*, *supra*, are direct authority for the proposition just stated.

In the *Amos* Case, 225 U. S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266, *supra*, the government's witnesses were deputy collectors of internal revenue. They went to the defendant's home, and, not finding him there, but finding a woman who stated she was his wife, told her that they were revenue officers and had come to search the premises for violation of the revenue law. Thereupon the woman opened the store, and the witnesses entered and in a barrel of peas found a bottle containing blockade whisky. On cross-examination these witnesses testified that they had no warrant for the arrest of the defendant, nor any search warrant to search his house. Thereupon their testimony was excepted to, but the trial court admitted it over the defendant's objection. With respect to this action of the trial court the Supreme Court said:

"The answer of the government to the claim that the trial court erred in the two rulings we have described is that the petition for the return of defendant's property was properly denied, because it came too late when presented after the jury was impaneled and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

"Plainly, the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, *Gouled v. United States*, 255 U. S. 298, 66 L. ed. 647, 41 Sup. Ct. Rep. 261."

The court thereupon held the action of the trial court in admitting the evidence aforesaid to be reversible error. The reasoning of the court by which this result was reached had been stated by the court in its opinion in the case of *Gouled*. The *Gouled* Case, as stated by the court, was this:

"In a joint indictment the plaintiff in error, *Gouled*, one *Vaughan*, an officer of the United States Army, and a third, an attorney at law, were charged in the first count with being parties to a conspiracy to defraud the United States, in violation of § 37 of the Federal Criminal Code [Comp. Stat. § 10,201, 7 Fed. Stat. Anno. 2d ed. p. 534], and, in the second count, with having used the mails to promote a scheme to defraud the United States, in violation of § 215 of that Code [Comp. Stat. § 10,384, 7 Fed. Stat. Anno. 2d ed. p. 812]. *Vaughan* pleaded guilty, the attorney was acquitted, and *Gouled*, whom we shall refer to as the defendant, was convicted, and thereupon prosecuted error to the circuit court of appeals, which certifies to this court six questions which we are to consider.

"Of these questions, the first two relate to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under direction of officers of the Intelligence Department of the Army of the United States, and the remaining four relate to papers taken from defendant's office under two search warrants, issued pursuant to the Act of June 15, 1917 (40 Stat. at L. 217, 228, chap. 30, Comp. Stat. §§ 10,496½a, 10,496½b, Fed. Stat. Anno. Supp. 1918, pp. 120, 128). It was objected on the trial, and is here insisted upon, that it was error to admit these papers in evidence, because possession of them was obtained by violating the rights secured to the defendant by the 4th and 5th Amendments to the Constitution of the United States.

"The 4th Amendment reads: 'The right of the people to be secure

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"The part of the 5th Amendment here involved reads: 'No such person . . . shall be compelled in any criminal case to be a witness against himself.' "

Two of the questions certified to the Supreme Court for answer were:

First. "Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government of the United States, a violation of the 4th Amendment?"

Second. "Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the 5th Amendment?"

The facts upon which the answer to these two questions depended were: "The facts derived from the certificate, essential to be considered in answering the first two questions, are: That in January, 1918, it was suspected that the defendant, Gouled, and Vaughan, were conspiring to defraud the government through contracts with it for clothing and equipment; that one Cohen, a private in the Army, attached to the Intelligence Department, and a business acquaintance of defendant Gouled, under direction of his superior officers, pretending to make a friendly call upon the defendant, gained admission to his office, and in his absence, without warrant of any character, seized and carried away several documents; that one of these papers, described as 'of evidential value only,' and belonging to Gouled, was subsequently delivered to the United States district attorney, and was by him introduced in evidence over the objection of the defendant that possession of it was obtained by a violation of the 4th

or 5th Amendment to the Constitution; and that the defendant did not know that Cohen had carried away any of his papers until he appeared on the witness stand and detailed the facts with respect thereto as we have stated them, when, necessarily, objection was first made to the admission of the paper in evidence."

The court's answer to these questions is:

"The ground on which the trial court overruled the objection to this paper is not stated, but from the certificate and the argument we must infer that it was admitted, either because it appeared that the possession of it was obtained without the use of force or illegal coercion, or because the objection came too late.

"The prohibition of the 4th Amendment is against all unreasonable searches and seizures, and if for a government officer to obtain entrance to a man's house or office by force, or by an illegal threat or show of force amounting to coercion, and then to search for and seize his private papers would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth, instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will, in the one case as in the other, and it must, therefore, be regarded as equally in violation of his constitutional rights.

"Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaint-

ance, or in the guise of a business call, and whether the owner be present or not when he enters any search and seizure subsequently and secretly made in his absence, fall within the scope of the prohibition of the 4th Amendment, and therefore the answer to the first question must be in the affirmative. . . .

"Upon authority of the *Boyd Case*, 116 U. S. 619, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, this second question must also be answered in the affirmative. In practice, the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the 5th Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

This result is said to follow from the spirit of the decisions dealing with these constitutional provisions, and which the court describes as follows: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182), have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citi-

zen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned, but mistakenly overzealous, executive officers."

In the *Gould Case*, just referred to, the court held that not only the papers obtained without a warrant at all, but also other papers which had been seized under search warrants duly and lawfully issued, were obtained in violation of the defendant's constitutional rights. It does not follow that, because property is seized under legal search warrant, the seizure itself is not violative of the constitutional provisions referred to. These particular papers which were seized under search warrants themselves had no pecuniary value; they were valuable only in affording evidence against the accused of the offense of which he was charged. So the question was presented as to whether or not papers of this character, seized under a search warrant, were protected from seizure by the constitutional provisions against unreasonable searches and seizures. The principles of law for determining these questions were stated by the court to be:

"The wording of the 4th Amendment implies that search warrants were in familiar use when the Constitution was adopted, and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable,

when made without them—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd Case, *supra*, and the Weeks Case, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, in which it is pointed out that, at the time the Constitution was adopted, stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling, 'and many other things of like character,' might be searched for in home or office, and, if found, might be seized, under search warrants lawfully applied for, issued, and executed.

"Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, *supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. Boyd Case, *supra*.

"There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of

the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized (*Langdon v. People*, 133 Ill. 382, 24 N. E. 874), and lottery tickets, under a statute prohibiting their possession with intent to sell them (*Com. v. Dana*, 2 Met. 329); and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds."

It was held by the court that, since the papers had no pecuniary value and the government could not have any interest in the papers themselves,—the only event in which they would have a right to take them into possession,—it could desire their possession only for use as evidence, and to search and seize them for such a purpose would be unlawful.

It was held that, although papers may not have any pecuniary value, nevertheless, if they were of that character which justified the government in seizing them, under the principle stated, they could be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him, but where the seizure was for the purpose only of using the paper as evidence such seizure would be unlawful. The court having held the seizure of these particular papers to have been unlawful, another question propounded to the court was: "If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted—if he then move before trial for the return of said papers, and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring

said papers when they are offered in evidence against the party so indicted?"

To this question the court replied: "The papers being of 'evidential value only,' and having been unlawfully seized, this question really is whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of the trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed, for any technical reason, to prevail over a constitutional right.

"In the case we are considering, the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that, on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed,

under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

We are of opinion that the case we have here, as made by the bill of exceptions, falls within the rule applied by the United States Supreme Court in the cases just referred to, rather than that announced in the Cohn Case. The state, having through its executive representatives produced the evidence of a violation

of the law by one of its citizens by means prohibited by the Constitution, cannot be permitted through its judicial tribunal to utilize the wrong thus committed against the citizen, to punish the citizen for his wrong; for it was only by violating his constitutionally protected rights that his wrong has been discovered. It is no answer to say that it matters not how a citizen's sins have been found out. Security from unlawful search is the right guaranteed to the citizen, even for the discovery of the citizen's sins. This right we must protect unless we may with impunity disregard our oath to support and enforce the Constitution. The experience of our forefathers with unlawful searches and seizures was deemed by the people who framed the Constitution sufficient to warrant the provision by which, in instances, even the guilty might escape detection and punishment. We are not to be understood as holding that all evidence obtained by unlawful means is inadmissible, but only where, in cases such as we have here, the evidence offered has been produced by violating the constitutional protection against unlawful searches and seizures.

Was the arrest and search of the defendant in this case unlawful? Provision is made by statute in this state for searches in two cases only: One by search warrant issued upon affidavit showing probable cause (Shannon's Code, §§ 7296-7311);

Search—after unlawful arrest—utilization of evidence discovered.

and the other when a person charged with a felony is suspected by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence (Shannon's Code, § 7312). However, searches are allowable under the common law in cases where persons are lawfully arrested. 2 R. C. L. p. 468. In the text cited it is said: "An officer making an arrest has authority to search the person of his prisoner, even against his will; but a search is justifiable only as an incident to a lawful arrest, and if the arrest is unlawful the search is also unlawful. Thus, an officer acting without a warrant for an arrest, and without attempting to make an arrest, is not justified in making a search of a person upon mere suspicion that he has committed a crime. The officer making an arrest and search of the person of the prisoner may take from him any dangerous weapons, or anything else that he reasonably may deem necessary to his own or the public safety, or for the safe-keeping of the prisoner, and take into his possession the instruments of the crime and such other articles as may be of use as evidence on the trial, or which might enable the prisoner to escape."

Our statute on the subject of searches, to which we have just referred, was taken from the Code of Alabama. The supreme court of Alabama, in discussing the right of search under the statute similar to our own, and under the common law, said, among other things:

"In commenting on article 4 of the Constitution of the United States, which prohibits unreasonable searches and seizures, in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, delivering the opinion, quoted with approbation from Lord Camden as follows: 'By the laws of England, every invasion of private

property, be it ever so minute, is a trespass. No man can set his foot on my ground without my license, but he is liable to an action, though the damage be nothing. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure was warranted. If that cannot be done, it is trespass.' These are the principles which protect every citizen of this government in the enjoyment of his personal liberty, his home, and his property, and no other 'can abide the pure atmosphere of a government of political liberty and personal freedom.'

"This court in *Chastang v. State*, 83 Ala. 30, 3 So. 304, 7 Am. Crim. Rep. 135, referring to the opinion of Justice Bradley, declared: 'We indorse and approve everything said therein.' The statute law provides for the issuance of search warrants, but specifies on what grounds they are to be issued, and only on probable cause, supported by affidavit, naming the person, and particularly describing the property and place to be searched. Code, §§ 4727-4729. The search and seizure in the present case were not made under these statutory provisions. Section 4745 of the Code we have quoted above, and which provides that when a person is charged with a felony, and is supposed to have a dangerous weapon, or anything which may be used as evidence of the commission of the offense, he may be searched, and such weapon or thing may be seized and retained, subject to the order of the court in which the defendant is to be tried.

The question as to the dangerous weapon does not arise in this case. That part of the statute which authorizes the seizure and retention of 'anything which may be used as evidence' on the prosecution is a mere statutory enactment of the common law. At common law the arresting officer had the right to remove money from the defendant's person; but this right was limited to cases in which the money was connected with the offense, or to be used as evidence. See Whart. Crim. Pl. & Pr. § 60; Bishop, Crim. Proc. §§ 210, 211, and the cases cited in support of the text." Ex parte Hurn, 92 Ala. 102, 13 L.R.A. 124, 25 Am. St. Rep. 23, 9 So. 515.

So that, if the arrest is lawful, a search revealing evidence of the offense for which a person is arrested is not unreasonable, or violative of § 7 of article 1 of the Constitution.

The arrest in this case was made by the sheriff without a warrant. It is contended for the state that the arrest was lawful, notwithstanding it was made without a warrant, for the reason that the plaintiff in error was engaged in the commission of an offense in the presence of the officers. The circuit judge was of the opinion that this arrest was authorized, because after the arrest it was found that the plaintiff in error had intoxicating liquor in his possession.

It does not follow from the fact that evidence discovered upon the arrest proved the commission of an offense, that the arrest itself was

**Arrest—without
warrant—com-
mission of of-
fense—evidence.**

authorized. Under our statute (Shannon's Code, § 6997) an officer may without a warrant arrest a person for a public offense committed in his presence. That means that the offense, or the facts constituting the offense, must be revealed in the presence of the officer. An officer cannot lawfully arrest a person without a warrant and search his person for the purpose of ascertaining whether or not he has violated the law. Even if the person arrest-

ed were in fact violating the law, the offense was not in legal contemplation committed in the presence of the officer, and such an arrest is unauthorized, where the facts constituting the offense are incapable of being observed, or are not observed by the officer. That such is the rule of law under our statutes is readily seen by an examination of the case of *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064. In that case the plaintiff in error had just shot one officer with a pistol, and was seen by several persons running down the street with a pistol in his hand, when another officer attempted to arrest him. He did, in fact, have the pistol at the time of the attempted arrest, because he turned upon the officer and shot and killed him. Yet it was held by this court that such an attempted arrest was unlawful, and plaintiff in error had a right to resist it. Under the circumstances the trial judge instructed the jury: "If deceased was a policeman in the city of Chattanooga at the time he was killed, and direct information was brought to him that defendant had a pistol on his person, it was his duty, as well as his lawful authority, to arrest said Hurd, with or without a warrant, and as to whether or not he was in uniform would be immaterial."

The court held that this instruction was erroneous, saying: "It is clear from the record that the deceased was attempting to arrest the defendant for a misdemeanor which was not committed in his presence, but the fact of its commission was communicated by others, and the instruction of the trial judge that deceased had lawful authority to arrest defendant without a warrant was erroneous."

And this was true, notwithstanding the fact that the defendant, when the officer attempted to arrest him, had the pistol, and in fact used the pistol on the officer in resisting arrest.

It follows, therefore, that it cannot be said that the plaintiff in er-

ror was in the commission of an offense in the presence of the officers, so as to justify the arrest, merely from the fact that, when the arrest was effected, it was found that he was actually committing an offense. Neither is it sufficient to —information of offense—justification for arrest.

that the officer had information justifying him in the belief that an offense was being committed, for the facts constituting the offense must have been within the knowledge of the officer, and that knowledge must have been revealed in the officer's presence. To illustrate: If a person has in his possession a concealed weapon, if he exposes it in the presence of an officer or uses it, and the officer sees it, then the officer may lawfully arrest him without a warrant. A person may have a concealed weapon upon his person, but if there is no evidence of that fact apparent to an officer his arrest would be unwarranted. The plaintiff in error may have been, as it was subsequently developed, engaged in the transportation of liquor in violation of the law, but the fact of his having liquor was not evident to the officer making the arrest. It must be held, therefore, that the arrest cannot be justified upon the ground of the commission of an offense in the presence of the officers.

But an officer may lawfully arrest a person if a breach of the peace is threatened in his presence. In such a case it is not necessary for the officer to see and know that the law is being violated. Indeed, he may arrest a person in order to prevent a violation of the law. In such a case he may lawfully arrest the person, if the circumstances are sufficient to justify the belief in the mind of a prudent officer, acting in good faith, that a breach of the peace is about to occur. Of course, an arrest for a breach of the peace cannot be justified merely upon belief or suspicion existing in the mind of the officer; but, where the actions of the person and the surrounding circumstances are such as to indi-

cate a threatened breach of the peace, the arrest may be lawfully made. In this case the plaintiff in error had left his automobile on the side of the road. He was approaching his car, carrying a keg having the appearance of a nail keg, or horseshoe keg. There was no store or other place in the direction from which he was coming to indicate that this keg contained nails, or horseshoes, or other articles ordinarily contained in a container of that kind. Plaintiff in error was reputed to be engaged in the unlawful sale of liquor. These circumstances justified the officer in believing that a violation of the law was about to be committed. It is a breach of the peace to transport intoxicating liquors.

State ex rel. Thompson v. Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 889. In that case the court said: "The unlawful sale of liquor being a breach of the peace, it is not always necessary for an officer to actually see a sale before he is authorized to make an arrest without a warrant. If, in his presence, such a sale is threatened, he is authorized to arrest as for any other threatened breach of the peace. The threat need not be in words. If one man puts himself in a position to assault, and by his acts manifests a purpose to assault another, a breach of the peace is undoubtedly threatened. How does this principle apply to a threatened unlawful sale of intoxicating liquors? The condemnation of our statutes is confined to the selling of such liquors. It is not unlawful for a man to have liquors, in any quantity, in his home or in his place of business. The mere presence of liquors, therefore, without more, is not a public offense, and will not under all circumstances indicate a purpose or threat to sell them unlawfully. Thus, a stock of liquors in a house from which an interstate shipping business is being done may have no unlawful significance. . . . Our act authorizing

an arrest for a threatened breach of the peace was taken from the Alabama Code of 1852. And we quote, with approval, what the supreme court of that state has said in sustaining the right of an officer to prevent a threatened breach of the peace, as follows: "Two great and vital principles of government are to be kept steadily in view, in pronouncing on conduct, such as is brought to view in this record; the liberty of a citizen, and the peace and repose of society. Civil liberty is natural liberty, shorn of the excesses which invade and trench on the equal liberty of others. No one can claim the right to violate the law, and precautionary force is justified, to prevent a greater impending evil. Such force, however, is in its nature remedial, and can be carried no further than is reasonably necessary to prevent the threatened wrong. Prevention is less hurtful than redress, and, when prudently exercised, is not only justified, but is commended of the law. No man can rightfully complain of any encroachment upon personal liberty, which he himself, by his lawlessness or violence, has rendered necessary for the safety and protection of others. It is liberty as defined by law, not unbridled license, our free Constitution guarantees to every man,—the humblest,

equally with the most exalted." *Hayes v. Mitchell*, 69 Ala. 454."

At the time of the *Reichman Case*, above referred to, receiving, having in possession, and transporting liquor was not a violation of the law; but it has been made such by subsequent legislation, and for the same reasons constitutes a breach of the peace, and therefore, when threatened under circumstances justifying apprehension in the presence of an officer, the officer may lawfully arrest the person about to commit it and search him for evidence of a violation.

We hold, therefore, that the arrest of the plaintiff in error under the circumstances was lawful, under the provisions of our statute which authorize an officer to arrest a person without a warrant for a breach of the peace threatened in his presence. The arrest being lawful, the search was also lawful, to the extent that it resulted in finding upon the person or in the possession of the plaintiff in error the evidence of the fact that he was about to violate the law, and this evidence was competent and admissible. There is, therefore, no error in the judgment of the Circuit Court, and the same will be in all things affirmed.

Arrest—breach
of peace.

Evidence—secured by search
after arrest—admissibility.

ANNOTATION.

Transportation of concealed liquor as an offense within presence of officer authorizing an arrest without a warrant.

The reported case (*HUGHES v. STATE*, ante, 639), in holding that the transportation of concealed liquor is not an offense in the presence of an officer so as to authorize an arrest without a warrant, finds support in *Douglass v. State* (1921). — Ga. —, 110 S. E. 168, a trial for homicide of sheriff, killed while attempting to arrest one on suspicion that he was illegally transporting liquor concealed in an automobile, which held that an instruction to the

effect, inter alia, that an officer has a right to arrest, without a warrant, one who is committing an offense in his presence, was erroneous under the circumstances, the basis of the decision being that the offense was not committed in the presence of the officer.

And see *Caffinni v. Hermann* (1914) 112 Me. 282, 91 Atl. 1009, which is to the effect that an officer has no authority to arrest, without a warrant, one whom he suspects is illegally

transporting intoxicating liquor in a suit case. See also *State v. Lutz* (1919) 85 W. Va. 330, 101 S. E. 434.

The reported case (*HUGHES v. STATE*, ante, 639) finds further support by analogy in *Roberson v. State* (1901) 43 Fla. 156, 52 L.R.A. 751, 29 So. 535; *Pickett v. State* (1896) 99 Ga. 12, 59 Am. St. Rep. 226, 25 S. W. 608; *Hughes v. State* (1907) 2 Ga. App. 29, 58 S. E. 390; *Stewart v. State* (1907) 2 Ga. App. 98, 58 S. E. 395; *Ballard v. State* (1885) 43 Ohio St. 340, 1 N. E. 76, 5 Am. Crim. Rep. 36; *Rasey v. Ciccolino* (1913) 1 Ohio App. 194, 18 Ohio C. C. N. S. 331, 34 Ohio C. C. 294; *State v. Lutz* (W. Va.) supra, which held that the carrying of concealed weapons, contrary to law, is not an offense committed in the officer's presence so as to authorize an arrest without a warrant.

In *Pickett v. State* (1896) 99 Ga. 12, 59 Am. St. Rep. 226, 25 S. W. 608, supra, which was cited in *Douglass v. State* (Ga.) supra, as authority for its decision, the court said: "While, under § 4223 of the Code, an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law. The Constitution of this state expressly declares in the Bill of Rights that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. If any search is unreasonable and obnoxious to our fundamental law, it is one of the kind with which we are now dealing, even if the person arrested did in fact have a pistol concealed about his person. The fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality."

And in *Roberson v. State* (Fla.) supra, where an officer was killed while attempting to arrest one on information that he was carrying a concealed weapon, the court, in holding that an arrest is unlawful under such circumstances, said: "From this testimony we gather the following brief summary of the circumstances attending the arrest of the defendant that resulted in this unfortunate homicide: The defendant and his brother, out of the presence and view of the two officers, committed a breach of the peace by shoving a woman from the sidewalk, at the same time intimidating her by the threatening display of a pistol. After this actual breach of the peace comes to an end, the two brothers pass on, and the woman seeks the two officers (deputy sheriffs), and informs them of the behavior of the two brothers, and also informs them that said two brothers are carrying pistols concealed on their persons. Neither of the two officers knew that the two brothers were carrying concealed weapons, except from what the woman told them. Upon receiving this information from the woman, the two officers at once, without procuring a warrant for their arrest, start out to find the brothers, the woman accompanying them to point them out. Upon discovering the two brothers walking close together, the two officers step up behind them, one officer on the right and the other on the left of the defendant brother, the deceased officer saying, 'Boys, I have to arrest you for carrying concealed weapons,' and at the time taking hold of the arm of the defendant, while the other officer laid his hand on the other arm of the defendant. The defendant instantly swung himself loose from the grasp of the officers, whipped out his pistol, and fired two shots in rapid succession at the officer Sadler, then ran away, turning as he ran, and firing two or three shots more at Sadler, who had been mortally wounded by one of the two first shots. Under these circumstances, was the arrest of the defendant by the two officers, without a warrant, authorized by law? We think that it was not a law-

ful arrest. The antecedent infraction of the peace by the defendant had ended, and had occurred out of the presence and view of the officers, and at the time of the arrest the defendant was conducting himself in a quiet, peaceable, and orderly manner. It is true, as subsequent events quickly proved, that he was at the time secretly armed with a pistol, but he was at the time making no threatening display of it; and it would seem to be uttering a solecism to say that a man behaving himself in a quiet, peaceable, and orderly manner, but having a pistol quietly concealed on his person, tended towards a disturber of the peace from the bare fact of being secretly armed with such pistol. Breaches of the peace generally manifest themselves by some outward, visible, audible, or violent demonstra-

tion; not from quiet, orderly, and peaceable acts secretly done, though such acts may be mala prohibita. The carrying of arms in a quiet, peaceable, and orderly manner, but concealed on or about the person, is not either a breach of the peace or malum in se. Neither does it, of itself, tend to a breach of the peace, but it becomes a misdemeanor only because it is prohibited by statute. The statute does not declare it to be a breach of the peace, nor does the statute authorize an arrest without warrant for its infraction."

As to constitutional guaranties against unreasonable searches and seizures as applied to a search for, or a seizure of, intoxicating liquors, see annotations in 3 A.L.R. 1514, and 13 A.L.R. 1316.

J. H. B.

ANNA E. LEET, Admrx., etc., of Charles F. Leet, Deceased,
v.

WILLIAM H. BLOCK et al.

Indiana Supreme Court — October 13, 1914.

(182 Ind. 271, 106 N. E. 373.)

Master and servant — statutory duty to inspect — independent contractor.

A property owner is not rendered liable for injury to an employee of an independent contractor performing work upon his building, through the breaking of a scaffold rope, by a statute providing that it is the duty of all owners, contractors, etc., engaged in the construction of any building, to see that all rope, etc., is carefully selected, inspected, and tested, and generally it shall be the duty of all owners and all other persons having charge of, or responsible for, any work involving risk or danger to employees, to use every precaution practicable for the protection and safety of life.

[See note on this question beginning on page 684.]

CROSS WRITS of error from the Superior Court for Marion County (Collier, J.) to review a judgment in favor of plaintiff against defendant Armond, in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate; plaintiff assigning as error the sustaining of motions for judgment on the answers to interrogatories in favor of some defendants, and defendants assigning as error the overruling of their motions for new trial. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. H. N. Spaan, Ralph M. Spaan, and George W. Curtis for plaintiff.

Messrs. John B. Elam, J. W. Fesler, and Harvey J. Elam, for defendants:

At common law neither of the appellees would be liable, because the deceased was injured by the act of an independent subcontractor for whom the plaintiff's decedent was working, and for whose acts these appellees were not responsible.

Stalder v. Huntington, 153 Ind. 354, 55 N. E. 88; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Schip v. Pabst Brewing Co.* 64 Minn. 22, 66 N. W. 3.

Even if the Statute of 1911 does declare that the erection of a building is a dangerous occupation, that fact would not make either the owner or general contractor liable to an employee of a subcontractor, injured on account of the negligence of such subcontractor.

Stalder v. Huntington, and *Schip v. Pabst Brewing Co.* supra; *Mohr v. McKenzie*, 60 Ill. App. 575; *Pender v. Raggs*, 178 Pa. 337, 35 Atl. 1135; *Callan v. Pugh*, 54 App. Div. 545, 66 N. Y. Supp. 1118; *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 325, 74 S. W. 797, 75 S. W. 817, 16 Am. Neg. Rep. 245; *Central Coal & I. Co. v. Bailey*, 25 Ky. L. Rep. 973, 76 S. W. 842.

Where the facts found do not plainly and clearly show liability, a new trial should be ordered.

Shoner v. Pennsylvania Co. 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; *Osborn v. Adams Brick Co.* 52 Ind. App. 189, 99 N. E. 530, 100 N. E. 472.

Morris, J., delivered the opinion of the court:

Action for damages for the death of Charles F. Leet against appellees William H. Block and Bedford Stone & Construction Company, and also against John Armond.

The complaint alleges that Block was the owner of certain real estate in Indianapolis, and in 1911 constructed a business block thereon; that said Block had complete and exclusive control of the construction of the building, and employed the defendants Bedford Stone & Construction Company and John Armond to do certain parts of the work under contracts the terms of which are unknown to plaintiff;

that plaintiff's decedent was employed by defendants on June 24, 1911, while the construction work was unfinished, to clean certain stonework on the building, which required him to work on a scaffold suspended by ropes; that one of the ropes broke, causing the fall of the scaffold from the seventh story of the building, and resulting in injuries which caused decedent's death; that the injury was caused by a defective rope, which was negligently provided by defendants, to support the scaffold.

There was a verdict for plaintiff, accompanied with answers to interrogatories. Appellees Block and Bedford Company each filed a motion for judgment non obstante and for a new trial. Each motion for a new trial was overruled, but those for judgment on the answers to interrogatories were sustained, and judgment was rendered in favor of plaintiff against the defendant Armond and in favor of Block and the Bedford Company. Appellant assigns as error the sustaining of the motions for judgment on the answers to interrogatories. Appellees each assign as cross error the overruling of the motion for a new trial. When the accident occurred, there was in effect the Act of March 6, 1911, relating to dangerous occupations. Acts 1911, p. 597; Burns's Anno. Stat. 1914, § 3862a.

Section 1 of the act provides that every employer or person managing or conducting any work of the character mentioned in the act is, for the purposes thereof, conducting a dangerous occupation at the time of such occurrence.

Section 4 (Burns's Anno. Stat. § 3862d) of the act provides that: "It is hereby made the duty of all owners, contractors, subcontractors, . . . engaged in the . . . construction . . . of any building, . . . to see and to require that all . . . rope, . . . appliances, . . . contrivances . . . are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions,

and that all scaffolding, . . . and all contrivances used, are amply, adequately and properly constructed, . . . and, generally, it shall be the duty of all owners, . . . contractors, subcontractors, and all other persons *having charge of, or responsible for, any work, . . . involving risk or danger to employees, . . . to use every device, care and precaution which it is practicable . . . to use for the protection and safety of life, limb and health, . . . without regard to additional cost, . . . the first concern being safety to life, limb and health.*" (Italics ours.)

Section 5 (Burns's Anno. Stat. § 3862e) makes it a misdemeanor to violate any provision of the act.

Appellee Block let the construction of the building to appellee Bedford Stone & Construction Company, but the terms of the contract are not set forth in the answers to interrogatories. The jury found specially that defendant Armond made a contract with the Bedford Company for the cleaning of certain parts of the building, under which Armond was to furnish his own labor and material and do the cleaning for a lump sum of money; that Armond employed decedent to work at the cleaning, and paid his wages for his work; that Block was "indirectly" a party to the contract between the Bedford Company and Armond.

Counsel for appellees rely on the defense that the accident was caused by the negligence of Armond, an independent contractor. *Marion Shoe Co. v. Eppley*, 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220. Appellant's counsel contend that the said Act of 1911 renders such doctrine unavailable to appellees. In instructing the jury, the trial court adopted appellant's theory, and, by instructions numbered 10 and 13, informed the jury that if Block let the contract for the erection of the building to the Bedford Company, and the latter sublet the cleaning to Armond, it was nevertheless the duty of Block and the

Bedford Company to test and inspect, for defects, the scaffold ropes used by the subcontractor. Afterwards, on presentation of appellees' motions for judgment non obstante, the court concluded that the act in question did not deprive appellees of the "independent contractor" defense, and sustained the motions. Each motion for a new trial assigned, as cause therefor, error in the giving of said instructions 10 and 13.

Does the Act of 1911 impose on the owner and contractor such duties of testing and inspecting as to deprive each of them of the "independent contractor" defense? We are of the opinion that the question must be answered in the negative. The act evinces no legislative intent to impose a duty of testing and inspecting appliances, except on the particular owner, contractor, or subcontractor who has "charge of," or is "responsible for," the work, etc., in question. While the act does materially change the common-law duties of the employer and impose on him greater obligations in relation to the safety of employees, it was not the legislative purpose to make the owner liable for an injury occurring to an employee of a contractor or subcontractor because of the latter's negligence, in cases where the owner lets a contract for the particular work, without reserving any control over the manner of the work or the character of appliances used. It was the purpose of the enactment to fix a higher standard of care on the person having the particular work in charge, whether such person be owner, contractor, subcontractor, or other person, but the language of the statute, considered as a whole, precludes the theory of any intent to eliminate the doctrine of independent contractor.

In June, 1910, an initiative petition for an act was filed in the office of the secretary of state of Oregon, pursuant to the provisions of the Constitution of that state. At the general election in November, 1910,

the same was approved by the voters of the state, and became a law by proclamation of the governor in December, 1910. General Laws of Oregon 1911, p. 16. Section 4 of said Act of 1911 is a substantial copy of § 1 of the Oregon law. In *Tamm v. Sauset* (1913) 67 Or. 292, L.R.A.1917D, 988, 135 Pac. 868, the supreme court of that state considered a case similar to this one, and, in determining the effect of § 1 of said initiative act on the common-law doctrine of independent contractor, said: "To take up the case in hand, the Employers' Liability Act particularizes the class, such as owners, contractors, subcontractors, corporations, or persons whatsoever *engaged* in certain activities shall see that the materials employed and the appliances used are carefully selected, inspected, and tested, so as to detect any defects. The evident intent of the statute was to hold responsible, for personal injuries to an employee, only that member of the class enumerated who was *engaged* in the undertaking or enterprise embraced in the statute, whereby the injury occurred. To conceive otherwise would be going wide of the rule established by this court in the case of *Lawton v. Morgan*, *Fliedner & Boyce*, 66 Or. 292, 131 Pac. 314, 134 Pac. 1037. The initiative act does fix a high standard of care, a violation of which is negligence per se, but lays that care to the door of the person having the work in charge, and, in consequence thereof, the application of the enactment must be circumscribed to that particular source from which or from whom authority and control of the instru-

20 A.L.R.—42.

mentalities and individuals emanate."

We are of the opinion that the court erred in instructions numbered 10 and 13, given to the jury, because each proceeds on the erroneous theory that our Act of 1911 abrogated the common-law right of appellees Block and the Bedford Company to rely on

the defense of independent contractor. However, in awarding judgment in favor of Block and the Bedford Company, reversible error was committed, because the answers to interrogatories do not show with sufficient certainty that Armond was an independent subcontractor, within the rule that permits of such defense by the owner and contractor. This proposition is practically conceded by counsel for appellees, who evidently assign cross errors because thereof.

Master and servant—statutory duty to inspect—independent contractor.

Judgment reversed, with instructions to overrule appellees' respective motions for judgment on the answers to interrogatories, and to sustain their motions for a new trial.

NOTE.

The elements bearing directly upon the quality of the contract as affecting the character of one as an independent contractor is the subject of the annotation following *CHICAGO, R. I. & P. R. CO. v. BENNETT*, post, 684. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes under "Master and servant."

G. W. STORM, Appt.,
v.
GEORGE O. THOMPSON.

Iowa Supreme Court — January 23, 1919.

(185 Iowa, 309, 170 N. W. 403.)

Workmen's compensation — independent contractor — one removing trees.

1. One who contracts with a highway contractor to remove for a lump sum the trees within the limits of the highway is a contractor, not entitled to the benefit of the Workmen's Compensation Act.

[See note on this question beginning on page 684.]

Definition — "contractor."

2. The word "contractor" is ordinarily applied to anyone who in the pursuit of an independent business undertakes to do a specified piece of work for other persons, using his own means and methods without submitting himself to their control in all its details.

[See 14 R. C. L. 67; 28 R. C. L. 762; 3 R. C. L. Supp. 163.]

Statute — presumption as to meaning of words.

3. The Workmen's Compensation Act will be presumed to have used the word "contractor" in the sense in which the term is commonly employed, and in which it has been defined by the courts.

[See 28 R. C. L. 762.]

APPEAL by claimant from a judgment of the District Court for Polk County (Guthrie, J.), affirming a finding of the arbitrator in favor of defendant in a proceeding under the Workmen's Compensation Act to recover compensation for injuries sustained while engaged in removing trees under a contract with defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John D. Denison and Royal & Royal, for appellant:

The Compensation Law is to be given a liberal construction in favor of the workman to be affected by its provisions.

Hunter v. Colfax Colliery Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; Rheinwald v. Builders' Brick & Supply Co. 168 App. Div. 425, 153 N. Y. Supp. 598; Milwaukee v. Miller, L.R.A.1916A, 215, note.

The term "workman" or "employee" is given a broader and more liberal interpretation under compensation laws than under the strict rules of common law.

Rheinwald v. Builders' Brick & Supply Co. 168 App. Div. 425, 153 N. Y. Supp. 598; Levine v. Gold's Sons, N. Y. Indus. Com. No. 25,712, Bulletin 3, p. 78; Litts v. Lumber Co. N. Y. Indus. Com. No. 513, Bulletin 3, p. 119.

Even by common law, plaintiff was a "workman" or "employee" and not

an independent contractor, because the employer had exercised and possessed the right of control.

Sylcord v. Horn, 179 Iowa, 936, 7 A.L.R. 1285, 162 N. W. 249, 16 N. C. C. A. 592; Callahan v. Burlington & M. River R. Co. 23 Iowa, 562; Richmond v. Sitterding, 65 L.R.A. 453, note; Tuttle v. Embury-Marvin Lumber Co. 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664.

The simple nature of the work to be done by claimant and its relation to the work of the employer would here indicate an ordinary employment rather than an independent contractor.

Richmond v. Sitterding, 65 L.R.A. 495, note; Ft. Wayne v. Christie, 156 Ind. 172, 59 N. E. 385; State, Red-strake, Prosecutor, v. Swayze, 52 N. J. L. 129, 18 Atl. 697; Rheinwald v. Builders' Brick & Supply Co. 168 App. Div. 425, 153 N. Y. Supp. 598.

The payment in a lump sum is not indicative of independent contractor.

Richmond v. Sitterding, 65 L.R.A. 505, note; Atlantic Transp. Co. v.

Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98; Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; Rheinwald Builders' Brick & Supply Co. supra; Tuttle v. Embury-Martin Lumber Co. supra.

Messrs. Brockett, Strauss, & Shaw and Frank T. Jensen, for appellee:

The independence of a contract is usually inferable where it is for the performance of an entire piece of work at a stipulated price.

Miller v. Minnesota & N. W. R. Co. 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Ireland v. Clark, 109 Me. 239, 83 Atl. 667; Edmundson v. Coca-Cola Co. — Tex. Civ. App. —, 150 S. W. 273; Richmond v. Sitterding, 65 L.R.A. 505, note.

The relationship of employer and employee is not shown by the reservation or exercise of the right of control over the work, where such control is not in regard to the means or method to be employed, but only as to results.

Callahan v. Burlington & M. River R. Co. 23 Iowa, 562; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; Francis v. Johnson, 127 Iowa, 391, 101 N. W. 878, 17 Am. Neg. Rep. 507; Gall v. Detroit Journal Co. 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 36; Cramblitt v. Percival-Porter Co. 176 Iowa, 733, L.R.A. 1917C, 77, 158 N. W. 541; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721; Richmond v. Sitterding, 65 L.R.A. 475, note.

The same test is applied under workmen's compensation acts as at common law.

State ex rel. Virginia & R. Lake Co. v. District Ct. 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; Perham v. American Roofing Co. 193 Mich. 221, 159 N. W. 140; Sylcord v. Horn, 179 Iowa, 936, 7 A.L.R. 1285, 162 N. W. 249, 16 N. C. C. A. 592; Donjon Bros. v. Industrial Acci. Commission, 173 Cal. 250, 159 Pac. 715; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721.

Weaver, J., delivered the opinion of the court:

The plaintiff for a period of two years or more had made a business of what he calls "tree work." Con-

cerning it he says his occupation was "anything to be done with trees, such as trimming, removing, and chopping them down. That is the way I make my living." The defendant was a contractor engaged in grading a city street. The progress of this work appears to have required the removal of certain trees upon the land through which a way for the street was being cut. On March 17, 1917, the parties entered into a contract for the removal of the trees. The agreement was in writing, and, omitting the signatures, reads as follows:

"This contract, entered into by G. W. Storm, party of the first part, and G. O. Thompson, party of the second part, witnesseth:

"The party of the first part agrees to remove by grubbing, if necessary, sixty-two (62) trees, located on Sixth avenue between Center and School streets, for the sum of seventy-five (75) dollars and the wood that said trees will make.

"Party of the second part agrees to remove stumps from job and furnish teams to haul wood to No. 1060 Sixth avenue."

Plaintiff proceeded with the work mentioned in the contract, and while so engaged, and in the act of removing one of the trees, he was accidentally injured in such manner as to cause the loss of two fingers of his left hand. On the theory that he was an employee engaged in the service of the defendant he made claim for an allowance of damages under the Workmen's Compensation Act (Code Supp. 1913, §§ 2477m-2477m51). This demand was resisted by the defendant on the ground that plaintiff was not its employee, but a contractor, and as such did not come within the protection of the statute. The majority of the arbitration committee to which the matter was submitted found against the plaintiff, on the theory that he was not an employee within the meaning of the Compensation Act, but a contractor.

On the hearing before the court

the contract was introduced in evidence, and the fact of plaintiff's injury was shown. In addition, plaintiff testified that he did the work alone, using his own saws, axes, ropes, and other tools, but procured or borrowed from defendant a bar, pick, and shovel for temporary use on some parts of the job. As the defendant's steam shovel was also working in that vicinity, and it was necessary to have the trees nearest the front of the shovel removed, to avoid delaying its operation, it was understood between the parties that this work should have priority of attention, and on several occasions the defendant gave directions to that effect. Plaintiff controlled his own hours and times of work so long as he kept it ahead of the shovel. After the accident defendant furnished a man to complete, or to assist plaintiff in completing, the removal of the trees.

There is no dispute as to the facts in the case. The trial court affirmed the arbitrators' finding, and plaintiff appeals.

The Workmen's Compensation Act, after defining the word "workman" as synonymous with "employee," and as meaning any person who has entered into the employment or works under contract of service for an employer, with certain specified exceptions, attaches to such definition the following proviso: "Provided that one who sustains the relation of contractor with any person, firm, association, (or) corporation . . . shall not be considered an employee thereof." Code Supp. 1913, 2477m16.

The question we have to consider in this case is whether the plaintiff's relation to the defendant, as shown by the evidence, is that of a workman or employee within the statutory definition of the term, so that he is entitled to an award in damages; or whether he is to be regarded as a contractor, and therefore not within the protection of the act.

Whether the distinction thus drawn between workman and con-

tractor is in all respects logical and just is a consideration for the legislature, and not for the court, which must apply and give effect to the statute according to its plain and unequivocal terms. The only debatable question, therefore, is whether, upon the admitted facts, the arbitrators and the trial court erred in classing plaintiff as a contractor. The term is one of very frequent use in common speech, and its meaning has often been considered by the courts. As is not unusual in judicial definitions of even the most familiar words, it has been variously phrased and interpreted, but we think there has been developed no radical difference of opinion as to its substantial meaning or effect. In its broadest sense, every person who enters into a contract or takes upon himself contract obligations of any kind is a contractor, but as ordinarily used it is applied to any person "who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as [to] the means by which it is accomplished." *Jann v. W. H. McKnight & Co.* 117 Ky. 655, 78 S. W. 862; *Caldwell v. Atlantic, B. & A. R. Co.* 161 Ala. 395, 49 So. 674; *Halstead v. Stahl*, 47 Ind. App. 600, 94 N. E. 1056; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203, 58 N. E. 347; *Humpton v. Unterkircher*, 97 Iowa, 514, 66 N. W. 776, 14 Am. Neg. Cas. 595; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Madix v. Hockgreve Brewing Co.* 154 Wis. 448, 143 N. W. 189; *Parrott v. Chicago G. W. R. Co.* 127 Iowa, 419, 103 N. W. 352; 2 Words & Phrases, p. 1534.

Tested by this rule, which seems to fairly reflect the consensus of ju-

Workmen's compensation—
independent contractor—one removing trees.

dicial opinion, there can be little doubt of the correctness of the decision of the trial court in this case.

The plaintiff made a specialty of this kind of work, and had supplied himself with substantially all the tools and appliances necessary for the performance of such jobs. His agreement with the defendant was to produce a certain result, to wit, the removal of sixty-two trees standing on a described tract of ground. The method and manner of their removal were left wholly to his own choice and discretion, except that the trees should be "grubbed" where necessary. No right to control or direct the work was reserved to the defendant, though plaintiff says it was understood that he was to keep in front of the steam shovel in order to clear the way for its operation. He was not limited in the time for the performance of the work, except as the law implied a duty to complete it within a reasonable period. He controlled his own time, and was in all essential respects his own master, being answerable to the defendant for nothing except the accomplishment of the promised result, the removal of the trees; or, if we go beyond the writing, the removal of the trees in such time as not to delay the operation of the steam shovel with which defendant was doing the grading through the land from which the trees were to be taken. To say that under these circumstances the plaintiff was not a

Definition—"contractor."

contractor, but an ordinary employee or servant, is quite impossible, unless we are ready to disregard all precedent. The stat-

ute must be presumed to have used the word "contractor" in the sense in which the term is commonly employed, and in which it has been defined by the courts, and we are satisfied that plaintiff's own showing brings him very clearly within that class.

Statute—presumption as to meaning of words.

This decision is in no way out of harmony with any of the authorities cited by appellant, unless it be *Rheinwald v. Builders' Brick & Supply Co.* 168 App. Div. 425, 153 N. Y. Supp. 598. That decision seems to have been reversed on appeal (see 174 App. Div. 935, 160 N. Y. Supp. 1143), and cannot be considered as of controlling authority.

The trial court did not err in holding plaintiff to be a contractor, and not an employee within the terms of the Compensation Act, and the judgment is affirmed.

Ladd, Ch. J., and Stevens, Preston, and Gaynor, JJ., concur.

NOTE.

The annotation following *CHICAGO, R. I. & P. R. Co. v. BENNETT*, post, 684, treats of the elements bearing directly upon the quality of a contract as affecting the character of one as an independent contractor. More specifically, as to the effect of the fact that the contractor is bound to furnish the materials and appliances required for the work, see § 34 of that annotation. As to oral evidence with respect to the extent of the power of control reserved to the employer, see §§ 15-18. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes under "Master and servant."

ROBERT GADSDEN, Appt.,

v.

CRAFT & COMPANY et al.

North Carolina Supreme Court — April 25, 1917.

(173 N. C. 418, 92 S. E. 174.)

Master and servant — independent contractor — who is.

One constructing a bridge for a railroad company under contract is not an independent contractor so as to relieve the railroad company from liability for injury to his employee, if the work is to be done agreeably to the orders of the railroad engineer, whose decision as to amounts due is conclusive, and who may employ laborers necessary to complete the job on time if the contractor fails to do so, or may declare the contract forfeited and complete it himself, and the railroad company may pay money directly to the contractor's employees or creditors for work done or materials furnished, while payment may be made on the cost-plus basis for work which cannot be accurately measured.

[See note on this question beginning on page 684.]

APPEAL by plaintiff from a nonsuit granted by the Superior Court for New Hanover County (Connor, J.) as to the defendant railroad companies in an action brought to recover damages for personal injuries, alleged to have been sustained by the fall of an improperly and insecurely constructed scaffold. *Reversed.*

Statement by Hoke, J.:

There was evidence tending to show that in the fall of 1914 defendants Craft & Company were engaged in constructing a reinforced concrete bridge over Fourth street in the city of Wilmington, under a contract with the two defendant railroads, and that on the 27th of November, 1914, plaintiff, while engaged as an employee in said work, was injured by the fall of a scaffold on which he was placed, in the course of his employment, the scaffold having been improperly and insecurely constructed.

On the trial it appeared for defendant companies that the work in question was being done by their co-defendants, Craft & Company, under a written contract which was put in evidence, and under the terms of which defendants contended that Craft & Company were independent contractors, and that no liability could be properly imputed to the companies by reason of default of such contractors.

The court having intimated an opinion that this was the effect of the contract and the attendant facts in evidence, plaintiff excepted, and submitted to a nonsuit as to the railroad companies. There was recovery and judgment for \$1,250 damages against Craft & Company, and judgment of nonsuit as to the railroad companies, and from the judgment as to these companies plaintiff appealed.

Mr. A. G. Ricaud for appellant.

Messrs. Rountree & Davis, John D. Bellamy, and Emmett Bellamy for appellees.

Hoke, J., delivered the opinion of the court:

Plaintiff objects to the validity of the judgment of nonsuit for the reasons: (1) That, under the terms of the written agreement, Craft & Company were not independent contractors; (2) that the work in which they were engaged was inherently dangerous, and that the position of independent contrac-

tor could in no event be maintained for the benefit of the appellees.

On the record we see nothing to justify the position that the work was inherently dangerous, and the objection made upon that ground must be disallowed. *Scales v. Lewellyn*, 172 N. C. 494, — A.L.R. —, 90 S. E. 521.

We are of opinion, however, that, under the written agreement offered in evidence, the powers reserved to the railroads during the performance of the work, and as to the manner and methods of doing it, are so extended and controlling that Craft & Company could in no proper sense be considered as independent contractors, but are themselves agents and employees of the railroads, for whose negligent default the companies may be held responsible under the principles of respondeat superior.

In *Beal v. Champion Fiber Co.* 154 N. C. 147-150, 69 S. E. 835, the court quotes with approval from Moll on Independent Contractors, who, in § 19, quotes as follows from Judge Thompson, who in his Commentaries on Negligence, states the rule thus: "If the proprietor retains for himself or for his agent (e. g., architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is" not deemed an independent contractor within the meaning of the rule under consideration, but he is "deemed the mere agent or servant of the proprietor, and the rule of respondeat superior operates to make the proprietor liable for his wrongful acts, or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary in such a case that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control."

And again, from *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113:

"Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an 'independent contractor,' and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor's negligence in the execution of the work."

These tests for determining the position of an independent contractor are in accord with the generally prevailing doctrine, and have been recently approved and applied in several decisions of this court. *Embler v. Gloucester Lumber Co.* 167 N. C. 457, 83 S. E. 740; *Harmon v. Ferguson Contracting Co.* 159 N. C. 22, 74 S. E. 632; *Johnson v. Carolina, C. & O. R. Co.* 157 N. C. 382, 72 S. E. 1057; *Hopper v. Ordway*, 157 N. C. 125, 72 S. E. 839; *Denny v. Burlington*, 155 N. C. 33, 70 S. E. 1085, 3 N. C. C. A. 922.

True, in *Denny v. Burlington*, supra, and in *Hopper v. Ordway*, 157 N. C. 125, 72 S. E. 839, it was held that when the relation of independent contractor has been created within the meaning of these definitions, the result is not affected by the fact that an agent of the proprietor is to be present for the purpose of seeing that the work is done according to specifications. *Johnson v. Carolina, C. & O. R. Co.* 157 N. C. 382-384, 72 S. E. 1057.

No more would conditions be changed by the mere fact that the contract contains a provision that, in case of failure to perform properly, the proprietor could take over the contract and complete the same. But, in our opinion, the powers reserved to the companies and their immediate agents by the provisions of the present contract go much beyond anything appearing in these decisions, on the principles they are intended to sustain. In the opening clause of the contract there is a stipulation that "the work is to be done and finished agreeably to the direction and orders of the chief en-

gineer of one of the defendants, or his assistants."

This officer, too, is given large powers with reference to modifications of the plans as the work progresses. His decision as to amounts due on the previous estimates is absolutely conclusive, and, in the final estimate, the amount due is to be paid when the entire work is completed to the satisfaction of the said engineer, and on his certificate that it has been done according to specifications, and in accordance with *his directions*, and to his satisfaction and acceptance. In another clause the work is to begin at once, and be completed on or before a specified period, and prosecuted with such force as the engineer may deem adequate, and "if said party shall fail to prosecute the work with sufficient force, in the opinion of said engineer, the latter, or such agent or agents as he may designate, may proceed to employ such number of workmen, laborers, and overseers as may be necessary to insure completion, at such wages as they may find necessary or expedient, and charge same over to Craft & Company on the contract," etc.

And again: "Or for failure to prosecute the work with an adequate force, or for *noncompliance* with his *directions* in regard to the *manner of constructing* it, or for failure to complete the work within the time limit, or for other delays in the performance of, or any omission or neglect of the requirements of, the agreement and specifications on the part of the party of the first part, the said engineer may, at his discretion, declare this contract, or any portion or section of it, forfeited, and the railroad companies exonerated from all liability under it."

In § 12 stipulation is made as follows: "It is further understood and agreed that the parties of the second and third parts, the railroad companies, jointly and severally, may at any time, either with or without an estimate furnished, pay any moneys directly to the em-

ployees and others having claims and demands against the party of the first part for work done and material furnished to the party of the first part, for the purpose of this contract, and may at any time require voucher for the payment to employees and others having claims and demands against the party of the first part, for the purposes aforesaid."

And § 13: "If, during the progress of the work contracted for, which shall be under the direction of the engineer not contemplated in the specifications mentioned in § 1 of this agreement, and not specifically included herein, which work cannot, in the opinion of the engineer, be accurately measured or estimated under the terms of this contract, then in that case the same shall be paid for at actual cost for labor and materials furnished by the party of the first part, with 10 per cent added for superintendence and use of tools, and it is further agreed and understood that all terms and stipulations of this contract, as far as may be applicable, shall attach to all work so done, which work for all purposes shall be deemed part of the work contracted for by the party of the first part hereunder."

From these stipulations, and under the principles approved and sustained by the authorities cited, it will sufficiently appear, as stated, that the powers over this work reserved

Master and servant—
independent contractor
—who is.

to the companies and their agents, in the course of its performance and as to the manner and methods of doing it, are of such a character and extent as to constitute the contractor, Crafts & Company, the agents and employees of the railroads in reference to the construction of this bridge, and the rights of the parties must be adjusted on that basis.

There is error, and this will be certified that the question of the responsibility of the appellees may be properly determined.

NOTE.

The elements bearing directly upon the quality of a contract as affecting the character of one as an independent contractor are the subject of the annotation following CHICAGO, R. I. & P. R. Co. v. BENNETT, post, 684. More specifically, as to the effect of stipulations requiring the contractor to satisfy a certain standard, see § 11 of that annotation; as to stipulations by

which the employer is authorized in general terms to give directions concerning the work, see § 12; and as to stipulations by which employer is empowered to give directions as to particular matters, see § 13. The effect of the employer's right to terminate the employment is considered in § 26. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes under "Master and servant."

C. H. SWAIN

v.

KIRKPATRICK LUMBER COMPANY
and

CALCASIEU NATIONAL BANK et al., Appts.

Louisiana Supreme Court — February 25, 1918.

(143 La. 30, 78 So. 140.)

Master and servant — payment for work produced — independent contractor.

1. A foreman and filer in a sawmill has a lien or privilege on the material manufactured in the mill, when he is employed under Act No. 23 of 1912, p. 30, although his wages are measured by the amount of material produced, less the amount paid by the employer to the workmen who are under the joint control of the employer and foreman. He is not an independent contractor.

[See note on this question beginning on page 684.]

Action — revocatory — when lies.

2. The revocatory action lies when the sale complained of was made by judicial process, or by convention of the parties.

Judicial sale — vacation — cause.

3. Fraud in the concealment or misrepresentation of facts is not the only

cause which will vitiate a judicial sale. Anything by a party in interest that chills the sale, or prevents competition among the bidders, will, on competent proof, cause such sale to be set aside.

[See 2 R. C. L. 1131, 1132; 16 R. C. L. 89, 95; 1 R. C. L. Supp. 710.]

Headnotes by SOMMERVILLE, J.

APPEAL by defendants bank and mercantile company from a judgment of the Judicial District Court for the Parish of Calcasieu (Overton, J.) in favor of plaintiff, in an action brought to have a sale of lumber on which he claimed a lien for wages set aside, and to recover the value of the lumber to the extent of his claim. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pujo & Williamson for appellants.

Messrs. Peterman & Dear, Hundley

& Hawthorn, and Cline & Bell, for appellee:

Where one is engaged by the presi-

dent of a sawmill company to manufacture lumber, but with authority retained by the president to direct its manufacture, employ and discharge laborers, and give orders to the workmen conjointly with the person so engaged, and which reserved authority is constantly exercised by the president, such engagement does not render such person an independent contractor.

Blumauer v. Clock, 24 Wash. 596, 85 Am. St. Rep. 966, 64 Pac. 844; Nyback v. Champagne Lumber Co. 48 C. C. A. 632, 109 Fed. 732; Southern Cotton Oil Co. v. Wallace, 23 Tex. Civ. App. 12, 54 S. W. 638; Parrott v. Chicago G. W. R. Co. 127 Iowa, 419, 103 N. W. 532; Barclay v. Puget Sound Lumber Co. 48 Wash. 241, 16 L.R.A.(N.S.) 140, 93 Pac. 430; Employers Indemnity Co. v. Kelly Coal Co. 149 Ky. 712, 41 L.R.A.(N.S.) 963, 149 S. W. 992; Yeates v. Illinois C. R. Co. 241 Ill. 205, 89 N. E. 338; McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A.(N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, 20 Am. Neg. Rep. 471; Indiana Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Andrews Bros. Co. v. Burns, 22 Ohio C. C. 437; Seaboard Air Line R. Co. v. Continental Trust Co. 166 Fed. 597; Faren v. Sellers & Co. 39 La. Ann. 1017, 4 Am. St. Rep. 256, 3 So. 363; Moffet v. Koch, 106 La. 375, 31 So. 40.

A sale of property as staple as lumber, at public auction, which brings less than 10 per cent of its value, should be annulled and set aside when it is shown that competitive bidding was stifled and chilled by acts of the owner of the property, and which injured to the benefit of the owner, by the act of the purchaser thereof in giving the owner credit, not for the amount for which the property was adjudicated at the sale, but for the amount which the purchaser realized at a resale thereof in the usual course of business.

2 R. C. L. 1131; Liles v. Rhodes, 7 La. 91; Wood v. Hennen, 9 La. Ann. 264; Herndon v. Gibson, 38 S. C. 357, 20 L.R.A. 545, 37 Am. St. Rep. 765, 17 S. E. 145; Hamilton v. Hamilton, 19 S. C. Eq. (2 Rich.) 355, 46 Am. Dec. 58; Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796; Hudson v. Hudson, 5 Munf. 180; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743; Jackson v. Morter, 82 Pa. 291; Stewart v. Severance, 43 Mo. 322, 97

Am. Dec. 392; Bunts v. Cole, 7 Blackf. 265, 41 Am. Dec. 226; Kinard v. Hiers, 24 S. C. Eq. (3 Rich.) 423, 55 Am. Dec. 643; Trimble v. Turner, 13 Smedes & M. 348, 53 Am. Dec. 90; Dick v. Lindsay, 2 Grant, Cas. 431, 24 Pa. 217; Bethel v. Sharp, 25 Ill. 173, 76 Am. Dec. 790; Chaffe v. Farmer, 34 La. Ann. 1017; Chaffe v. Mayer, 34 La. Ann. 1031; Meyer v. Farmer, 36 La. Ann. 785.

The law gives to a creditor injured by any device by which an illegal preference is given another creditor, whether the result of convention or the machinery of the courts, the right to have it annulled and set aside.

Block v. Marks, 47 La. Ann. 108, 16 So. 649; Palmer v. Hightower, 47 La. Ann. 18, 16 So. 560; Newman v. Baer, 50 La. Ann. 329, 23 So. 279.

Sommerville, J., delivered the opinion of the court:

Plaintiff, the foreman and filer in the mill of the Kirkpatrick Lumber Company, is a judgment creditor of that company, with recognition of a lien for wages on the lumber manufactured by said company while he was in its employment, and which was stacked on the yards of said company in Calcasieu parish. He caused the lumber to be provisionally seized; all in accordance with Act 23 of 1912, p. 30.

He alleges that while under seizure the other two defendants, the Calcasieu National Bank of Southwest Louisiana and the Calcasieu Mercantile Company, caused executory process to issue under a chattel mortgage given to them by the Kirkpatrick Lumber Company, under Act 65 of 1912, p. 75, and caused the same 350,000 feet of lumber provisionally seized by him to be seized and sold under the chattel mortgage above referred to, and that the bank became the purchaser thereof for the vile price of \$200, and that it has sold the same for the joint benefit and account of the Kirkpatrick Lumber Company, the mercantile company, and itself, and that he has thus been unfairly and fraudulently deprived of his wages and lien therefor.

Plaintiff further alleges and

shows that the lumber sold was well worth \$6 to \$8 per 1,000 feet. He further alleges that the three defendants conspired and colluded together to prevent, prohibit, suppress, and stifle competitive bidding at the sale of the lumber; that they circulated and caused to be circulated, directly and by inference, various and sundry reports tending to keep off and prevent bidders who were present at the sale from bidding; that no one bid at the sale except the agent and representative of the bank and the mercantile company; and that defendants were thus given an unfair and undue preference, to his injury.

Plaintiff alleges that the lumber company was insolvent on the day of the sale, and he has proved that it was insolvent, to the knowledge of the other defendants, at the date of the chattel mortgage given to them. He further alleged and proved that a large part of the lumber seized and sold under executory process was not covered by the chattel mortgage, to the knowledge of the defendants, and that the funds derived from the sale of the lumber mortgaged, and that not mortgaged, were commingled and confused.

Plaintiff asked that the sale be annulled and set aside, and, as the property had been disposed of by defendants, that he have judgment in his favor against defendants in solido for the value of the lumber to the extent of his claim.

The lumber company did not answer, and default was taken against it. There was judgment in favor of plaintiff and against the defendants. The bank and the mercantile company have appealed. The lumber company has not appealed.

In their answer the bank and the mercantile company deny that plaintiff had a lien on the lumber seized and sold. They argue that he was an independent contractor, and not covered by the terms of Act 23 of 1912, p. 30. They also set up the validity of the sale.

The evidence is clear that plaintiff was the foreman and saw filer

in the sawmill, and that he received, or was to receive, \$3.50 per 1,000 feet on the lumber manufactured in the mill; that he was to employ the hands engaged in the mill, who were subject to the orders of himself and his employer; that the hands were to be paid by the sawmill company; and that he (plaintiff) was to receive from his employer the difference between the wages thus paid to the other hands and the amount due him at \$3.50 per 1,000 feet of lumber manufactured.

The court has held adversely to the position assumed by the defendants in somewhat similar cases.

The sawmill company owned and operated the mill, and plaintiff was hired by it to serve as

Master and servant—payment for work produced—Independent contractor.

foreman therein, at the will of the company. The president of the company was present every day, and directed plaintiff and the other workmen. Plaintiff was under the authority of the company, and the other workmen were under the joint authority of plaintiff and the company. It is immaterial what plaintiff's wages were to have been, or how they were to have been paid. Wages are that which are paid for a service rendered; what are paid for labor; hire. Century.

In the case of *Lalanne v. McKinney*, 28 La. Ann. 642, where laborers were to receive one half of the proceeds of the cotton and other produce, the court said: "The testimony of the laborers shows that the contract between them and McKinney was that they were hirelings, to be paid by the half of the proceeds of the cotton and by receiving the half of the other produce. This contract was exactly like the one between the Cowans and their laborers, reported in [*Bres v. Cowans*] 22 La. Ann. p. 438, where it is said: 'The plantation in question was owned by the defendants in 1867, and cultivated by them in cotton. The defendants employed certain laborers, and agreed to give them, in lieu of

wages, one third of the gross products of the cotton. There was plainly no partnership in this. The plantation was the Cowans's, the cotton as it grew was theirs, the supplies were furnished to them for the crop, and every fiber of the cotton as it matured was affected by the privilege.'"

Again, in the case of *Faren v. Sellers*, 39 La. Ann. 1017, 4 Am. St. Rep. 256, 3 So. 366, the court quotes from Mr. Wood [Mast. & S.] p. 614, as follows: "The simple test is, Who has the general control over the work? Who has the right to direct what shall be done, and how to do it? And if the person employed reserves this power to himself, his relation to his employer is independent and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant."

In other jurisdictions, findings are to the same effect. See *Nyback v. Champagne Lumber Co.* 48 C. C. A. 632, 109 Fed. 732: "Defendant, which owned and operated a saw-mill, contracted with a third person to work up the slabs into laths and pickets, using machines in the mill, which were run, kept in order, and lighted by defendant. Defendant owned the products, paid the wages of the workmen employed by such person, and paid him the remainder, if any, due, computed at a stipulated price per one thousand for the laths and pickets made. Held, that such person was not an independent contractor, but a servant of defendant, put in charge of particular machines, and paid upon the terms stated, and that whatever duty there was to instruct an inexperienced workman employed in the operation of such machines, as to the dangers of the employment, remained a duty of defendant."

And *Barclay v. Puget Sound Lumber Co.* 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430, 3 Am. Dig. (1908A) p. 1806: "Where defendant operated a lath mill through a contract with T., by which T. was to receive 75 cents per

1,000 laths produced, and was to employ other men, whom defendant was to pay out of the 75 cents per thousand, T. to receive the balance, . . . and plaintiff was employed by T. to work in the mill, T. was not an independent contractor, . . . and the relation of master and servant existed between plaintiff and defendant."

See also *Moffet v. Koch*, 106 La. 375, 31 So. 40; *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966, 64 Pac. 844; *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638; *Employers Indemnity Co. v. Kelly Coal Co.* 149 Ky. 712, 41 L.R.A. (N.S.) 963, 149 S. W. 992; *Yeates v. Illinois C. R. Co.* 241 Ill. 205, 89 N. E. 338, 7 Am. Dig. 1722.

And in *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803, 13 Decen. Dig. 27, it was held: "Defendant was engaged in the business of manufacturing iron and steel, and owned and furnished the building, machinery, material, and motive power, and provided the superintendent and head workmen in a rolling mill in which plaintiff worked. The department in which plaintiff worked was under the control of a 'boss roller,' who furnished his own assistants and employed all help under him (among whom was plaintiff), kept the time of these assistants, had the right to discharge them, had sole control of manufacturing into iron and steel material furnished him by the defendant, and was paid a certain gross sum for his work, from which he paid his assistants. Defendant repaired and improved all machinery, exercised some control over material while it was in the boss roller's hands, and also had the right to discharge men employed by said boss roller. Held, that the boss roller was a foreman rather than an independent contractor, since such contractor is not the servant of his employer, and that from the fact that defendant had the right to discharge plaintiff could be implied the

contractual relation of master and servant."

And in *Andrews Bros. Co. v. Burns*, 22 Ohio C. C. 437, 13 Decen. Dig. 27, it was held: "Where a rolling mill company employs a boss roller under the rules . . . of the . . . association, the boss roller to employ his own assistant roller, roughers, and beaters, the compensation to be an agreed price per ton for labor performed, divided among the boss roller and his assistants . . . as provided by the rules, . . . and the output of the mill to be under the direction of the general superintendent and to his satisfaction, the relation between the company and the employee is that of master and servant."

Plaintiff has not offered direct evidence showing collusion and fraud between the three defendants, by which he was deprived of the lumber upon which his lien rested; but the conclusion is clear that the acts of defendants, taken separately and together, deterred bidding at the sheriff's sale except by one bidder. That bidder was declared, in an answer to one of the suits between plaintiff and defendants, not to represent them (defendants) at the sale; the bank and the company admit him to have been their representative at the sale, in their answer to this suit.

The evidence shows that the bank and the mercantile company knew that the sawmill company was insolvent at the time that they took the mortgage notes foreclosed upon in the executory proceeding; they knew that some, if not about one half, of the property upon which their chattel mortgage rested, had been sold and removed by the lumber company before the seizure was made by them; they caused to be seized and sold lumber upon which they knew their mortgage did not rest; they knew that the president of the sawmill company permitted them to seize and sell lumber upon which their chattel mortgage did not rest, if he did not actually agree to the seizure; they knew before

they sought execution on their mortgage notes that plaintiff had sued the sawmill company for his wages as foreman and filer, and had asked to have a lien or privilege on the lumber recognized therefor; they sent a representative to the sale who pretended to be acting for himself; this agent saw several prospective bidders on the day of the sale, and told one of them "whoever bought the lumber would have a lawsuit with the bank," and that person decided he would have to litigate with the bank if he bought, and he did not bid, although he had gone there for the purpose of bidding. Other bidders present refused to bid because the president of the sawmill company told them that the lumber was on leased ground and subject to a landlord's lien, when the yearly rent was only \$5, and that had been paid in advance; he also said that the buying of the lumber would not give a right of way for hauling it, and that the railroad spur which was laid to the sawmill was a private spur, which belonged to his company, and that it could not be used unless he gave permission to use it. Defendants knew that their bid of \$200 was an inadequate price for the lumber, being less than one tenth of its value. The bank and mercantile company bought the lumber for the joint account of themselves and the sawmill company, and did not credit the account of the latter with the \$200; but they, with the assistance of the president of the sawmill company, subsequently sold and delivered the lumber to others for more than \$2,000, and divided the receipts between the bank and the mercantile company, and credited the notes of the sawmill company with the full amount realized from the sale.

Thus, the three defendants acted in the interest of one another through all the stages of the transaction referred to, and throughout the litigation, and, at the close, divided the spoils between them.

The suit of plaintiff is similar to

the revocatory action. Plaintiff is a judgment creditor of the sawmill company, which concern was in insolvent circumstances when the mortgage notes were issued to defendants, and when the sale and purchase thereunder took place. These transactions were made in bad faith, and they injured plaintiff. They are deemed under the law to have been made in fraud of the creditors of the sawmill company. It is immaterial that the sale of the lumber was by a judicial proceeding, rather than by convention between the parties. On this point, it is said in *Newman v. Baer*, 50 La. Ann. 329, 23 So. 279: "An insolvent debtor cannot give in payment to one creditor, to the prejudice of the others, any other thing than the sum of money due. Rev. Civ. Code, art. 2658; *Taylor v. Knox*, 2 La. 16; *Lovell v. Payne*, 30 La. Ann. 511. The acts and doings of an insolvent debtor, through which he seeks to give a fraudulent preference to one creditor over others, are all the more to be reprobated when the machinery of the law is invoked to give the semblance of plausibility and propriety to such proceedings. *Haas v. Haas*, 35 La. Ann. 885. The law recognizes no distinction between a voluntary conveyance of property in fraud of creditors, and such an alienation disguised under the forms of judicial proceedings. It will annul and set aside any machination or contrivance by which this is sought to be done. Rev. Civ. Code, arts. 1969, 1970, 1983, 1984, 2658; *Muse v. Yarborough*, 11 La. 530. Neither the law nor the courts are to be used as instruments to work injustice. To attempt this is to aggravate the offending."

The state of facts in this case is one which admits most clearly of the application of the revocatory action. Not only contracts which dispose of property, says the Civil Code, article 1984, but all others which are made in fraud of creditors, and deprive

them of their recourse upon the property of their debtor, come within the provisions of the section of the Code which treats of this action. In the case of *Prats v. His Creditors*, 5 Rob. 288, the court held: "A fraud perpetrated by the machinery of a judgment, when the courts themselves are made the unconscious instruments, is as liable to be questioned and annulled as when effected in the usual forms of a contract."

And in *Stone v. Kidder*, 6 La. Ann. 552, the court said: "Every fraudulent device, contrivance, or artifice by which a creditor may have been injured, and from which a fraud upon his rights is practised, is reached and remedied by this action."

See also, to the same effect, *Block v. Marks*, 47 La. Ann. 108, 16 So. 649.

The judgment of the trial court in setting aside the sheriff's sale was also fully justified because of the acts of defendant's agent in deterring another from bidding, regardless of what his motive was, honest or fraudulent. His acts caused great prejudice to this plaintiff by preventing others from giving a greater price for the lumber.

The law is stated in 2 R. C. L. 1131, to be: "Sales at auction must be fairly and openly conducted. The great object of the rules regulating such sales, and said to be founded upon reasons of public policy, is to secure a fair price to the owner or those interested in the proceeds of the property. This can be accomplished only by the means of fair competition. Just as the law protects the purchaser by condemning the practice of employing puffers to enhance the price, in like manner it protects the owner of the property, and such persons as may be interested in the proceeds thereof, by forbidding the stifling of competition among bidders, irrespective of the cloak under which it is accomplished, in order that those interested in the property may obtain a full equivalent therefor.

Action—revocatory—when lies.

. . . A sale may be set aside where a mortgagor whose property is being sold at foreclosure appeals to the sympathy of the crowd in order to induce them not to bid against him, even though his representations are perfectly true. Moreover, it is entirely immaterial whether the statements were made publicly at the sale, or privately, so long as they had a depressing effect upon the sale. The rule is equally

**Judicial sale—
vacation—cause.**

applicable to any act of the auctioneer of the owner of the party selling, or of third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes the competition and stifles or chills the sale."

See also *Liles v. Rhodes*, 7 La. 91; *Wood v. Hennen*, 9 La. Ann. 264; *Chaffe v. Farmer*, 34 La. Ann. 1017; *Chaffe v. Meyer*, 34 La. Ann. 1031; *Barclay v. Puget Sound Lumber Co.* 48 Wash. 241, 16 L.R.A. (N.S.) 140, 92 Pac. 430.

Act 23 of 1912, p. 30, in the first section, gives to "all managers, mechanics, or laborers employed by or working in sawmills," etc., liens or privileges on all logs, lumber, etc., manufactured in the mills where such managers, mechanics, or laborers are engaged or em-

ployed, for the payment of their salaries or wages.

Plaintiff was engaged and employed in defendant's sawmill as foreman and filer, and he had a lien upon the lumber seized and sold by the other defendants, the bank and the mercantile company, and he was in a position to contest, and he has successfully contested, the validity of the sale of that lumber under the executory process sued out by two of the defendants. *Meyer v. Farmer*, 36 La. Ann. 785.

The judgment appealed from is affirmed.

NOTE.

The annotation following *CHICAGO, R. I. & P. R. Co. v. BENNETT*, post, 684, deals with the elements bearing directly upon the quality of a contract as affecting the character of one as an independent contractor. More specifically, as to the significance of the footing upon which the remuneration of the person employed is computed, see § 25 of that annotation. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes, under "Master and servant."

MURDOCK CAMPBELL, Appt.,

v.

E. N. JONES et al., Respts.

Washington Supreme Court — October 3, 1910.

(60 Wash. 265, 110 Pac. 1083.)

Master — independent contractor — fixed profit.

1. A railroad company which employs a person to construct a bridge for it, upon paying the actual cost of labor, tools, and materials, plus a fixed percentage for profit, is not liable for injury to his employees through negligent performance of the work, since he is an independent contractor.

[See note on this question beginning on page 684.]

— injury to servant — safe working place.

2. Bridge contractors are liable for injuries to one of their employees through the negligent act of their

foreman in uprooting a stump on a hillside, for use as fuel, in such manner that it causes a stone to roll down on the injured person, who was working at the foot of the hill, since it is

their duty to furnish him a safe place in which to work.

[See 18 R. C. L. 593.]

Trial — question for jury — negligence.

3. The jury must determine whether

or not it is negligence for the foreman of a bridge gang to loosen a stump on a hillside above the place where the men were working, in such manner that it caused a stone to roll down upon them.

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County (Sullivan, J.) in defendants' favor, in an action brought to recover damages for personal injuries for which defendants were alleged to have been responsible. *Affirmed as to defendant railway company. Reversed as to remaining defendants.*

The facts are stated in the opinion of the court.

Messrs. Plummer & Latimer for appellant.

Messrs. H. H. Field and Cullen & Dudley for respondents.

Fullerton, J., delivered the opinion of the court:

The appellant brought this action against the respondents to recover for personal injuries. On the trial, at the close of his case in chief, a challenge to the sufficiency of his evidence was interposed by the respondents and sustained by the court, and afterwards a judgment was entered against him to the effect that he take nothing by his action. This appeal followed.

From the record it appears that, at the time the appellant received the injuries for which he sues, the respondent Chicago, Milwaukee, & Puget Sound Railway Company was engaged in constructing a railroad across the state of Washington, and had let the contract for the construction of a part of its roadbed to a firm of contractors known as Grant, Smith, & Company, who in turn had sublet the work of constructing a portion thereof to the respondents Jones & Onserud. Between the terminals of the work undertaken by Jones & Onserud, or contiguous thereto, was certain bridge work, which was not included within the work undertaken by them, but which nevertheless required certain grading and excavating to be done preparatory to the erection of the bridge. The contractors, Jones & Onserud, undertook to do this work under what a witness called a "force account;"

that is, as the witness explains, Jones & Onserud undertook to furnish all the necessary labor, materials, and tools, and do the necessary grading and excavating, for the actual cost of the work, plus a fixed percentage to be added thereto as profit. The appellant was employed by Jones & Onserud, and was put to work with some three or four others on the "force account" work, excavating for a bridge pier under the direction of one A. E. Lundin, foreman for Jones & Onserud. The place of work was on a steep hillside; so steep, in fact, that before paths and steps were cut into the face of the hill, the workmen were let down to their places of work with ropes. A part of the work consisted in drilling holes into the bank with churn drills. The weather being cold, clay and earth would freeze to the drills, rendering them useless, and to clean them they were heated in a small fire, which was kept burning for that purpose at the place of work. To get fuel for this fire the foreman, Lundin, went up the hill, some 150 feet above the fire, and proceeded to uproot a small stump that stood at that place, by kicking it with his foot. In so doing he loosened a rock some 12 inches in diameter, which rolled down the hill and struck appellant, causing the injuries for which he sues.

The record does not show that the railway company was in any manner concerned in the employment of the appellant. It did not hire him directly, nor did it attempt in any manner to direct or control his work

while he was engaged in excavating for the pier. Its contract was with Jones & Onserud. It employed that firm to do the work, leaving them to perform it according to their own methods, and with their own tools, materials, and employees, subject to the one condition that certain defined results be obtained. Such being the record, we think the trial judge very properly sustained the challenge to the sufficiency of the evidence made by the respondent railway company. Jones & Onserud, the employers of the appellant,

Master—
independent
contractor—
fixed profit.

sustained to that company the relation of independent contractors, and

their negligence, or the negligence of their foreman, whereby one of their employees was injured, could not render the railroad company liable for such injury. *Easter v. Hall*, 12 Wash. 160, 40 Pac. 728; *Boyle v. Great Northern R. Co.* 13 Wash. 383, 43 Pac. 344; *Ziebell v. Eclipse Lumber Co.* 33 Wash. 591, 74 Pac. 680, 15 Am. Neg. Rep. 457; *Miller v. Moran Bros. Co.* 39 Wash. 631, 1 L.R.A.(N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136, 19 Am. Neg. Rep. 49; *Larson v. American Bridge Co.* 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6.

But we think the court erred in sustaining the challenge to the evidence made on behalf of the defendants Jones & Onserud. They were the appellant's employers, and owed to him the duty of furnishing him with a reasonably safe place in which to work, and the duty of keeping the place reasonably safe as long as they required him to work therein. This duty was non-delegable, and when they intrusted it to another they became responsible for the negligent performance of the duty by that other. If, therefore,

—injury to servant—safe working place.

Lundin, in uprooting the stump, acted negligently, and

the place of work which had been

furnished the appellant was thereby rendered dangerous or unsafe, there can be no question of the liability of his principals therefor. His negligence was their negligence, and any negligent act in the line of his duty, which would render him personally responsible to the appellant, would render his principals likewise personally responsible. The liability of the respondents Jones & Onserud, therefore, turns on the question whether the act of uprooting the stump was in itself negligent. But as to this we think the evidence made a case for the jury. Trial-question for jury—negligence.

The position of the stump with reference to the working place of the appellant, the manner in which it was uprooted, the frozen condition of the ground, and the fact that the act did in fact loosen a rock, which rolled down the hill and injured the appellant, were all matters to be considered by the jury in determining the character of the act, and the court should have submitted the question of negligence to them.

We are aware of the contention of the respondents to the effect that Lundin, when he uprooted the stump, was not engaged in the master's work, but was performing the labor of a servant; that he was at that time a fellow servant, and his acts, being those of a fellow servant, would not render the master liable for injuries resulting therefrom, even though it were considered that the acts were negligent. But this reasoning overlooks the fact that the duty of the respondents to oversee the appellant's place of work was a continuing duty, obligatory upon them at all times; that, while the work itself may have been servant's work, the duty to see that its performance did not result in injury to the servants working elsewhere was the master's duty. This duty, as we say, could not be delegated, and if the injury to appellant was caused by its negligent performance the master is liable.

This principle was announced by this court in the case of *Creamer v. Moran Bros. Co.* 41 Wash. 636, 84

Pac. 592. There certain employees of the appellant were engaged, under the direction of a foreman, in removing a propeller from a propeller shaft of a ship, to which it was tightly wedged. The hub of the propeller had been heated to facilitate its removal, and oil confined therein had by that means become intensely hot. In the course of the work, the foreman took up a sledge and struck the hub a blow which loosened it, releasing the hot oil, which poured upon an employee assisting in the work, and burned him so severely as to cause his death. It was held that the act of the foreman was the act of the master, and not that of a fellow servant. In the course of its opinion the court said: "It is urged by appellant that the act of the superintendent in striking the hub with the sledge at the time and in the manner in which he did constituted an act of a fellow servant of Creamer; that such an act, although performed by the superintendent, was not one of superintendence, was not one of the non-delegable duties of the master, was not the act of a vice principal, but was the manual act of one working with Creamer in the same undertaking and to accomplish the same end toward which they were all working; that in striking said blow said superintendent was, for the time being, a fellow workman of Creamer; and that his negligence, as such, would not render the appellant company liable. This argument would appeal

strongly to the writer of this opinion, were it not for the former decisions of this court. *Nelson v. S. Willey S. S. & Nav. Co.* 26 Wash. 548, 67 Pac. 237; *Dossett v. St. Paul & T. Lumber Co.* 40 Wash. 276, 82 Pac. 273; *O'Brien v. Page Lumber Co.* 39 Wash. 537, 82 Pac. 114. Under the authority of those decisions, when the superintendent, without the knowledge of the workman, negligently set in operation an agency fraught with danger, he thereby rendered the company liable for the result of such negligence."

We are of the opinion, therefore, that, on any view of the case, the judgment is erroneous as to the respondents *Jones & Onserud*. As to them the judgment will be reversed, and the cause remanded, with instructions to grant a new trial. As to the *Chicago, Milwaukee, & Puget Sound Railway Company*, it will stand affirmed.

Rudkin, Ch. J., and Gose and Chadwick, JJ., concur.

NOTE.

The elements bearing directly upon the quality of the contract as affecting the character of one as an independent contractor is the subject of the annotation following *CHICAGO, R. I. & P. R. Co. v. BENNETT*, post, 684. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes under "Master and servant."

C. F. KALER et al., Respts.,

v.

PUGET SOUND BRIDGE & DREDGING COMPANY, Impleaded, etc.,
Appt.

Washington Supreme Court (Dept. No. 1) — March 20, 1913.

(72 Wash. 497, 130 Pac. 894.)

Master and servant — contractor — trespass — remedy against principal lost.

A contractor is not liable for injury to private property by casting

material thereon in filling adjoining low land, under contract with a municipality for the conservation of public health, if he follows the plans prepared by the municipal authority, and the right to hold the city liable has been lost.

[See note on this question beginning on page 684.]

APPEAL by the defendant dredging company from a judgment of the Superior Court for Thurston County (Mitchell, J.) in plaintiff's favor, in an action brought to recover compensation for injuries to real estate through an improvement executed by defendant under contract with the city of Olympia. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John W. Roberts and George L. Spirk, for appellant:

Plaintiff is estopped by bringing a lawsuit.

Justice v. Lancaster, 20 Mo. App. 559; Preston v. Cedar Rapids, 95 Iowa, 71, 63 N. W. 577; Collins v. Grand Rapids, 95 Mich. 286, 54 N. W. 889; Hembling v. Big Rapids, 89 Mich. 1, 50 N. W. 741; Dallas v. Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762; Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. 999.

The release of the city by respondents operated to release appellant as alleged joint tort-feasor.

De Baker v. Southern California R. Co. 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856, 2 Ann. Cas. 873; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; 24 Am. & Eng. Enc. Law, 285; 34 Cyc. 1047.

If there was any liability, that liability was one which could be imposed upon the city alone.

28 Cyc. 1086; De Baker v. Southern California R. Co. 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; Denison & P. Suburban R. Co. v. James, 20 Tex. Civ. App. 358, 49 S. W. 660; St. Louis use of Sullivan v. Clemens, 42 Mo. 69; Shaw v. Crocker, 42 Cal. 435; Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829; Engebretsen v. Gay, 158 Cal. 775, 109 Pac. 879; Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856, 2 Ann. Cas. 873; Pearson v. Zable, 78 Ky. 170; Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. 999; Cooper v. Seattle, 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887; Seattle v. Buzby, 2 Wash. Terr. 25, 3 Pac. 180; Provine v. Seattle, 59 Wash. 681, 110 Pac. 619; Cincinnati v. Stone, 5 Ohio St. 38; Fink v. St. Louis,

71 Mo. 52; Quinn v. Peterson & Co. 69 Wash. 207, 124 Pac. 502; Potter v. Spokane, 63 Wash. 269, 115 Pac. 176.

Messrs. Thomas M. Vance and Harry L. Parr for respondents.

Chadwick, J., delivered the opinion of the court:

This is a suit growing out of a municipal improvement in the city of Olympia, and known locally as the "Swantown fill." The work was done under an invocation of the police power of the city, the ordinance reciting that it was "necessary and expedient, on account of the public health, sanitation, the general welfare, and the general improvement of the property located within the boundaries" of the district, which are described in the ordinance. Two lots and a fraction, which were included in the improvement district, are owned by the plaintiffs. When the fill, which was made by a hydraulic dredger with silt and sand from the bottom of the bay, had so far progressed as to come up to plaintiffs' property, they asked and were granted the right to take a part of their property out of the district. They undertook, at their own expense, to build a bulkhead along the line agreed upon. The material used was old bridge flooring, which was placed against some fence posts. As the work progressed, this gave way. A new line was agreed upon, and a new bulkhead put in. The salt water and silt ran through and over the barrier, and did considerable damage to the property of the plaintiffs. A trial was had, and a verdict in the

sum of \$500 was returned in plaintiffs' favor. The city was made a party to the suit; but, it appearing on the trial that no claim had been presented within the time fixed by law for the presentation of claims, it was dismissed out of the case, and the trial proceeded against the dredging company alone.

It is not denied that the ordinance and contract under which the work was done provided that it should be done strictly in accordance with the plans and specifications furnished by the city, and under the direction of the city engineer, and the testimony shows that the changes made were sanctioned by that officer. One other fact material to our discussion is that the property of the plaintiffs was bounded on the north by a street, and on the west and south by property still within the improvement district, and which the dredging company was bound to fill under its contract.

The arguments of counsel, as set forth in the briefs, have taken wide range; but the case, in so far as the liability of the appellant is concerned, can be quickly determined by reference to some of the cases heretofore decided by this court, and to one or two fundamental principles. One of the suggestions made by respondents, and which should be first determined, is that there has been a taking and damaging, within the meaning of the Constitution (art. 1, § 16), for which they are entitled to compensation; that, the city being a trespasser, appellant could not escape liability because it had a contract to do that which was unlawful. Whether the damage suffered by respondents is such an injury as would sustain a recovery under the Constitution, and to which the special statute covering the presentation of claims would not apply, is a question that cannot now be raised. Whatever the law may be, the trial court held that the city was not liable; and, no appeal having been taken from that order, it has become the law of the

case (8 Cyc. 791), and respondents must recover from the appellant, if at all, upon other grounds.

This court has held that it is within the police power of a city to fill low-lying ground, when necessary to protect the health, comfort, and convenience of the municipality, and that any consequential damage suffered because thereof is in due process of law. "It would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community." *Bowes v. Aberdeen*, 58 Wash. 535, 30 L.R.A. (N.S.) 709, 109 Pac. 369. A proceeding in all respects similar to the one under discussion has been passed by this court as possessing no legal infirmity. *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214. Consequently, the city council having determined that it was necessary to fill and improve the property of these respondents, no damages could have been recovered if the city had made the improvement in accordance with the original plan. While the city can improve property within the insanitary district as determined by the ordinance, it does not follow that it can damage abutting property. "Legislation tending to the preservation of the public health is favored by the courts, and is regarded as a power inherent in a municipal corporation where population is congested. 28 Cyc. 709; *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44. But the power must be exercised within a proper limit—in this case, the filling of the district—and when the city goes beyond that limit the legislature should provide, and it has in this case provided, for compensation to those whose property stands in the way. If it did not, it would result in the confiscation of unoffending property." *State ex rel. Stalding v. Aberdeen*, 58 Wash. 562, 109 Pac. 379. See also *Dono-*

frio v. Seattle, 72 Wash. 178, 129 Pac. 1094; Ferry-Leary Land Co. v. Holt & Jeffery, 53 Wash. 584, 102 Pac. 445; Olson v. Seattle, 30 Wash. 687, 71 Pac. 201; State ex rel. Smith v. Superior Ct. 26 Wash. 278, 66 Pac. 385. When the city, acting through its engineer, he having authority to exempt property, excluded a part of respondents' property and drew new lines around it, it made the excluded lots abutting property; and it would become liable for such damages as might result to the abutting property from the manner in which the work was done. Now, admitting, without deciding, that there was such damage for which the city could have been held, the question remains whether, the city, which furnished the plan of the work and directed it in all particulars, having been dismissed out of the case, its contractor is liable. The negligence, if any, upon which a right of recovery could have been predicated, was the omission of the city to provide an adequate plan, or to make proper provision for carrying away the water and silt which, in the natural order of things, would seep through and over the bulkheads, and to care for the water that flowed from an artesian well which was on the premises. Because of these omissions water was left standing on the lots, and trees and vegetation were killed. It is not shown that appellant has in any manner violated its contract with the city, or has failed to follow the plans and specifications, or refused to obey the orders and directions of the city engineer.

Negligence implies a wilful fault. In keeping with this principle, it has been held by this, and generally by other courts, that where the fault lies in the plan furnished by the superior, and the work is done under his direction, the contractor is not liable in the absence of negligence. If negligent, he is held for his negligence, and not as a trespasser. This case, in principle and in many of its facts, is not unlike the case of Quinn v. Peterson & Co. 69 Wash.

208, 124 Pac. 502, where a recovery was denied. In Potter v. Spokane, 63 Wash. 267, 115 Pac. 176, it appeared that the damage for which a recovery was sought was caused by a defective bulkhead. It was held that, the plan being at fault, the contractor, who had done the work under a contract which "provided that the work should be performed according to certain plans and specifications described in the contract, and should be under the supervision, direction, and control of the board of public works of the city, and its representative, the city engineer; and that, in case of improper construction and noncompliance with the contract, the board had the right to order a partial or entire reconstruction of the work, or to declare the contract forfeited, and relet the same to another contractor, and to adjust the differences that should arise between the city and the contractor by reason of the change"—was not liable.

The liability of the contractor was not expressly passed on in that case, or in Cooper v. Seattle, 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887, but it would seem to follow from the reasoning of the court that the general rule would have been applied, if it had been necessary to a decision. Peter Casassa brought suit against the city of Seattle and the Lewis & Wiley Company, contractors, for damages from slides suffered because of insufficient slopes to sustain a street grade. The city was held, but the contractor was exonerated, it appearing that the work was done under the direction of the city, and that there was no sufficient evidence of negligence to charge the contracting company. Casassa v. Seattle, 66 Wash. 146, 119 Pac. 13. The general rule, as found by Mr. Dillon, is thus stated: "Where a city, acting within its general powers, contracts for the grading of a public street, and in accordance with the conditions of the contract, and the law prescribing the same, the work is done under the imme-

diate supervision of certain officers, whose official duty it is to superintend the work, and the damages result, not from any negligence or wrongdoing of the contractors, but from the performance of the work in the manner required by the contract, *the contractors are the agents of the city*, and the city is liable for such damages." 4 Dill. Mun. Corp.

Master and
servant—
contractor—
trespass—remedy
against
principal lost.

5th ed. § 1655, note;
28 Cyc. 1280. We
conclude that appel-
lant was not an in-
dependent contrac-

tor, and that the liability for the damages sustained rested upon the city, and not upon appellant.

We shall not discuss the other questions, some of which might, in any event, call for a new trial, as the forgoing is determinative of the case.

Reversed, with instructions to dismiss the suit.

Crow, Ch. J., and Gose, Parker, and Mount, JJ., concur.

NOTE.

The question whether or not one is an independent contractor as affected by the elements bearing directly upon the quality of the contract is the subject of the annotation following CHICAGO, R. I. & P. R. Co. v. BENNETT, post, 684. As to the effect of provisions in statutes and municipal ordinances, see § 2 of that annotation. For other annotations on the general question, who is an independent contractor, see A.L.R. Indexes, under "Master and servant."

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff.
in Err.,

v.

E. S. BENNETT.

Oklahoma Supreme Court (Division No. 2) — September 17, 1912.

(36 Okla. 358, 128 Pac. 705.)

Master and servant — test of relation.

1. In determining whether the relation between a proprietor and one doing work for him is that of master and servant, or proprietor and independent contractor, while the court may take into consideration the manner of payment, whether by the day, week, month, etc., with a reservation of the right to discharge, or whether there was to be payment by the piece or entire job, yet the mode of payment is not a decisive test by which to determine the question. The test lies in whether or not the contract reserves to the proprietor the power of control over the employee. The mere fact that the work being performed by an employee at the time he was injured was done by the piece or job, as by payment of a stated price per ton for shoveling coal into an engine tender, does not deprive him of the character of an employee, where he was a mere servant carrying out his employer's will and instructions.

[See note on this question beginning on page 684.]

— independent contractor defined.

2. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods,

and without being subject to the control of his employer except as to the result of the work.

[See 14 R. C. L. 67; 3 R. C. L. Supp. 164.]

Headnotes by BREWER, C.

(36 Okla. 358, 128 Pac. 705.)

— retention of contract — inference.

3. The employer's intention to retain the right of exercising control over a person performing work for him, and hence creating the relation of master and servant between the parties, will be inferred when it appears that the employment was general, and not based on a contract to do a certain piece of work on certain specified terms in a particular manner and for a stipulated sum.

Trial — question of law — construction of contract.

4. Where the contract of employment involved is in writing, the question of the relation created by it between the parties is ordinarily one of law for the court; but if the contract is oral, and the evidence as to its terms is conflicting, or where a written contract has been modified by the

practice under it, the question should be submitted to the jury under proper instructions. But, although the contract may be oral, if there is no dispute as to its terms, or if but one inference can be drawn from the evidence, then the question of whether the relation is that of employer and independent contractor, or that of master and servant, is for the court.

[See 14 R. C. L. 78; 3 R. C. L. Supp. 168.]

Master and servant — safety of working place — duty.

5. A master is under an obligation to take care that the premises in which, and the appliances and instrumentalities with which, he requires his servant to work, shall be reasonably safe for the purposes intended.

[See 18 R. C. L. 587, 593; 3 R. C. L. Supp. 827.]

ERROR to the District Court for Greer County (Brown, J.) to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, for plaintiff in error:

A carrier is not responsible for the loading or unloading of cars.

Gulf, W. T. & P. R. Co. v. Wittnebert, 101 Tex. 368, 14 L.R.A. (N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153.

Plaintiff was an independent contractor, not a servant of defendant.

Thomp. Neg. § 202, p. 575, note 4; Steel v. South-Eastern R. Co. 16 C. B. 550, 139 Eng. Reprint, 875; Earl v. Beadleston, 10 Jones & S. 294; Anderson v. Tug River Coal & Coke Co. 59 W. Va. 301, 53 S. E. 713; Riedel v. Moran, Fitzsimons Co. 103 Mich. 262, 61 N. W. 509; St. Louis, I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800.

The question as to whether the plaintiff was an independent contractor or an employee of the railroad company should have been submitted to the jury for its determination.

Sacker v. Waddell, 98 Md. 43, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Whitson v. Ames, 68 Minn. 23, 70 N. W. 793, 2 Am. Neg. Rep. 178; Wallace v. Southern Cotton Oil Co. 91 Tex. 18, 40 S. W.

399; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Brophy v. Bartlett, 108 N. Y. 632, 15 N. E. 368; Daley v. Boston & A. R. Co. 147 Mass. 101, 16 N. E. 690; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; Craft v. Albermarle Timber Co. 132 N. C. 151, 43 S. E. 597.

Messrs. H. M. Thacker and Charles M. Thacker for defendant in error.

Brewer, C., filed the following opinion:

The defendant in error, as plaintiff below, recovered judgment against the plaintiff in error, as defendant, in the sum of \$750, on account of personal injuries received in defendant's yards at Mangum, while loading a locomotive tender with coal from a box car. The coal had been loaded into the box car, without using grain or inside doors, and the heavy lump coal thus loaded came into contact with sliding side doors of the car, bulging the doors out against the sides of the groove upon which it was to be moved. On the night of the injury the engine to be coaled was placed on the north side of the car, but the north door

was bulged and broken so it could not be opened. The engine was then placed on the south side of the car. The south door was sprung and bulged to some extent, but was not broken so far as could be seen, and plaintiff, with the assistance of a yardman, attempted to open the south door by sliding it back. It was tight, and would not move, so plaintiff inserted the point of a small iron pick in an attempt to slide the door, when it suddenly broke loose, evidently from the great pressure of the heavy lumps of coal inside, and the door fell on plaintiff, breaking his arm and causing other injuries.

The defendant, after general denial, set up the special defense of independent contractor. In the petition in error defendant sets out thirteen specifications of error, and, in presenting its argument thereon, says in its brief: "In presenting the errors to this court on appeal the plaintiff in error desires to urge them as a whole without urging any one specifically, and without waiver of any," etc. The argument and authorities are submitted, however, under three subheads, a consideration of which will dispose of the case. They are: First, the plaintiff is an independent contractor, and not a servant of defendant; second, it was the duty of the court to submit the question of independent contractor to the jury; third, the carrier is not responsible for loading or unloading of cars.

1. We will consider the questions in their order; and to determine the relation existing between the plaintiff and the defendant—that is, whether he was a servant, or an independent contractor—we will refer to the evidence. The plaintiff was a coal heaver. His contract of employment was oral. He says he heard there was a vacancy, and applied in person for the job; that he was told to go to work that night—that the company would try him and see how long he would stay. Plaintiff says nothing was said at the time about how he was to be

paid, whether by the day, week, month, or ton, but that shortly thereafter he learned he was to be paid by the ton. The station agent said he hired plaintiff, and told him his pay would be by the ton. The station agent and night watchman both disclaimed any authority to direct plaintiff in his work. It was also shown that upon occasions plaintiff had hired a neighbor, paying him a pig to help him shovel coal. It appears that as engines came in the engine watchmen would run them to some convenient place in the yards, then draw a car of coal alongside, and plaintiff would then shovel coal into the tender of the engine. It is also shown that the station agent directed the engine watchmen which cars to unload, and the watchmen would then direct plaintiff what cars to unload first, etc.; that plaintiff would assist in switching engines and cars, and in spotting them to be coaled; and that the other employees sometimes assisted plaintiff in his work. The lantern and other instrumentalities for plaintiff's work were furnished by the defendant.

The defendant bases its contention, in the main, that plaintiff was an independent contractor, on the fact that he was paid by the ton for his work, and the evidence of the station agent that he did not give plaintiff any direction or exercise any control over him as to how he unloaded the coal into the tenders. The generally accepted rule of law is 1 Thomp. Neg. (§ 622): "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. . . . In every case the decisive question is: Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? Does he reserve to himself the essential powers of a master? It is but another form of language, expressing the same idea, to say

that the true test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. On this question the contract under which the work has been done must speak conclusively in every case, reference being had, of course, to surrounding circumstances. This being so, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. 'If such were the rule, a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman, or gardener.'" And, further, the same author, in discussing the manner of payment as bearing on the relation between the parties, says: "Sec. 629. In determining whether the relation is that of master and servant, or that of proprietor and independent contractor, the courts have sometimes taken into consideration the manner of payment—whether payment was to be made by the day, week, month, etc., with a reservation of the power to discharge, or whether there was to be a payment by the piece or by the entire job. But the mode of payment is not a decisive test by which to determine this question. The test lies in the question whether the contract reserves to the proprietor the power of control over the employee. That the mere fact that the work being performed by an employee at the time he was injured was done by the piece or job—as by payment of a stated price for each car when loaded—does not deprive him of the character of an employee, where he was a mere servant carrying out the employer's will and instructions."

Master and servant—test of relation.

made by the day, week, month, etc., with a reservation of the power to discharge, or whether there was to be a payment by the piece or by the entire job. But the mode of payment is not a decisive test by which to determine this question. The test lies in the question whether the contract reserves to the proprietor the power of control over the employee. That the mere fact that the work being performed by an employee at the time he was injured was done by the piece or job—as by payment of a stated price for each car when loaded—does not deprive him of the character of an employee, where he was a mere servant carrying out the employer's will and instructions."

Among the definitions selected and approved in 4 Words &

Phrases, 3542, we find the following: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 807."

—independent contractor defined.

It has been seen that the mode of payment—as, in this case, by the ton—is not a test of the relation between the parties; nor is such fact in any way inconsistent with the idea of that relation being one of master and servant. The station agent said that he did not control or direct the method or detail of plaintiff's work, and that other employees in the yard merely designated the cars to be unloaded. But the test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under the contract of employment, taking into account the circumstances and situation of the parties and the work, to so control and direct him in the work. *Moll, Independent Contractors*, § 35; *Linnahan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. A case directly in point is that of *Hamilton v. Oklahoma Trading Co.* 33 Okla. 81, 124 Pac. 38, and the numerous authorities cited and quoted from. See also *Chas. T. Derr Constr. Co. v. Gelruth*, 29 Okla. 538, 120 Pac. 253. In this case, would an officer or manager of defendant, who might have seen plaintiff heaving coal carelessly or wastefully, and loading the tender improperly, have had the right to require him to use a better method? If such manager saw him loading one tender, and preferred that he load another first, would he not have at once commanded and enforced obedience to his wishes, thus changing plaintiff's plan and method of work? Is it conceivable that a railroad, in hiring an un-

skilled man to perform one of the simplest tasks of hard manual labor, requiring scarcely more than muscle in its performance, yet one that must be constantly performed in the yards to keep trains moving, would absolutely relinquish all right of control and direction? We hardly think so. In *Moll on Independent Contractors*, at page 76, it is said: "The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work"—citing *Richmond v. Sitterding*, 65 L.R.A. 445, and note (101 Va. 354, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616). The same author (*Moll*) at page 76 continues: "It is held in Massachusetts that the employer's intention to retain the right of exercising control, and hence creating the relation of master and servant, should always be inferred where it appears that the employment was general, and not based on a contract to do a certain piece of work on certain specified terms in a particular manner and for a stipulated price"—citing *Brackett v. Lubke*, 4 Allen, 138, 81 Am. Dec. 694; *Dane v. Cochrane Chemical Co.* 164 Mass. 453, 41 N. E. 678, and numerous other cases.

In this case the employment was general. Many or few engines were to be provided with coal according to the demands of business. There was no particular manner of doing the work; no particular place in the yards for it to be done. The work was to be done where and when and as much of it as the needs of the employer might require. If this coal heaver was a contractor, and not a servant, every coal miner in this state occupies toward the company for which he works the same relation. It is common knowledge that the miner furnishes his entire

equipment of tools, his oil, and lamp, and his powder, fuse, and caps, and receives a stipulated price per ton for the coal mined; yet we doubt if anyone would now seriously urge in this jurisdiction, where the courts are full of mining cases, that the coal miner sustains that relation to his company. It has been held, however, that he does not sustain such relation. *Drennen v. Smith*, 115 Ala. 396, 22 So. 442; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423, 10 Mor. Min. Rep. 39. We therefore conclude that in this case it is shown that the relation existing between the parties at the time of the injury was that of master and servant.

2. What has been said on the first proposition relieves us of any extended consideration of the second, i. e., that it was reversible error to refuse to submit to the jury the question of whether plaintiff was a contractor or a servant. We think it can be correctly said that, where the contract of employment is in writing, the question of the relation created

Trial—question of law—construction of contract.

by it between the parties is ordinarily one of law for the court; but if the contract is oral, and the evidence is conflicting, or where a written contract has been modified by the practice under it, the question should be submitted to the jury under proper instructions. 1 *Thomp. Neg.* 640; *Moll, Independent Contractors*, §§ 28, 29, and authorities cited. But although the contract may be oral, if there is no dispute as to its terms, or if but one inference can be drawn from the evidence, then the question whether the relation is that of employer and independent contractor, or that of master and servant, is for the court. *Moll, Independent Contractors*, §§ 28, 29; *Foley v. Felrath*, 98 Ala. 176, 39 Am. St. Rep. 39, 13 So. 485, and authorities cited; *Drennen v. Smith*, 115 Ala. 403, 22 So. 442. The evidence in this case presents no substantial conflict relative to

the employment of plaintiff; and, taking into consideration the nature and character of the work, the duties involved, the methods pursued, and the necessary interest and concern of each of the parties in the time, place, and manner of doing the work and in the results to be accomplished, we have no hesitancy in holding that but one reasonable inference could be drawn from the evidence as to the relation of the parties, and that is that such relation was that of master and servant. This being the case, the court very properly, under the facts presented, refused to submit the question to the jury.

3. The remaining point contended for by defendant—that it was not responsible for a negligent loading of the car by the consignor—loses much, if not all, of its force and applicability, when it has once been determined that the plaintiff was its servant. The question, that relation once established, becomes one of safe place in which to work and safe instrumentalities and appliances with which to work, and the doctrine and rules of law relative to the duty of a carrier to the consignor or consignee of freight, or the consignee's servants in unloading the same after a delivery to him, where the question of negligent loading by the consignor is presented, are no longer controlling, if, indeed, applicable at all. We have read *Gulf, W. T. & P. R. Co. v. Wittnebert*, 101 Tex. 368, 14 L.R.A. (N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153, cited by defendant, and do not think it in point here.

The duty of the master involved in this case is stated thus in *Labatt on Master & Servant*, 1st ed. § 14: "The rule defining the nature and extent of the master's obligation with respect to the condition of the agencies of his business may be stated in its most general form as follows: The degree of care required of an employer in protecting his employees from injury is the adoption of all reasonable means

and precautions to provide for the safety of his servants while in the performance of their work. What shall be deemed 'due care' is to be 'estimated on a consideration of the facts of each particular case.' It is 'such care as reasonable and prudent men would use under similar circumstances.' The care which such a man is, for the purposes of this rule, assumed to exercise, is that which he would exercise for his own safety if the instrumentality in question was furnished for his own personal use. That is to say, a master is required to furnish 'such [appliances] as a prudent man would furnish, if his own life were exposed to the danger that would result from unsuitable or unsafe appliances.'" See also *Thompson, Neg. § 8*. And, regarding the instrumentalities and appliances furnished the servant, the same author (*Labatt*), at § 22a, states as a corollary to the foregoing the following: "The general principle laid down in § 14, *supra*, involves the corollary that the master is in default as respects his servants, unless the appliances furnished are such as would commend themselves to a reasonably prudent man. He is bound to furnish such appliances as are reasonably safe and suitable—such as a

Master and servant—safety of working place—duty.

prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. In order to discharge this obligation, he must see that the instrumentalities which he furnishes are in 'proper condition;' that is to say, in 'a condition which shall not endanger the safety of the employed,' or in such a condition 'that an employee can perform all the duties required of him with reasonable safety,' or in such a condition that it shall be 'reasonably probable that injury will not occur in the exercise of the employment.' Such being the general character of the master's obligations, the doctrine is now regarded as axiomatic that the employer is

bound to furnish adequate materials, and means, and resources suitable to accomplish the work; that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose." In this case the car of coal, with its sliding door to be opened, was an instrumentality furnished plaintiff, with which, and about which, to work. There is some evidence that it was in a defective and dangerous condition, and that such condition could have been easily ascertained if any attention had been given to it when it was set out for unloading. The plaintiff went to it to unload it on a dark night, equipped with no light by which he could see and determine conditions, save that of a lantern provided him by the defendant. The question of whether plaintiff was guilty of contributory negligence was submitted to the jury, and determined in his favor. The jury were properly instructed that

plaintiff could not recover unless they should find that his injury was the direct and proximate result of defendant's neglect to use ordinary care to keep and maintain said car and the door thereof in a safe condition to be unloaded, without injury to those performing the work. While the petition may be subject to some slight criticism in not being sufficiently full and specific in stating defective and unsafe conditions, yet the proof was directed and instructions given on this theory, and we have no doubt but that it was the correct theory of the case. We have read the entire record, and believe there was sufficient evidence to support the verdict of the jury, and that no reversible error has been shown.

The case should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied,
December 17, 1912.

ANNOTATION.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor.

I. In general:

- § 1. Scope, 686.
- § 2. Effect of provisions in statutes and municipal ordinances, 686.
- § 3. Identification of contractor and his servants for the purpose of determining the significance of an exercise of control, 687.

II. Stipulations construed as investing the employer with powers of control which do not extend to the details of the work:

- § 4. In general, 687.
- § 5. Stipulations requiring the contractor to satisfy a certain standard, 693.
- § 6. Stipulations by which the employer is empowered in general terms to give directions concerning the work, 697.

II.—continued.

- § 7. Stipulations by which the employer is empowered to give directions with regard to particular matters, 702.
- § 8. Other stipulations importing a reservation of a certain degree of control over the work, 707.
- § 9. Typical contracts relating to various descriptions of work:
 - 1 (a) Work performed for railroad companies, 709.
 - (b) Work with respect to buildings, 709.
 - (c) Construction of sewers, 709.
 - (d) Laying gas pipes, 709.
 - (e) Work with respect to timber, 710.

II. 9—continued.

(f) Operation of quarries, 710.

III. Stipulations construed as investing the employer with powers of control which extend to the details of the work:

- § 10. In general, 710.
- § 11. Stipulations requiring the contractor to satisfy a certain standard, 710.
- § 12. Stipulations by which the employer is authorized in general terms to give directions concerning the work, 712.
- § 13. Stipulations by which the employer is empowered to give directions with regard to particular matters, 719.
- § 14. Typical contracts relating to various kinds of work:
 - 1 (a) Work performed for railroad companies, 721.
 - (b) Work with respect to buildings, 721.
 - (c) Construction of highways, 721.
 - (d) Construction of sewer, 721.
 - (e) Construction of telephone system, 721.
 - (f) Scavenging work, 721.

IV. Oral evidence with respect to the extent of the power of control reserved to the employer:

- § 15. Evidence relating specifically to the nature of the contract as entered into, 721.
- § 16. Evidence as to the conduct or words of the parties during the progress of the work, 725.
- § 17. Same subject; independence of contract predicated, 727.
- § 18. Same subject; independence of contract negatived, 735.

V. Circumstantial evidence bearing upon the quality of the contract:

- § 19. Introductory, 744.
- § 20. Special skill required for the performance of the stipulated work, 745.
- § 21. Humble industrial status of the person employed, 745.
- § 22. Financial irresponsibility of the person employed, 751.

V.—continued.

- § 23. Contractor bound or not bound to perform the work himself, 751.
- § 24. Partition of the work among several contractors, 754.
- § 25. Footing upon which the remuneration of the person employed is computed, 755.
- § 26. Employer entitled to terminate the employment, 761.
- § 27. Employer not entitled to terminate the employment, 765.
- § 28. Contract not terminable without the consent of the person employed, 766.
- § 29. Employer entitled or not entitled to discharge the workmen hired by the contractor:
 - (a) Right vested in employer, 766.
 - (b) Right not vested in employer, 768.
 - (c) Bearing of these circumstances upon the question of special temporary service, 769.
- § 30. Employer empowered to control the employment and discharge of the workmen, 769.
- § 31. Contract not to be assigned or sublet without the employer's permission, 770.
- § 32. Party by whom the wages of the contractor's servants paid:
 - (a) Payment by the contractee, 772.
 - (b) Payment by the contractor, 773.
 - (c) Bearing of these circumstances upon the question of special, temporary service, 774.
- § 33. Contractor bound to furnish the labor required for the work, 774.
- § 34. Contractor bound to furnish the materials and appliances required for the work, 776.
- § 35. Contractor bound to furnish both the labor and appliances, 777.
- § 36. Employer bound to furnish the materials and appliances required for the work, 778.

V.—continued.

§ 37. Employer's surrender or retention of the control of the place of work:

(a) Control surrendered, 781.

(b) Control retained, 784.

§ 38. Arrangements with regard to the medical treatment of the workmen hired by the person employed. 787.

§ 39. Arrangements with regard to insurance against liability, 787.

§ 40. Obligation of contractor to indemnify employer for injuries resulting from the work, 788.

§ 41. Contractor a stockholder in employing company, 789.

§ 42. Contractor a director of employing company, 789.

§ 42a. Contracting company an auxiliary of the employing company, 790.

§ 43. Custom or usage, 790.

I. In general.

§ 1. Scope.

The evidential elements with reference to which the quality of the contract is determinable fall into two categories, viz.:

(1) Those which have a direct bearing upon the question whether the person employed was free from or subject to the control of the employer with respect to the details of the stipulated work.

(2) Those of a circumstantial description, which possess a merely indirect and inferential significance with respect to that question.

¹ In *Harper v. Milwaukee* (1872) 30 Wis. 365 (earth dug from a trench was left in such a position that the water in a drain was obstructed and diverted onto the plaintiff's premises), the independence of a contract with a city for the building of a sewer was held to be negatived, where the contract was let pursuant to the provisions of a statute by virtue of which the board of public works had full and complete control of the manner of the performance of the work

V.—continued.

§ 44. Miscellaneous facts—tending to show that the person employed was an independent contractor, 790.

§ 45. —tending to prove that the person employed was a servant, 792.

§ 46. —not inconsistent with the inference that the person employed was an independent contractor, 793.

§ 47. —not inconsistent with the inference that the person employed was a servant, 795.

§ 48. —irrelevant or immaterial, 795.

§ 49. Bad faith on employer's part in respect of making a contract independent in form, 795.

§ 50. Virtual identity of employing and employed companies or partnerships, 802.

§ 51. Estoppel of employer to aver independence of contract, 807.

The probative significance which has been ascribed to the various elements belonging to both of these categories is discussed in the present monograph.

§ 2. Effect of provisions in statutes and municipal ordinances.

The independence of a contract for the performance of municipal work is necessarily negatived, where it is made with reference to a statute or ordinance containing a provision the effect of which is to place the contractor completely under the control of some designated agent of the municipality during the progress of the work.¹

by the contractor during the progress thereof, and it was the duty of that board to reserve, in the contract for building the sewer, the right to determine finally all questions as to the proper performance thereof, or the doing of the work therein specified, and, in case of imperfect or improper performance, to suspend the work, to order a reconstruction thereof, or to relet the work to some other party. *Wis. Private & Local Laws 1869*, chap. 399, §§ 11, 17, chap. 401, § 12. The

§ 3. Identification of contractor and his servants for the purpose of determining the significance of an exercise of control.

In the cases in which the effect of evidence that the employer exercised control over the performance of the work has been considered, the courts have proceeded upon the theory that the contractor is so far identified with his servants that the probative significance of such evidence does not in any wise depend upon whether the control was exercised with respect to the contractor himself, or to his servants.¹ In a logical point of view this theory would seem to be unassailable.

court, not having the contract before it, entertained the presumption that it was made in accordance with the requirements of the statute. See also *Kollock v. Madison* (1893) 84 Wis. 458, 54 N. W. 725.

In *St. Paul v. Seitz* (1859) 3 Minn. 297, Gil. 205, 74 Am. Dec. 753 (plaintiff fell into an excavation made in the course of the grading of a street), the intention of the legislature that the city of St. Paul should "retain that supervisory and directory power over the details of the work and the manner of its performance which is so valuable to the citizen in protecting his person and property against the carelessness of irresponsible contractors," was held to be a necessary inference, for the reason that the charter provided as follows: "The said street commissioners shall have power to order and contract for the making, grading, repairing, and cleansing of streets, alleys, public ground, reservoirs, gutters, and sewers within their respective wards, and to direct and control the persons employed therein."

In *Seattle v. Buzby* (1880) 2 Wash. Terr. 25, 3 Pac. 180, and *Smith v. Seattle* (1899) 20 Wash. 613, 56 Pac. 389, the independence of the contracts in question was held to be negated by the fact that they were made with reference to ordinances which declared that the stipulated work was to be done "under the supervision" of the designated agents of the defendants. See, however, cases cited in § 12, *infra*.

In *Cooper v. Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887, the charter of the defendant city

II. Stipulations construed as investing the employer with powers of control which do not extend to the details of the work.

§ 4. In general.

The general doctrine is well established, that stipulations which entitle the employer to exercise a certain measure of control over the work, but go no further than to enable him to secure that it shall be properly performed, do not affect the quality of contracts which, apart from those stipulations, would be construed as independent.¹ In other words, the re-

provided that such improvements as were made by contractors should be "under the management" of its board of public works. But the decision holding that the contractor was a servant of the city was apparently founded entirely on the stipulations of the contract itself.

See also *KALER v. PUGET SOUND B. & O. Co.* (reported herewith, ante, 674).

¹ For cases in which the independence of the contract was held not to be destroyed by proof of the exercise of a certain measure of control over the contractor's servants, see *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322 (employer directed driver of contractor's wagon where to haul certain bricks, how to load them, and where to deliver them); *Cohen v. Western Electric Co.* (1906; App. T.) 50 Misc. 660, 99 N. Y. Supp. 525 (clerk of employer of trucking firm gave directions as to where the drivers were to take the goods.).

¹ "The right of the employer to exercise a limited control over the work, without thereby destroying the independent character of the contract, has been recognized by the courts in numerous cases. The rule seems to be well established that where the control reserved does not apply to the mode or manner of having the work done, and does not in any way take the work out of the hands of the contractor, it will not destroy the independent nature of the contract. . . . In other words, the relation of master and servant is not to be inferred from the reservation by the employer of powers which do not deprive the contractor of his right to use his own

methods in accordance with his contract." *St. Louis & S. F. R. Co. v. Madden* (1908) 77 Kan. 80, 17 L.R.A. (N.S.) 788, 93 Pac. 586.

"The mere fact that a proprietor retains a general supervision over work to be constructed for him by another, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him, the proprietor, responsible for the wrongs done to third persons in the prosecution of the work." *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

If the other provisions of the contract are such as render the person employed an independent contractor, he will not be converted into a servant by the insertion of stipulations reserving to the employer "the right to change, inspect, and supervise to the extent necessary to produce the result intended by the contract." *Upington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115.

"The mere fact of direction as to things to be done, without control over the methods or means of doing them, does not make a contractor a servant." *Shearm. & Redf. Neg.* § 164—quoted in *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835.

In one case the broad rule was laid down that the mere right of the defendant to supervise the work so far as to see whether it was done according to contract does not throw the responsibility, if any, of the contractor, on the employer. *Welsh v. Lehigh & W. Coal Co.* (1886) 2 Sadler (Pa.) 319, 5 Atl. 48.

"It is now an accepted rule that supervision of such work [i. e., building a railway] may be retained without interfering with the independent action or liability of contractors who have engaged to perform it, or subdivisions of it." *Larson v. Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L.R.A. 330, 33 Am. St. Rep. 439, 19 S. W. 416.

"Although the employer may have had an agent who supervised the work for the mere purpose of seeing that it was done in conformity to the contract, without interfering as to the particular method in which it was done, or the means by which a given result was to be accomplished, that

would not be in law a control and direction of the work by her; and she would not be responsible for the manner in which the work was done." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320 (language of headnote prepared by the court).

An employer cannot be held liable for the acts of a contractor merely because his engineer has a general supervision of the work, where the power of such engineer is "limited to the manner of its accomplishment, and the time within which it should be finished, rather than the means to be used." *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

A contract is none the less independent because the employer's representative has the right to see that the work is properly done. *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334.

One of the stipulations which, in *Mobley v. J. S. Rogers Co.* (1919) 68 Ind. App. 308, 119 N. E. 477, was held to be independent, was that the contractor should provide facilities for inspection by the employer.

In *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 244, 154 Eng. Reprint, 1201, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, a provision by which the employer reserved a general power of watching the work was treated as immaterial. In fact, it was not even contended by counsel that it changed the relation of the parties to that of master and servant.

In *Crudup v. Schreiner* (1901) 98 Ill. App. 337, the provision which was held not to affect the independence of a subcontractor was contained in the following contract between the principal employer and the contractor in chief: "The contractor must personally superintend the whole of this work at all times in every detail, or appoint a competent foreman to represent him, to whom all necessary orders may be given from time to time during the progress of the work."

In *Thurston v. Kansas City Terminal R. Co.* (1914) — Mo. App. —, 168 S. W. 236, it was provided by one of the clauses in a contract for the demolition of a building belonging to the defendant company that it should name and furnish a man to look after its interest while the work was in progress, who was to be paid by the other party a sum of not less than \$15 per week, until the work was com-

pleted. Held, that the provision did not operate so as to repel the inference, deducible from the residue of the contract, that the person employed was an independent contractor.

In *Arkansas Natural Gas Co. v. Miller* (1912) 105 Ark. 477, 152 S. W. 147, a written contract for the construction of a pipe line, whereby the contractors agreed to furnish the material and do the work for a stipulated price, provided that "all material furnished by the said contractor in the construction and laying of said pipe line, and all work done, should be subject to the inspection and approval of the company, or its duly authorized agent, and that the said inspection shall be made as work progresses, and that any defective materials, or workmanship shall be pointed out by it as soon as the same is discovered, and the said defect shall be at once remedied by the said contractor." Held, that this provision did not operate so as to render the defendant liable for the negligent acts of the contractors or their servants.

In *Mason & H. Co. v. Highland* (1909) — Ky. —, 116 S. W. 320, an instruction by which the jury were told that the employers were not liable for an injury sustained by the plaintiff, while in the service of an independent contractor, but which contained the qualifying statement that such liability would be predicable if they retained control of the stipulated work, was held erroneous in respect of its not sufficiently informing the jury that the employers might, without destroying the independent character of the contract, retain control of the work, to the extent of seeing that it was done in accordance with the contract.

In *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888, the contract between the water board of New Orleans and a construction company contained the following provision, apparently inserted *ex abundanti cantela*: "It is well understood that the right of supervision by the general superintendent and other employees of the board will not make the contractor an agent of the board, and that the liability of the contractor for all damages to public or private property arising from the contractor's execution of the work shall not be

20 A.L.R.—44.

lessened because of such right of supervision. Such right of supervision is retained in order to insure to the board the completion of the work according to the specifications, and to insure the public in general from all unnecessary inconveniences during the construction of the work." Such a provision was undoubtedly binding, as the court laid down, upon the two parties to the contract. But a stipulation of this sort would clearly be ineffectual to relieve the contractee of responsibility for the contractor's defaults, if the right of supervision reserved by the contract had actually been sufficiently extensive to place the former in the position of a master with regard to the latter.

For other cases in which the doctrine stated in the text has been recognized, see:

Alabama. — *Chattahoochee & G. R. Co. v. Behrman* (1903) 136 Ala. 508, 35 So. 132.

Arkansas. — *St. Louis, A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *St. Louis, I. M. & S. R. Co. v. Gillihan* (1906) 77 Ark. 551, 92 S. W. 793; *Arkansas Natural Gas Co. v. Miller* (1912) 105 Ark. 477, 152 S. W. 147; *Arkansas Land & Lumber Co. v. Sechrist* (1915) 118 Ark. 561, 177 S. W. 37.

California. — *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8; *Donlon Bros. v. Industrial Acci. Commission* (1916) 173 Cal. 250, 159 Pac. 715; *Johnson v. Helbing* (1907) 6 Cal. App. 424, 92 Pac. 360; *Buckingham v. Commery-Peterson Co.* (1919) 39 Cal. App. 154, 178 Pac. 318.

Connecticut. — *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

District of Columbia. — *Philadelphia, B. & W. R. Co. v. Karr* (1912) 38 App. D. C. 193, — A.L.R. —.

Georgia. — *Lee v. Atlanta, B. & A. R. Co.* (1911) 9 Ga. App. 752, 72 S. E. 165.

Illinois. — *Nevins v. Peoria* (1886) 41 Ill. 502, 89 Am. Dec. 392; *Pfau v. Williamson* (1872) 63 Ill. 16; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17; *Boyd v. Chicago & N. W. R. Co.* (1905) 217 Ill. 332, 108 Am. St. Rep. 253, 75 N. E. 496 ("only a right of general supervision and inspection to see that the contract was properly performed"); *Bayer v. Chicago, M. & N. R. Co.* (1896) 68 Ill. App. 219; *Cary v. Chi-*

Chicago (1895) 60 Ill. App. 341; Fitzpatrick v. Chicago & W. I. R. Co. (1889) 81 Ill. App. 649, appeal dismissed in (1891) 139 Ill. 248, 28 N. E. 837; Geist v. Rothchild (1900) 90 Ill. App. 324; Bjornson v. Saccone (1899) 88 Ill. App. 6 (contractor agreed to "permit the owners and all persons appointed by them to visit and inspect the said work, or any part thereof, at all times and places, during the progress of the same, and shall provide sufficient, safe, and proper facilities for such inspection"); Vacker v. Yeager (1909) 151 Ill. App. 144; Fell v. Chicago Bldg. & Special Constr. Co. (1914) 187 Ill. App. 286.

Indiana.—New Albany Forge & Rolling Mill v. Cooper (1891) 131 Ind. 363, 30 N. E. 294; Staldter v. Huntington (1899) 153 Ind. 354, 55 N. E. 88; Marion Shoe Co. v. Eppley (1914) 181 Ind. 219, 104 N. E. 66, Ann. Cas. 1916D, 220; Prest-O-Lite Co. v. Skeel (1914) 182 Ind. 593, 106 N. E. 367, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724 (contract provided that the owner, through a person called an inspector, should have the authority to examine the materials furnished, and to condemn those which did not conform to the prescribed standard, and that his inspector could also arrest the progress of the work if he found that it was not conforming to the standard prescribed in the contract); Julius Keller Constr. Co. v. Herkless (1915) 59 Ind. App. 472, 109 N. E. 797.

Iowa.—Hughbanks v. Boston Invest. Co. (1894) 92 Iowa, 267, 60 N. W. 640; Kelleher v. Schmitt & H. Mfg. Co. (1907) 122 Iowa, 635, 98 N. W. 482.

Kansas.—Pottorff v. Fidelity Coal Min. Co. (1912) 86 Kan. 774, 122 Pac. 120 (in syllabus of court).

Louisiana.—Robichaux v. Morgan's L. & T. R. & S. S. Co. (1912) 131 La. 727, 60 So. 206; Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

Massachusetts.—Harding v. Boston (1895) 163 Mass. 14, 39 N. E. 411; Gorham v. Cross (1878) 125 Mass. 232, 28 Am. Rep. 224; Morgan v. Smith (1893) 159 Mass. 570, 35 N. E. 101.

Michigan.—Bacon v. Candler (1914) 181 Mich. 372, 148 N. W. 194.

Missouri.—Crenshaw v. Ullman (1892) 113 Mo. 633, 20 S. W. 1077; McKinley v. Chicago, S. F. & C. R. Co.

(1890) 40 Mo. App. 449; Ege v. Phoenix Brick & Constr. Co. (1906) 118 Mo. App. 630, 94 S. W. 999.

New York.—Uppington v. New York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Froelich v. New York (1910) 199 N. Y. 466, 93 N. E. 79, modifying judgment in (1908) 129 App. Div. 909, 144 N. Y. Supp. 1127 ("right to change, supervise, and inspect to the extent necessary to produce the result intended by the contract"); Herman v. Buffalo (1915) 214 N. Y. 316, 108 N. E. 451; Hawke v. Brown (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032; Duerr v. Consolidated Gas Co. (1903) 86 App. Div. 14, 83 N. Y. Supp. 714; Carpenter v. New York (1906) 115 App. Div. 552, 101 N. Y. Supp. 402; Jaskoey v. Consolidated Gas Co. (1900) 33 Misc. 790, 67 N. Y. Supp. 976; Gardner v. Bennett (1874) 6 Jones & S. 197; Clare v. National City Bank (1875) 8 Jones & S. 104.

North Carolina.—Denny v. Burlington (1911) 155 N. C. 39, 70 S. E. 1085, 3 N. C. C. A. 922; Hopper v. Ordway (1911) 157 N. C. 125, 72 S. E. 839; Johnson v. Carolina, C. & O. R. Co. (1911) 157 N. C. 382, 72 S. E. 1057; Embler v. Gloucester Lumber Co. (1914) 167 N. C. 457, 63 S. E. 740.

Oklahoma.—Bokoshe Smokeless Coal Co. v. Morehead (1912) 34 Okla. 424, 126 Pac. 1033 (coal company reserved the right to inspect, examine, and survey the premises at any time, and it was agreed that all the "workings" on the premises should be done under the general supervision of the company).

Oregon.—Giacconi v. Astoria (1911) 60 Or. 12, 37 L.R.A.(N.S.) 1150, 113 Pac. 855, 118 Pac. 180.

Pennsylvania.—Reed v. Allegheny (1875) 79 Pa. 300; Wray v. Evans (1875) 80 Pa. 102; Welsh v. Parrish (1892) 148 Pa. 599, 24 Atl. 86; Miller v. Merritt (1905) 211 Pa. 127, 60 Atl. 508.

Texas.—Simonton v. Perry (1901) — Tex. Civ. App. —, 62 S. W. 1090; Edmundson v. Coca-Cola Co. (1912) — Tex. Civ. App. —, 150 S. W. 273.

Virginia.—Bibb v. Norfolk & W. R. Co. (1891) 87 Va. 711, 14 S. E. 163.

Washington.—Miller v. Moran Bros. Co. (1905) 39 Wash. 631, 1 L.R.A. (N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089; Larson v. American Bridge Co. (1905) 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294; Cary v. Spark-

lation of master and servant is not inferable from the reservation of powers which do not "deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with his contract."²

It would seem that, in the final analysis, this doctrine may appropriately be referred to the consideration that, to every agreement by which one person undertakes to produce certain concrete results for the benefit of another, there is attached an implied condition that the latter person shall have the right of refusing to accept the results finally obtained, if they do not constitute a satisfactory execution of the agreement.³

man & M. Co. (1911) 62 Wash. 363, — A.L.R. —, 113 Pac. 1093; North Bend Lumber Co. v. Chicago, M. & P. S. R. Co. (1913) 76 Wash. 232, 135 Pac. 1017; Watson v. Hecla Min. Co. (1914) 79 Wash. 383, 140 Pac. 317 (stipulation "to do all in a workmanlike and substantial manner, the same to be inspected by the foreman" of the contractee); Johnston v. Seattle Taxicab & Transfer Co. (1915) 85 Wash. 551, 148 Pac. 900 (arguendo).

Canada.—Ballentine v. Ontario Pipe Line Co. (1908) 16 Ont. L. Rep. 654 (contract assumed by single judge to be independent); Smith v. Montreal (1917) Rap. Jud. Quebec 52 C. S. 284 (decision of single judge); Smith v. Ulen (1914) — Alberta L. R. —, 17 D. L. R. 400 (decision of single judge).

See also the cases cited in the following sections.

² A phrase used by Rigby, L. J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. (Eng.) 335, 353, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

In a Canadian case, *Osler, J. A.*, expressed the opinion that the legal criterion for determining the question whether the relation of master and servant existed was whether the alleged master had the power of controlling the work which the alleged servant was doing for him, "in respect to anything not necessarily involved in the proper doing of the work." *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265.

³ The logical connection thus suggested is traceable in such a pas-

The courts have also emphasized the special consideration, appropriate, more particularly, to formal contracts of a somewhat elaborate description, that the question whether the person employed was an independent contractor or a mere servant "is not determined solely by the retention of a certain kind or degree of supervision by the employer. It is to be determined by the contract as a whole,—by its spirit and essence,—and not by the phraseology of a single sentence or paragraph."⁴ The effect of applying this test to a stipulation which on its face may be understood as reserving to the employer either a complete power of control over the work, or as confer-

sage as the following: "Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach not only to the servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim [i. e., 'respondeat superior']. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence." *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542. This statement of principles was quoted with approval in *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265.

⁴ *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322, affirming (1901) 96 Ill. App. 4, held, with reference to the words "under the immediate direction and superintendence," that the nature of the relationship is to be ascertained "in the light of the entire instrument embracing the contract."

Ridgeway v. Downing Co. (1900) 109 Ga. 591, 34 S. E. 1028, 7 Am. Neg. Rep. 218.

ring upon him merely the right of seeing that certain results are accomplished, will frequently be to create a

reasonable certainty that the person employed was an independent contractor.⁵

⁵ In *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the trial judge held that a stipulation of this tenor created the relation of master and servant, his conclusion being based upon a remark made by Strong, J., in *Painter v. Pittsburgh* (1863) 46 Pa. 213, to the effect that a certain clause there under review only gave the employer "the power to direct the results of the work, without any control over the manner of performing it, which control, alone, furnishes a ground for holding the master or principal for the act of a servant or agent." The supreme court, however, said: "The word 'manner,' in the above quotation, is evidently considered as having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. 'Manner' must, in such a case, mean the power to control the work not only as to its character, but also as to the particular means used to accomplish it. This must needs be so, for, as we have seen in the case of *Reed v. Allegheny* (1875) 79 Pa. 300, a stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. It is quite obvious that the word 'manner' must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places, as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution; but, turning to the body of the contract, we find that Grant was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed. So as to place; that is fixed between certain points on State street, and whilst the engineer might direct that the work should be done on either side or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some

other street, or even beyond the points indicated on State street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed; that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something which is not found therein, he must then act as arbiter between the contracting parties, and fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This, in itself, exhibits two independent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents, or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun, or during its progress, is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully specified; the province of the engineer was to see that these means were properly applied; in other words, to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract."

In *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383, the trial judge, in an opinion adopted as correct by the supreme court, said: "'Noncompliance with the directions of the engineer' must be construed in connection with other parts of the contract. It evidently means noncompliance with his directions in such matters as, under the agreement, he had the right to direct. It does not, either expressly or by inference, give him the right to interfere with the means Stark chose to use to accomplish the work. Such right is not reserved in the agreement, and it was not within the contemplation of the

The general doctrine above stated obviously applies only to cases in which the reserved right of supervision has relation to "results, and not to the method of doing the stipulated work."⁶

An express stipulation to the effect that no control over the person employed is reserved by the employer with respect to the performance of the work, except as to the results to be accomplished, is an element proper to be considered.⁷ But manifestly it will not avail to protect the employer from liability to a third person, if the contract is otherwise of such a tenor as to require the conclusion that he was invested with the

power of controlling the details of the work.⁸

§ 5. Stipulations requiring the contractor to satisfy a certain standard.

The general doctrine stated in the preceding section is illustrated, in one of its aspects, by the cases in which it has been held that the inclusion of such stipulations as the following does not destroy the independence of a contract:

That the work is to be done "under the supervision, and subject to the approval," of the employer or his agent.¹

That the work shall be "subject to approval and acceptance."²

parties that the engineer could compel a forfeiture of the agreement by assuming, at his will, to give directions in matters over which the agreement did not give him jurisdiction."

⁶ *Stagg v. Taylor* (1916) 119 Va. 266, 89 S. E. 237—laying down the law with reference to a new trial.

In *Harger v. Harger* (1920) 144 Ark. 375, 222 S. W. 736, the court thus commented upon the fact that the lessor of the mine in question had reserved the right to send inspectors to see that the property was cared for and not injured: "The reservation of this right did not make the lessor liable for the failure of the lessee to keep the premises in good repair, for one of the essentials of a contract to have work done independently is that the work is to be done in the course of an independent occupation, according to the methods and under the direction of the contractor himself, and that he represents the will of the owner only as to the result of the work done."

⁷ In *Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S. 449, 66 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342, where the person employed was held to be an independent contractor, a stipulation of this tenor was treated as one of the elements upon which that conclusion was based.

For cases in which contracts which included a similar provision were held to be independent, see *Barton v. Studebaker Corp.* (1920) — Cal. App. —, 189 Pac. 1025; *Gall v. Detroit Journal Co.* (1916) 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 36; *Stricker v. Industrial Commission* (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849.

⁸ In *Tiffin v. McCormack* (1878) 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194, where such a contract was under review, the court laid it down that "a master cannot exonerate himself from responsibility to third persons, which the law imposes on him, for injury resulting from the misconduct of the servant, by contracting with the servant that he will not exercise any control over him."

In *CHICAGO, R. I. & P. R. Co. v. BENNETT* (reported herewith) ante, 678, where the independence of the contract under review was deemed to be deducible from its other clauses, the court held that this conclusion was not negated by the fact that it also embraced the following clause: "It is hereby agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work, other than as to the result to be accomplished."

¹ *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401.

² *Montain v. Fargo* (1917) 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826; *Bain v. Petroleum Iron Works Co.* (1909) 223 Pa. 96, 72 Atl. 279.

That the work shall be done in conformity with the contract and the rules of the employer.³

That the work shall be done in accordance with the plans and specifications.⁴

That the work shall be done "in accordance with the plans and specifications furnished" by the employer, "or such person as he may appoint."⁵

That the work shall be done "in accordance with the specifications

and drawings and instructions that have been or may later be given."⁶

That the work shall be done "according to the employer's plans, and to the satisfaction" of his representative.⁷

That the labor, materials, machinery, etc., required for the performance of the contract, shall be provided in accordance with the plans and specifications.⁸

That the work shall be done "to the

³ *Porter v. Tennessee Coal, Iron, & R. Co.* (1912) 177 Ala. 406, 59 So. 255. The actual words of the contract are not stated in the report.

⁴ *Morning v. Cramp & Co.* (1909) 170 Fed. 364; *Johnson v. Helbing* (1907) 6 Cal. App. 424, 92 Pac. 360; *Long v. Moon* (1891) 107 Mo. 334, 17 S. W. 810; *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S. W. 1077; *Omaha Bridge & Terminal Co. v. Hargadine* (1904) 5 Neb. (Unof.) 418, 98 N. W. 1071, second appeal (1906) 76 Neb. 729, 107 N. W. 864; *Hopper v. S. S. Ordway & Sons* (1911) 157 N. C. 125, 72 S. E. 839 (work was to be finished complete to the intent and meaning of the specifications, and the plans and details); *Allen v. Willard* (1868) 57 Pa. 374; *School Dist. v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627; *Louisville & N. R. Co. v. Cheatham* (1907) 118 Tenn. 160, 100 S. W. 902 ("work to be done by the said contractors to the satisfaction of the engineer of the railroad company, according to the said specifications, plans, profiles, and sections, and according to such working plans and explanatory drawings and instructions as may from time to time be furnished by said engineer"); *Morris v. Salt Lake City* (1909) 35 Utah, 474, 101 Pac. 373; *Cary v. Sparkman & M. Co.* (1911) 62 Wash. 363, — A.L.R. —, 113 Pac. 1093.

In *Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495 (writ of error denied by supreme court), one of the provisions in a contract held to be independent was to the effect that, if the work was not sufficiently explained by the drawings and specifications, the contractor was to apply to the architect for such further drawings and explanations as might be necessary, and was to comply with the same so far as consistent with the original drawings and speci-

fications, the decision of the architect being conclusive, in case of doubt, as to the meaning of the drawings and specifications.

Indianapolis Northern Traction Co. v. Brennan (1909) 174 Ind. 1, 30 L.R.A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728.

⁵ *Hunt v. Pennsylvania R. Co.* (1866) 51 Pa. 475. The court held that the word "instructions," used in the agreement, referred to the kind of structure, design, materials, combinations, and all matters pertaining to the planning of the building to be erected, but that, as to the mode of accomplishing the work which the contractor undertook, he was left to his own skill and judgment.

⁶ *Bain v. Petroleum Iron Works Co.* (1909) 223 Pa. 96, 72 Atl. 279.

⁷ *Allen v. Hayward* (1845) 7 Q. B. 960, 115 Eng. Reprint, 749, 15 L. J. Q. B. N. S. 99, 10 Jur. 92, 4 Eng. Ry. & C. Cas. 104; *Philadelphia & R. Co. v. Karr* (1912) 38 App. D. C. 193, — A.L.R. —.

⁸ *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508.

In *Philadelphia, B. & W. R. Co. v. Karr* (1912) 38 App. D. C. 196, — A.L.R. —, it was stipulated as follows: "The contractor is to provide all manner of labor, materials, apparatus, machinery, appliances, power, light, and all other things needful or necessary for the performance of the work in strict accordance with the attached drawings and specifications forming a part of this contract, and to the satisfaction of the chief engineer of the railroad company."

In *Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542, the contract under review contained the following clause: "Said labor, teams, tools, engines, machinery, and mate-

satisfaction" of the employer or the employer's agent.⁹

That the work shall be done "to the satisfaction and acceptance" of the employer's agent.¹⁰

That the men and appliances furnished under the contract shall be acceptable to the designated agent of the employer.¹¹

rials to be furnished, and the said work to be done, by said contractors, to the satisfaction of the engineer of the railroad company, according to said specifications, plans, profiles, and sections, and according to such working plans and explanatory drawings and instructions as may from time to time be furnished by said engineer."

⁹ *United States*.—*New Orleans, M. & C. R. Co. v. Hanning* (1873) 15 Wall. 649, 21 L. ed. 220; 7 Am. Neg. Cas. 309.

Georgia.—*Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542; *Lampton v. Cedartown Co.* (1909) 6 Ga. App. 147, 64 S. E. 495; *Lee v. Atlanta, B. & A. R. Co.* (1911) 9 Ga. App. 752, 72 S. E. 165.

Illinois.—*Crudup v. Schreiner* (1901) 98 Ill. App. 337.

Massachusetts.—*Connors v. Hennessey* (1873) 112 Mass. 96; *Eldred v. Mackie* (1901) 178 Mass. 1, 59 N. E. 673.

Michigan.—*Holbrook v. Olympia Hotel Co.* (1918) 200 Mich. 597, 166 N. W. 876.

Missouri.—*Salmon v. Kansas City* (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16.

Nebraska.—*Omaha Bridge & Terminal R. Co. v. Hargadine* (1904) 5 Neb. (Unof.) 418, 98 N. W. 1071, second appeal (1906) 76 Neb. 729, 107 N. W. 864.

Ohio.—*Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Oregon.—*Giaconi v. Astoria* (1911) 60 Or. 12, 37 L.R.A.(N.S.) 1150, 113 Pac. 855, 118 Pac. 180.

Pennsylvania.—*Wray v. Evans* (1875) 80 Pa. 102; *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508.

Tennessee.—*Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902.

Texas.—*Ewing v. Litzmann* (1916) — Tex. Civ. App. —, 188 S. W. 742.

Washington.—*Miller v. Moran Bros. Co.* (1905) 39 Wash. 631, 1

That the work shall be done under a specified municipal ordinance "to the full satisfaction and acceptance" of the municipality.¹²

That suitable material is to be furnished, and a specified structure erected, subject to the daily approval of the employer's engineer.¹³

That the labor and material used

L.R.A.(N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089; *Johnston v. Seattle Taxicab & Transfer Co.* (1915) 85 Wash. 551, 148 Pac. 900.

Wisconsin.—*Smith v. Milwaukee Builders' & T. Exchange* (1895) 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041.

The liability of the employer was denied, where the contractor had offered to do the work of excavation for "\$645, lump job," and the defendant had accepted the offer in a letter, in which, among the other terms given, it was stated that "the excavation was to be done absolutely in accordance with the drawing," and "to the full satisfaction of the architect," and that the lines of the excavation were to be given by their engineer. *Hunt v. Vanderbilt* (1894) 115 N. C. 559, 20 S. E. 168.

¹⁰ *Indianapolis Northern Traction Co.* (1909) 174 Ind. 1, 30 L.R.A.(N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503 ("satisfaction and acceptance"); *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

¹¹ *Montain v. Fargo* (1917) 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826.

¹² *Ibid.*

¹³ *Casement v. Brown* (1893) 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672. The court said: "This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract. . . . They were to see that the thing produced and the result obtained were such as the contract provided for."

by the contractor shall be subject to the "approval" of the agent designated by the contractee.¹⁴

That no work shall be commenced until the drawings therefor are approved by the engineer of the employer.¹⁵

That the employer may inspect the work at any time, and direct changes to be made in work which has not been done, or is not being done, in accordance with the contract.¹⁶

That the contractor shall remedy

all defects in the work or materials, when ordered to do so by a designated agent of the employer.¹⁷

That the employer's agent shall have the right of rejecting unsatisfactory materials.¹⁸

Some of the stipulations tabulated in the next section contain words which would render it possible, as a matter of classification, to place them under the same category as those specified above.

¹⁴ Stanley v. Aurora, E. & C. R. Co. (1911) 166 Ill. App. 132; Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888; Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16.

¹⁵ Stanley v. Aurora, E. & C. R. Co. (Ill.) supra.

¹⁶ Swansea Lease v. Molloy (1919) 20 Ariz. 531, 183 Pac. 740.

¹⁷ Arkansas Natural Gas Co. v. Miller (1912) 105 Ark. 477, 152 S. W. 147 (defective materials or workmanship, to be remedied, "as soon as the same is pointed out"); Good v. Johnson (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439 (defective work and material to be remedied to the satisfaction of the employer's engineer); Norwalk Gaslight Co. v. Norwalk (1893) 63 Conn. 495, 28 Atl. 32 (any materials or implements brought on the ground which the employer's agent "shall deem to be of improper description, or improper to be used in the work," shall be removed "forthwith"); Prest-O-Lite Co. v. Skeel (1914) 182 Ind. 593, 106 N. E. 367, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724 (employer's inspector empowered to condemn materials not conforming to the prescribed standard); Mobley v. J. S. Rogers Co. (1919) 68 Ind. App. 308, 119 N. E. 477 (contractor "shall remove after notice all materials condemned by the architect"); Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888 (contract empowered the employer's agent to require the contractor to discontinue the use of machinery which, in the agent's judgment, was not adapted to the purpose for which it was being used, and also to remedy all neglected portions of the work, and all improperly constructed work, on notice in writing from the employer's engineer.

Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16 (contractor shall, "upon being so directed by the engineer," remove, rebuild, or make good, at his own cost, any work which the "latter shall decide to be defective"); Uppington v. New York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115 (any "materials or implements brought upon the ground" which the engineer "shall deem to be of improper description, or improper to be used in the work," shall be removed forthwith); Smith v. Humphreyville (1907) 47 Tex. Civ. App. 140, 104 S. W. 495 (contractor to take down "all portions of the work condemned" by the architect as unsound, or improper, or not conforming to specifications and drawings"); Callahan v. Salt Lake City (1912) 41 Utah, 300, 125 Pac. 863 (contractor required to remove any work defectively done, whenever "directed" to do so); Dayton v. Free (1914) 46 Utah, 277, 143 Pac. 408 ("all imperfect or insufficient work or material, when pointed out by the engineer of the company, shall be immediately remedied and made good and sufficient by the contractor, at his own cost and expense, to the satisfaction of said engineer"); McGrath v. St. Louis (1909) 215 Mo. 191, 114 S. W. 611 (employer's engineer shall have power to condemn work and require it to be reconstructed); Ewing v. Litzmann (1916) — Tex. Civ. App. —, 188 S. W. 742 (contractor shall remove all materials condemned by the employer's architect, and discontinue all portions of the work condemned by him).

¹⁸ Fitzpatrick v. Chicago & W. I. R. Co. (1889) 31 Ill. App. 649 (words of clause are not stated). Appeal dismissed in (1891) 139 Ill. 248, 28 N. E. 837.

§ 6. Stipulations by which the employer is empowered in general terms to give directions concerning the work.

The extent to which the courts have gone in refusing to infer the existence of the relation of master and servant is shown in a still more striking manner, by the decisions with respect to stipulations investing the employer or his representative with the right to give "directions," "orders," or "instructions," concerning the performance of the work.¹ This principle of interpretation has been deemed to warrant the inference that a contract is none the less independent in its character, because it contains one or other of the following provisions:

That the work was to be done "in accordance with instructions" from the employer.²

That the person employed shall "conform to all the instructions" of the employer's agent "as to the mode of doing the work."³

That the employer's agent shall "superintend the work, and give such instructions from time to time as the necessities of the work shall demand."⁴

¹ That there was at first a disposition on the part of judges to construe such a stipulation to the disadvantage of the employer may, perhaps, be inferred from some remarks of Lord Denman, in *Allen v. Hayward* (1845) 7 Q. B. 960, 115 Eng. Reprint, 749, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92. Referring to a clause of the contract which required that all such parts of the work as were not specified and described in the contract, or plans and specifications, should be executed in such manner as the surveyor of the works should direct, he said that this provision appeared to take power from the contractor, and keep it in the hands of the commissioners, or their surveyor. But it was held not to be applicable to the facts under discussion, and its actual effect was not determined.

² *Smith v. State Workmen's Ins. Fund* (1918) 262 Pa. 286, 19 A.L.R. 1156, 105 Atl. 90.

³ *McGrath v. St. Louis & H. Constr. Co.* (1908) 215 Mo. 191, 114 S. W. 611.

That the person employed shall "at all times conform to, and comply with, such instructions as may be given by the employer's agent."⁵

That the work shall be performed "in such manner as shall be directed."⁶

That the work shall be done, and the materials furnished, "as directed" by the employer's agent.⁷

That the work shall be done "subject to the inspection and direction" of the employer's agent.⁸

That the employer's agent shall "supervise and direct the work."⁹

That the work shall be executed "under the supervision" of the employer's agent, and "as he may direct."¹⁰

That the materials and work are to be furnished and done "according to the plan and under the direction and supervision" of the employer's agent.¹¹

That the work shall be done "under the direction and supervision" of the employer's agent.¹²

That the employer shall have the right of supervising, by his agents, the execution of the work, and of giving directions with respect to it.¹³

⁴ *Robinson v. Webb* (1875) 11 Bush (Ky.) 464.

⁵ *Pearson v. M. M. Potter Co.* (1909) 10 Cal. App. 245, 101 Pac. 681.

⁶ *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847 (case involving a workman's claim for extra compensation).

⁷ *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

⁸ *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

⁹ *New Orleans M. & C. R. Co. v. Hanning* (1873) 15 Wall. (U. S.) 649, 21 L. ed. 220, 7 Am. Neg. Cas. 309.

¹⁰ *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

¹¹ *Allen v. Willard* (1868) 57 Pa. 374.

¹² *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439; *Montain v. Fargo* (1917) 38 N. D. 432, L.R.A.1918C, 600, 166 N. W. 416, Ann. Cas. 1918D, 826.

¹³ *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N. Y. Supp. 7.

That the work shall be done "as directed" by the employer or his designated agent.¹⁴

That the work shall be done "under the direction" of a designated agent of the employer.¹⁵ In one of the cases in which the contract contained a provision of this tenor, there was the further statement that the decision of the agent "as to the true construction and meaning of the drawings and specifications shall be final."¹⁶

That the work shall be done "according to the drawings prepared by the employer's architect, and under the architect's direction."¹⁷

That the work shall be done "ac-

ording to plans and specifications, under the supervision" of the employer's architect.¹⁸

That the work shall be done "under the direction" of the employer's architect, and "in conformity to" certain drawings and specifications.¹⁹

That the contractor is to complete the work in conformity with plans, "in strict obedience to the directions which from time to time will be given by the city engineer, or his authorized agents, in accordance with certain specifications."²⁰

That the work shall be done "under the direction and to the satisfaction" of the employer's agent.²¹

¹⁴ Kirby v. Lackawanna Steel Co. (1905) 109 App. Div. 334, 95 N. Y. Supp. 833.

In LaGroue v. New Orleans (1905) 114 La. 253, 38 So. 160, the words "as directed," in a contract by which a man agreed to plant trees in a street, were construed as referring to the particular places at which the trees were to be planted, and not as importing that the board was to supervise the mode of planting. "This was left to the superior knowledge of the contractor, and the board and city were protected by his guaranty."

¹⁵ Indianapolis Northern Traction Co. v. Brennan (1909) 174 Ind. 1, 30 L.R.A.(N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; Scharff v. Southern Illinois Constr. Co. (1905) 115 Mo. App. 157, 92 S. W. 126; Burke v. Ireland (1898) 26 App. Div. 487, 50 N. Y. Supp. 369.

¹⁶ United Gas Improv. Co. v. Larsen (1910) 105 C. C. A. 486, 182 Fed. 620.

¹⁷ Scharff v. Southern Illinois Constr. Co. (1905) 115 Mo. App. 157, 92 S. W. 126.

¹⁸ Jansen v. Jersey City (1897) 61 N. J. L. 243, 39 Atl. 1025, 4 Am. Neg. Rep. 313.

¹⁹ Mobley v. J. S. Rogers Co. (1918) 68 Ind. App. 308, 119 N. E. 477.

²⁰ Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16.

²¹ Frassi v. McDonald (1898) 122 Cal. 400, 55 Pac. 139, 772; Ridgeway v. Downing Co. (1900) 109 Ga. 591, 34 S. E. 1028; Pioneer Fireproof Constr. Co. v. Hansen (1898) 176 Ill. 100, 52 N. E. 17, affirming (1897) 69 Ill. App. 659, 3 Am. Neg. Rep. 16; Foster v. Chicago (1902) 197 Ill. 264, 64 N. E.

322; Bjornson v. Saccone (1900) 88 Ill. App. 6; Stanley v. Aurora, E. & C. R. Co. (1911) 166 Ill. App. 132; Prest-O-Lite Co. v. Skeel (1914) 182 Ind. 593, 106 N. E. 366, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724; Indiana Iron Co. v. Cray (1897) 19 Ind. App. 565, 48 N. E. 803; Kelly v. New York (1854) 11 N. Y. 432; Slater v. Mersereau (1876) 64 N. Y. 138.

In Humpton v. Unterkirchner (1896) 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595, a clause which provided that the work was to be done "under the direction of the defendants and their architect, and to their entire satisfaction, approval, and acceptance" was thus commented upon: "It is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it. . . . Appellant relied largely upon the use of the word 'discretion,' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give was as to what should be done to accomplish the ends aimed at by the contract. He could

That certain portions of the work are to be done "as directed" by the inspector or superintendent of the employer, and that the whole work is to be done "subject to the direction" of the superintendent at all times.²³

That the work shall be performed "as ordered by the employer's engineer and to his satisfaction."²³

not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts."

A provision in a building contract that the work shall be performed in accordance with the plans and drawings, and executed under the direction and to the satisfaction of the owner's architect, does not authorize the latter to modify the plans, so as to relieve the contractor from doing the work called for by the contract; and the owner cannot be held liable for injuries to an employee of a subcontractor from the fall of the building during erection, owing to a change in the specifications by the architect. *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N. Y. Supp. 369.

²³ *United Gas Improv. Co. v. Larsen* (1910) 105 C. C. A. 486, 182 Fed. 620.

²³ *Gagnon v. Saraguay Electric Light & P. Co.* (1909) Rap. Jud. Quebec 36 S. C. 227.

²⁴ *Foster v. Chicago* (1901) 96 Ill. App. 4, affirmed in (1902) 197 Ill. 264, 64 N. E. 322. In an opinion, adopted by the supreme court as being a correct statement of principles, the court of appeals said: "The requirement that the time and manner of doing the work must be satisfactory to the city's commissioner of public works does not include the means employed, and is limited by the provisions of the contract. The direction and superintendence provided for do not relieve the contractor of responsibility, or permit the city to change or modify the terms of the written instrument. The contractor agrees to do all work necessary to fully complete the sewer in the manner required by the contract, as well as in a manner satisfactory to the city. Provided he reaches a satisfactory result in building such a sewer as the contract calls for, the contractor is not prevented from using his own methods. The specifications require the sides of a trench, like that where the caving

That the work shall be done "under the immediate direction and superintendence," of the employer's representative, and "to his entire satisfaction, approval, and acceptance."²⁴

That the work shall be done "subject to the direction and acceptance" of the employer's agent.²⁵

That "the work shall, at every stage

occurred, 'to be effectually supported with suitable planks and timbers by the contractor without expense to the city.' The method of using such planks and timbers for such purpose is left to the contractor. The contract does not include the direction, management, and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employee. He was an independent contractor, the city retaining such supervisory powers as it might, from time to time, find it necessary to exercise to insure compliance with the contract, and to obtain the result called for thereby."

²⁵ *In Hooe v. Boston & N. Street R. Co.* (1904) 187 Mass. 67, 72 N. E. 341, where the trial judge was held to have properly declined to instruct the jury that certain employees engaged in the work in question were not servants of one Farnum, but of the railway company for which he had undertaken to perform the work, the court thus commented upon the terms of the written agreement between Farnum and the company: "It was a contract which gave Farnum the legal right to provide all the necessary labor and materials to complete the subgrading and ballasting of the proposed line of railroad. By the terms of the writing he was to have 'the general direction of the work,' and he could be displaced only in case the progress made on the work was 'not satisfactory to the railroad company,' in reference to the time when he agreed to have it completed. The expression, 'subject to the direction and acceptance of the engineer,' is similar to the common provision in building contracts, which gives the architect a right to represent the owner in determining whether the work is in accordance with the requirements of the contract. In this case the work to be done is described

of its progress, be subjected to the direction, inspection, and acceptance of the employer's engineer."²⁶ In one of the cases in which this phraseology was used in the contract, it was also provided that the engineer "shall determine what, in any case, is a fair construction of the contract, and

what such construction requires to be done by either party."²⁷

That the contractor shall comply with the "directions" of the employer's superintendent of construction as to the time and manner of performing the work, the precautions to be taken, and the quality of the materials and workmanship.²⁸

in the agreement very generally. Probably something as to the details of construction was understood to be left to the determination of the engineer or agent. But this did not give to the engineer any right of control or direction as to the execution of the work, after he had indicated to the contractor what was to be done and what materials were to be furnished. This further right was to determine whether the work done by the contractor was acceptable."

In *Vacker v. Yeager* (1909) 151 Ill. App. 144, it was laid down that the contract in question, in so far as it provided that the work should be done under the direction of the defendants or their authorized foreman, and accepted by the architects or their authorized representative, conferred upon the contractor merely the right of inspection, and that the reservation of such right of inspection was not a reservation of the power to control the method of doing the work.

²⁶ *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902; *Madisonville, H. & E. R. Co. v. Owen* (1912) 147 Ky. 1, 143 S. W. 421.

²⁷ *Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542.

²⁸ *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508. Discussing the contention that the defendants were denied the control of the work and the mode of performing it by this provision, the court said: "This is a misapprehension of the effect of this clause of the agreement. The contract provides that the work shall be completed in two weeks, and the specifications require the materials to be the best of their respective kinds, and the entire work 'to be constructed and finished in every part in a good, substantial, and workmanlike manner, according to the accompanying drawings and this specification.' It is apparent, therefore, that the clause of the agreement just referred to conferred on the owner's superintendent of construction only such su-

pervisory powers as would enable him to see that the defendants were performing the work in compliance with the provisions of the contract and specifications, and gave him no authority to direct the workmen as to the methods of executing the details of the work. If he discovered, on inspection, that the defendants' employees were neglecting or not properly constructing the work, it was not his duty to instruct them how to do it, or to require them to do it in a proper manner, but to notify their employers, the defendants, of their conduct, and, upon failure of the defendants to have the work satisfactorily performed, the owner was authorized by the agreement, at the cost and expense of the defendants, to 'employ on the work such mechanics, overseers, and laborers, . . . and purchase such materials, as may . . . be necessary' to make up or correct the shortcomings, omissions, or delinquencies of the defendants, who were liable to the owner for damages caused by their default. This view of this clause of the contract in question is supported by the language of the agreement immediately preceding the clause, which declares that the defendants shall provide safe and proper facilities for the inspection of the work by the owner's superintendent of construction." There is a seeming conflict between this decision and *Herrington v. Booth* (1916) 252 Pa. 70, 97 Atl. 178. See § 12, note 22, *infra*.

In *Romaniuk v. Grand Trunk P. R. Co.* (1914; C. A.) 24 Manitoba L. R. 797, 20 D. L. R. 301, the plaintiff, a workman in the service of M. & M., a firm of contractors employed by the defendant company to fill a bay with rocks in order to protect the railway track, was injured by a rock which rolled down on him while engaged in loading the boat by which the materials for the filling were conveyed to the bay. The provisions of the contract regarded as material in the case

That the work is to be conformed to such "further direction" as shall be given by the employer's agent.²⁰

were as follows: (5) The engineer (i. e., the chief engineer of the defendants) may, at any time before the completion of the work, order extra work done, or make any changes he may deem expedient therein, and may furnish other plans, either by way of supplement, or in substitution of the plans referred to, etc. (6) The contractor shall, at his own expense, furnish all the labor, materials, and tools necessary for the said work, prosecute the same in a skilful and efficient manner and under the control and supervision of the engineer, to whose direction he shall at all times conform; afford every facility for inspection and testing by the engineer of the work as done, and being done, and of the materials provided therefor; re-execute any work that, in the opinion of the engineer, is not in accordance with the plans and specifications, removing materials objected to by the engineer, and replacing same with other material to his satisfaction; and in all respects follow and observe the instructions of the engineer, whose authority shall be paramount in and about the construction of the said work. (7) The engineer shall be sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final. (8) The contractor shall keep a competent foreman on the ground, during all working hours, to receive orders of the engineer, such foreman to be engaged and retained only with approval of the engineer. Held, that the contract did not operate so as to render M. & M. the servants of the company, and consequently that the plaintiff could not maintain an action against it for the injury sustained by him. Commenting on the provisions of clause 6, which were considered the most important, the court said: "This plainly intends to give the engineer complete authority over the construction, but does not extend that authority to the manner of procuring the material and bringing it to the place where it is to be used. The clear intention is to give the engineer full supervision and authority over the actual construction, and to make his decision final in respect of the

That the work shall be done "as described in the specifications, and agreeably to the direction, from

quality of the material and the proper performance of the work. The engineer has no control over the contractor as to where or how the latter procures the material. An engineer of the defendant, who appears to have superintended the work in question, states that the contractors selected the quarries from which the rock was to be taken, and that these were satisfactory to him. He also states that the rock was taken from the defendants' property with the defendants' permission. There was nothing, however, to prevent the contractors from obtaining the material in any other place, as long as it was suitable for the work. There is nothing to show that the defendants exercised any supervision or control over the manner in which the quarries were worked, or over the means taken for bringing the material upon the work." From the following passage in the judgment, however, it would appear that the conclusion of the court would have been different if the accident had occurred while the plaintiff was engaged in the actual work of filling the bay: "Here the injury complained of was not caused by anything done, or any negligence that occurred, during the actual construction of the work, over which construction the engineer was given such wide power of supervision and control. The accident took place while the contractor was procuring and taking out material for use on the work, an operation over which the engineer had no such power."

²⁰ Pack v. New York (1853) 8 N. Y. 222. The court said: "This clause . . . is nothing more than a stipulation for a change of the specifications of the work as stated in the contract, at fixed prices provided therein. It does not, as the court below held, make Riley [a subcontractor] the immediate servant of the defendants, or give to them any control over him as to the manner, or otherwise, in which he should conduct the blasting. The defendants may change the grade by new specifications from that provided in the contract, and the duty is then imposed upon Foster to make his grade accordingly; but as to the manner in which he shall proceed in his blasting to make the grade, or do the

time to time," of the employer's agent.³⁰

That the employer's engineers shall have full power to decide as to the manner of conducting and executing the work in every particular, and that the contractor shall follow the instructions or orders of any person designated by the employer.³¹

That any orders or directions given by the agent delegated to superintend the work on behalf of the contractor, or by his duly appointed representative, "shall be immediately and strictly obeyed by the contractor or any overseer in charge of the work."³²

That "the entire work shall be done in full accordance with the directions and instructions" of the employer's agent.³³

That the person employed shall "obey and follow every direction to be given by the employer's engineer, and in all respects carry out his requirements."³⁴

That the person employed shall "follow at all times, without delay, all orders and instructions of the employer's engineer in the prosecution and completion of the work."³⁵

work, he is as perfectly independent of the defendants as a man ever was while engaged in doing his own work."

³⁰ Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461. The court said that when the whole contract (see § 22, note 1 (a) of the monograph appended to Gall v. Detroit Journal Co. 19 A.L.R. pp. 1168 et seq.), was considered, it was quite clear that "the directions of the engineer or his assistants," thus referred to, were those only which were specially named in the specifications.

³¹ Smith v. Ulen (1914; Alberta Sup. Ct.) 28 West. L. R. 136, 6 West. Week. Rep. 678, 17 D. L. R. 400 (per Beck, J., sitting alone).

³² Engler v. Seattle (1905) 40 Wash. 72, 82 Pac. 136, 19 Am. Neg. Rep. 49. The second provision, unsuccessfully relied upon as being incompatible with the independence of the contract, was: "Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate

That "all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under the contract will be given by the employer's engineer."³⁶

That whenever the contractor is not present at the work, and at such time instructions become necessary, the designated agent of the contractee "may give the necessary orders to the superintendent" in charge of the work.³⁷

That the agents of the employer "shall have full power to decide as to the manner of conducting and executing the work in every particular, and the contractor shall follow the instructions or orders" of any person designated by the employer.³⁸

§ 7. Stipulations by which the employer is empowered to give directions with regard to particular matters.

The following provisions of this tenor have been held not to affect the independence of a contract:

That certain specified things shall be done "according to instructions," and "as may be desired," and "as may be required."¹

charge thereof, and shall by them be received and strictly obeyed."

³³ Hopper v. S. S. Ordway & Sons (1911) 157 N. C. 125, 72 S. E. 839.

³⁴ Carpenter v. New York (1906) 115 App. Div. 552, 101 N. Y. Supp. 402.

³⁵ Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

³⁶ Uppington v. New York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115.

³⁷ McGrath v. St. Louis & H. Constr. Co. (1908) 215 Mo. 191, 114 S. W. 611; Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A. (N.S.) 328, 145 S. W. 16; Callahan v. Salt Lake City (1912) 41 Utah, 300, 125 Pac. 863; Engler v. Seattle (1905) 40 Wash. 72, 82 Pac. 136, 19 Am. Neg. Rep. 49.

³⁸ Smith v. Ulen (1914; Alberta Sup. Ct.) 28 West. L. R. 133, 6 West. Week. Rep. 678, 17 D. L. R. 400.

¹ Roper v. Hussey-Freke [1915; Ct. of App.] 3 K. B. (Eng.) 222, [1915] W. N. 261, 31 Times L. R. 507, 84 L. J.

That certain portions of the work shall be performed in accordance

with the "directions" of a designated agent of the employer.³

K. B. N. S. 1351, 113 L. T. N. S. 635, 59 Sol. Jo. 596, 8 B. W. C. C. 604.

³In *Stanley v. Aurora, E. & C. R. Co.* (1911) 166 Ill. App. 132, the specifications provided, inter alia, that the girders of the bridge in question should be spaced as required by local circumstances and "directed" by the engineer of the defendant railroad company.

In *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411, a contract for the construction of a sewer contained the following provisions: That, "if the material was unsuitable for forming the bottom, a further depth was to be excavated, as directed by the superintendent or inspector in charge;" that only such length of trench was to be opened at once "as directed by the inspector;" that all sewers or drains were to be connected with the work "as directed by the superintendent or inspector;" and that the work should be performed so as to permit the passage of street cars, "unless by special direction of the superintendent."

In *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa, 562, where a contract for the grading of a railroad provided that certain perishable materials on the right of way should be removed "as the engineer might direct," an action for damages caused to plaintiff's property by fire which spread from piles of wood, etc., which the defendant's engineer had ordered a contractor to burn on its right of way, was held not to be maintainable. The court said: "The clearing of the ground was the work to be done,—the end to be attained,—and could be done in one of two modes, at the option of the defendant. In the exercise of that option, burning was chosen as the mode of accomplishing the end. But with the manner of burning defendant had nothing to do, and over it exercised no control. It could not direct that the combustible materials should be gathered in large or small heaps, or on one side of the roadway or the other, or that the act of burning should be prudently and carefully done, and proper precautions of watchfulness be exercised in order to prevent danger to the property of others—all relating to the manner of doing the work required by the contract to be done."

In *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86, the contract between a telephone company and one K. provided that K. should furnish "all necessary labor, skill, material, apparatus, supplies, and machinery" to construct and complete the line, that the "telephones and switchboard were to be installed, located, and placed as and where directed" by the telephone company, and that the work should be under the supervision of the company and its agent. Held that K. was an independent contractor; at least, in respect to stringing the wires on the poles.

In *Salmon v. Kansas City* (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16, the following specifications were included in a sewer contract held to be independent: That certain tests for the purpose of determining the quality of the cement should be complied with, "except on such portions of the work as the city engineer might otherwise direct," and that it should be prepared in a certain manner, "unless otherwise ordered by the city engineer;" that the surplus earth excavated for the sewer should be removed to such distance "as may be designated by the engineer;" that the contractor should not blast any rock without taking such precautions as would prevent damage to person or property; and that the house connections of the sewers should be worked into the casing "in such manner as the engineer might direct."

In *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115, it was provided in a sewer contract held to be independent that the city engineer was to "have the right to regulate the excavation," and that "not more than 400 feet of trench" were to be opened at one time, without his permission.

In *Gay v. Roanoke R. & Lumber Co.* (1909) 148 N. C. 336, 62 S. E. 436, it was assumed that a provision in a contract by which a firm employed to cut timber agreed to load it on railroad cars "in a proper manner, the logs being secured to stand transportation by the railroad, and the loading to be done according to directions as given" by the railroad company, did not negative the inference deducible from the other provisions that the

That a designated portion of the work is to be done according to the plans, and "in accordance with the directions," of the employer's engineer, and another portion "under the immediate supervision and direction" of such engineer.²

That the person employed shall "conform to the directions" of the employer's agent as "to the order of time in which different parts of the work shall be done."⁴

That all work shall be "commenced and carried on at such times, and in such places, and in such manner, as the employer's engineer shall direct."⁵

That the whole of the work "shall be commenced and carried on when

and where the employer's agent shall direct."⁶

That the work shall be "prosecuted at and from as many different points on the line of the work as the employer's agent may, from time to time, during the progress of the work, determine."⁷

That the contractor shall "carry on and prosecute the work in such manner, at such time, and at such places or points, as the chief engineer of the employer shall direct," and shall "complete any portion of the work that may be required" by the employer's engineer.⁸

The employer's engineer shall have the right to give directions as to the quantity of work to be done.⁹

firm were independent contractors. The same position was taken with regard to a provision that the firm should "cut the timber in proper and workmanlike manner, and as close as the [employer] may direct, and to cut all and every suitable tree into logs before leaving any one location."

In *Hopper v. S. S. Ordway & Sons* (1911) 157 N. C. 125, 72 S. E. 839, the specifications provided that "mortar should be composed of two parts clean sharp sand, and one part of Rosendale cement, of such brand as the engineer may approve, and mixed in such manner as he may direct."

In *Stricker v. Industrial Commission* (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849, it was provided that the rock to be quarried should be taken from the places "directed."

See also *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461 where the contract contained a large number of provisions reserving to the defendant's engineer a right of direction as regarded various matters. In discussing paragraph (5) of the contract, the court said: "The power of the engineer to direct, under this clause, is limited to cases where waste earth from an excavation is thrown out over the top slope of the excavation, into spoil banks, and as to the manner in which such spoil banks shall be made to slope backward from the excavation. Conceding that the railway company would be liable for an injury from the mode and manner in which such spoil banks might be constructed, under the direction, or without the direction, of the engineer,

it is not claimed that the plaintiff was so injured. In wasting the earth, which resulted in plaintiff's injury, the contractors were acting on their own responsibility, without any control, or right of control, on the part of the engineer, as to the mode or manner of doing the work."

² *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

⁴ *McGrath v. St. Louis & H. Constr. Co.* (1908) 215 Mo. 191, 114 S. W. 611.

⁵ *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642.

⁶ *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322, affirming (1901) 96 Ill. App. 4.

⁷ *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

⁸ *Hayes v. Chicago, O. & P. R. Co.* (1916) 203 Ill. App. 472. The court took the position that, when construed in connection with all the other provisions of the contract, this stipulation must be understood as not being intended to give any control to the company over the individual employees of the contractor, or any control over the details of the work to be done by the contractor, or the means, mechanical or otherwise, by which the work was to be accomplished.

⁹ The fact that a subcontract for the laying of a railroad track contains a provision to the effect that the track is to be laid as far as it shall be ordered by the chief engineer of the general contractor does not render the general contractor liable for the negligence of the subcontractor. *Powell v. Virginia Constr. Co.* (1890) 88

That the contractor shall follow the "directions" of the employer with respect to the number of men employed, the work they should do, and the rate of wages to be paid.¹⁰

That the work "shall be prosecuted with such force as the employer's engineer may deem adequate for its completion within the time specified."¹¹

That the "amount of force employed by the contractors is at all times subject to regulation, and must be increased or diminished as required by the engineer."¹²

That the contractor shall increase the force "whenever required by the employer's engineer."¹³

That the employer's chief engineer may, on giving notice in writing, suspend operations, or reduce the working force from time to time, at any particular point or points, or upon the whole work.¹⁴

That the engineer of the employer

"shall have power to direct the application of the forces to any portion of the work which, in his judgment, requires it, and to order the increase or diminution of the forces at any point he may indicate."¹⁵

That the work shall be executed "at such places and in such order of precedence as the engineer of the employer shall direct."¹⁶

That the work was "to be proceeded in or suspended on any portion, when required by the employer's engineer."¹⁷

That the work of handling the materials to which the contract has relation shall be performed at the place specified by the employer.¹⁸

That the employer's agent shall "prescribe the order in which the materials shall be placed."¹⁹

That certain materials shall be delivered or deposited at the places designated.²⁰

That the contractor "shall com-

Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

¹⁰ Kirby v. Lackawanna Steel Co. (1905) 109 App. Div. 334, 95 N. Y. Supp. 833.

¹¹ Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461.

¹² Louisville & N. R. Co. v. Hughes (1910) 134 Ga. 75, 67 S. E. 542.

That a stipulation by which a contractor undertaking to sink a shaft was required to maintain three shifts of workmen continuously did not destroy the independence of the contractor was held in *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740.

¹³ Rogers v. Florence R. Co. (1889) 31 S. C. 378, 9 S. E. 1059.

¹⁴ Hayes v. Chicago, O. & P. R. Co. (1916) 203 Ill. App. 472.

¹⁵ Louisville & N. R. Co. v. Hughes (1910) 134 Ga. 75, 67 S. E. 542. See also *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439, where a similar provision was involved.

¹⁶ Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

¹⁷ Wray v. Evans (1876) 80 Pa. 102.

¹⁸ Chicago, R. I. & P. R. Co. v. Bond (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342 (person employed by railroad compa-

ny was to unload wood and sand at the points designated by it).

¹⁹ Callan v. Bull (1896) 113 Cal. 593, 45 Pac. 1017.

²⁰ In *O'Hara v. Laclede Gaslight Co.* (1912) 244 Mo. 395, 148 S. W. 884 (reversing (1908) 131 Mo. App. 428, 110 S. W. 642, for error in instruction) where the plaintiff's minor child was killed by a gas pipe which certain boys had set rolling from a pile deposited by the Uffman Company, a contractor to which the defendant had left the work of delivering pipes at the places where they were to be laid, the contract as to the delivery contained the following clause: "The party of the first part hereby agrees to haul such quantities of cast iron from cars to streets or lots designated by the party of the second part, or from storage lots to streets, and to distribute such pipes along the streets as required by the second party." The court, in denying the right of action, said: "We can see no reason why the doctrine of independent contractor should not apply to this case. The defendant had to designate the streets upon which pipes were 'required' by the contract. Whether such pipes were to be placed on the north side of the street, or the south side of a particular street, the contract is silent. That was a matter

mence work at such points as the employer's engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same."³¹

That the work shall be conformed to the lines given by the employer's engineer.³²

That the contractor shall be guided in the work by the lines staked, and the instructions given to him by the engineer of the employer contractor.³³

That the employee shall have the power to "modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of the materials to be used from time to time."³⁴

left solely to the Uffman Company. Whether they should be blocked to prevent them from rolling was a matter relating to the unloading of the pipes in the street, and was under the control of the Uffman Company."

³¹ *Salmon v. Kansas City* (1912) 241 Mo. 14, 39 L.R.A. (N.S.) 316, 145 S. W. 16; *Ege v. Phoenix Brick & Constr. Co.* (1906) 118 Mo. App. 630, 94 S. W. 999.

For a case in which stipulations requiring the contractor to commence work at such places as may be directed were involved, see *Callahan v. Salt Lake City* (1912) 41 Utah, 300, 125 Pac. 863.

³² *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888; *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383; *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334.

³³ *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

In *Winniford v. MacLeod* (1913) 68 Or. 301, 136 Pac. 28, the contract, after providing that the first party should furnish, on application of the second party, such additional information as might be required for the guidance and information of the second party in the conduct of the work,

That the designated agents of the employer shall have the power "to vary, extend, or diminish the quantity of work during its progress, without vitiating the contract."³⁵

That the employer shall have the right, at any time during the progress of the work, to "make any alterations, deviations, or omissions from the contract."³⁶

That the employer's agent shall have the power to "change, at his discretion, the amounts of all the various kinds of work, and materials, and structures."³⁷

That the employer shall have the right to order alterations or additions to the work as specified in the contract.³⁸

Reference may also be made in this connection, to a case in which it was

continued: "And the second parties agree to make all cuts and fills in accordance with such staking, and in each and every instance to dress the streets and slopes to the true line and surface without back filling. . . . But, whether in excavation or in embankment, they shall in all cases conform to the staking of the first party, and to any request which the first party may from time to time, during the progress of the work, make of the second parties."

³⁴ *Hardaker v. Idle Dist. Council* [1896; C. A.] 1 Q. B. (Eng.) 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

³⁵ *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115.

³⁶ *Frassi v. McDonald* (1898) 122 Cal. 402, 55 Pac. 139, 772.

³⁷ *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115.

³⁸ *Arkansas Land & Lumber Co. v. Secrist* (1915) 118 Ark. 561, 177 S. W. 37; *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8; *Buckingham v. Commary-Peterson Co.* (1918) 39 Cal. App. 154, 178 Pac. 318; *Marion Shoe Co. v. Eppeley* (1914) 181 Ind. 219, 104 N. E. 66, Ann. Cas. 1916D, 220; *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508; *Bain v. Petroleum Iron Works Co.* (1909) 223 Pa. 96, 27 Atl. 279; *Louisville & N. R. Co. v. Cheatham* (1907) 118 Tenn. 160, 100 S. W. 902 ("engineer shall

held that, if the provisions of a contract between the owner and the driver of a cab are otherwise such as to show that the relationship created between them is that of bailor and bailee, the conclusion thus indicated will not be repelled by other provisions which merely limit the fares to be charged, fix boundaries, prescribe the uniforms to be worn, require cleanly and sober habits, and deal with other incidental matters.²⁹

§ 8. Other stipulations importing a reservation of a certain degree of control over the work.

Stipulations which, although they import a reservation of a certain de-

gree of control over the performance of the work, have been treated as being not inconsistent with the conclusion that the contractor was independent are the following:

That if the contractor neglects to do the work, or furnish the material therefor, in accordance with the agreement, the employer shall be at liberty to provide such labor or materials, and to proceed with the completion of the work.¹

That if the work is not "satisfactory" to "the employer's" agent, he may employ men at the expense of the contractor to make the necessary change."²

have the right to make any alteration that may be hereafter determined upon by him as necessary or desirable, in the location, line, grade, plan, form, or dimensions of the work, either before or after the commencement of the same"); *Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495; *Dayton v. Free* (1914) 46 Utah, 277, 148 Pac. 408 (mining company reserved, in contract for construction of tunnel, the right "at any time, either before or during the construction of the work, or any portion thereof, to order any additional work to be done, and to make any changes in the work contracted for, or in its location or position, either in line or grade, which it may deem expedient, or which the engineer of the company may direct"); *Romanink v. Grand Trunk P. R. Co.* (1914; Ct. of App.) 24 Manitoba L. R. 797, 18 Can. Ry. Cas. 170, 29 West. L. R. 766, 7 West. Week. Rep. 399, 20 D. L. R. 301.

In *Salmon v. Kansas City* (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16, the contract, which was one for the construction of sewers, contained both a general clause of the tenor stated in the text, and also a special provision to the effect that the manholes and catch basins might be changed as regards location, or might be omitted altogether, "if deemed best by the city engineer."

Compare also *Giaconi v. Astoria* (1911) 60 Or. 12, 37 L.R.A.(N.S.) 1150, 113 Pac. 855, 118 Pac. 180, where the resolution of a municipal council with regard to the grading of the street in question provided that "any matter of construction and

drainage found necessary to make the improvement safe or substantial shall be done by the contractor, whether specified or not, without extra charge." There, however, the effect of the provision was not considered with reference to the question whether the contract was one of an independent character.

The doctrine entertained in *Larsen v. Home Teleph. Co.* (1911) 164 Mich. 295, 129 N. W. 894, with regard to the effect of a provision of this type, is apparently different from that reflected by the above cases.

²⁹ *McColligan v. Pennsylvania R. Co.* (1905) 214 Pa. 229, 6 L.R.A.(N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, 20 Am. Neg. Rep. 471, the court said: "The conditions and regulations—incidents of the contract of letting, in some instances, it is true—are consistent with the relation of master and servant, but not inconsistent with that of bailor and bailee. If the company, in order to protect its property and give the traveling public modern conveniences and suitable accommodations, has deemed it advisable to embody in the contract of letting certain reasonable regulations, no legal or business reason can be properly assigned why the real relation of the parties should be changed thereby."

¹ *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508. The contract under review in *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383, contained a similar provision, but the precise terms are not stated. See also *Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495.

² *Washington Natural Gas Co. v.*

That, if the contractor "fails to prosecute the work with due diligence," the employer may finish the same and charge it to the contractor."³

That if the contractor "shall refuse or neglect to prosecute the work with a sufficient force," the employer's engineer "may employ such a number of workmen, laborers, and overseers," as may, in his opinion, be necessary to insure the completion of the work within the time specified.⁴

That additional workmen may be employed by the contractee's engineer, and the amount of their wages charged to the contractors, whenever the contractor is not prosecuting the work with the force which, in the opinion of such agent, is necessary for its completion within the time specified.⁵

That, in the event of the contractor's failing to provide a sufficient number of skilled workmen, the em-

ployer shall have the right to employ such labor, and charge to the contractor all damages occasioned by the default.⁶

That, if the contractor shall at any time neglect or refuse to provide a sufficiency of materials and workmen to execute the work properly, the employer may himself furnish such materials and workmen, proceed with the execution of the work, and charge to the contractor the expenses thus incurred.⁷

That the employer shall be at liberty to provide the necessary labor and materials, if a sufficiency thereof is not supplied by the contractor, after he has been notified by a designated agent of the employee to do so.⁸

That the work may be suspended under certain specified circumstances.⁹

That the contractor shall "comply with the ordinances of the city" with which the contract is made.¹⁰

Wilkinson (1885) 1 Sadler (Pa.) 637, 2 Atl. 338.

³ Ibid.

⁴ Louisville & N. R. Co. v. Cheatham (1906) 118 Tenn. 160, 100 S. W. 902. For other cases in which similar provisions were contained in the contracts under review, see Raxworthy v. Heisen (1915) 191 Ill. App. 457, 8 N. C. C. A. 819, affirmed (1916) 274 Ill. 398, 113 N. E. 699; Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461; Wray v. Evans (1876) 80 Pa. 102; Washington Natural Gas Co. v. Wilkinson (1885) 1 Sadler (Pa.) 637, 2 Atl. 338.

⁵ Louisville & N. R. Co. v. Cheatham (1907) 118 Tenn. 160, 100 S. W. 902. See also Good v. Johnson (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439 (contractor might be required, on pain of suffering a forfeiture of the contract, to increase the force and equipment to the necessary extent); Hopper v. S. S. Ordway & Sons (1911) 157 N. C. 125, 72 S. E. 839.

⁶ Mobley v. J. S. Rogers Co. (1918) 68 Ind. App. 308, 119 N. E. 477.

⁷ Pioneer Fireproof Constr. Co. v. Hansen (1898) 176 Ill. 100, 52 N. E. 17; Wray v. Evans (1876) 80 Pa. 102; Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461; Thomas v. Altoona & L. Valley Electric R. Co. (1899) 191 Pa. 361, 43 Atl. 215, 6 Am.

Neg. Rep. 383; Rogers v. Florence R. Co. (1889) 31 S. C. 378, 9 S. E. 1059.

⁸ Ewing v. Litzmann (1916) — Tex. Civ. App. —, 188 S. W. 742.

⁹ Prest-O-Lite Co. v. Skeel (1914) 182 Ind. 593, 106 N. E. 367, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724 (employer's inspector empowered to arrest progress of work, if he found it was not conforming to the standard prescribed in the work); Julius Keller Constr. Co. v. Herkless (1915) 59 Ind. App. 472, 109 N. E. 797 (work was to be suspended in winter, if such suspension should be required by weather conditions); Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16 (clause as to suspension during freezing weather was supplemented by a statement that the engineer of the contractee "should have the right to direct that the work should be continued under such conditions as he should prescribe," and by a provision that, during the suspension of the work from any cause, the same should be suitably covered and the trenches filled, "if the engineer so directed").

¹⁰ Norwalk Gaslight Co. v. Norwalk (1893) 63 Conn. 495, 28 Atl. 32; Harding v. Boston (1895) 163 Mass. 14, 39 N. E. 411; Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16; Uppington v. New

That the employee shall have the right to make a certain use of what is produced by the work, while it is in course of performance.¹¹

The significance of other stipulations is discussed in §§ 27–31, *infra*.

§ 9. Typical contracts relating to various descriptions of work.

For the purpose of enabling the

York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115 (contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and "in all cases of rock blasting the blast" was "to be carefully covered with heavy timber, according to the ordinances of the common council" relating to the subject, "which ordinances shall be strictly observed"); Callahan v. Salt Lake City (1912) 41 Utah, 300, 125 Pac. 863 ("ordinances, in so far as they may affect his employees or the disposition or transportation of the materials").

See, however, Larsen v. Home Teleph. Co. (1911) 164 Mich. 295, 129 N. W. 894, where a different construction was placed on a stipulation of this character.

In Ware v. Dominion Exp. Co. (1908; Montreal Ct. of Rev.) 13 Rev. L. N. S. (Quebec) 358, reversing 14 Rev. L. N. S. 398, where a child was injured through falling into an excavation made for a building, the construction contract provided that "all the work, labor, and materials were to be rendered, furnished, and performed according, subject, and conformably to the plans of the architects, or, in their absence, to the direction of whomsoever they might appoint; that the contractor should "observe and conform to all the laws, ordinances, and regulations of the city of Montreal and province of Quebec relating to the use and obstruction of streets, . . . protection of the public from danger, and all other matters whatsoever." Lynch, J., took the position that the wording of the contract "certainly relieved the proprietor from all liability for any damages which the contractor might occasion. The architect had complete direction of the building operations, but he was concerned merely with the results of the work, and not with the means by which those results were obtained. In my opinion, the defend-

reader to examine some typical contracts of a detailed and comprehensive character, which embrace stipulations of the various descriptions tabulated in the preceding sections, it will be advisable to cite the cases in which the contents of such contracts have been particularized by the courts.¹

ant exercised no control whatever over the work." With this view Pagnuelo, J., agreed, remarking that the French decisions were not binding upon the court.

¹¹ Dayton v. Free (1914) 46 Utah, 277, 148 Pac. 408, where, in a contract relating to the construction of a mining tunnel, the company reserved the right, "at any time during the prosecution of the work," to run drifts, etc., and to conduct and carry on such other mining operations through and from the said tunnel as it might desire," provided that they did not interfere with the reasonable prosecution of the work by the contractors.

1 (a) Work performed for railroad companies.

(The cross-references are to the sections of the monograph in 19 A.L.R. pp. 1168, et seq.)

Philadelphia, B. & W. R. Co. v. Karr (1912) 38 App. D. C. 193, — A.L.R. — (see § 22, note 1 (a)); Hayes v. Chicago, O. & P. R. Co. (1916) 203 Ill. App. 472 (see § 22, note 1 (a)); Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461 (see § 22, note 1 (a)); Rogers v. Florence R. Co. (1889) 31 S. C. 378, 9 S. E. 1059 (see § 22, note 1 (a)); Louisville & N. R. Co. v. Cheatham (1906) 118 Tenn. 160, 100 S. W. 902 (see § 22, note 1 (a)).

(b) Work with respect to buildings.

Mobley v. J. S. Rogers Co. (1919) 68 Ind. App. 308, 119 N. E. 477 (see § 22, note 1 (b)).

(c) Construction of sewers.

Norwalk Gaslight Co. v. Norwalk (1893) 63 Conn. 495, 28 Atl. 32 (see § 22, note 1 (e)); Harding v. Boston (1895) 163 Mass. 14, 39 N. E. 411 (see § 22, note 1 (e)); Uppington v. New York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115 (see § 22, note 1 (e)).

(d) Laying gas pipes.

Hardaker v. Idle Dist. Council

III. Stipulations construed as investing the employer with powers of control which extend to the details of the work.

§ 10. In general.

In the following sections will be found a statement of the effect of various stipulations which have been construed as reserving to the employer that full control over the work which places him, with relation to the person employed, in the position of a master.

A comparison of the cases cited in this and the preceding subtitle discloses a fundamental divergence of views with respect to the significance of identical and virtually identical stipulations. This conflict of opinion is, doubtless, a natural consequence of the fact that the phraseology of several of the stipulations discussed in both subtitles, is on its face, susceptible of two diverse interpretations—one importing a control which extends to details, and the other a control which has relation merely to the results of the work. But the actual state of the authorities which has resulted from the inconsistencies produced by this cause is extremely unsatisfactory, and, in view of the fact that all the stipulations with regard to which there is so much dis-

agreement are found in written contracts, furnishes a singular, and by no means edifying, commentary upon the doctrine that the construction of such contracts is assigned to the courts for the purpose of securing uniformity in the decisions.

In a case where a person employed to superintend construction work had inserted in certain subcontracts for the supply of materials, clauses to the effect that the deliveries should meet his approval, it was unsuccessfully contended that the inclusion of such provisions showed that his interest in the subcontracts was that of an independent contractor.¹

§ 11. Stipulations requiring the contractor to satisfy a certain standard.

The following provisions have been construed as being inconsistent with the inference that the person employed was an independent contractor:

That the contractor shall execute all the works mentioned in the specifications and certain plans, according to such explanatory drawings and instructions as may be furnished to him by the employer's surveyor.¹

That the work shall be performed "in a manner satisfactory to" the employer.²

That the work shall "be carried on

[1896] 1 Q. B. (Eng.) 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196 (see § 18, note 1 (dd)).

(e) Work with respect to timber.

Gay v. Roanoke R. & Lumber Co. (1908) 148 N. C. 336, 62 S. E. 436 (see § 22, note 1 (j)).

(f) Operation of quarries.

Stricker v. Industrial Commission (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849 (see § 34, note 1 (e)).

¹Manton v. H. L. Stevens & Co. (1915) 170 Iowa, 495, 153 N. W. 87, the court said: "It was appropriate and consistent to make such provision for the benefit of the Martins. The very purpose of their employment of Stevens & Company as architects and engineers and superintendents was that they might have the benefit of their experience, knowledge, and judgment. It was entirely consis-

tent, therefore, that the contracts in their behalf should meet the approval of Stevens & Company as a condition precedent to acceptance."

¹Penny v. Wimbledon Urban Dist. Council [1898] 2 Q. B. (Eng.) 212, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748.

²In *Stroka v. Halliday* (1916) 39 R. I. 119, 97 Atl. 965, Ann. Cas. 1918D, 961, the members of a municipal committee managing a 4th of July celebration, which included a display of fireworks, were sued for an injury occasioned to a boy through the explosion of an unexploded bomb which he had picked up, after the celebration, on land adjacent to the place where the fireworks were exhibited. Under its contract the fireworks manufacturing company agreed "to furnish the fireworks . . . in accordance with the program, . . . and in a manner satisfactory to said 4th of July com-

under the supervision, and according to the direction of the (mine) manager, or his duly authorized agent, and to his satisfaction as to the manner of doing said work, and as to the limit and extent thereof."^{2a}

mittee." Having expressed the opinion that it was to be inferred, from the "whole wording of the contract, that it was the intention of the parties thereto that all the firing should be done by the members of the company, or its employees," the court thus commented upon the second of the conditions imposed upon the contractor: "This clause, then, applies to everything to be done—not only to the quality and extent of the exhibit, but also to the manner of doing the firing; and it seems to us to be unwarranted to say that, under this language, the committee or any member thereof did not have full authority to control the 'manner' of doing anything which had to be done. If it had been observed in any portion of this display, during the day or evening, that the bombs or other fireworks were being discharged in such a manner as to be dangerous to property or to persons, or so as to show that the man engaged in the work of firing was incompetent, reckless, or negligent, it would have been not only the right, but the duty, of the committee or any member thereof, or of the subcommittee or any member thereof, to have stopped the firing, and either to have forbidden the continuance of the display entirely, or to have insisted that the incompetent, reckless, or negligent person in charge should be removed, and that a man or men competent for the work should be substituted. We are of the opinion that, by the terms of the contract itself, the 'manner' of doing the work was subject at all times to the full control of the defendants, who authorized the contract, and who were personally responsible, as we have shown, and that the fireworks company was not an 'independent contractor' in the sense used in the books. The mere fact that the fireworks company was permitted by the committee to conduct this display through a member of the firm, with such assistance as he found necessary, and entirely without interference by the committee or any member thereof, was entirely immaterial."

That "the amount due is to be paid when the entire work is completed to the satisfaction of the employer's engineer."³

That "all material furnished and work done, not in accordance with the

In *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740, one of the clauses regarded as negating the independence of the contract was to the effect that the work was "to be done to the satisfaction" of the employer.

^{2a} *Kelley v. Delaware, L. & W. R. Co.* (1921) 270 Pa. 426, 113 Atl. 419, decided with special reference to the Pennsylvania Act of June 2, 1891, P. L. 176, and the amending Act of June 1, 1915, the latter of which provides that the owner "shall have supervision, direction, and control of the mine foreman." In the contract under review there was a general clause to the effect that, "except as herein specifically provided, all matters pertaining to the works . . . shall be under the sole supervision and control of the mine foreman, . . . and the contractor and all his employees shall be subject to the order and directions of said mine foreman pertaining to all matters under the control of said foreman as provided by existing laws." Discussing the effect of this clause with relation to the particular provisions of the contract, the court said: "It will thus be seen that the contract specifically provides for the control of the means of performance by the mine foreman, that the manner of doing the work shall be to the satisfaction of the manager, that the defendant shall have the right to suspend or terminate the work without notice to the contractor, with the right to remove from the work any workmen who, in the opinion of its manager, are incompetent, careless, or for any other reason unsatisfactory, and that the interpretation of the contract . . . shall be by the manager, whose decision shall be conclusive. It is, therefore, manifest that, through the manager and mine foreman, full control over the means and manner of performance was reserved to defendant, and there was left in the contractor no independence whatever in manner and means of performance."

³ *GADSDEN v. CRAFT & Co.* (reported herewith) ante, 662.

specifications," shall be removed by the contractor, at his own expense, within a certain number of hours after notice from the designated agent of the contractee.⁴

That the sanction of the employer to the closing of all proposed sales of the employer's properties should be obtained by the person employed to make such sales.⁵

Some of the stipulations referred to in the next section may also be assigned to the same category as those above tabulated.

⁴ *Thillman v. Baltimore* (1909) 111 Md. 131, 73 Atl. 722. In this case, where the defendant was held liable for damage caused by water deflected into the plaintiff's cellar by reason of negligence with respect to the work of repaving an alley, the conclusion that the tort-feasor was not an independent contractor seems to have been mainly based upon the reservation of the right conferred by a provision of this tenor. But the court also relied upon the effect of certain provisions (not quoted) which gave the engineer of the contractee "more or less control over the work," particularly a specification which had a direct relation to the conditions which occasioned the injury complained of, viz., that "all soft and spongy material below the subgrade [of the alley to be repaved] be removed, and filled with some material satisfactory to the city engineer."

See also *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866, where a contract held not to be independent included a provision requiring the contractor to remove all condemned materials, etc., within a specified time after he received notice to do so.

⁵ *Brown v. Industrial Acci. Commission* (1917) 174 Cal. 457, 163 Pac. 664. The court was of opinion that this stipulation "necessarily implied the power of designating and directing in advance the terms upon which each lot must be sold."

¹ *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866.

² *Smith v. Seattle* (1899) 20 Wash. 613, 56 Pac. 389 (defendant held liable for injury caused to his property

§ 12. Stipulations by which the employer is authorized in general terms to give directions concerning the work.

The following stipulations have been held to negative the independence of a contract in which they were inserted:

That the work shall "at all times be subject to the supervision" of the employer's engineer."¹

That the work shall be done "under the supervision" of the employer's agent.²

That the work shall be conducted "under the superintendence" of the employer's agent.³

by the removal of lateral support consequent upon the grading of a street); *Flynn v. Philadelphia* (1901) 199 Pa. 476, 49 Atl. 249 (in opinion of judge of first instance which was adopted by the supreme court).

From provisions of a contract which showed that the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work, and that the dismissals of the board of public works, which represented the city, were final and conclusive in every case that might arise under the contract, the court drew the inference that there were "dependence" and "serviency" in the contractors. *Chicago v. Joney* (1871) 60 Ill. 383. The phraseology of the clauses as to supervision is not stated.

In *Cunningham v. Penn Bridge Co.* (1912) 131 La. 196, 59 So. 119, the court after referring to a passage in *Thompson on Negligence*, continued thus: "We will state that from the same commentator we gather: 'When the owner maintains control on a given particular of the work, the contractor is not an independent contractor.' The city certainly retained some control over the construction." As the provisions which were regarded as being indicative of a "retention of control" are not mentioned in the report, it is impossible to say under which of the paragraphs of this section the case should be placed.

³ *Nisbitt v. Dixon* (1852) 14 Sc. Sess. Cas. 2d series, 973.

In *Scott v. Springfield* (1899) 81 Mo. App. 312, it was held that a contract containing the following provision was not independent: The word "engineer," as herein employed, shall

That the employer shall have the "direction and constant supervision" of the work.⁴

That the work shall be "under the superintendence" of the defendant's engineer, and "any orders or directions given by him shall be respected, and immediately and strictly obeyed by the contractor."⁵

That "except as herein specifically provided, all matters pertaining to the work shall be under the sole supervision and control of the mine foreman, and the contractor and all his employees shall be subject to the

orders and directions of said mine foreman, pertaining to all matters under the control of said mine foreman as provided by existing laws."^{6a}

That the employer shall have the right to "direct the manner in which the work shall be carried out."⁶

That the contractor "shall carry on the work during suitable weather, as the employer's engineers shall direct."⁷

That the work shall be performed "under the direction" of the employer's agent.⁸

That the work shall be done "ac-

be construed to mean such person as shall be designated by the city council, whose duty it shall be to superintend the work in all its details, pass upon and reject such material as may not be in conformity with these specifications, designate when work shall begin, and how it shall be conducted, discharge incompetent or disobedient employees, and pass upon all questions as to the intent and meaning of these specifications. The engineer, subject to approval of the sewer committee, may appoint and place upon the work such inspectors as he may see fit, fully authorized to act for him in his absence.

⁴ *Bechnel v. New Orleans, M. & T. R. Co.* (1876) 28 La. Ann. 522.

⁵ *Cooper v. Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887.

^{6a} *Kelley v. Delaware, L. & W. R. Co.* (1921) 270 Pa. 426, 113 Atl. 419.

⁶ *Beal v. Champion Fiber Co.* (1910) 154 N. C. 147, 69 S. E. 834.

⁷ *Chas. T. Derr Constr. Co. v. Gelruth* (1911) 29 Okla. 538, 120 Pac. 253.

⁸ *Williams v. National Cash Register Co.* (1914) 157 Ky. 836, 164 S. W. 112; *Delmonico v. New York* (1848; Super. Ct.) 1 Sandf. (N. Y.) 222; *Harmon v. Ferguson Contracting Co.* (1912) 159 N. C. 22, 74 S. E. 632; *Schade Brewing Co. v. Chicago, M. & P. S. R. Co.* (1914) 79 Wash. 651, 140 Pac. 897.

In *Burger v. Philadelphia* (1900) 196 Pa. 41, 46 Atl. 262, the purport of a contract for the reconstruction of sewer inlets was thus summarized by the court: "The contract under which the work was done was a contract to furnish the material and labor for the reconstruction of sewer inlets in any part of the city of Philadelphia, during the year 1896, as re-

quired by the department of public works, and subject to its direction and approval. For a part of the work a fixed price was to be paid, as for stone, bricks, or iron inlets of different patterns, for iron gratings, man-holes, terra-cotta pipe, etc., but in most cases the work was to be paid for at a fixed price per foot or yard, as excavating, masonry, curving, paving, etc. No particular work was specified, and none might be ordered. When ordered, the work was to be done in the presence of an inspector, and the department reserved the right of absolute control and direction. There was no evidence that the department exercised any right except that of supervision, or that the contractor received any directions from anyone acting for the city." As there was evidence that the defendant's agents had accepted the work with notice of the defects which caused the plaintiff's injury, the court declined to consider whether, in view of the exceptional character of the contract, the city was relieved of liability for the negligence of its contractor, under the ruling in *Painter v. Pittsburgh* (1863) 46 Pa. 213, and the line of cases which followed it.

In *Nashville v. Brown* (1871) 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289, the court seems to have considered that the fact of its having been provided, by a contract for certain street work, that it was to be done "under the direction of the city engineer, and to the satisfaction of the street committee," was an element which in itself showed that the relation created was that of master and servant. But the main ground of the decision was the rule which declares the keeping of a street in a safe condition to be a non-delegable duty.

cording to the directions of the supervising architect, whose decisions on all points shall be final.⁹

That the work shall be "done and finished agreeably to the directions and orders" of the employer's engineer.¹⁰

That the contractor shall be "subject at all times, during the progress of the work, to the direction" of the employer's engineers.¹¹

That "all directions and instructions given by the engineers, etc., of the employer, must be fully carried out" by the contractor.¹²

That the contractor must strictly follow without delay all orders and instructions from the chief engineer or his authorized assistants in the

prosecution and completion of the work and every part thereof.^{12a}

That the employers "may submit to the contractor such orders, directions, and instructions as they wish for the proper carrying out of the contract, and the contractor shall obey the same."¹³

That the work shall be done under "direction" of the employer's designated agents, who "shall have entire control over the manner of doing, or shaping, all and every part of the work."¹⁴

That the work shall be carried on, "in its several parts and branches, in such manner, at such times, and at such places, as the employer may from time to time direct."¹⁵

⁹ *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363 (workman injured). The court said: "The nature of the work was such that nothing else but the method of doing it required the supervision of the architect. . . . If the architect had directed or permitted Lynch to strip the building, as actually done by defendants, before removing the spans, Lynch would have been the servant of defendants quoad the adoption of this method, and they would have been responsible for any injury resulting therefrom. A fortiori are they responsible when they themselves adopt this method and do this part of the work themselves."

¹⁰ *GADSDEN v. CRAFT & Co.* (reported herewith) ante, 662.

¹¹ *Carlton County Farmers Mut. F. Ins. Co. v. Foley Bros.* (1912) 117 Minn. 59, 38 L.R.A. (N.S.) 175, 134 N. W. 311.

¹² *Ibid.*

^{12a} *Flynn v. Philadelphia* (1901) 199 Pa. 476, 49 Atl. 249 (in opinion of judge of first instance which was adopted by the supreme court).

¹³ *Chas. T. Derr Constr. Co. v. Geruth* (1911) 29 Okla. 538, 120 Pac. 253.

¹⁴ *Covington v. Geyler* (1892) 93 Ky. 275, 19 S. W. 741 (plaintiff's house injured by removal of lateral support).

¹⁵ *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866 (servant of contractor injured while working on a building); *Gulf, C. & S. F. R. Co. v. Delaney* (1900) 22 Tex. Civ. App. 427, 55 S. W. 538.

In *Morrissey v. Cincinnati* (1911) 33 Ohio C. C. 541, affirmed in (1913) 87 Ohio St. 525, 102 N. E. 1121, which involved a similar provision, not containing the words "at such times," an action was held to be maintainable for damage caused to a building by explosions of dynamite used in excavating a trench for a sewer. The lower court (consisting of three circuit judges) said: "The excavation for the sewer was part of the work contracted for, and we think it clear that, under the provision just quoted, the city engineer or inspector had the right to control the manner of making the excavation, and to determine whether same should be by pick and shovel, blasting, steam shovel, or otherwise, such right to be exercised reasonably and with a proper regard for the welfare of persons and property likely to be affected, as well as for the advantage of the contractor in the adoption of such method or manner as would cheapen and facilitate the execution of the contract. It seems to us that the contract secures such right to the city without ambiguity. If any aids to construction were necessary, we think all the circumstances—the character of the ground, depth of excavation, power and duty of the city with reference to streets, contiguous buildings—all make such reservation on the part of the city appear reasonable and necessary." The court was of opinion that the clause in question was to be construed in the same sense as the one considered in *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

That the contractor shall "conform in all respects to the directions and instructions" of the employer's engineers, relative to the work, and shall progress with the same at such time or times, in such manner, and at such particular points on the line of the work as the engineers shall direct."¹⁶

That the contractor shall be subject at all times during the progress of the work to the "direction" of the employer's agent as to the mode and manner of doing it, and shall prosecute the work in such manner and at such points as he may direct.¹⁷

That "all of the work, material, and apparatus shall be performed, done, located, and placed, at such place, and in such manner, as shall be designated or required" by the employer's engineer.¹⁸

That the employer's engineer "will

designate the order of time in which the different parts of the work shall be done, as well as the mode of doing the same."¹⁹

That the instrumentality to be used for the work shall be "under the direction and supervision" of the employer, and do certain specified parts of the work "in the manner" to be indicated by him.²⁰

That the work shall be done "under the supervision and according to the direction" of the employer's engineer, and that he shall have power "to reject or condemn any work."²¹

That the work shall be done "in the manner" prescribed by the employer, and that his "orders shall be obeyed" by the contractor and the contractor's employees.²²

That the work shall be done "as ordered."²³

That the contractor shall be "under

In *Denver v. Rhodes* (1886) 9 Colo. 554, 13 Pac. 729, the retention by the defendant municipality of control over the work was held to be a necessary inference, where a power had been reserved to make alterations in the manner, extent, and plan of the work, as it progressed, and to relet the work in case the terms of the contract were not complied with, and, among other reservations of authority and control over the work, was the following: "The contractor shall commence the work at such points as the engineer and sewer committee may direct, and shall conform to their directions as to the order of time in which the different parts of the work shall be done, as well as to all the engineer's other instructions as to the mode of doing the same, including the length of street or alley that may be taken up in advance of the back filling."

¹⁶*Carlton County Farmers Mut. F. Ins. Co. v. Foley Bros.* (1912) 117 Minn. 59, 38 L.R.A.(N.S.) 175, 134 N. W. 311.

¹⁷*North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.* (1913) 76 Wash. 232, 135 Pac. 1017.

¹⁸*Larsen v. Home Teleph. Co.* (1911) 164 Mich. 295, 129 N. W. 894.

¹⁹*Pressley v. Sallisaw* (1916) 54 Okla. 747, 154 Pac. 660.

²⁰*Perkins v. Blauth* (1912) 163 Cal. 782, 127 Pac. 50, where an action was

held to be maintainable against the trustees of a reclamation district for damage sustained by the plaintiff's land, in consequence of the failure of a dredger company to protect his land from the waters of a river, after a levee had been cut for the purpose of enabling the dredger to pass through it and reach the place where the work for which it had been hired was to be done. Stress was laid upon the circumstance that the negligence complained of had relation to certain particular matters in respect of which the right of control had been reserved. But it is reasonably clear from the language of the court that this consideration was regarded as being merely corroborative of an inference deemed to be deducible from the general provision, which was applicable to the work as a whole.

²¹*Cincinnati, H. & D. R. Co. v. Van Dorn* (1885) 1 Ohio C. C. 292, 1 Ohio C. D. 160.

²²*Herrington v. Booth* (1916) 252 Pa. 70, 97 Atl. 178. As the precise tenor of the contract under review is not stated in the report, it is impossible to say whether this decision is really in conflict with *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508, which is seemingly inconsistent with it. See § 6, note 28, supra.

²³*Porter v. Withers Estate Co.* (1919) 201 Mo. App. 27, 210 S. W. 109.

the immediate order" of the employer's agent, and that the work shall be performed "to his entire satisfaction."²⁴

That "the work shall be prosecuted at such time and in such manner as the employer's engineer may direct."²⁵

That the work shall be done "under the direction" of the employer's engineer, who shall have "entire control over the manner of doing and shaping all or any part of the same," and whose directions are to be "strictly obeyed."²⁶

That the person "employed" is to perform the stipulated work according to the "instructions" of the employer.²⁷

²⁴ *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542.

²⁵ *Larsen v. Home Teleph. Co.* (1911) 164 Mich. 295, 129 N. W. 894.

²⁶ *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

²⁷ A clause of this purport was treated as the controlling element in *Linguist v. Hodges* (1911) 248 Ill. 491, 94 N. E. 94, where Hodges employed B. and R. to superintend the masonry and the concrete and carpentry work for a factory building, and agreed to "lease from them all tools and equipment necessary for the completion of the work." Hodges was held liable for the negligence of a workman, whereby injury was inflicted on the plaintiff, another workman, but not a fellow servant of the tortfeasor.

The above case was followed in *Fetzer v. Noel Constr. Co.* (1912) 175 Ill. App. 401, where, in an action brought by a servant of an elevator company to recover for an injury by the negligence of a servant of the Armored Company, in allowing a plank to project into the shaft in which a car on which plaintiff stood was being operated, the contract between the Armored Company and the Noel Company, the general contractor for the construction of the building in which the accident occurred, was held to import that the Armored Company was to act as superintendent for the Noel Company. The only provisions specifically mentioned by the court were that the compensation

That the work is to be carried on "under the instructions" of the employer's foreman.²⁸

That the person employed shall be "governed by the printed instructions on the back of this contract."²⁹

That the work shall be done under the general supervision of the employer's agent, that such agent shall have authority to direct the order in which and the points at which it should be prosecuted, and that the contractor shall immediately comply with all the instructions given by the engineer.³⁰

That the work shall be done "according to the plans and directions of the employer's chief engineer."³¹

That the work shall be done "in accordance with the plans and speci-

was to be 10 per cent "for the superintending of the work," and that there was also to be paid, as additional compensation, a certain percentage of the amount by which the cost of the labor, etc., should fall short of a certain amount.

In *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866, one of the clauses which were adverted to as destroying the independence of the contract was to the effect that all the work should be carried out strictly in accordance with the plans which would be furnished, and specifications and instructions which would be given from time to time by the architect, engineer, or inspectors of the contractee. On the principle, "noscitur a sociis," however, it would seem preferable, in this instance, to construe the word "instructions" as connoting merely supplementary directions of the same character as "specifications," and not directions concerning the details of the work.

²⁸ *Arizona-Hercules Copper Co. v. Crenshaw* (1919) 21 Ariz. 15, 184 Pac. 996.

²⁹ *Gahagan v. Aermotor Co.* (1897) 67 Minn. 252, 69 N. W. 914, 1 Am. Neg. Rep. 92.

³⁰ *McCarthy v. Clark* (1911) 115 Md. 454, 81 Atl. 12 (pedestrian stumbled over a manhole frame left on a sidewalk by a servant of a firm engaged in constructing a sewer).

³¹ *Veazie v. Penobscot R. Co.* (1860) 49 Me. 119.

cations, and as directed" by the employer's agent.³³

That the work shall be done "under the direction and subject to the approval" of the employer.³³

That the work shall be done "un-

der the directions, and to the satisfaction," of the designated agents of the employer.³⁴

That the work shall be done "according to the plans and specifica-

³³ *DePalma v. Weinman* (1909) 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782 (excavation on adjacent lot caused plaintiff's wall to collapse). The court quoted some of the language used in *New Orleans, M. & C. R. Co. v. Hanning* (1872) 15 Wall. (U. S.) 649, 21 L. ed. 220, and continued thus: "The contract in this case seems as broad in its terms. In superintending and directing there is no limitation upon the power of La Driere [architect], so long as he stayed within the plans and specifications. He could direct where every stone should be laid and every shovelful of dirt should be taken out. Grande [contractor] was, therefore, a servant of Barnett, who, though he was to receive a stipulated price for his work, executed it under the direction and superintendence of his employer." The decision rendered on the subsequent appeal of this case in (1911) 16 N. M. 302, 121 Pac. 38, was affirmed in (1914) 232 U. S. 571, 58 L. ed. 733, 34 Sup. Ct. Rep. 370, in which, although a merely cursory reference to the terms of the contract was made, the position of the lower court with regard to the effect of the clause quoted in the text was evidently approved.

³³ In *Linnehan v. Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287, the trial judge, on a charge to a jury which was held by the supreme court to be a correct statement of principles, thus commented on a contract which provided, in substance, that one Elston was to take down the entire building, or so much thereof as the employer might request: "This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time, and man-

ner, and mode of doing this work; that they had the right to step in and say to him: 'You are not doing this as we directed you to do it. We direct you thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant so far as Elston and the defendants are concerned."

³⁴ *Parrott v. Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352. The court argued thus: "No plans and specifications were attached to the contract, and nothing in it indicated the result to be attained, save that the earth was to be taken from the cuts and placed in the fill. To what elevation or line was the fill to be raised? To what depth or width were the excavations to be made along the right of way? The contract contains no answer to these inquiries, save in stipulating that the 'grading shall be done under the direction, and to the satisfaction, of the chief engineer of the company and his assistant.' The word 'grading,' as used, is not synonymous with 'filling,' for the contractor promised to furnish the work, tools, etc., to do 'all the grading required for filling.' The earth to be used is described as 'material for filling,' not grading, and the fill, when completed, is designated as an 'embankment,' not a grade. Manifestly, the word was not employed in the technical sense of bringing the surface at the bridge to a line or grade, but in the broader sense of including the excavating and filling contemplated by the agreement of the parties. See *Ryan v. Dubuque* (1900) 112 Iowa, 284, 83 N. W. 1073. Otherwise the company must be held to have authorized the contractor to excavate from its right of way in any manner or to any extent he might choose—a thing inconsistent with its duty to the public, and inconceivable in the protection of its own interests. As he was to do the grading (that is, excavate and fill) under the direction of defendant's agents, the engineer, Stoddart was not an independent con-

tions, and under the direction, superintendence, and approval" of the designated agent of the employer.³⁵

That the work shall be done "under the control" of the employer's superintendent, and "to his satisfaction."³⁶

That the work "shall at every stage of its progress, from beginning to end, be subject to the direction, in-

spection, and acceptance of the engineer" of the employer.³⁷

That the work shall be done "under the direction and supervision" of the employer as to times, places, and quantities, and "according to his approval."³⁸

That the work is to be done as ordered by "the designated agent of the employer, and "to his satisfaction."³⁹

tractor, but the servant of the company, and it is liable for any damages occasioned by the removal of the soil from plaintiff's land."

Compare also *Hill v. Caverly* (1834) 7 N. H. 215, 26 Am. Dec. 735, where the liability of the owner of a saw-mill for damages caused to the plaintiff's land through the bursting of a defective dam, constructed by the "lessee" of the mill, was affirmed on the ground that such lessee, having agreed "to follow the directions of the lessor in everything relating to the stoppage or flowage of the water in the mill pond," was a mere servant.

³⁵ *Harold v. Montreal* (1867; Q. B.) 11 Lower Can. Jur. 169. The court also laid stress upon the fact that the contract embraced a provision authorizing the defendant corporation to set it aside after twenty-four hours' notice given. But the decision was evidently based upon the provision specified in the text.

In *Pelletier, J., Groleau v. Quebec C. R. Co.* (1895; *Quebec Cir. Ct.*) 1 Rev. de Jur. 54, it was laid down that a railway company which contracts for the construction of a line for a fixed price, but nominates its own engineer as an arbiter between itself and the contractors, for the purpose of determining the quantity and quality of the work performed, and of giving the certificate required by the contract as a condition precedent to the payment of sums of money on account of the total cost of the undertaking, and which obligates itself to furnish the right of way, exercises thereby such superintendence and control over the work as to render itself responsible to a third person for any injury inflicted by the undertakers. This ruling goes much further than the other Quebec case cited above. But it was made by a single judge of first instance, and its authority as a precedent is doubtful.

³⁶ *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303.

In *Schwartz v. Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227, where the existence of a contract of service was held to have been properly inferred, the court thus commented upon the language of an instruction: "Here, although Daegling was erecting the walls under a contract, he was, by its terms, to carry forward the work under the control of the superintendent, and 'to remove all improper work or materials upon being directed so to do by the superintendent,' to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize. The owner also reserved the right to change his plan, and the architect was declared to be the superintendent for the owner."

³⁷ *Madisonville, H. & E. R. Co. v. Owen* (1912) 147 Ky. 1, 143 S. W. 421, holding that the jury had been correctly instructed that a company which had taken the construction contract embracing this provision was a servant of the defendant railroad company, and that the latter company was liable for the damages resulting to the plaintiff from the obstruction of a stream by logs which the former company had thrown into it. The contention of the defendant that this provision reserved to the railroad company no more than the right to pass on the finished work was rejected.

³⁸ *Wooton v. Dragon Consol. Min. Co.* (1919) 54 Utah, 459, 181 Pac. 593.

³⁹ *Gagnon v. Saraguay Electric Light & P. Co.* (1909) Rap. Jud. Quebec 36 C. S. 227.

In *Porter v. Withers Estate Co.* (1919) 201 Mo. App. 27, 210 S. W. 109, where the court went no further than to hold that a provision obligating the contractor to perform all work of a certain kind, "as ordered by" the employer, should, when considered with reference to some of the other clauses of the contract, be construed as importing an exercise of full control.

§ 13. Stipulations by which the employer is empowered to give directions with regard to particular matters.

The independent character of the contract is clearly destroyed, pro tanto, by a provision which invests the employer with the right of control in respect of a certain portion of the stipulated work. In this point of view any torts of the contractor which are incidental to his performance of that portion are imputable to the employer, irrespective of whether the contract is one which would, so far as its other provisions are concerned, be classed as independent. Whether li-

ability is predicable on this ground is obviously a matter to be determined from a consideration of the tenor of the provision in question, and the nature of the tort complained of.

Some of the particular provisions with reference to which the independence of contracts has been denied are the following:

That the contractor shall "observe all lines, grade stakes, reference points, and other location details."¹

That "all movements of the contractor's equipment over the employing railroad company's main and side tracks shall be under such rules and

¹ Chas. T. Derr Constr. Co. v. Gelruth (1911) 29 Okla. 538, 120 Pac. 253.

In *Goldschmid v. New York* (1897) 14 App. Div. 135, 43 N. Y. Supp. 447, 1 Am. Neg. Rep. 508, where the defendant city was held to be liable for the injury caused by a retaining wall which a contractor for the grading of a street had built beyond the boundary line of the plaintiff's lot, and constructed of such poor materials that it bulged over his land, the facts which were held to show that the city had reserved the right to specify the place where the wall should be built, and the manner of its construction, were thus stated: "It was expressly provided in the contract that the retaining walls should be built where they were indicated on the plan, or where they were directed by the engineer to be built, and that the manner in which the walls should be built was to be determined by the engineer. It was further agreed in the contract that, during all the time while the work was in progress, the materials used in it should be subject to the examination of the commissioner of street improvement, and should be immediately removed if not satisfactory to him. It was proved upon the trial, by the evidence of the witnesses produced on the part of the city, that an inspector was present all the time the work was going on, and that he gave directions as to the stone that was put in the wall. It was also proved, and not disputed, that the place where the wall was located was designated by the engineer employed by the city, and that the trench was dug and the wall was built precisely in the place where the city's engineers directed it to be done."

In *Stork v. Philadelphia* (1901) 199 Pa. 462, 49 Atl. 236, the undisputed evidence showed that, in the prosecution of the work of constructing a subway on a street, it became necessary to tear down a house adjacent to that of plaintiff; that the city had reserved the right to determine when any underpinning or shoring up of foundations should be done by the contractors; that it had refused to authorize the shoring up of plaintiff's house, when the excavation was first made; and that this resulted in serious damage to the property. Held, that there was evidence on which the case must have gone to the jury, and consequently that, under the agreement of the parties as to the amount of the damages recoverable, if there was any evidence from which the jury could infer negligence, the trial judge had properly entered judgment for the plaintiff.

In *Norris v. Philadelphia* (1912) 49 Pa. Super. Ct. 641, the defendant entered into an agreement with a contractor for the laying of a water main. The execution of the work involved the cutting of a very large and deep trench in front of plaintiff's property, and the municipal officers located the line of that trench near the sidewalk on plaintiff's side of the street. During the progress of the work the earth excavated from the trench was all thrown upon the side thereof next plaintiff's property, and covered a large part of the lawn in front of her house, destroying her fence, the grass sod upon her lawn, her shrubbery and vines, and a number of trees. The contract contained the following clause: "All materials excavated shall be placed where directed by the chief of the bureau of water, and

restrictions as the company's division superintendent may prescribe."²

That the employer's agent "may at any time change form of plan, grade

footways shall be kept clear for a width of 4 feet next to the house line, . . . unless special permission to the contrary be granted by the director of the department of public works." By other provisions the sale and removal of the material excavated from the pipe trenches, and the operation of refilling them, were placed under the control of the director of the department of public works. Counsel for the defendant argued that the contractor who did the work and placed the materials upon plaintiff's land had no right, under his contract, to do this, and that he and not the city should be held liable. But the court said: "With these provisions in the contract it is idle to assert that the city did not retain the absolute control, through its officers, of the disposition of the material taken from the trench, and the return of that material to the trench, for the purpose of refilling, after the water main had been laid. If the contractor had disregarded the instructions of the city officers, and, in violation of their instructions, deposited it upon the property of some individual, the city would not have been liable for injuries resulting from that unauthorized act; but the plaintiff produced evidence which would have warranted a finding that the contractor heaped the dirt upon plaintiff's sidewalks and lawn in accordance with the express direction of the chief of the bureau of water, and that all that was done was under the direction of the proper city officials. If this testimony was true, the contractor only did with the material what his contract with the city required him to do—deposited it in the place directed by the chief of the bureau of water; and the city was liable for any injury to property which resulted from the act."

In *Quanah, A. & P. R. Co. v. Goodwin* (1915) — Tex. Civ. App. —, 177 S. W. 545, where the plaintiff's horse took fright at a pile of rails deposited in a street by a subcontractor, his right to hold the defendant, the principal contractor, liable for the resulting injury, was predicated on the ground that the defendant had reserved the right to select the place of

or section, elevation or location of the work."³

That the work "shall be prosecuted with such force as the employer's en-

deposit, and had received a promise from the contractor to deposit the rails at the point in question.

In *Northern P. R. Co. v. Tillotson* (1915) 84 Wash. 678, 147 Pac. 423, the defendant who had taken a subcontract for the construction of a part of a highway, was charged by a railroad company with having felled trees so negligently as to endanger its telegraph wires and the operation of its trains, and to damage its track, one of the specifications provided: "If any work or service be required to be done which, in the opinion of the engineer, does not come within the class of work to be measured under the contract, he shall be at liberty to direct the contractor to perform the same by day labor, and the contractor when required by him shall furnish such force and materials and perform such work in the manner directed.

. . . The engineer shall be at liberty to discharge any inefficient or unsuitable workman who shall be placed on such work, and the work so performed shall be subject to his approval before payment is made therefor." Held, that this provision, being applicable only to the extra work specified, did not destroy the independent character of the contract.

Where the contract for laying a line of pipes provided that they "were to be deposited in such continuous lines as might be pointed out, in such manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present," and the plaintiff was injured by falling over a pipe which had been deposited by a carter in such a manner as to project over a crossing, one of the judges was of opinion that the public board which had made the contract for the distribution of this and other pipes along the highway had retained a discretionary power to indicate, by the direction of their officer, the places at which the pipes were to be deposited. *O'Brien v. Board of Land & Works* (1880) 6 Vict. L. Rep. (L.) 204, 2 Austr. L. T. 22.

² *Callahan Constr. Co. v. Rayburn* (1915) 110 Miss. 107, 69 So. 669.

³ *Chas. T. Derr Constr. Co. v. Gelruth* (1911) 29 Okla. 538, 120 Pac. 253.

gineer may deem adequate; if said party shall fail to prosecute the work with sufficient force in the opinion of said engineer, the latter, or such agent or agents as he may designate, may proceed to employ such number of workmen, laborers, and overseers as may be necessary to insure completion" at the time specified.⁴

The significance of other stipulations is discussed in §§ 27-31, *infra*.

§ 14. Typical contracts relating to various kinds of work.

For the purpose of enabling the reader to examine some typical contracts of a detailed and comprehensive character, which embrace stipulations of the various descriptions

tabulated in the preceding sections, it will be advisable to cite the cases in which the contents of such contracts have been particularized by the courts.¹

IV. Oral evidence with respect to the extent of the power of control reserved to the employer.

§ 15. Evidence relating specifically to the nature of the contract as entered into.

Some of the decisions which turn upon the significance of evidence of this description illustrate the circumstances which are regarded as pointing to the conclusion that the employer's powers of control did not extend to the details of the work.¹

⁴GADSDEN v. CRAFT & Co. (reported herewith) ante, 662.

1 (a) Work performed for railroad companies.

(The cross-references are to the sections of the monograph in 19 A.L.R. pp. 1168 et seq.)

New Orleans, M. & C. R. Co. v. Han-ning (1872) 15 Wall. (U. S.) 649, 21 L. ed. 220 (see § 20, note 1 (a)); GADSDEN v. CRAFT & Co. (reported herewith) ante, 662; Foehr v. New York Short Line L. R. Co. (1909) 40 Pa. Super. Ct. 7 (see § 24, note 1 (a)); North Bend Lumber Co. v. Chicago, M. & P. S. R. Co. (1913) 76 Wash. 232, 135 Pac. 1017 (see § 24, note 1 (a)); Schade Brewing Co. v. Chicago, M. & P. S. R. Co. (1914) 79 Wash. 651, 140 Pac. 897 (see § 30, note 1 (a)).

(b) Work with respect to buildings.

Chicago v. Murdock (1904) 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46, affirming 113 Ill. App. 656 (see § 24, note 1 (b)); Bissell v. Ford (1913) 176 Mich. 64, 141 N. W. 860 (see § 24, note 1 (b)); Aarnes v. Great Northern R. Co. (1915) 129 Minn. 467, 152 N. W. 866 (see § 24, note 1 (b)); Beal v. Champion Fiber Co. (1910) 154 N. C. 147, 69 S. E. 834 (see § 24, note 1 (b)).

(c) Construction of highways.

East St. Louis v. Murphy (1900) 89 Ill. App. 22 (see § 24, note 1 (c)).

(d) Construction of sewer.

Hamill v. Territilli (1915) 195 Ill. App. 174 (see § 24, note 1 (d)); Pressley v. Sallisaw (1916) 54 Okla. 747, 154 Pac. 660 (see § 24, note 1 (d)); First Presby. Congregation v. Smith 20 A.L.R.—46.

(1894) 163 Pa. 561, 26 L.R.A. 564, 43 Am. St. Rep. 808, 30 Atl. 279 (see § 24, note 1 (d)).

(e) Construction of telephone system.

Larsen v. Home Telephone Co. (1911) 164 Mich. 295, 129 N. W. 894 (see § 24, note 1 (e)).

(f) Scavenging work.

Stephens v. Thurso Police Comrs. (1876) 3 Sc. Sess. Cas. 4th series, 542 (see § 36, note 1 (k)).

¹In Arkansas Land & Lumber Co. v. Secrist (1915) 118 Ark. 561, 177 S. W. 37, the evidence which was held to show that the plaintiff's immediate employer was an independent contractor, and that he was consequently not entitled to recover against the principal employer for an injury received in the course of his employment, was thus stated: "Allen testified that the appellant company had nothing to do with the work, except to see that the shed was constructed in accordance with the plans, and that the appellant company had nothing to do with employing or discharging the labor, and that it had no authority to give, and did not give, any orders or directions to any of the laborers in regard to the manner of performing their work, but that any suggestions or directions concerning the work, made by appellants, were given either to him or his foreman, and were given for the purpose of conforming the work to the plans. He testified that the lumber company furnished the plans and specifications to go by, and that certain changes were made by its superintendent in the

Under this head it will be advisable to refer specially to the rulings which have proceeded upon the theory that, where a contract for the transporta-

tion of goods is shown by the rest of the evidence to be independent, its quality is not altered by evidence to the effect that the employer is entitled

plans, but such changes were indicated on the blue print; that on one occasion the superintendent made some changes in the material to be used, but no directions were ever given by any representative of the appellant company to the men about their work, but that he and his foreman at all times had sole authority and supervision over the appellee and all other laborers. It is shown, however, that appellant's general manager and superintendent were both about the work once or twice a day, and sometimes oftener; and Allen's foreman and one of the laborers both testified, on cross-examination, that it was their duty to do as they were told by appellant's superintendent, and that they were subject to his orders in the performance of their duties. But a consideration of all the evidence given by these witnesses makes it plain that they only intended to say that the superintendent had the right to prescribe plans for the building, and that it was their duty to execute these plans."

In *Richards v. Consolidated Lighting Co.* (1916) 90 Vt. 552, 99 Atl. 241, the plaintiff relied upon certain evidence of the following purport: The defendant's representative gave the plaintiff a plan of the coal conveyer in question, and told him to build it—in the plaintiff's own language: "We first looked at the plan, and then they (defendant's representatives) said, 'We will leave it to you to go and put it on.'" Held, that the contract was an independent one.

In *Kettleman v. Atkins* (1917) 229 Mass. 89, 118 N. E. 249, the right of the plaintiff to recover for an injury caused by a piece of molding which fell from a building, for the erection of which the defendant had contracted, turned upon the meaning to be ascribed to his own testimony, which is thus summarized in the opinion: As a witness called by the plaintiff, he testified upon direct examination that he "'sublet the carpentry, painting, and plastering.' He further testified, 'I had a contract to do all the work. I hired the carpenter and painter and looked after their work, and was daily on the job to see what the painter, or the carpenter, or anybody else, did about their work.' He then was asked

by the plaintiff's counsel the following questions, and replied as follows: 'Q. And they worked under your direction? A. Yes, under the contract. Q. While you sublet it to different people, they all worked under your direction? A. Yes. Q. They had to do what you said? A. Yes. Q. And whoever did that work were all under your direction? A. Yes.' Upon cross-examination he testified 'that he sublet the carpenter work and the plastering work, and had contracted with the carpenter to do the carpenter work. And when he said that the carpenter did the work under his direction he meant he did it under the terms of his contract with him, and that he was there to see that the carpenter lived up to the terms of the contract with him, and to see the quality of the work. He did no carpenter work himself. His own work was masonwork, and the masonwork had all been finished at that time. So far as he was concerned, he was doing no work on his own account on that December 30. The work that was being done was being done under contract with various subcontractors, holding contracts under him.'" The contention of the plaintiff that the answers given by the defendant, in reply to direct questions put to him by the plaintiff's counsel, were evidence in the nature of an admission that the defendant was in charge of the carpenter work upon the building at the time the plaintiff was injured, was rejected, on the ground that these answers "were given in connection with the defendant's previous testimony that he had sublet the carpenter work and certain other work upon the building." The court then proceeded as follows: "The only fair inference from the testimony of the defendant to the effect that all the men who worked on the building so worked under his direction is that the subcontractors so worked as he had previously testified. It would be manifestly unfair, in considering this testimony, to deal with the defendant's answers, disregarding what he said with reference to having sublet the carpenter work. The only reasonable inference leads to the conclusion that, when he said that all the men who worked on the building so

to give directions with regard to such matters as these:—the particular articles which are to be transported,² the places from which they are to be taken,³ or the places at which they are to be delivered.⁴

worked under his direction, he referred to the subcontractors, and not to the men in their employ. So construed, there is no evidence to warrant a finding that the piece of molding which struck the plaintiff was thrown or fell from the building by reason of the negligence of any workman for whom the defendant was legally responsible."

In *Miller v. Moran Bros. Co.* (1905) 39 Wash. 631, 1 L.R.A.(N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089, where the contract was held to be independent, evidence that the person employed was to have control and supervision of the workmen was mentioned as one of the elements on which the conclusion was based. But obviously this fact is indecisive, unless the control and supervision contemplated by the parties were exclusive.

In *Reisman v. Public Service Corp.* (1911; Err. & App.) 82 N. J. L. 464, 38 L.R.A.(N.S.) 922, 81 Atl. 838, the inference that persons who had undertaken to give an exhibition of fireworks were independent contractors was held to be proper, where the testimony showed that they were uncontrolled as regards the manner of performing the contract, except that the employer fixed the time when, and the place where, the fireworks were to be set off.

In *Coolidge v. State* (1908; Ct. Cl.) 61 Misc. 38, 114 N. Y. Supp. 553, the independence of the contract was predicated upon evidence to the effect that the contractor "had the supervision of his men and the direction and control of the work."

In *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100, testimony that the plaintiff, "in his work, was to be under the direction" of the defendant's superintendent, was held not to rebut the conclusion deducible from the written contract of the parties, viz., that the person employed was not a servant.

In *Muldry v. Fromherz* (1917) 142 La. 1087, 78 So. 126, a finding of fact that the only right reserved was with regard to seeing that the work was done was construed as importing that the contract was an independent one.

In other cases the evidence was considered to be inconsistent with the inference that the person employed was an independent contractor.⁵

From evidence which merely shows that the employer made some sugges-

² See cases cited in § 17, note 10, *infra*.

Where a person entered into an absolute contract with a railway company to draw its cars, and furnished the horses and drivers, and assumed the entire control, it was held that the fact that the company could give directions as to which cars were to be hauled, the stations to which, and the time at which, they were to be hauled, did not disprove the independence of the contract. *Schular v. Hudson River R. Co.* (1862) 38 Barb. (N. Y.) 653.

³ *Echert's Case* (1919) 233 Mass. 577, 124 N. E. 421.

In *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265, reversing (1898) 29 Ont. Rep. 273, the evidence showed that a man whom the defendant city had employed, with his horse and cart, to remove street scrapings, was free from the control and direction of the city, except that he was directed where to load and where to unload. Held, that he was not a servant of the city, so as to render it liable for injuries negligently inflicted by him upon a third person, while he was taking a load to the dumping ground.

Where it has been shown, in an action against A for the negligence of B, that A was working under a contract to haul sand at so much a load from B's lot, a witness cannot be asked by whose orders A left off drawing sand from another lot of B, and whether B could have directed A to stop hauling from the lot in question. Such evidence has no tendency to show that the employer reserved control over the manner of doing the work. *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376, reversing (1881) 10 Mo. App. 61.

⁴ See *Schular v. Hudson River R. Co.* (N. Y.) note 2, *supra*, and cases cited in § 17, note 9, *infra*.

⁵ In *Employers' Indemnity Co. v. Kelly Coal Co.* (1913) 156 Ky. 74, 49 L.R.A.(N.S.) 850, 160 S. W. 914, the facts and the conclusion based upon them were thus stated by the court. "Appellee operated its mines chiefly through one McBrayer, its mine foreman, and through him entered into a

tions regarding the manner in which the work was to be done, it cannot be

inferred that the person employed was a servant.⁶

verbal contract with one Ramsey, whereby it was agreed that Ramsey was to get out coal from a certain part of appellee's mine, and deliver the coal to a sidetrack, and keep up a certain part of the entry, at the price of 70 cents per car. The part of the mine from which Ramsey was to take the coal included the entry and six or eight rooms, and he was to lay his own track, prop the rooms, and remove the slate, and the company was to furnish the cars and mules, and feed them; but the right was reserved to the mine foreman, upon behalf of the company, to see that the work was done according to the rules of the company, and to protect the property of the company, and the work was to be done so as to meet all legal requirements of the company. While Ramsey was to employ his own men and immediately supervise their work, it was all to be done under and within the rules of the company."

In *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866, the evidence held insufficient to show that one Barrett, a subcontractor for the brickwork of a building, was a servant of the defendant, is thus stated: The superintendent of the brickwork testified that it was his duty to oversee the work, including the cleaning and pointing of the walls; that if he saw that Barrett was doing a "streaky job," he would call his attention to it; that he had no authority to make him do it over; that that would be left to the architect, but it would have to be satisfactory before the work would be acceptable; and that if Barrett had replaced brick, or done other extra work of that nature, the superintendent would inspect it, and either accept it or report to the office.

In *Simmons v. John L. Rope Lumber Co.* (1917) 174 N. C. 220, 93 S. E. 736, the inference that a person employed for logging work was a servant was held to be warranted by his testimony that the employer's vice principal "told him where to work, and how to work, and where to put the logs, and so forth."

In *Doharty v. Boyd* [1909] S. C. 87, 46 Scot. L. R. 71, 2 B. W. C. C. 257, the employer testified that the claim-

ant was under his orders as to where to work, and subject to dismissal. Held, that the claimant was not an independent contractor. But it is apprehended that all courts would not regard such evidence as negating the independence of a contract.

The same criticism is also applicable to *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334, where evidence which showed that the duties of the defendant's inspector with regard to the work of laying a sewer pipe were, principally, to lay off the direction of the drain, paying particular attention to its depth and grade, taking the depth every fifth foot, and seeing that the pipe was properly cemented, was held to be inconsistent with the inference that the person employed was an independent contractor.

In *Greene County v. Schertzer* (1920) — Ind. App. —, 127 N. E. 843, the court took the position that testimony to the effect that the person employed "was his own boss" was to be construed with relation to the rest of the testimony, and that, when so construed, it did not necessarily prove that he was an independent contractor.

In *Manton v. H. L. Stevens & Co.* (1915) 170 Iowa, 495, 153 N. W. 87, the fact that the recommendations of the persons employed were followed in every case throughout the construction work which they were supervising, and that at no time did their employers overrule or change those recommendations, was also relied upon as showing that they had the actual control of the method of construction. But the court said: "The question at this point is not so much what the Martins [employers] did do in that regard, as what they had a right to do. It is undisputed that every item of cost, both for labor and material, was incurred under the eye of the Martins. . . . They were free to increase or reduce the cost; to follow the original plans, or to change them. Their right in this respect was not affected by the fact that no friction or difference of opinion arose between them and their architects in the prosecution of the work."

⁶ *Norton v. Day Coal Co.* (1920) — Iowa, —, 180 N. W. 905.

§ 16. Evidence as to the conduct or words of the parties during the progress of the work.

The absence of any testimony warranting the inference that the employer actually exercised control over the work while it was in progress has frequently been adverted to as an element which tended to prove that he had no right to exercise such control, and consequently that the person employed was an independent contractor.¹ Having regard to the circumstances under which work of most of the descriptions discussed in this treatise is ordinarily performed, it may be said that the omission of the party by whom the independence of the contract is denied to offer such testimony must usually be decisive.

Evidence which shows that the employer did, as a matter of fact, interfere with, or give directions concerning, certain particulars of the work, has a material bearing both upon the rights and liabilities of the parties to the contract and upon the enforceability of claims in respect of injuries caused by acts done in the course of the work. Such evidence is susceptible, according to circumstances, of being considered under two different aspects.

(1) It may be regarded as tending to establish the general conclusion that the employer's acts were done in pursuance of a right reserved by him at

the time when the contract was made, or acquired by him with the consent of the contractor after the commencement of the stipulated work, and that he consequently occupied the position of a master with respect to the person employed.² In this point of view the evidence has sometimes been spoken of as being indicative of a "practical construction of the contract in the performance of the work."³ To negative the inference that the person employed was an independent contractor, it is not necessary that the directions actually given should have embraced every detail in the execution of the work.⁴

(2) It may be regarded as tending to establish the particular conclusion, appropriate only to cases in which the injury was a direct result of the employer's interference or orders, that he was a principal tort-feasor, and responsible as such, whatever may have been the nature of the contract as a whole.

The decisions cited in the present subtitle are those which, having regard to the facts involved, and the language used in the opinions, may with reasonable certainty be included in the category of those which illustrate the significance of the evidence in the former of these points of view. But in some instances the theory with reference to which they were rendered is more or less doubtful.

¹ See, for example:

Alabama. — Massey v. Oates (1905) 143 Ala. 248, 39 So. 142.

Arkansas. — St. Louis, I. M. & S. R. Co. v. Yonley (1890) — Ark. —, 13 S. W. 333.

California. — Houghton v. Loma Prieta Lumber Co. (1908) 152 Cal. 574, 93 Pac. 377.

Illinois. — Galatia Coal Co. v. Harris (1904) 116 Ill. App. 70; Boyle v. Weber (1914) 189 Ill. App. 184, 9 N. C. C. A. 351.

New York. — Benedict v. Martin (1862) 36 Barb. 288.

Rhode Island. — Lake v. Bennett (1918) 41 R. I. 154, 103 Atl. 145.

Texas. — Simonton v. Perry (1901) — Tex. Civ. App. —, 62 S. W. 1090.

² By Georgia Civ. Code 1911, § 4415 (3819), it is provided that the employer is liable for the negligence of

a contractor, "if he retains the right to control the time and manner of executing the work."

³ Louisville & N. R. Co. v. Cheatham (1907) 118 Tenn. 160, 100 S. W. 902, citing Powell v. Virginia Constr. Co. (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691, where similar language was used. See also Chicago, R. I. & P. R. Co. v. Bond (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342 (phrase used in opinion of trial judge, quoted by Supreme Court); De Perri v. Motor Haulage Co. (1918) 185 App. Div. 384, 173 N. Y. Supp. 189.

⁴ Sullivan v. Dunham (1898) 35 App. Div. 342, 54 N. Y. Supp. 962, affirmed in (1900) 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923, 7 Am. Neg. Rep. 126.

So far as regards that class of cases in which the claimant is the injured servant of the person whom the defendant alleges to be an independent contractor, it is clear that, apart from the question whether he was entitled by the terms of the contract to exercise control over that person, his liability in respect of the injury may be predicated on the ground of the general principle that, "if an employer in fact assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes upon such a relation attach."⁵

It is manifest that, where the acts relied upon as evidence of the exercise of an actual control over the details of the work were done by an agent of the principal employer, liability cannot be imputed to the latter on account of these acts, unless it appears that the acts were within the scope of the agent's authority.⁶

In a case where the essence of the plaintiff's claim is simply that the person employed was not an independ-

ent contractor, and, in the alternative, that if he was such a contractor, the work which he was called upon to perform under his contract was inherently dangerous to others, so that the independence of the contract did not shield the employer from liability, an instruction embodying the general rule as to the nonliability of an employer for the negligence of an independent contractor is not open to exception on the ground of its failing to state the effect of the employer's interference in the methods of performing the stipulated work.⁷

It should be mentioned that evidence of the description considered in this and the following sections may be adduced, not for the purpose of showing the general character of the contract of employment, but for the purpose of proving that the principal employer had, as a result of his having assumed the immediate control and direction of a particular portion of the stipulated work, become the master *ad hanc vicem* of the servant or servants by whom it was performed.⁸

⁵ *Kansas City, M. & O. R. Co. v. Loosley* (1907) 76 Kan. 103, 90 Pac. 990.

⁶ In *United Gas Improv. Co. v. Larsen* (1910) 105 C. C. A. 486, 182 Fed. 620, where the contract for the reconstruction of a building contained the provision that the work should be done "under the direction of the architects named, acting as counsel" for the principal employer, the court observed: "Had the architects undertaken to direct or control the work, they would have been outside the line of any duty they owed the gas company, and any such unauthorized acts would not make the architects its agents in that respect."

⁷ *Alexander v. R. A. Sherman's Sons Co.* (1912) 86 Conn. 292, 85 Atl. 514. The court said: "It was only necessary to give a charge adapted to the facts and claims in the case. To excuse the defendant from liability under the charge given, the jury must have found that under the contract between the defendant and O'Neil, which was by parol, the latter was employed to do, independently or without subordination to the defendant, the work in question, and

that he was to have the selection and control of the workmen and other agencies employed, and to have control over the whole work, and be responsible to the defendant only for the result. If they found this to be the contract, it excluded the right of the defendant to control the work, and, under the authorities cited above, made O'Neil an independent contractor. In view of the claims made in the case, we think the charge upon this point was sufficient."

⁸ In *McBride v. Jerry Madden Shingle Co.* (1912) 173 Mich. 248, 138 N. W. 1077, the evidence was held insufficient to show that this situation existed.

Evidence that the defendant's representative hired other laborers on a gang besides its foreman, that he had previously discharged and taken back the whole gang, that he refused employment to some men, and that he directed men when to go on and stop work, will warrant a jury in finding that the defendant was the master of the foreman and the laborers on the gang. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 102, 16 N. E. 690.

For a case in which the evidence re-

The actual exercise of control over the person employed has sometimes been regarded as evidence bearing upon the question whether the contract was made in good faith.⁹

§ 17. Same subject; independence of contract predicated.

Both on principle and authority it is clear that the existence of the relationship of master and servant between the employer and person employed is not established by evidence which merely shows that the former exercised over the latter a limited control, similar in kind and degree

to that which is indicated by such oral evidence as that referred to in § 15, *supra*, or to that which is imported by those formal provisions which, as has been shown in §§ 4 *et seq.*, *supra*, may be reserved in a written contract without affecting its independent character.¹

In some of the classes of cases in which the decisions were rendered with reference to this doctrine, the evidence was to the effect that the employer gave such directions as were appropriate for the purpose of insuring its performance in accordance with the terms of the contract.² The

lied upon by a workman who had originally been hired by a subcontractor was held to be sufficient to warrant the inference that, at the time when he was injured, the contractor in chief had assumed control on the work, so as to render him the plaintiff's master, see *Anderson v. Foley Bros.* (1910) 110 Minn. 151, 124 N. W. 987.

⁹*Bokoshe Smokeless Coal Co. v. Morehead* (1912) 34 Okla. 424, 126 Pac. 1033. See § 49, *infra*.

¹In *Clark v. Tall Timber Lumber Co.* (1916) 140 La. Ann. 380, 73 So. 239, a portion of the evidence which was held to establish the independence of the contract was to the effect that the employer had nothing whatever to do with the manner in which the person employed performed the stipulated work of getting out ties, except to see that they were made according to specifications.

²In *Curtis v. Plumptre* (1913; C. A.) W. C. & Ins. Rep. (Eng.) 195, 6 B. W. C. C. 87, *Cozens-Hardy, M. R.*, is stated in one of the reports to have remarked: "A landowner who employs an independent contractor with a gang of men does not exercise control if he goes down to the work, and, seeing some man doing something which he considers injurious, tells him not to do it, or to do it in some other way. That does not amount to an order given by a master to his servant, but is a direction by the landowner to a man employed by the contractor." Considering that the remedial rights of the claimant depended, not upon the mere fact that the direction was given, but upon the character of the direction as an element bearing upon the extent of the controlling powers reserved by the

employer, this language is, to say the least, lacking in precision—so much so that it seems questionable whether the words of the learned judge are correctly stated. According to the other report, the sort of instruction referred to was described by him as a "piece of advice." This is a still more unsatisfactory version, for it is difficult to believe that he could have used such a phrase to characterize a direction which the employer was entitled to give. If he had no right to give the direction, it manifestly had no juristic significance with respect to the nature of the relationship.

In *Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342, the agent of the defendant railway company testified that the contractor was "directed by him what to do," was "under his supervision and control all the time," and "performed his duties in accordance with what the agent directed him to do." The witness also answered in the negative the question, "Did you have anything to do with directing him in detail as to how he performed the terms of his contract?" Held, that the lower court has erred in treating this evidence as proof that the employer had exercised over the work a degree of control which showed that he considered the contractor to be a servant.

In *Cox v. Philadelphia* (1908) 165 Fed. 559, it was held that no such control over the work of building a subway under a street as would render the defendant liable for the negligence of the builder was shown by evidence that the defendant city had an inspector on the ground, watching the progress of the work, and that he

cases cited under this head should be collated with those which involve the effect of written provisions re-

pointed out to the construction company from time to time what he considered to be unsafe places, whereupon the construction company gave the matter such attention as seemed to be needed.

In *United Gas Improv. Co. v. Larsen* (1910) 105 C. C. A. 486, 182 Fed. 620, one of the grounds upon which the liability of the defendant was denied was that "all of the acts which are cited to show such assumption [of control] are attributable to that supervision and inspection which the contract provided the architects should exercise to insure the work being done according to the terms stipulated."

In *Johnson v. Helbing* (1907) 6 Cal. App. 424, 92 Pac. 360, the evidence showed that the defendant was present at the building in question every day; that he watched the progress of all the work, and saw that it was done according to his plans and specifications and contract; but that he did not direct the company's workmen in their work, or interfere with them in any way.

In *Bellamy v. F. A. Ames Co.* (1910) 140 Ky. 98, 130 S. W. 980, where a servant of a contractor for the brick work of a building was injured by the collapse of a wall, the evidence showed that the president and the superintendent of the defendant company were frequently, almost daily, upon or about the building, watching its progress and the character of the work; but they testified that their presence and inspection were due to the fact that the company was having done by its own laborers certain parts of the work, which they were looking after in a general way, and that they were in no case interfering with or directing the work being done by the contractor. Held, that the owner's presence and acts detailed did not, under the circumstances, amount to such an assumption of control as to destroy the independence of the contract, and consequently that the defendant was not liable for the plaintiff's injury.

The fact that a superintendent of the employer "occasionally would visit the work, to ascertain whether the contractor was performing it according to specifications," was held in *Carey v. Baxter* (1909) 201 Mass. 522,

serving the right of supervision. See § 4, *supra*.

In other cases the purport of the

87 N. E. 901, to be insufficient to destroy the independence of the contract.

In *McBride v. Jerry Madden Shingle Co.* (1912) 173 Mich. 248, 138 N. W. 1077, the defendant's superintending agent testified that the contractor himself "had the sole direction" of cutting the lumber in question, and of hauling, and placing it on the ground designated. In answer to the inquiry whether he had any work to do, or instructions from the company with respect to that work, he said: "Why, no more than to go and look around and see how they were getting along." Held, that the control thus exercised did not destroy the independence of the contract.

The fact that a landlord, when employing a plumber to make some repairs, informs him that a tenant on the premises will show him what to do, has no tendency to prove that the defendant reserves the right to direct how the work shall be done. *Burns v. McDonald* (1894) 57 Mo. App. 599.

In *Denny v. Burlington* (1911) 155 N. C. 33, 70 S. E. 1085, 3 N. C. C. A. 922, evidence held to be insufficient to show that the defendant, at any time during the progress of the work, assumed control thereof, or of any part of it, was thus reviewed: "There are to be found, to be sure, expressions from witnesses to the effect that Kueffner, the city engineer, was present now and then when the work was going on; but, when the evidence touching upon this feature of the case is justly and properly considered, it amounts to no more than proof that he was there, in the interest of the city and under instructions from it, for the purpose of seeing that the work was done according to the contract, and not to give any instructions as to how it should be done, or to supervise or control it. He made a suggestion, it is true, as to how some of it should be done, but it was not made while in the exercise of any power or control over those doing the work, and was merely the gratuitous expression of an opinion, which any outsider might have given, and it was entirely optional with Rodden, foreman of Russell & Harris, whether to adopt or accept this advice."

In *Coates v. Chapman* (1900) 195

evidence was that the employer gave, with regard to particular matters, directions similar in character to those which are the subject of the express stipulations discussed in §§ 6 and 7, *supra*. It has been held that the independence of the contract is not negatived by testimony tending to show these facts:

That the employer gave directions concerning the order in which certain portions of the work should be performed.³

That the employer gave the person employed directions with regard to the particular places at which the stipulated work was to be performed.⁴

Pa. 109, 45 *Atl.* 676, it was arranged by a person who had undertaken to build houses on his own property that some portions of the work should be performed by his own servants, and the remainder by contractors. He appointed a general superintendent of the whole work to see that the various contracts were complied with, but no control was exercised by such superintendent over the contractors and their work, except by calling their attention to the requirements of the contract. In an action brought by one of the owner's servants against one of the contractors, to recover for injuries caused by the negligence of a workman in the defendant's employ, it was held that the plaintiff was not a fellow servant of the tort-feasor.

In *Polluck v. Minneapolis & St. L. R. Co.* (1917) 40 *S. D.* 186, 166 *N. W.* 641, the testimony unsuccessfully relied upon as being indicative of independence was that if the workmen of one who had contracted to keep coal chutes on a railroad filled "did not keep the coal shoveled, as he had agreed to do, the railroad company's agent would complain to him that it was not done."

For other cases which sustain the statement in the text, see:

United States. — *Salliotte v. King Bridge Co.* (1903) 65 *L.R.A.* 620, 58 *C. A.* 466, 122 *Fed.* 378, certiorari denied in (1903) 191 *U. S.* 569, 48 *L. ed.* 306, 24 *Sup. Ct. Rep.* 841; *Morning v. Cramp & Co.* (1909) 170 *Fed.* 364.

Alabama. — *Hubbard v. Coffin* (1914) 191 *Ala.* 494, 67 *So.* 697.

California. — *Fay v. German General Benev. Soc.* (1912) 163 *Cal.* 118, 124 *Pac.* 844.

Indiana. — *Marion Show Co. v. Eppley* (1914) 181 *Ind.* 219, 104 *N. E.* 65, *Ann. Cas.* 1916D, 220.

Kentucky. — *Pine Mountain R. Co. v. Finley* (1909) — *Ky.* —, 117 *S. W.* 413; *Louisville & N. R. Co. v. Smith* (1909) 134 *Ky.* 47, 119 *S. W.* 241.

Louisiana. — *Clark v. Tall Timber*

Lumber Co. (1916) 140 *La. Ann.* 380, 73 *So.* 239.

Massachusetts. — *Davis v. John L. Whiting & Son Co.* (1909) 201 *Mass.* 91, 18 *A.L.R.* 782, 87 *N. E.* 199.

Michigan. — *Lenderink v. Rockford* (1904) 135 *Mich.* 531, 98 *N. W.* 4.

New York. — *Lubelsky v. Silverman* (1905) 49 *Misc.* 133, 96 *N. Y. Supp.* 1056; *Freund v. Composite Realty Co.* (1917) 165 *N. Y. Supp.* 951.

Texas. — *Smith v. Humphreyville* (1907) 47 *Tex. Civ. App.* 140, 104 *S. W.* 495.

In *White v. Oliver Hill Fire Brick Co.* (1916) 169 *Ky.* 835, 185 *S. W.* 107, evidence that the employer's superintendent had, once or twice during the progress of the work, made some objection to the manner in which it was being done, was held to be not inconsistent with the supposition that the person employed was an independent contractor. But this statement seems open to criticism if it is to be understood as importing that such a fact has no tendency whatever to prove that the person employed was a servant. That it possesses some relevancy in that regard would seem to be quite clear.

³*STORM v. THOMPSON* (reported herewith) ante, 658.

⁴In *The Satilla* (1916) 148 *C. C. A.* 552, 235 *Fed.* 58, affirming (1915) 221 *Fed.* 949, the president of the stevedoring company for whose negligence, resulting in injury to one of its servants, it was sought to hold the ship in question responsible, testified that the superintendent of the shipowner gave him orders when he wanted the cargo; how quickly he wanted the ship discharged or loaded; when the ship had got to go; if he wanted the company to work nights or days; and where he wanted the cargo. The contention that, under the circumstances thus stated, the stevedoring company was a servant, was rejected. The remarks of the lower court with respect to this part of the evidence were as follows:

"It does not alter the case to say that those in control of the ship pointed out in a general way the work to be done by the contractors. The direction given by the ship people was merely to indicate the work to be done and where the load was to be stored. In no other sense did they control the contractors, for neither the contractors, nor the men who tied the rails together, nor the winchmen, were subject to the general orders of the agents of the ship."

In *See v. Leidecker* (1913) 152 Ky. 724, 154 S. W. 10, the owner of a wagon and team, who contracted for a specified sum to transport a boiler from a railroad station, the exact place of delivery to be designated by contractee, was held to be an independent contractor, although, at the time when the boiler was being unloaded, he followed directions given by the employer with the view of securing that it should be deposited at a particular place and set in a particular way. That the ruling of the court in this regard was entirely correct cannot be disputed, for it was in accord with the authorities as a whole; if there was no more in the case than this, no exception could be taken to the decision. But the report states that for the purpose of holding the boiler, or as a means for pulling it off the wagon, Leidecker directed See to put a chain round the boiler, and for the purpose of connecting it he told See "to pass the chain under the boiler and hand it up on the other side." It seems clear that, in this state of the evidence, the only possible conclusion is that Leidecker was directing See "how to do" this portion of the work, or, in other words, controlling the means by which it was performed. If so, the relationship of master and servant was created *ad hanc vicem*, and for the injury in suit, which was caused by the boiler's toppling over onto See while he was carrying the chain under it, Leidecker might properly have been held answerable, if the evidence was such as to warrant the inference that he had failed to fulfil a master's obligation with regard to the maintenance of a safe place of work. As this aspect of the case was not brought to the attention of the court, the decision was, to say the least, unsatisfactory, as ignoring a ground upon which See's right of recovery might possibly have been predicated.

In *Vogemann v. American Dock & Trust Co.* (1909) 131 App. Div. 216, 115 N. Y. Supp. 741, affirmed in (1910) 198 N. Y. 586, 92 N. E. 1105, the owners of certain goods, which were thrown into the water owing to the collapse of the defendant's pier while the steamship of which the plaintiffs were charterers was being discharged by stevedores, recovered judgments against the plaintiffs. In an action brought to recover the amount of those judgments, together with the reasonable expenses incurred in the litigation, the plaintiffs alleged that the damage was caused, in part, by the negligence of the stevedores in improperly loading the cargo upon the pier. The evidence which was held to have warranted the jury in finding that these stevedores were independent contractors, and upon which, in the opinion of the court, the trial judge might well have ruled that this was their relationship to the defendants, was to the effect that they were regularly employed by the plaintiffs for unloading cargoes and were paid a regular contract price by the ton, with extra charge for tiering above the ordinary height, and that the work was done by their own men, under the supervision of a foreman employed by them. Under such circumstances, the mere fact that the plaintiffs' tally clerk was present to keep track of the work, or that he gave directions where to put the cargo, or for extra tiering, did not change the case. The plaintiffs were concerned only with the result, not with the means or methods employed by the stevedores to attain it.

In *Giaconi v. Astoria* (1911) 60 Or. 12, 37 L.R.A. (N.S.) 1150, 113 Pac. 855, 118 Pac. 180, the court laid stress upon the absence of any evidence showing that any direction was given by defendant's officers or agents respecting the performance of the work, except that the contractor was required to place a box flume in the fill to be constructed—a duty imposed upon him by a resolution of the city council—whenever necessity demanded a drain.

In *Southwestern Teleg. & Teleph. Co. v. Paris* (1905) 39 Tex. Civ. App. 424, 87 S. W. 724, where the agent in charge of a building occupied by a telephone company indicated the particular rooms in which the work of one who had undertaken to paper the

That the employer's engineer gave the levels necessary for the execution of grading work.^{4a}

That the employer gave certain

entire building should be carried on at certain times, it was observed that these directions were for the purpose of preventing, as far as practicable, an interference with the operation of the telephones. Commenting upon the testimony of the person employed that the work "was not done as he would have done it, had he been left to himself," the court said: "Whether this applies to the method and manner of putting on the paper and paint, or to the moving around from room to room at the suggestion of McDuffie, is not shown. If he intended it should apply to the method and manner of putting on the paper and paint, then he failed to specify or detail wherein McDuffie was superintending."

In *Texas Traction Co. v. George* (1912) — *Tex. Civ. App.* —, 149 S. W. 438, where the plaintiff's decedent was killed while assisting in the work of installing a transformer and of making the framework connections, in a traction company's substation, the court refused to ascribe any weight to the fact that the officers of the company directed where the transformer should be located in the building, and that the framework to be constructed and installed by the contractor should conform in size and color to the framework belonging to the company, which had been already erected in the substation.

In *Dayton v. Free* (1914) 46 *Utah*, 277, 148 *Pac.* 408, the court assumed that the independence of a contract for the construction of a tunnel was not destroyed by the fact that the employer's engineer furnished the course and grade of the tunnel, designated the places requiring timbering, and the places where the track and pipe were to be laid, and, at places, required the widening of the tunnel and the performance of extra work to support the roof of the tunnel with reinforced concrete.

In *Lawton v. Morgan, Flidner & Boyce* (1913) 66 *Or.* 292, 131 *Pac.* 314, 134 *Pac.* 1037, evidence which showed that a contractor's foreman directed a subcontractor concerning the places where piles should be driven, and indicated where it was necessary to

instructions with regard to the dimensions of a portion of a structure.⁵

That the employer specified the places at which certain materials were to be placed.⁶

place one pile on top of another, in order to force them to the depths necessary to insure an adequate support for the foundation to be laid upon them, was held not to disprove the independent status of the subcontractor.

In *Farmer v. St. Croix Power Co.* (1903) 117 *Wis.* 76, 98 *Am. St. Rep.* 914, 93 *N. W.* 830, the court observed: "Obviously the mere fact that employees of a person having a distinct portion of contract work to do take directions to some extent, as the work proceeds, from the principal contractor, does not change the status of their employer from that of a subcontractor to that of an employee of the principal contractor. The circumstances in regard to who directed the teamsters where to unload material from their wagons has nothing to do with the question of whether their employer was an employee or a subcontractor. That must be determined by the nature of his contract itself."

^{4a} In *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 *Pa.* 361, 43 *Atl.* 215, 6 *Am. Neg. Rep.* 383, one Stark, who had undertaken to grade the defendant's railroad, testified that all the authority possessed by the defendant's engineer was to put in the grade stakes and say to him. "These are your grade stakes." Held, that the witness meant by this answer that the work to be supervised by the engineer was the manner of its completion, not the manner of its execution. This view as to import of the evidence was corroborated by the testimony of the defendant's chief engineer that the company did not reserve any right or power to control the performance—only that Stark "was to grade the track and lay the rails, subject to his approval in every respect."

⁵ *Connolly v. Industrial Acci. Commission* (1916) 173 *Cal.* 405, 160 *Pac.* 239; *Arkansas Land & Lumber Co. v. Secrist* (1915) 118 *Ark.* 561, 177 *S. W.* 37 (length specified for posts which had to be adapted to the level of the top of a foundation wall built by employer for the house erected by the contractor).

⁶ In *Swansea Lease v. Molloy* (1919)

That the employer superintended the adjustment or arrangement of portions of a structure.⁷

That the employer gave orders that stronger materials should be used for a certain portion of a structure.⁸

That the employer specified the

20 Ariz. 531, 183 Pac. 740, it was held that the existence of the relation of master and servant was not shown by evidence to the effect that after men employed to perform mining work had been for some time dumping the waste rock and material in a circular form around the collar of the shaft on which they were working, the employer's superintendent instructed them to dump it at another place.

⁷In *Stanley v. Aurora, E. & C. R. Co.* (1911) 166 Ill. App. 132, the evidence introduced by plaintiff tended to show that defendant's engineer, J., was present nearly every day during the erection of the bridge in question; that upon one occasion, when it had been set up so that one end was lower than the other, J. told the workmen that they had better block it up, or the bridge would slide off; that upon other occasions he told them to keep the bridge square and to put the beams in; that he noticed the rivets to see if they were bolted up thoroughly; and that when the plaintiff was engaged in taking the ends off a couple of bolts, J. told him "not to take the nuts clear off, or the end of the crossbeam would drop down." Held, that there was nothing in what was said and done by J. that substantially supported the averment in the declaration that the plaintiff was the servant of the defendant.

In *Klages v. Gillette-Herzog Mfg. Co.* (1902) 86 Minn. 458, 90 N. W. 1116, 12 Am. Neg. Rep. 488, one of the facts in evidence was that the employer had superintended the work of putting into place certain plates which formed part of the structural iron to which the contract had relation.

⁸*Wood v. Watertown* (1890) 58 Hun, 298, 11 N. Y. Supp. 864.

⁹*Bray v. Kirkpatrick* [1919; Ir. C. A.] W. C. & Ins. Rep. 151; *Pace v. Appanoose County* (1918) 184 Iowa, 498, 168 N. W. 916, 17 N. C. C. A. 682; *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513, affirmed in (1897) 168 Ill. 514, 48 N. E. 163; *Cohen v. Western Electric Co.* (1906; App.

destinations to which articles were to be conveyed by a person employed for transportation work.⁹

That the employer's foreman directed the person employed and his driver, with regard to the particular materials which were to be hauled under the contract in question.¹⁰

T.) 50 Misc. 660, 99 N. Y. Supp. 525; *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835 (taking of sand and gravel).

The fact that the owner of a store points out the goods to be carted, and their destination, to a man in the employ of a cartage company which is under contract to do all the cartage of the former at a specified price, does not show that the owner of the store exercised control over the manner in which the goods were to be transferred to the trucks, or over the route by which they were to be taken to their destination. *Riedel v. Moran, Fitzsimons Co.* (1894) 103 Mich. 262, 61 N. W. 509.

In *Moore v. Stainton* (1903) 80 App. Div. 295, 80 N. Y. Supp. 244, affirmed on opinion below in (1904) 177 N. Y. 581, 69 N. E. 1127, where Stainton, a truckman, was held to be an independent contractor, a portion of the evidence consisted of the testimony of a member of the employing firm to the effect that Stainton had to do the stipulated work, "not only to our satisfaction, but according to our direction;" but he also stated: "We do not give any directions whatever to Mr. Stainton, except to hand him the written delivery order for the goods."

In *Reer v. Babcock* (1920) 230 N. Y. 106, 129 N. E. 224, reversing (1919) 187 App. Div. 925, 174 N. Y. Supp. 914, a portion of the evidence on which the court based its ruling that a truckman was not a servant was thus stated: "The practice was to deliver to a truckman a slip indicating the place of delivery after the coal had been weighed, but no directions were given as to the route to be traversed to make a delivery; neither did Babcock & Company have or exercise jurisdiction over them after they left the yard."

¹⁰*Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721; *Flickenger v. Industrial Acci. Commission* (1919) 181 Cal. 425, 19 A.L.R. 1150, 184 Pac. 851.

That the employer designated certain materials for use in a structure.¹¹

That the employer specified a particular portion of his property as being excepted from the operation of the contract.¹²

That the employer directed the person employed to give special attention to one particular portion of the work.¹³

That the employer or his agent gave directions concerning the mate-

rials to be used in an article which the person employed had undertaken to manufacture.¹⁴

That the employer's agent gave directions with regard to the time at which the work was to be performed.¹⁵

That the operation of construction trains used by a contractor for the purposes of his work was regulated to some extent by the railroad company.¹⁶

¹¹ In *Mobley v. J. S. Rogers Co.* (1918) 68 Ind. App. 308, 119 N. E. 477, the court said that the marking of the stones to be set in a building was "simply an indication of the place where the cutting had to be done, in order that they might conform to the specifications and fit in the proper places."

¹² *Scales v. First State Bank* (1918) 88 Or. 490, 172 Pac. 499 (trees marked to be left on tract where timber was to be cut).

¹³ *Litts v. Risley Lumber Co.* (1918) 224 N. Y. 321, 19 A.L.R. 1147, 120 N. E. 730 (painter directed to scrape off and paint well the rusty spots on a smokestack).

¹⁴ *Kelleher v. Schmitt & H. Mfg. Co.* (1904) 122 Iowa, 635, 98 N. W. 482 (filling of mattresses).

¹⁵ In *St. Louis & S. F. R. Co. v. Madden* (1908) 77 Kan. 80, 17 L.R.A. (N.S.) 788, 93 Pac. 586, where the plaintiff's property was injured by a fire which escaped from a railroad company's right of way, on which a man had contracted to burn a fire guard, the evidence which was relied upon for the purpose of affecting the railroad company with liability, and which was held insufficient, was that the fire escaped from the control of the contractor by reason of the high wind, and that but for the order and direction of the company's foreman, given two days previously, the fire would not have been set out on the day selected. The court reasoned thus: "It is not reasonable to presume that, when the foreman directed Gregory to begin the work on the following Monday, it was the intention thereby to deprive him of the use of all discretion in the matter, or that the order meant that he should begin the work on that day, regardless of wind and weather." The present writer ventures to express the opinion that the decision in this case was erroneous, as having been referred to an

improper theory regarding the effect of the evidence. It is submitted that the questions which the evidence indicated to be controlling were: (1) Whether the order given by the foreman was one which the defendant was authorized to give by the specific terms of the contract as originally entered into; (2) whether, if the order was not so authorized, the contractor was warranted, on other grounds, in treating it as one which he was bound to obey; (3) whether the injury complained of was occasioned by acts done in compliance with the order. Supposing the first and third of these questions, or the second and third, to be answered in the affirmative, it seems clear that the injury would have been simply one which was occasioned by obedience to instructions which the contractor was obliged to follow, and that the precise nature of the relationship created by the contract would be an entirely immaterial element. In this point of view, the motion upon which the decision is largely based, viz., that the contractor had a discretion in respect of obeying the order, became, even if conceded to be correct, quite irrelevant. The only question, so far as a third person, like the plaintiff, was concerned, would be whether the fire which caused the damage was kindled in pursuance of instructions given by an agent of the company, within the scope of his powers.

¹⁶ In *Kansas City, M. & O. R. Co. v. Loosley* (1907) 76 Kan. 103, 90 Pac. 990, where it was sought to hold a railway company liable for an injury caused by the negligent operation of a construction train, a portion of the evidence was thus discussed: "It may be conceded that the superintendent of the railway company made statements which, if taken literally, might indicate that he had complete dominion over every movement of the construction company's trains and every detail

That the employer's foreman gave directions which amounted to specifying the size of the charge to be used in blasting.¹⁷

of their work at Carmen, and the plaintiff had the right to go to the jury upon them. But a fair inference from his testimony as a whole is that the construction company's trains were under his jurisdiction, and subject to the time cards, rules, and regulations of the railroad company, merely to the extent necessary to prevent conflict and confusion from the joint use by the two companies of the same tracks and yards; that the railroad company was not doing the work of the construction company in any sense; that it was not, *pro tanto*, building its own road; that all the details in the prosecution of that work were left to the full discretion of the construction company; that the superintendent could not say when a train should take out material, or when it should return to the material yards, or prohibit it from going or returning, or say how it should be handled, or who should handle it, and so generally, respecting the manner and means of carrying out the construction company's contract; and the defendant had the right to go to the jury upon this theory. If the jury had taken this view, they might have found that the railway company had 'control' over the plaintiff's train in the sense that it was on a track turned over under the contract, that it was subject to the railway company's time cards, rules, and regulations, and that it was under the jurisdiction of the railway company's superintendent, and yet they rightfully might have returned a verdict for the defendant."

In *Louisville & N. R. Co. v. Smith* (1909) 134 Ky. 47, 119 S. W. 241, it was held that the independence of a contract for the construction of a railroad culvert was not negated by the fact that, while the work was in progress, the railroad company kept a man upon the ground whose function was to see that the track was kept safe for the passage of trains.

¹⁷*Louisville & N. R. Co. v. Newland* (1917) 176 Ky. 166, 195 S. W. 415. The court reasoned thus: "While it is true that plaintiff and his nephew say that plaintiff was subject to the directions of Applegate, who told him exactly how to do the work, yet, when

That a person employed to deliver newspapers was instructed not to exceed the legal limit of speed.¹⁸

(It should be pointed out that, in

asked to tell what these directions were, plaintiff said that Applegate told him 'to put in so many sticks of dynamite for the first spring, and so many for the second, and so many for the third, and so on,' and then 'to shoot them,' and his nephew said: 'He (Applegate) told us how many to put in, as I have stated before, and if he seen we wasn't doing it according to the way that he wanted it done, that he had the right and the authority to stop us.' . . . The purpose of the work was to change the physical condition of the fill, so as to prevent it from slipping. Hence the mere firing of the shots was not the object sought by the company, but the blasting of the holes with charges of dynamite sufficient to prove effective for the purpose intended. Every contract reserves to the employer the right to see that the contract is performed according to the specifications. . . . Here the directions with reference to the particular 'springs,' and the amount of dynamite to be used in each 'spring,' were mere specifications intended to accomplish a particular result, and the fact that the company reserved the right to end the contract if the work was not done according to the specifications does not tend to show that it reserved any control over plaintiff as to the manner of doing the work. The only control reserved was the right to demand that the plaintiff should fire only such blasts as were prepared in accordance with the directions which constituted a part of the contract. Upon this showing the court concludes that the evidence tending to show that plaintiff was a servant of the defendant was insufficient to take the case to the jury, and that the trial court should have held, as a matter of law, that he was an independent contractor." This decision deals with conditions which lie very close to the border line between "details" and "results," and, if correct,—a point which certainly seems to be arguable,—illustrates the extreme difficulty of differentiating, under some states of facts, between those categories.

¹⁸*Gall v. Detroit Journal Co.* (1916) 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 38.

some cases, the right of the claimant to recover on the ground of acts and words betokening the exercise of a limited measure of control has been denied, not with reference to their bearing upon the nature of the relationship between the employer and the contractor himself, but with reference to their bearing upon the nature of the relationship between the employer and the contractor's servants);¹⁹

¹⁹ In *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322, the plaintiff, a passenger on a street car, was injured as a result of its collision with a wagon driven by a man whose immediate employers were K. & D., a firm engaged in the stone business on their own account, and also in the business of teaming for others. At the time of the accident the wagon was conveying a load of bricks for the defendant brick company, with which the firm had made an oral contract to do a portion of the teaming on the terms that they were to be paid a certain price per load according to the distance it was hauled. Other circumstances adverted to by the court, as having a bearing upon the nature of the relationship created by the contract, were the following: The wagons and horses were kept at defendant's yards in sheds belonging to it, but they were maintained by K. & D., and were in charge of their employees. One H. was shipping clerk and yardman for the defendant at the yards from which the load in question was sent out. If K. & D. desired to use their horses and wagons in their own business, they communicated with H. to find out whether he could spare any of their teams, because, under the contract with the defendant, it was to have the preference in use of the teams to do its hauling before K. & D. could use them for others, or in their stone business. The drivers were employed and paid by K. & D. with their money, the evidence warranting the conclusion that, on the occasions when the money was handed to the men by H., and the money furnished by the defendant, this was done as a matter of accommodation for K. & D. It was deemed to have been established by a clear preponderance of the evidence that H. had no power to hire or discharge the teamsters; that he had no control over their actions further than to direct them when to haul brick, how

§ 18. Same subject; independence of contract negatived.

Facts which have been treated as inconsistent with the inference that the person employed was an independent contractor are the following:

(1) That the employer gave directions with regard to the manner in which various portions of the work were to be performed.¹ A comparison between the cases collected in the

they should load it, and where it should be delivered; and that he did not direct their teamsters as to the way they should go, or in any way as to how they should drive the teams. A verdict for the plaintiff was set aside and a new trial ordered.

In *Jahn v. W. H. McKnight & Co.* (1904) 117 Ky. 655, 78 S. W. 862, it was held that a driver regularly in the employ of a firm of truckmen engaged by the defendant to deliver packages, was not their servant, where they had no right to direct him, except to the extent of seeing that the packages were delivered to the proper addresses.

¹ In *McNally v. Fitzgerald* (1914) 48 Ir. L. T. 4, a claimant under the Workmen's Compensation Act was a plumber who had been called in to effect some repairs in a hotel, the materials for the job being supplied by the proprietor. Holmes, L. J., said: "I think, as a rule, when you send for a plumber to do work, he comes to do it as a contractor, because it is a business the ordinary man does not know much about, and it is left in the plumber's hands; he supplies all the materials necessary, and does the work on that basis, and he is usually paid for the whole work when finished. Here a man, having to a certain extent found out what was wrong, sent for a plumber carrying on business in a small country town; he gave directions to remove the obstruction, pointing out where it was located. He came back from time to time to see how the work was going on, and a servant of his held a candle for the plumber. In addition to this, there is positive evidence that the owner of the hotel was not an ordinary employer; he was a man anxious to give a great deal of assistance; a man who understood a great deal about the business; and that he was not only present, but gave directions which would not be given to an independent contractor." All the members of the court expressed doubts

as to the correctness of the decision of the county court judge, awarding compensation, but were of opinion that there was sufficient evidence to support it.

In *Sacchi v. Bayside Lumber Co.* (1910) 13 Cal. App. 72, 108 Pac. 885, where plaintiff's land was inundated by the water of a river in which an obstruction was created by logging and quarrying operations, the contention that the persons performing the work were independent contractors was rejected on the ground that while they were, under their contracts, "to receive specific compensation . . . not in the nature of wages, each, nevertheless, prosecuted his work in conformity with the general directions of the defendant."

In *Connell v. Harris* (1913) 23 Cal. App. 537, 138 Pac. 949, where the plaintiff's automobile came into collision with the rear end of a wagon loaded with timber upon which no light was displayed, the evidence showed that the driver was a teamster, who had contracted with the defendant to haul the timber to another city for \$6; that, as the wagon of the teamster himself was too small to carry the timbers, a larger one belonging to the defendant was used, and drawn by the teamster's horses; that the defendant showed the teamster the way to the yards where the timbers were, helped to load them, and rode with him for some distance, and personally procured a white light after nightfall, and assisted to place it on the wagon. Held, that the evidence indicated the retention by the defendant of a sufficient degree of control over the manner of performing the work to destroy the independence of the contract.

In *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288, the fact that the driver of a baker's wagon was not directed by his employer as to where he should go, or as to whom he should sell bread, was held to have some tendency to show that he was not a servant.

In *Aisenberg v. C. F. Adams Co.* (1920) 95 Conn. 419, 111 Atl. 591, where a salesman was held to be an "employee" entitled to claim under a Workmen's Compensation Act, the circumstance that the employee "made the terms of all sales" was stated to be a "very important feature of control."

In *Mumby v. Bowden* (1889) 25 Fla.

455, 6 So. 453, where the goods of the tenants of a building were injured through the negligent manner in which an employee of the landlord had repaired a gutter over a party wall, the evidence relied upon as showing that the employee was under the control of the defendant, and therefore, in "legal contemplation," his servant, comprised the following facts: That the job was a light one; that the defendant had not surrendered the premises while the work was being done; that he had instructed the employee not to do the work when rain was threatened; and that he had ordered the employee to "go ahead" when the latter explained what he thought best to be done.

In *St. Johns & H. R. Co. v. Shalley* (1894) 33 Fla. 397, 14 So. 890 (fire negligently started damaged property of adjoining landowner), the court thus commented on the evidence which, in its opinion, negatived the contention of the defendant that the laborers whose carelessness produced the injury were independent contractors: "The proof shows that these graders were employed directly by the railroad company, and were paid by the company at the rate of so much per cubic yard of earth removed, and an agreed price for all stumps removed. The graders were common laborers, and the defendant company seems to have been carrying on the general work of constructing its road within itself, and not, as is often customary, through the instrumentality of an independent contractor for the various branches of its work. Its witness, C. R. Knight, who was its engineer, as he says, 'in charge' of the extension of the road to Palatka, undertakes in his evidence to represent these graders as being independent contractors; but he testified that their work was staked out for them by the engineer in sections, and the 'yardage' computed, and that then a 'foreman' let out the sections to those who applied for the grading of them; and that the next duty of the foreman was to accept or reject the work upon its completion, and, in case of doubt as to whether the work was well done, he called on the engineer for the levels necessary to determine the doubt as to whether the grader had 'properly and faithfully, and in accordance with his contract, done his work.' He testified further that the foreman had the right to take the work away from them

when, for any cause, they neglected to perform it within a reasonable time, and to relet any uncompleted portion, paying pro rata for the part performed; and that whenever the foreman's attention was called to any specific violation of the 'contract,' he had the right to annul the contract or to compel the grader to do the work as he had contracted to do it; and that the foreman pointed out to the grader the 'amount and nature' of the work, directing him as to the width and height of the embankment, and where the earth was to be taken from, etc., etc. In other words, what this witness termed the 'stipulations of the contract' with the graders were evidently nothing more than directions from the foreman and engineer to the graders as to the mode and manner of doing their work, and if it was not done in accordance with those directions, the grader was forced to comply with them, or else be dismissed without pay for the uncompleted or imperfect work. Under these circumstances we think these graders, instead of being independent contractors in the sense that would relieve the employer company from responsibility for their negligence, are sunk to the level of ordinary laboring servants to the company, which was their master, and that the company was properly held to be liable for the damage resulting from their negligence in the performance of the work they were put by the company to perform for its use and benefit."

In *International Agri. Corp. v. Suber* (1919) 24 Ga. App. 445, 101 S. E. 300, where the plaintiff's minor son was injured as a result of the breaking of a rope which supported a scaffold used by the immediate employer of the injured person for the purpose of performing a contract made for the painting of the defendant's building, a verdict for the plaintiff was sustained on the ground that the defendant's vice principal not only interfered with the manner in which the independent contractor and his employees were painting the building—prohibiting them from hanging the hooks on the roof of the building—but went further, and directed where and how the hooks should be hung, and furnished them with a rope with which to hang the scaffold as directed by him. The right of action was affirmed with reference both to common-law principles and to the Civil Code 1910, § 4415, subsec. 5, 20 A.L.R.—47.

which provides that the employer is liable for the negligence of the contractor, if he "interferes and assumes control so as to create the relation of master and servant, or so that an injury results which is traceable to his interference."

In *Louisville & N. R. Co. v. Tow* (1901) 23 Ky. L. Rep. 408, 66 L.R.A. 941, 63 S. W. 27, where the plaintiff, while seeking employment, was injured by a blast set off without warning by the workmen of a contractor engaged to construct a railroad tunnel, a verdict negating the independence of the contract, and finding the railroad company liable, was held to be warranted by evidence to the effect that the railroad company's section men were assisting in the manual labor; that an employee of the company was showing the way in which the blasting should be done; that the engine which hauled the cars used for the work belonged to the company; and that various employees of the company were aiding in the control and management of the work generally.

In *Ballard & B. Co. v. Lee* (1908) 131 Ky. 412, 115 S. W. 732, it was held that the question whether the defendant company was liable for the death of a servant of a contractor employed by it should have been submitted to the jury, where the evidence introduced by the plaintiff's administrator tended to show that the defendant's superintendent of the work was frequently about the place where it was going on; that sometimes, in the absence of the contractor, he would not only tell the laborers what to do, but how to do it, directing them as to the manner of doing the work right, and correcting them when wrong; that he kept an account of the wages due to the contractor as well as the laborers, and looked after the payments; and that he also exercised a general superintendence over the contractor.

In *Moffet v. Koch* (1901) 106 La. 371, 31 So. 40, the evidence showed that the defendant had contracted to erect a brewery, and that he let out to one W. the contract for general work, including the hoisting into position of the iron required in the building; that W. employed and discharged his own mechanics and laborers; and that the defendant communicated with him, and not with the men employed by him. The court remarked that there was, upon the one hand,

an uncertainty as to the precise limitations of the contract, and, upon the other, a certainty that the defendant was continually on hand, and in control, even though his directions as to how the work should be done were given to W. The conclusion arrived at, therefore, was that W. was not an independent contractor in such a sense as to relieve the defendant of liability for his conduct in the prosecution of that work.

In *Keyes v. Second Baptist Church* (1904) 99 Me. 308, 59 Atl. 446, 17 Am. Neg. Rep. 526, the evidence which was held to show that one Nelson who had contracted to make certain alterations in a church building was a servant was thus stated by the court: The defendants "not only reserved the right of access, but exercised it. They furnished an architect. The committee was in daily attendance. The plans were not made in advance, 'not settled at any one time, but grew as time and the work went on,' as the chairman of the committee testified. He further says that he frequently consulted about the work with Mr. Nelson, and that they 'frequently brought the architect in to settle questions which we could not, such as how the work should be accomplished,—and that he had authority to control Mr. Nelson.' We need not quote further. The evidence, taken in connection with the written contract of Nelson, conclusively shows that Nelson, instead of 'not acting,' did act, under the direction and control of his employers, and did not determine for himself in what manner the work should be done. He was compelled to so act if he worked at all, and did so act. We are unable to see any reason why, at any time if they so desired, the defendants could not have discharged Nelson and all his men, without subjecting themselves to any liability whatever for breach of contract. Nelson was not an independent contractor, and the ruling of the presiding justice must stand."

In *Hanrahan v. Baltimore* (1911) 114 Md. 517, 80 Atl. 312, the liability of the defendant was inferred from certain undisputed evidence (not reported) that the contractors were under the supervision of the city, and that the division sewer engineer was in control of the work.

In *Christianson v. Lannin* (1913) 215 Mass. 322, 102 N. E. 419, where a covered pipe in which a watercourse crossed the plaintiff's land was ob-

structed, while the defendant's land, near which the pipe opened, was being graded by one M., the plaintiff's right to retain a verdict for the damage occasioned to his property by the overflow resulting from the obstruction was affirmed, upon evidence which tended to show that the defendant made a contract with M. to "do all rough grading as directed;" that M., although he let the grading to a subcontractor, caused the work to be done as the defendant directed; that the level of the surface of the earth at the rear of the lot, near the opening of the watercourse, was raised about 3½ feet; and that M. pointed out to the defendant the opening of the pipe, and said he had put some sticks and stones there, whereupon the defendant told him to leave it where it was. Such evidence, it was held, would justify a finding that the defendant "retained an active directory control over the manner in which the grading and filling were done."

In *Ripley v. Priest* (1912) 169 Mich. 383, 135 N. W. 258, the action was brought to recover for injuries occasioned to plaintiff's property by a fire which escaped from defendant's land, owing to the negligence of men employed under a written contract to clear it for a certain sum per acre. After remarking that, if the defendant had left the conduct of the work to these men, his liability, if it existed, would rest upon grounds which it was not necessary to consider, continued thus: "The plaintiff, however, gave testimony tending to show that defendant undertook to control and direct the method of burning. He testified that back-firing was done to minimize the danger of escape, upon the suggestion of defendant, and that defendant told him 'that he had his hired men in there, but he could not depend on them, and wanted me to look after it.' A fire set sometime in August had escaped control, and had with great difficulty and labor been extinguished. Plaintiff had assisted in this work, and defendant had paid him for it. . . . Under the facts disclosed by the evidence in this case, we are of opinion that the learned circuit judge properly submitted to the jury the question whether the defendant, with the consent of Hook and Still, directed them how they should perform their work the same as though they were servants. If the master controls the manner of performance of

the acts of which complaint is made, or even reserves the right to supervise or control, he is liable for the negligent performance of those acts." The phrase, "even reserves the right to supervise or control," is somewhat oddly worded, considering that such reservation is the recognized indicium of the relationship of master and servant.

The fact that "at least some supervision was exercised" by the employer's agents was one of the evidential elements adverted to in *Brown v. Douglas Lumber Co.* (1910) 113 Minn. 67, 129 N. W. 161. This language is somewhat wanting in precision. Presumably the "supervision" which the court had in mind amounted to a control over the details of the work, and not merely to a general supervision exercised for the purpose of insuring that its results should be in conformity with the provisions of the contract.

The inference that a man employed to make an excavation for a cellar, at a specified price per diem and commissions on the outlay, was a contractor and not a servant, cannot properly be drawn, where the evidence of the employer himself shows that he was exercising control over him in respect to the manner in which the earth should be removed, so as to secure the safety of a house on the adjacent lot. *Mound City Paint & Color Co. v. Conlon* (1887) 92 Mo. 221, 4 S. W. 922, 16 Am. Neg. Cas. 435.

In *Porter v. Withers Estate Co.* (1919) 201 Mo. App. 27, 210 S. W. 109, the plaintiff testified that one Goodwin, the defendant's agent, was on the work, and that "he would give directions what to do, and what colors to use, and where to paint," and that he would direct Batty, the plaintiff's immediate employer, with a suggestion "about how high up we were painting this border," and that he directed Batty what to do, "how to paint it, and so on." The evidence also showed that defendant was interfering in the work, to the extent of dictating the kind of men that should be employed. Held, that these facts were inconsistent with the theory that defendant was looking only to the result of the work.

In *Jensen v. Barbour* (1895) 15 Mont. 582, 39 Pac. 906, where it was held that a person who had made with the owner of a street car line a contract, under which, for a specified amount per month, he was to haul a

car over the line once a day each way, and to furnish a driver, was a servant of the owner, and not an independent contractor, one of the grounds on which the decision was based was that the reservation of a power of control was indicated by the fact that the defendant's agent was accustomed to give directions for the protection of property, and to warn the driver not to allow boys to ride on the car.

In *De Sandro v. Missoula Light & Water Co.* (1915) 48 Mont. 226, 136 Pac. 711, evidence held to be competent as bearing upon the question of the extent to which the defendant retained control of the work was to the effect that W., the defendant's general foreman, gave some orders to O., the foreman in charge of the stipulated work, concerning the completion of the particular portion of it on which the plaintiff was engaged on the day before he was injured, and that W. also directed O. to keep the crew working at the same place on the following day.

In *Paro v. Whitefield Sav. Bank & T. Co.* (1914) 77 N. H. 394, 92 Atl. 331, where plaintiff came into collision with a piece of timber left upon the sidewalk in front of defendant's bank by the workmen of one Smith, who had contracted to cement the cellar floor, on a basis of payment for all labor and supplies at cost price, with 10 per cent added, a nonsuit was held erroneous for the reason that, upon the evidence, it could be found that the bank did not relinquish the control of the premises to Smith, and that his contract was merely to furnish such material and workmen as the bank should, from time to time, require in the progress of the repair and improvement then contemplated, or decide upon in the course of the work. The court said: "There was evidence that Page (treasurer), for the bank, gave directions in the course of the work to Smith and the workmen; the plan prepared before the work was begun was not adhered to; it could be found that the cement was brought upon the premises for work not contemplated when Smith was employed. There was no evidence that Smith objected to the changes made as the work progressed, or to the interference of Page, or understood he had any right to object. From these facts it could be inferred Smith was not employed to produce a certain result, with control

over the details of the work, but was employed to oversee the making of such changes as the defendants from time to time should direct, securing for them such of the necessary labor and material as the defendants did not otherwise provide; in short, that he was the defendants' servant. . . . Aside from the direct testimony of Smith that everything was done under the supervision of Page, the treasurer of the bank,—that 'he was the boss,'—there was other evidence tending to the same conclusion. It is unnecessary to recite it. If Smith is believed, the bank not only retained the right of control as to the details of the work, but exercised such control."

In *Hart v. Ryan* (1889) 3 *Silv. Sup. Ct.* 415, 6 *N. Y. Supp.* 921 (removal of lateral support damaged a building), it was held that the trial judge properly refused to hold upon the evidence that the defendants, the principal contractors for the erection of a building, were not liable by reason of their arrangement with one K. as to the excavations, the evidence being to this effect: That K. was to be paid by the yard for such excavations as he made; that it was his duty to follow the directions of the defendants from time to time, as to where and when he should dig; that they supervised the work; and that Ryan gave directions to the men there. Under these circumstances, it was considered that, if K. made the excavations which caused the damage upon the plaintiff's land, it was with the knowledge and apparently with the direction of the defendants. Hence if, upon all the evidence, the jury found that the footing course was erected upon the plaintiff's land, K., as well as the defendants, became a trespasser upon the plaintiff's premises.

In *Postal Telegr.-Cable Co. v. Murrell* (1918) 180 *Ky.* 52, *L.R.A.* 1918D, 357, 201 *S. W.* 402, the court proceeded upon the theory that an employer exercises control over the details of work, when he directs a messenger boy with regard to the places from which he is to collect telegrams, or at which he is to deliver them.

In *Sullivan v. Dunham* (1898) 35 *App. Div.* 342, 54 *N. Y. Supp.* 962, affirmed in (1900) 161 *N. Y.* 290, 47 *L.R.A.* 715, 76 *Am. St. Rep.* 274, 55 *N. E.* 923, 7 *Am. Neg. Rep.* 126 (tree which was blasted out whole fell on plaintiff), one Jewell had made a con-

tract with the defendant for removing trees. The former testified that he was to furnish teams and men for a certain price, and that either he or one Dinkel was to be present and act as foreman under the direction of one Ward, who was the defendant's foreman, and was to do the work pursuant to his direction. Ward was present a part of the time while the work was progressing and pointed out what was to be done. The witness said: "We did not usually do anything that Ward did not first tell us to do." The directions given by Ward consisted in pointing out the particular pieces of work to be done, such as the excavation for the foundation of a barn, and construction of a ditch. For new pieces of work Dinkel and Jewell went to Ward; he directed them to take the trees out whole. The defendants Dinkel and Jewell received pay as foremen, at a given price per day, and the men, material, and expenses were paid for at cost, and bills rendered therefor with a certain percentage added as profit. On the other hand, the defendant stated, in effect, that he said a good deal to Mr. Ward on the subject of giving directions to Dinkel and Jewell "as to the manner or method and means of doing this work, before I left; also while I was there, before I had made my plans for going." The defendant was present when the work began, but while it was in progress he went away, and subsequently communicated with Ward in reference to the work. The defendant also testified that he gave no directions, either himself or through Ward, to Dinkel or Jewell, except in regard to the expansion of the work, and additional items of work to be done. The court thus commented on this evidence: "If the arrangement was that Dunham was simply to give directions as to the work to be done, and did not give, or had no authority to give, directions as to the manner in which it should be done, or as to the means to be used in performing it, then he would not be liable for any injury resulting from the method of its performance, as there would be no relation of master and servant. But the evidence authorized a different inference from this. As we have seen, Dunham said that he did not give directions as to the manner, method, and means of doing the work, and Ward carried out this view when he directed that the trees should

be taken out whole, and he gave such direction in relation to blasting the particular tree out of which the injury arose. It was not necessary that the directions should embrace every detail in doing the work."

In *Waters v. Greenleaf-Johnson Lumber Co.* (1894) 115 N. C. 648, 20 N. E. 718, all the trees of a certain size on the plaintiff's land were purchased by the defendant company, under a contract giving it the right to construct a railroad for the removal of the timber. Parker, a man engaged to construct the road and cut and deliver the timber, committed, in the course of his work, a trespass on the plaintiff's property. The evidence did not show how he was paid; nor did it appear whether he was the mere instrument of the company, which directed the work, furnished the material necessary to prosecute it, and paid the hands, or whether it devolved on him exclusively, under his contract, to attend to all of these matters. It was, however, held that the fact that the company "supervised the cutting of the timber, and issued orders that Parker was bound to obey, showed affirmatively, of itself, a state of subjection on his part that made him, in law, its servant."

In *Oklahoma City Constr. Co. v. Peppard* (1914) 43 Okla. 121, 140 Pac. 1084, the president of the company which was erecting the building on which the plaintiff's decedent was killed testified that the authority of the owners was recognized with relation to everything in respect of which he sought to exercise it, and that his word was law on the building. This evidence, together with other facts not reported, was held to be sufficient to sustain the finding of the jury that the company was not an independent contractor.

In *Moore v. B. F. Sturtevant Co.* (1910) 228 Pa. 399, 77 Atl. 564, a servant of a manufacturing company, in whose building the defendant had contracted to place machinery and to erect a smokestack, was injured by reason of a defect in an appliance used in building the stack. The main ground of the defense was that this work had been sublet by the defendant, and was done by an independent contractor. The contract with the subcontractor was partly in writing, and partly oral, and there was a dispute in relation to the oral part of it. The testimony produced by the plaintiff tended to show

that, while the subcontractor furnished men and machinery, the whole control and management of the work were under the charge of the defendant. The nature of the relationship created by the contract was held to be a question for the jury.

Men who were employed to load coke on the cars of a railway company, and who were paid by the number of cars loaded, and who, as the undisputed evidence showed, did their work under the immediate supervision and control of the company's superintendent, were held not to be independent contractors, in *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403, 3 Am. Neg. Rep. 174 (laborer threw a heavy board down into the street without looking).

In *Corrigan v. Heubler* (1914) — Tex. Civ. App. —, 167 S. W. 159, where the right of the plaintiff to recover damages for an injury caused by a defective structure upon which he was working depended upon whether his immediate employer, Gilkison, was the servant of the defendants, who were principal contractors, or was himself an independent contractor, the character of the relationship was held to be a question for the jury, the evidence being as follows: That the contract between the defendants and Gilkison was oral; that Gilkison was irresponsible financially, and was furnished by the defendants with all the material used by him, and with money for the payment of his workmen; that the contract entered into between the principal employer and the defendants provided that the latter "would not assign, transfer, or sublet the work, or any part thereof, without the written consent of the agents of the principal employer; that such consent was not shown; that the defendants put certain employees, not alleged to have been employed by Gilkison, upon the work he was doing; that Gilkison thereupon abandoned the work; that the defendant's physician and surgeon, who treated all their men when treatment was necessary, treated the plaintiff when he was hurt, at the instance of the defendants, who paid him for his services; and that the defendants, on more than one occasion, exercised authority and control over Gilkison in directing where he and the men under him should work, how the work should be done, and how the material should be used in doing it.

In *Houston Belt & Terminal R. Co. v. Scheppelman* (1918) — *Tex. Civ. App.* —, 203 S. W. 167, where the injury complained of was caused by the improper manner in which a sewer trench had been refilled after pipes had been laid, a portion of the evidence on which the finding of the jury that the contract in question was not an independent one was that the employing company had given directions as to the manner in which the filling was to be done.

In *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484, a portion of the testimony which was held to justify a finding that the person employed, who had been engaged to haul goods, was not an independent contractor, was that he was subject at all times to the employer's directions with regard to the particular thing that he was to haul, the time when it was to be hauled, and the place to which the thing was to be taken.

In *Rankel v. Buckstaff-Edwards Co.* (1909) 138 Wis. 442, 20 L.R.A.(N.S.) 1180, 120 N. W. 269, a portion of the evidence was that the defendant's officers had "exercised control over the undertaking, to the extent of directing its progress, course of procedure, and general management."

An employer who is sued for a personal injury received by an employee from the falling of an ice house cannot escape liability on the ground that he reserved no control over the erection of the building, where the evidence shows that before the contract was let he consulted with the builder, and determined the materials to be used and plan of construction, and was around the premises constantly while it was under construction. *Meier v. Morgan* (1892) 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174.

The independence of a contract is negated where the evidence is that a person agreed to clear a piece of land at a certain price per acre, but that the employer watched the progress of the work, gave advice as to the setting of the fire to burn the timber and brushwood, and, when he was told that a certain fence which extended to the plaintiff's land might take fire, said that it made no difference. *Johnston v. Hastie* (1870) 30 U. C. Q. B. 232.

For other cases in which the circumstance that the employer did, in

point of fact, interfere with and control the employees in the course of their work, has been adverted to as a cumulative element supporting the conclusion that they were mere servants, see *Sérandat v. Saïsse* (1866) L. R. 1 P. C. (Eng.) 152, 35 L. J. P. C. N. S. 17, 12 Jur. N. S. 301, 14 Week. Rep. 487; *Homewood Rice Land Syndicate v. Suhs* (1920) 142 Ark. 619, 219 S. W. 333; *Giacomini v. Pacific Lumber Co.* (1907) 5 Cal. App. 218, 89 Pac. 1059 (employer's agent "frequently criticized the work of the workmen" hired by the contractor, and "occasionally gave them orders"); *Quayle v. Sewerage & Water Bd.* (1912) 131 La. 26, 58 So. 1021 (defendant's inspector "remained on the work, and directed how it should be done"); *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S. W. 399; *Wm. Cameron & Co. v. Realmuto* (1907) 45 Tex. Civ. App. 305, 100 S. W. 194 (employer "directed how and when the work should be done"); *Moore v. Kopplin* (1911) — *Tex. Civ. App.* —, 135 S. W. 1033 (evidence showed that the fence in question was erected under the orders and directions of the defendant's agent); *Texas Bldg. Co. v. Reed* (1914) — *Tex. Civ. App.* —, 169 S. W. 211 (evidence held to warrant finding that an agent of the defendant exercised control over the manner in which the person employed was to do the work); *Kniceley v. West Virginia Midland R. Co.* (1908) 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811 (man employed to transfer lumber from narrow-gauge to standard-gauge cars unloaded it "in such manner as the employer directed, and placed it where he was ordered to put it").

In *Worthington v. Parker* (1885) 11 Daly (N. Y.) 545, the defendant's agent employed a firm of tinmiths to make a change in a water pipe of a house, and described to them the manner in which the leader was to be let out, how to put it in, and solder it; —stating that the pipe was to be changed which ran through the fire-wall, and then a leader was to be run along the wall to the rear of the building to carry the water off. This made it necessary to connect the leader that came through the wall, which was a 3½-inch pipe, with the other leader, by an elbow joint. Held, that the persons employed were not independent con-

footnote and those which are reviewed in the preceding section discloses, in some instances, a conflict of views which is the analogue of the still more remarkable difference of opinion which is exhibited by the decisions which turn upon the probative significance of the express stipulations discussed in the two preceding subtitles.

(2) That the employer transferred the contractor's servants from one kind of work to another.²

(3) That the employer promised, in response to a complaint made by one of his own servants, that the contractor's careless methods of work, by

tractors. The court said: "They were directed as to the manner in which the work was to be done. . . . In the case of workmen employed to do a job like this, she, or her agent, had the right to dismiss them at any moment if not satisfied as to their ability, or mode of doing it; and as she, through her agent, selected them, she is responsible for the injury that arose from having made the choice of unskilful or careless persons to do what was to be done." As the persons employed were a firm of master mechanics engaged in a recognized business on their own account, it would seem that they must have been—*prima facie*, at least—independent contractors (see 19 A.L.R. pp. 241 et seq.), and consequently that the court was not justified in treating them as "agents," or, rather, as "servants," for the following passage shows that this was really the position in which they were deemed to be. In this point of view it is important to observe that the "direction" to which the tort-feasors are here stated to have been subject was apparently not one of such a character as to require the inference that they were servants.

² In *Southern Cotton Oil Co. v. Wallace* (1900) 23 Tex. Civ. App. 12, 54 S. W. 638, two facts adverted to as being indicative of the conclusion that the contractor was a servant were that the employer's agents frequently required the workmen controlled by them to do other kinds of work besides that which was covered by his contract, and that the contractee's superintendent compelled him to take back a workman whom he had discharged.

In *Sempier v. Goemann* (1917) 165

which they were endangered, should be remedied.³

(4) That the employer's agent inspected the work to see that it was being performed in accordance with the terms of the contract.⁴ But having regard to the cases cited in note 2 to the preceding section and in § 1, *supra*, the theory that this fact has a tendency to disprove the independence of the contract is so clearly opposed to the weight of authority that it may safely be pronounced erroneous.

(5) That the person employed began and ceased work at the hours specified by the employer's agent.⁵

(6) That the contractor exercised

Wis. 103, 161 N. W. 354, Ann. Cas. 1918C, 670, one of the facts with reference to which the independence of the contract was denied was that the principal employer had exercised some species of control over the contractor's servants, by shifting at least one of them to work which was admittedly under the personal direction of the former.

³ In *Simila v. Northwestern Improv. Co.* (1913) 73 Wash. 285, 131 Pac. 831, the plaintiff, while working near the mouth of a tunnel of the mine operated by the defendant, his employer, was struck by a piece of timber sent down a chute by men who had contracted in writing to cut timber and deliver it at the mine. His witnesses testified that, only a short time before the accident, complaint had been made to the defendant's superintendent regarding the reckless manner in which the timbers were being sent down the chute, and that he did not then disclaim authority, but promised to see that the trouble was remedied. Held, that this evidence should have been submitted to the jury, not only for the reason that it was inconsistent with his own statement that the defendant had no control over the stipulated work, but also for the reason that, if this statement was correct, the course taken by him tended to mislead the defendant's workmen with regard to the nature of the relationship between the defendant and the contractors.

⁴ *State ex rel. Virginia & R. Lake Co. v. District Ct.* (1914) 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Midgett v. Branning Mfg. Co.* (1909) 150 N. C. 333, 64 S. E. 5.

⁵ *Van Simaey v. George R. Cook Co.* (1918) 201 Mich. 540, 167 N. W. 925.

"entire supervision" over the work and the workmen.⁶

(7) That the employer "outlined the route" to be taken by a man employed as a carter.⁷

V. Circumstantial evidence bearing upon the quality of the contract.

§ 19. Introductory.

In the present division it is proposed to discuss those evidential elements which are circumstantial in their nature, and therefore possess a merely indirect and inferential significance with regard to the character of the relationship between the employer and the person employed.

The characteristic feature of all these elements is that they each possess some significance as tending to prove or disprove the independence of the contract, but are not conclusive with respect to that point. Having regard to their inconclusive quality, it is apparent that none of them, taken singly and apart from other testimony, can constitute an adequate basis for an ultimate inference of fact concerning the relationship between the employer and the person employed. To what extent the cumulative weight of two or more of them in combination may be sufficient to justify such an inference is a question less easily determined.

Merely as a matter of abstract logic, it might possibly be argued that a definite conclusion cannot warrantably be founded upon a conjunction of elements, each of which is indecisive in relation to the issue upon which it has a bearing. This phase of the subject has not yet been discussed by the courts with reference to the general principles by which the probative value of evidence is appraised. But it is clear that many of the decisions, as they stand, cannot be harmonized with such a theory. It is inconsistent with the cases which proceed, expressly or by implication, upon the doctrine that a presumption of

independence is raised by evidence which shows that the stipulated work was to be performed on a quantitative basis, and that the person employed was normally engaged in a distinct and recognized occupation, business, or calling. See §§ 17 and 33 of the monograph in 19 A.L.R. pp. 1168 et seq.

Nor can it be reconciled with the cases in which an affirmation or denial of independence has been predicated upon evidence which did not include any testimony having a direct tendency to show that the person employed was not under the control of the employer with respect to the details of the work, or that he was subject to such control. See §§ 17 and 33 of the monograph in 19 A.L.R. pp. 1168 et seq.

Another class of cases in which it is necessary to assume that a definite significance was ascribed to a conjunction of these inconclusive elements consists of those in which there was direct testimony as to the existence of a right on the employer's part to exercise control over the work, but that testimony was itself of an indecisive character, as being susceptible either of the construction that this right extended to prescribing the manner in which the work was to be done, or of the construction that it was of that limited scope which is deemed to be consistent with independence of the contract. In cases of this type it seems permissible to view the function of the indirect testimony from two different standpoints; either to regard the items composing it as being merely a portion of an entire aggregate of evidence on which the decision is founded, or to consider them as a collection of particulars which serves to affix to the direct testimony a definite significance which, when considered apart from them, it does not possess. But the reports throw no light upon this general aspect of the matter.

⁶ *Richmond v. Sitterding* (1903) 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562, 18 Am. Neg. Rep. 616.

⁷ *Muldoon v. City Fireproofing Co.* (1909) 134 App. Div. 453, 119 N. Y. Supp. 320.

§ 20. Special skill required for the performance of the stipulated work.

The fact that the work to be done was such as required special skill for its proper performance is frequently referred to in cases where the contract was held to be independent. There is specific authority for the doctrine that this circumstance is to be regarded as one of those which have some tendency to show that the relation between the employer and the person employed was not that of master and servant.¹ But the present writer has not found any case in which it has been credited with a distinctly differentiating significance; and there are many instances in which it has been wholly disregarded.²

§ 21. Humble industrial status of the person employed.

The theory upon which the courts

seem to have proceeded in many cases was that in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work. In other words, it was considered that, although the persons employed might have been engaged in a distinct occupation or calling, in the sense that they held themselves out as being prepared to do certain kinds of work for such parties as might engage them, the relation which they bore to those parties, during the progress of such work as might be undertaken by them, was in law that of a servant.¹ The authorities do not show distinctly the rationale of the presumption thus entertained. Essentially it may, perhaps, be said to reflect merely the un-

¹ See, for example, *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N. Y. Supp. 522, affirmed on opinion below in (1902) 170 N. Y. 562, 62 N. E. 1096; *Ziebell v. Eclipse Lumber Co.* (1903) 33 Wash. 591, 74 Pac. 680, 15 Am. Neg. Rep. 457; *Threlkeld v. White* (1890) 8 N. Z. L. R. 513.

In *Cleghorn v. Taylor* (1856) 18 Sc. Sess. Cas. 2d series, 664, it was held that a master slater employed to put up a chimney can and top was not a contractor.

² In *Morgan v. Bowman* (1856) 22 Mo. 538, where the fact that the person employed had been selected on account of his peculiar skill was declared not to be decisive, if he was in point of fact subject to control as regarded the details of the work.

In *Gulf, C. & S. F. R. Co. v. Clement* (1920) — Tex. Civ. App. —, 220 S. W. 407, where a carpenter was injured while repairing a railway car from which gasoline was leaking, the court made the following remarks: "Plaintiff was employed for hire to do a particular work, and the fact that he was so employed by reason of his special skill, which was the only fact relied on to show that he was an independent contractor, would not of itself make plaintiff an independent contractor, since all servants are supposed to be competent to perform the duties assigned to them, and are employed for that reason. In order to show that

plaintiff was employed as an independent contractor, it was incumbent upon defendant to plead and prove some special facts which would negative the prima facie showing that he was employed as was any other employee, such as locomotive engineer, who is likewise employed because of his special skill in the operation of a locomotive."

¹ In *Sadler v. Henlock* (1855) 119 Eng. Reprint, 209, 4 El. & Bl. 570, the defendant directed a man named Pearson to cleanse out a drain on his land. Pearson was not otherwise in the employment of the defendant; he was a common laborer, who had originally made the drain. Pearson executed the work with his own hands, and charged the defendant 5 shillings for the job, which the defendant paid. The defendant was not shown to have interfered with the work, or to have seen the way in which it was executed, or to have given any specific directions. Pearson, in clearing out the drain, took up the part of the highway under which the drain passed. After completing the work, he replaced the soil of the highway, but imperfectly and with insufficient materials; and, in consequence, it gave way while a horse belonging to the plaintiff, and on which plaintiff was riding at the time, was passing over it; and the horse, by falling into the hole thus made, was injured. Upon this evidence it was

derstanding of the courts as to the terms upon which work is ordinarily

held that Pearson was a servant, for whose negligence the defendant was responsible. Lord Campbell, Ch. J., said: "Had Pearson been the domestic servant of the defendant, and the defendant had said to him, 'Go and clean out the drain,' no doubt Pearson, by doing the work negligently, would have made the defendant liable. Then what difference can it make that Pearson was an independent laborer, to be paid by the job? The defendant might have said, 'Fill up the hole in the road, but not as you are now doing it, lest, when a horse goes over the place, he may be injured.' Pearson was, therefore, the defendant's servant, and, if so, *cadit questio*." Coleridge, J., said: "If the work had been done by his own hand he would have been responsible. So he would, if it had been done by his servant, or by a common laborer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such works. Such person is just as much his servant, for this purpose, as a domestic servant." Wightman, J., said: "Really the question is whether Pearson is to be considered as the defendant's servant, or as a contractor exercising an independent employment. The whole evidence shows that the former is the correct view. Pearson was not a person exercising an independent business, but an ordinary laborer, chosen by the defendant in preference to any other, but not exercising an independent employment." Crompton, J., said: "The real question is whether the defendant and Pearson stood to each other in the relation of master and servant. I decide not on the ground that Pearson did not employ the hands of another; for, if he was the defendant's servant, the defendant would be liable for the wrongdoing of the person whom the servant employed; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstances of the man being employed at so much a day, or by the job. I think that here the relation was that of master and

contracted for, under the circumstances indicated.

servant, not of contractor and contractee." The last-mentioned judge also remarked, during the argument of counsel (p. 575): "Is not this rather a case where the employer maintains a control over the person whom he employs? A contractor chooses the mode in which the work is done, and the persons who do it. I thought the principle of the cases, which are cases of difficulty, was that the contractor had this power of choice."

In *Tucker v. Axbridge Highway Bd.* (1889; Q. B. D.) 53 J. P. (Eng.) 87, where a trap was capsized by striking against a heap of stones which had been left beside a road by a man who had been employed to repair it, the defendant was held liable on the general ground, as it would seem, that "if a person does merely menial work then he is clearly a servant."

In *M'Keon v. Bolton* (1851) 1 Ir. C. L. Rep. 377, 3 Ir. Jur. O. S. 288, a man employed by the defendant to cleanse out, at certain intervals, the contents of his ash pit, deposited them on one occasion in the street, preparatory to their being removed, and the plaintiff's vehicle was upset by the heap. The jury found that the contract was an entire one to remove the rubbish altogether, and not merely to take it to the street. It was held error to enter judgment for the defendant on this finding. Blackburne, J., remarked that the nature of the subject-matter in such cases makes all the difference, and that, when regard was had to the fact that the act which caused the injury done in the very house occupied by the defendant, and under his wife's directions, it appeared to have been but the ordinary act of a servant.

In *Cinofsky v. Industrial Commission* (1919) 290 Ill. 521, 125 N. E. 286, one of the facts emphasized by the court was that the work [stripping of engines by men engaged in the "junk" business] was simple, and little supervision was required for it.

In *Bristol & G. Co. v. Industrial Commission* (1920) 292 Ill. 16, 126 N. E. 599, the fact that the work of a man employed as a teamster was simple, was one of the grounds upon which he was held to be an "employee," within the meaning of a workmen's compensation act.

Where a city was constructing a water-pipe trench, and a laborer em-

As stated in § 18 of the monograph in 18 A.L.R. pp. 802 et seq., that

ployed under the direction of the city's inspector and superintendent was assigned to the excavation of a 12-foot section of the trench, but had no authority or discretion as to his work, it was held that he was not, therefore, an independent contractor, but a servant, and that the city was bound to provide for his safety against caving of the banks while performing the work. *Ft. Wayne v. Christie* (1900) 156 Ind. 172, 59 N. E. 385.

In *Rait v. New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N. W. 729, the court inclined strongly to the view that the decision in *Sadler v. Henlock* (Eng.) supra, would have justified it in holding, as a matter of law, that a person whose general occupation was that of carpenter and builder, who was employed by a house owner to stop a leak in the roof of the house, and, while engaged on the job, threw down some ice and snow on a passer-by, was a mere servant. But it was declared to be, at least, a question for the jury to say whether the defendant surrendered all control over the actions of the employee as to the manner of removing the ice and snow from the roof of the building. The construction thus put upon the English case is of very dubious correctness, when it is considered that the work there involved did not require any special skill, as in the case before the court. Upon the facts the Minnesota ruling is inconsistent with another English case, *Welfare v. London & B. R. Co.* (1869) L. R. 4 Q. B. (Eng.) 696, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065.

In *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S. W. 764, where it was held that a laborer engaged for 50 cents to drive an animal was a servant to the owner of the animal, and not an independent contractor, the court reasoned as follows: "There is nothing in the nature of the employment, or in the contract, to indicate that Simon [the laborer] was not subject to the control, supervision, and direction of Blase, had he seen fit to exercise such control over Simon's movements. Nor is there anything whatever in the testimony to prove that Simon exercised a distinct calling, as did the colored teamster, Stevenson, in *Pink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep.

"ouvriers d'une profession et determinee" are not within the purview of

376, and the licensed drover described in an English case cited by appellant [*Milligan v. Wedge* (1840) 12 Ad. & El. 737, 113 Eng. Reprint, 993, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19]. Simon was doing any sort of ordinary work at that time. To constitute him an independent contractor, so as to relieve his employer from liability for his conduct, it must, at least, appear that the work to be performed was committed exclusively to the discretion of the contractor. The independence of the contractor may appear by the nature of the work sometimes, and at other times by the terms of the contract, or by the calling of the contractor. The nature of the work in question in this case, no less than the agreement itself, totally fails to establish a foundation for holding Simon to be an independent contractor in the matter of driving the cow to defendant's place of business. The fact that the work was to be paid for in one price is not decisive of the question."

In *Hughes v. Orange County Milk Asso.* (1890) 56 Hun, 396, 31 N. Y. S. R. 468, 10 N. Y. Supp. 252, the ground upon which the defendant company was held liable for injuries received by a pedestrian who fell into an unguarded hole in a sidewalk, which was used for the removal of manure from its stables, was that the person who had removed the covering, a man under a yearly contract with the defendant to remove the manure, was not a tenant, but a servant of the company, and that the company was bound to see to it that the sidewalk was made safe while the hole was open.

In *Curry v. Addoms* (1915) 166 App. Div. 433, 151 N. Y. Supp. 1017, reargument denied in (1915) 168 App. Div. 925, 152 N. Y. Supp. 1106, where the plaintiff, a woman employed as an assistant, without the defendant's knowledge, by the janitress of two of his houses, whose duties were "to keep the premises clean and see that the ashes were removed, to collect the rents, and to report to me the general condition of the houses from time to time," was injured by reason of a defect in a flight of steps, one of the theories relied upon was that, under § 200 of the Labor Law (Consol. Laws, chap. 31 [Laws 1909, chap. 36], as amended by

art. 1384 of the Code Napoléon, which provides that "les maîtres et commet-

tants son responsables du dommage causé par leurs domestiques et pre-

Laws of 1910, chap. 352), known as the Employers' Liability Act, the janitress was an independent contractor, so that the plaintiff became her sub-contractor, and the defendant was liable for any defect in his "ways, works, machinery, or plant." But the contention in this regard was rejected by the court, which said: "In the matter of duties, her position was similar to that of a housekeeper, or domestic servant, to whom fall the innumerable small duties, indefinite and shifting in nature and variety, covering the fields of cleaning, sweeping, scrubbing, setting to right movable things gone awry, watching the various phenomena of disrepair and reporting them, with attentive mending of the fires and the disposition of ashes, meanwhile removed from the immediate eye of her master, but awaiting and obedient to his command as to the manner in which she should do his work, provided he exercise the right to interfere. As such a person she did, indeed, contract to do the work for a fixed sum, but in a legal sense she was not freed from the overruling will of the master, who of right could direct to what, and in what way, she should put her hand in work. Like an independent contractor, she promised to effect a result, but, unlike such a person, she was not legally free to choose her means of doing it. It is not a question whether the master does leave his servant to choose her means and to direct herself in the matter of details, but whether he is bound to do so, or has the right to interpose his own methods even to the point of caprice. . . . The statute, by the term 'independent contractor,' means to indicate a person who, in the legal sense, is independent of the service of the person who employs him. In thought, in speech, and in matters of contract, there are distinctively dissociated from such person the usual cleaners and caretakers of public or private buildings. The statute may, in this case, well be interpreted by customary estimate of the relations of one person to another. Moreover, it would be quite unfortunate to lift a janitress to the position of an independent contractor, and thereby remove from the master the rule respondeat superior, inasmuch as upon her care in the matter of details

the safety of tenants depends, and for the prudent doing of which the master is responsible."

In *Hamilton v. Oklahoma Trading Co.* (1911) 33 Okla. 81, 124 Pac. 38, the defendant was held not to be liable for the breakage of a plate-glass window, occasioned by the negligence of laborers engaged to convey, by means of his truck, a carload of flour from the sidewalk into the building occupied by him.

In *CHICAGO, R. I. & P. R. CO. v. BENNETT* (reported herewith) ante, 678, the conclusion of the court, that a man engaged by a railroad company to shovel coal at so much per ton into engine tenders was not an independent contractor, was based in part on the extreme improbability that the company, "hiring an unskilled man to perform one of the simplest tasks of manual labor, . . . would absolutely relinquish all right of control and directions."

See also *Ruehl v. Lidgerwood Rural Teleph. Co.* (1912) 23 N. D. 6, L.R.A. 1918C, 1063, 135 N. W. 793, Ann. Cas. 1914C, 680, where one of the grounds upon which the defendant was held to be liable for injuries received by a child, who had fallen into one of the holes dug for its poles, was that the man by whom the holes were dug was shown not to be an independent contractor, by his testimony to the effect that the defendant's general manager of the construction work had employed him to dig them at a specified price for each hole, and with tools furnished by the person whom the manager was to send to mark the places where the holes were to be dug. But the precise position of the court with regard to the significance of the testimony is obscure.

Where a landowner who is about to rebuild a house which has been destroyed by fire contracts directly with a laborer to make the excavation for the foundation for a specified price, instead of letting out the whole work to one person, it is error to give an instruction which would exclude from the consideration of the jury the possibility that the laborer was hired as a servant. *Stevenson v. Wallace* (1876) 27 Gratt. (Va.) 77.

In *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N. Y. Supp. 522, the court remarked *arguendo*: "Undoubtedly,

posés." Since persons belonging to the category considered in the present section are, normally at least, outside the class thus exempted from responsibility, there is some apparent ground for the theory that, in coun-

one cannot shield himself under the doctrine of independent contractors by simply employing another person, and giving him a general authority to procure others to assist in work which requires no care, or skill, or experience, but which is merely such as might be done by any person with sufficient physical strength."

In *Rankine v. Dixon* (1847) 9 Sc. Sess. Cas. 2d series, 1048, where the plaintiff, the proprietor of a mineral stratum which had been damaged by fire which spread from the place where ironstone was being calcined, it was shown that the lessee of the ironstone workings had employed contractors to calcine it at so much per ton, payable at the end of every fortnight. These contractors employed and paid all the workmen, the lessee having no direct management in the calcining operations. The jury were charged by Lord President Boyle that in point of law the lessee was responsible for the acts of these contractors, as they were in no different position from any other laborers hired by a master to work by the piece.

In *Nisbet v. Dixon* (1852) 14 Sc. Sess. Cas. 2d series, 973, a later case arising out of the same occurrence, the stipulations of the contract are set forth in greater detail. The contractor agreed to employ the necessary number of miners, to pay them their wages, to furnish various implements necessary for the workings, etc. After the first two months the output was to be not less than 100 tons of calcined stone weekly, and a failure to perform this stipulation entitled the contractee to terminate the contract by giving a written notice of one month. The working was to be carried on regularly and fairly, and agreeably to the instructions of the contractee or his overseer. The contractor, after the first month, had the right to abandon the job upon giving one month's notice. It was held that, as between the lessee of the ironstone and his landlord, the contractor was to be regarded as a mere servant of the lessee. The factor upon which the judgment of Lord Colonsay was mainly based

tries in which the Code is in force, the element now under discussion carries a higher and more definite significance than that which is accorded to it in other jurisdictions.²

But, having regard to the prece-

was the humble industrial status of the contractors: "This is a case of injury to a neighboring property by a person who held a mixed character—at least, whose trade had not yet assumed such an independent character as entitles us to hold that the defenders can get rid of the responsibility which attaches to them, by employing such a person as Watson and his gangers, instead of laborers paid directly by themselves." The two other judges relied upon the existence of a non-delegable duty.

In a New Zealand case it was remarked, *arguendo*: "There is yet another point of distinction which has been referred to in several of the cases, and is, perhaps, here applicable—the employment of an ordinary laborer to do ordinary laborer's work by the piece, and the employment of persons skilled in a particular business." *Threlkeld v. White* (1890) 8 N. Z. L. R. 513.

A porter who was occasionally employed by a butter factor to leave parcels at the houses of purchasers, and was paid by the persons to whom the parcels were delivered, was held to be a "servant" of such factor, within the meaning of the embezzlement statutes, and not a person following an independent employment. *Reg. v. Lynch* (1854) 6 Cox, C. C. (Eng.) 445.

The case of *Bon Jellico Coal Co. v. Murphy* (1914) 161 Ky. 450, 171 S. W. 160, is possibly to be classed as one of those illustrating the doctrine referred to in the text. But its precise rationale is not clear.

In *Schroer v. Brooks* (1920) 204 Mo. App. 567, 224 S. W. 53, it was held that the work of cutting logs was not "common or hard labor" in such a sense as to exclude the inference that the person employed was an independent contractor.

² In *Sérandat v. Saïsse* (1866) L. R. 1 P. C. (Eng.) 152, 35 L. J. P. C. N. S. 17, 12 Jur. N. S. 301, 14 Week. Rep. 487, the respondent brought an action for injuries caused by a fire kindled on the appellant's land by laborers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made that sparks

dents already cited, it can scarcely be doubted that, on facts such as those presented in the case reviewed below, the conclusion that the con-

tract was not an independent one would be arrived at by any court which proceeds upon the principles of Anglo-American law.³

and other burning particles were carried over and scattered upon his premises. He grounded his claim for damage on art. 1384 of the Code Napoléon (which is administered in Mauritius where the action was brought), which is in these words: "Les maîtres et commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." The respondent contended that the appellant and the men he employed stood in the relation of commettant and préposé within the meaning of this article. From an examination of the authorities the conclusion was arrived at that, subject to the qualification mentioned in the following sentence, the word "préposé" in the article means substantially a person who stands in the same relation to "commettant" as "domestique" does to "maître," i. e., a person whom the "commettant" has intrusted to perform certain things on his behalf. It was observed, however, that the French lawyers, in their interpretations of the article, had qualified this construction by the doctrine that, in order to make the commettant responsible for the negligence of the préposé, the latter must be acting "sous les ordres, sous la direction et la surveillance du commettant." The evidence showed that there were two bands of Indian laborers employed, and that the work was to be paid for at a certain price per acre, but left it doubtful whether the appellant was to pay the price to the headmen of each band, or to them and the Indians in their respective bands. On this evidence the contention of the appellant that he had severed himself from the execution of the work, and parted with all superintendence and control over the persons by whom it was performed, was rejected by the privy council, on grounds explained in the following extract from the judgment: "Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of

dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not show that the general control, direction, and surveillance of the operations were relinquished by the appellant, by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by Sirey ('Codes Annotés,' vol. 1, p. 665) of ouvriers d'une profession reconnue et déterminée; they were ordinary laborers characterized by the court below as 'a set of idle, careless semibarbarians.' The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence, which shows that in point of fact the appellant did interfere and control the men in the course of the work. For example, it was said by Joondine: 'Mr. Sérendat told me not to put fire in the place where I was working; . . . he told me to put fire in another place which he pointed.' Again, Beesapa says: "The previous day Mr. Sérendat had come and told Joondine to leave that portion of ground, which is \$50, and go and work in the interior of the field." And the appellant's answer states that he had given orders five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished. Looking, then, at the whole case, we are of opinion that the appellant and the Indian whose negligence caused the fire stood in the relation of 'commettant' and 'préposé.' And, as it has not been disputed that the negligent act was done by the 'préposé' in the course of his employment, it follows that the responsibility of the appellant is made out."

³In the monograph in 19 A.L.R. pp. 1168 et seq., the reader will find, in the various sections which illustrate the circumstances under which the independence of the contracts was denied, many cases which support this statement.

§ 22. Financial irresponsibility of the person employed.

An evidential situation which includes among its elements the one adverted to in the preceding section ordinarily includes another circumstance which is intimately associated with that element, viz., the financial irresponsibility of the person employed. This circumstance, also, is regarded as one which tends to negative the independence of the contract.¹ In the nature of the case it is clear that the probative value attaching to such evidence must vary according to the extent and importance of the stipulated work.² It may be said to reach the vanishing point where the undertaking in question

was one of such a nature that it could readily be carried out by a person who possessed little or no capital.

The theory that this circumstance is not necessarily inconsistent with the inference that the contract was an independent one was recognized in the cases cited below.³

§ 23. Contractor bound or not bound to perform the work himself.

A natural deduction from the ordinary conception of an independent contractor, viz., that he is essentially a person who merely agrees to produce certain specified results by any means which he may think proper to select, is that, unless restricted by some express stipulation, he will always be entitled to use the labor of

¹ For cases in which this significance was ascribed to it, see also *Lehigh Valley Coal Co. v. Yensavage* (1914) 134 C. C. A. 275, 218 Fed. 547, certiorari denied in (1915) 235 U. S. 705, 59 L. ed. 434, 35 Sup. Ct. Rep. 282; *Arizona-Hercules Copper Co. v. Crenshaw* (1919) 21 Ariz. 15, 184 Pac. 996; *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S. W. 399; *Fehrenbacher v. Oakdale Copper Min. Co.* (1911) 65 Wash. 134, 117 Pac. 870.

In *Keech v. John L. Roper Lumber Co.* (1914) 166 N. C. 503, 82 S. E. 836, an instruction was approved by which the jury were told that if the tortfeasor, a man employed for logging operations, was insolvent, it was a circumstance which they were to take into consideration in determining whether he was an independent contractor.

In *Corrigan v. Heubler* (1914) — Tex. Civ. App. —, 167 S. W. 159, the facts that a man who had undertaken the erection of a building was financially irresponsible, and had been furnished with all the materials used by him, and the wages of his workmen, were mentioned in conjunction, as tending to negative the independence of the contract.

In *Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578, the contractor's want of means or capital was adverted to as a circumstance tending to show that the contract was a device for the purpose of evading liability. In this point of view, it will be observed, fi-

nancial irresponsibility was not regarded as an element which bore upon the nature of the relationship between the parties, but one which tended to establish the existence of a situation in which the fact of the independence of the contract would afford no protection to the employer. See § 49, *infra*.

² In *Southern Cotton Oil Co. v. Wallace* (1899) 23 Tex. Civ. App. 12, 54 S. W. 638, it was remarked that the rationale of the significance ascribed to this element was not the fact that the financial irresponsibility would debar a person from assuming the position of an independent contractor, but the "extreme improbability" that the employer "would intrust to such a person [without means, the performance of] a continuing contract involving the operation of valuable machinery and the filling of important orders as a result of his work, without retaining control and management over the methods, means, and manner of the work, and the time when it should be done."

³ *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107 (plaintiff was insolvent, and doing the work at a smaller price than it could reasonably be done for); *Keech v. John L. Roper Lumber Co.* (1914) 166 N. C. 503, 82 S. E. 836 (one of the statements of an instruction held to be correct was that if the person employed "was insolvent, and was an experienced man, and the contract was made in good faith, still he would be an independent contractor)."

others in executing the work which he has undertaken. In this point of view the conclusion is indicated that evidence from which it may warrantably be inferred that the person

whose status is in question was not bound to perform personally the work undertaken by him tends strongly to show that he was not employed as a mere servant.¹

¹For cases in which the probative significance of such evidence was recognized, see *Burns v. Michigan Paint Co.* (1908) 152 Mich. 613, 16 L.R.A. (N.S.) 816, 116 N. W. 182; *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866; *Holbrook v. Olympia Hotel Co.* (1918) 200 Mich. 597, 166 N. W. 876; *Bray v. Kirkpatrick* [1919; Ir. Ct. App.] W. C. & Ins. Rep. 151; *Walsh v. Waterford Harbour Comrs.* [1914; Ir. Ct. of App.] W. C. & Ins. Rep. 16, 47 Ir. L. T. 263, 7 B. W. C. C. 960.

In *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721, the facts from which the conclusion was deduced that the claimant, one Stevens, was not an "employee" within the meaning of the California Workmen's Compensation Act, were thus stated by the court: "The contract between Stevens and Tittle [contractor for municipal work] did not cover any definite period. . . . The latter's foreman directed Stevens and his driver in the matter of the materials to be hauled. There was no agreement regarding the bulk of matter or the number of loads per day, but each wagon was to be used for the period of eight hours a day, both in removing the rubbish and surplus sand that accumulated from Tittle's work, . . . and also in hauling lumber and rock for the use of Tittle. . . . There is no word of evidence that Stevens was employed personally to drive either of his teams. He was to furnish the means of accomplishing certain results—namely, drivers, teams, and wagons—and there was no element of personal service in the contract. . . . He did [as a matter of fact] drive one of his own wagons, but, if he had desired to devote a day to other occupations, his contract with Tittle would have been fully performed if he had put any competent man in charge of the horses he had been driving, because he had been required to furnish 'teams' (which included wagons and drivers). Neither Mr. Stevens nor the driver of his second team was listed as an employee on the books of Mr. Tittle (who did business under the name of 'Tittle

Company'), the account being carried as 'H. H. Stevens teams.'" At the end of each week an envelop was given to Stevens containing pay at the rate of \$6 per day for each team, neither he nor his driver receiving any segregated sum from Tittle as wages.

In *Dallison v. Hampel* (1910) 12 West. Austr. L. R. 152, where a man engaged on a piecework footing to cart wood, etc., was held to be an independent contractor, the two circumstances relied upon were the absence of any obligation on his part to perform the contract personally, and his freedom from the employer's control.

In *Farmer v. St. Croix Power Co.* (1903) 117 Wis. 76, 98 Am. St. Rep. 914, 93 N. E. 830, a subcontractor was held not to be an "employee" within the purview of a lien law, because "he was as free to perform his contract by the employment of others as the principal was to perform his contract that way. The element of personal service essential to the relation of a servant to his master or a laborer to his employer was entirely wanting."

A person to whom a government contract for road work which was to be done according to certain specifications, and paid for at so much per chain, had been sublet, has been held not to be a servant within the purview of the Masters and Servants Act of New South Wales. *Ex parte Rathbone* (1892) 13 New South Wales L. R. 56.

So, also, it has been held that the corresponding statute in Victoria is not applicable to a person whose position is defined by the acceptance of his offer to paint a certain number of railway trucks to the satisfaction of the owner. Under such an agreement there is nothing to prevent the contracting party from getting the work done by deputy. *McElroy v. Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953.

It is not irrelevant to mention in this connection that, in construing the English Truck Act (1 & 2 Wm. IV. chap. 37), the courts have held a person is or is not a "laborer" or an "artificer," within the scope of its provisions, according as he is or is not

It may be remarked that, in the cases which bear upon the subject, the language used by the courts is sometimes such as to leave a doubt as to whether the right of the contractor to avail himself of the labor of others was regarded as being predicable from the terms of the contract itself, or as a deduction from affirmative testimony. There is authority for the doctrine that the independence of the contract may sometimes be a warrantable conclusion, if the person employed did, as a matter of fact, execute the work by the hands of another.²

bound to execute in person the work which he has undertaken to do, the theory being that this term is intended to apply only to persons who are actually and personally engaged to perform the work. *Riley v. Warden* (1848) 2 Exch. 59, 154 Eng. Reprint, 405, 18 L. J. Exch. N. S. 120; *Bowers v. Lovekin* (1856) 6 El. & Bl. 584, 119 Eng. Reprint, 982, 25 L. J. Q. B. N. S. 371, 2 Jur. N. S. 1187, 4 Week. Rep. 600; *Ingram v. Barnes* (1857) 7 El. & Bl. 115, 119 Eng. Reprint, 1190, 26 L. J. Q. B. N. S. 319, 3 Jur. N. S. 861, 5 Week. Rep. 726; *Floyd v. Weaver* (1852) 16 Jur. (Eng.) 289, 21 L. J. Q. B. N. S. 151; *Sharman v. Sanders* (1853) 13 C. B. 166, 138 Eng. Reprint, 1161, 3 Car. & K. 298, 22 L. J. P. C. N. S. 86, 17 Jur. N. S. 765, 1 Week. Rep. 152; *Sleeman v. Barrett* (1864) 2 Hurlst. & C. 934, 159 Eng. Reprint, 386, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411.

²In a leading case *Crompton, J.*, remarked that the fact of another person's having been engaged by the negligent employee to carry out the stipulated work "may sometimes be a test as to whether the employer was a servant or an independent contractor." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 119 Eng. Reprint, 209, 3 C. L. R. 760, 1 Jur. N. S. 677, 24 L. J. Q. B. N. S. 138, 3 Week. Rep. 181.

³One of the evidential elements relied upon in *Gall v. Detroit Journal Co.* (1916) 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 36, was that the person employed was bound to do the stipulated work in person.

In *Sadler v. Henlock* (Eng.) *supra*, while one of the counsel was arguing that the workman was not the per-

sonal agent of the defendant, and that he might have employed a third person to do the work, Lord Campbell interposed the remark: "I doubt that; if I select a person in whom I place confidence, can he employ another?"

As the principle of the maxim "*delegatus non potest delegare*" is understood to apply in its full force to a servant, it is perhaps permissible to lay it down as a general rule that if it should appear, either from the nature of the employment or the terms of the agreement, that the person employed is expected to do the work with his own hands, the appropriate inference, in the absence of countervailing considerations, will be that he is engaged as a servant. But there is very little judicial authority upon this point.³ It is clear, moreover, that the probative significance of this element,

sonal agent of the defendant, and that he might have employed a third person to do the work, Lord Campbell interposed the remark: "I doubt that; if I select a person in whom I place confidence, can he employ another?"

In *Rheinwald v. Builders' Brick & Supply Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598, which involved the enforceability of a claim under the Workmen's Compensation Act, one of the points taken by counsel was that the decedent, a painter, "was not a 'workman' or 'employee,' but rather an 'independent contractor,' within the meaning and scope of the term 'workman' or 'employee,' as used in 'master and servant' statutes, or in common-law decisions applying familiar rules of the master's liability in negligence for injuries sustained by an employee." But the theory thus relied upon was held untenable. "The record itself," said the court, "clearly indicates that it was contemplated by both Rheinwald and his employer that he should and would do all the work personally; he had no assistants on whose labor he made a profit; he personally performed every detail of the work for which he was paid; and the record indicates that both understood that full rights of control and direction were reserved to, and ordinarily exercised by, the employer on painting work performed by Rheinwald." The decision itself in this case is no longer good law in New York. See (1916) 174 App. Div. 935, 160 N. Y. Supp. 1143, reargument denied in (1916) 175 App. Div. 957, 161 N. Y. Supp. 1142, which is affirmed in (1918) 223 N. Y. 572, 119 N. E. 1074. But the correctness of

whatever it may be, is in no wise decisive.⁴

§ 24. Partition of the work among several contractors.

In a Pennsylvania case, where the plaintiff, while passing along a street, fell into an unguarded excavation which had been made in the course of building operations, the court approved a charge of the trial judge to the effect that where the work is split up in different contracts, and the owner undertakes to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for the supervision of the work or the erection and maintenance of guards around it, it is justifiable to draw the inference that the owner retained the supervision, and that his duty to protect the public has not been devolved on others.¹ In the argument of the court it is taken for granted that, under such circumstances as those involved, an employee may, by an express stipulation,

devolve upon a contractor the duty of protecting the public—a doctrine which had been established in Pennsylvania by an earlier ruling, but which is discredited by the weight of authority.² In most jurisdictions, therefore, the special consideration upon which the court relied would have no force, as the employer would have been held liable on the simple ground that a non-delegable duty had not been fulfilled, and irrespective of the question whether the work had been undertaken by one or several contractors. The present writer has found only one other case in which it has been intimated that the partition of the work among two or more contractors may be a sufficient reason for charging a principal with liability for their negligence.³ Such a limitation of the general doctrine seems to be quite arbitrary and irrational, and there are not wanting decisions in which it has been ignored or repudiated.⁴

these particular remarks has not been questioned.

⁴In *Luckie v. Diamond Coal Co.* (1919) 41 Cal. App. 468, 183 Pac. 178, the court made the following remarks: "Assuming, though not conceding, that the written contract of employment contemplated that Foulks should personally drive the truck, the fact remains that Foulks did employ others to drive it and deliver the loads; that these other persons received their orders and directions, as well as their pay, from him and not from defendant; and that defendant acquiesced in this course of conduct. And even if Foulks himself had been required to drive the truck, it would not necessarily follow that he was a servant, and not an independent contractor."

The fact that the person employed was doing the work himself was declared not to be a material element in *Norton v. Day Coal Co.* (1920) — Iowa, —, 180 N. W. 905.

¹*Homan v. Stanley* (1870) 66 Pa. 464, 5 Am. Rep. 389.

²*Allen v. Willard* (1868) 57 Pa. 374, where a principal contractor was sued for an injury caused by the negligence of a subcontractor in leaving unguarded an excavation under a footpath, it was laid down that, al-

though the defendant would not have been liable if he had committed to the subcontractor the entire control of the work of making the excavation, he should be held responsible, for the reason that the evidence was insufficient to establish the conclusion that the control of the work had been thus transferred.

³*McCleary v. Kent* (1854) 3 Duer (N. Y.) 27, where the remark was made arguendo, with reference to the liability of a contractor for the negligence of subcontractors.

⁴In *Treadwell v. New York* (1861) 1 Daly (N. Y.) 128, it was held that a person who employs two independent contractors to execute different portions of the work of constructing a building is not liable to one of them for injuries caused by the negligence of the other.

In *Martin v. Tribune Asso.* (1883) 30 Hun (N. Y.) 391, the defendant was held not to be liable for the negligence of one of several mechanics who had been employed to do different parts of the work of constructing a building.

In *Potter v. Seymour* (1859) 4 Bosw. (N. Y.) 140, Hoffman, J., remarked: "When we once arrive at the principle that employment, control, and supervision, or the right to

§ 25. Footing upon which the remuneration of the person employed is computed.

It has been laid down that "the manner of payment of the contractor, whether it be by the day, or in a lump sum, is not a material factor in determining the relation between the parties,"¹ and that it does not matter "whether the contractor is to be compensated by a lump sum, or a commission on the cost, or a per diem payment."²

such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable that such rule is as applicable to contracts for distinct portions of a building, as to a contract for the whole."

¹ *Ballard & B. Co. v. Lee* (1909) 131 Ky. 412, 115 S. W. 732; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100 (contract to break down rock in a mine at a certain price per foot).

Language indicative of a similar point of view was used in *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875 (charge to jury); *Waters v. Pioneer Fuel Co.* (1893) 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564.

² *Marion Shoe Co. v. Eppley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220.

³ The statement in 1 Thomp. Negl. §§ 579, 629, to this effect, was approved in *Messner v. Bell & Co.* (1909) 138 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; *Williams v. National Cash Register Co.* (1914) 157 Ky. 836, 164 S. W. 112.

For some recent cases in which the rule that the mode of paying the remuneration of the person employed is one of the circumstances to be considered was recognized in general terms, see *Vacker v. Yeager* (1909) 151 Ill. App. 144; *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 795, 160 S. W. 731; *Bodwell v. Webster* (1915) 98 Neb. 664, 154 N. W. 229, Ann. Cas. 1918C, 624; *Ruehl v. Lidgerwood Rural Teleph. Co.* (1912) 23 N. D. 6, L.R.A.1918C, 1063, 135 N. W. 793, Ann. Cas. 1914C, 680.

"The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment." *Atlantic Transp. Co. v. Coneys* (1897) 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177.

But it is manifest from the decisions that these sweeping statements need some qualification. The correct doctrine, so far as it can be expressed in general phraseology, is this: that the mode of payment is an element which has some bearing upon the question whether the person employed was an independent contractor, but does not afford a decisive test of the nature of his relationship to the employer.³ In this point of

"In the books divers rules for pronouncing upon this question [i. e., whether or not an employee was a servant] have been stated, but I must say not always with definiteness and perspicuity. Some lay it down that the manner of paying for the work or thing done, whether by the day or the job, is the rule; but this is not so; that is a circumstance to be considered, but not the criterion." *Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63.

"The fact that payment is to be made by the piece, or the job, or the day or hour is not necessarily controlling, where the workman is subject to the control of the employer as an employee, and not a contractor." *Franklin Coal & Coke Co. v. Industrial Commission* (1921) 296 Ill. 329, 129 N. E. 811.

That the mode of payment is a circumstance in determining whether one is an independent contractor or a servant of another, but is not decisive, was declared in *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803.

An instruction based on the theory that the mode of payment is a decisive circumstance was held erroneous in *New Orleans & N. E. R. Co. v. Reese* (1884) 61 Miss. 581, where the statement disapproved was to the effect that a contract with a railroad company to complete an abandoned construction job, the agreement being that the contractor was to be paid what the labor and material to be furnished by him should cost, and 10 per cent additional as compensation, made the contractor the servant of the company so as to render it liable for his trespass in taking trees from the land of a third party.

The cases cited passim in the monograph in 19 A.L.R. pp. 1168 et seq.,

view it follows that, for a complete and accurate statement of the effect of the decisions, several affirmative propositions and their negative complements are required.

(1) The fact that the person employed undertook to perform the stipulated work as a whole for a specific sum tends very strongly to show that he was an independent contractor. The high degree of probative force ascribed to this element, apparent from the cases cited in §§ 17 and 33, of the monograph in 19 A.L.R. pp. 1168 et seq., would indicate that, when it is combined with the single additional element of the exercise

of an independent occupation by the person employed, the inference with respect to the quality of the contract becomes virtually a *prima facie* presumption, which prevails in the absence of affirmative proof that the employer was entitled to control the details of the work. But it is well settled that the element is not necessarily decisive as regards the quality of the contract.⁴

(2) The fact that the remuneration of the person employed was computed with reference to the quantity of work performed by him tends strongly to show that he was an independent contractor.⁵ That its probative sig-

are also inconsistent with the broad statements quoted in the text.

⁴This obvious proposition was explicitly affirmed in *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Kniceley v. West Virginia Midland R. Co.* (1908) 64 W. Va. 278, 17 L.R.A. (N.S.) 370, 61 S. E. 811.

And see other cases cited in footnotes to §§ 19 and 20 of the monograph in 19 A.L.R. pp. 1168 et seq., in which this element appears in connection with evidence, circumstantial, or partly circumstantial and partly direct, negating independence of the contract.

In *Cargeme v. Alberta Coal & Min. Co.* (1912) 22 West. L. R. (Can.) 68, 7 B. W. C. C. 1020, 6 D. L. R. 231, it was held that an applicant under a Workmen's Compensation Act was precluded from enforcing his claim, by reason merely of the fact that he contracted to perform the work in question for a lump sum, and not on a time basis.

⁵In *Bellamy v. F. A. Ames Co.* (1910) 140 Ky. 98, 130 S. W. 980, the court upheld a judgment for the defendant in an action brought by a hodcarrier, injured while in the employ of a mason whose compensation for the brickwork in a building, then under construction for the defendant, was based upon the number of bricks laid. In this case, it should be observed, evidence offered on behalf of the plaintiff, which showed that the mason's workmen were paid directly by the defendant, and that the defendant had exercised control over the operations, was explained in such a manner as to destroy the probative

value which would otherwise have been ascribed to it.

In *Chute v. Moeser* (1908) 77 Kan. 706, 95 Pac. 398, the fact of the defendant's having "paid upon estimates, as the work progressed, according to an agreed price per cubic foot," was specified as one of several "considerations which did not affect the reason of the rule which ordinarily exempts an employer from responsibility for the negligence of an independent contractor." The precise import of this statement is somewhat obscure, but if it means that this fact had no evidential significance whatever, in respect of the nature of the relationship, it was manifestly inconsistent with the weight of authority.

In *De Sandro v. Missoula Light & Water Co.* (1915) 48 Mont. 226, 136 Pac. 711, evidence which showed that periodical settlements were made between the person employed and the defendant company, based upon estimates at the specified price per foot, the company paying a lump sum for the amount due, tended to corroborate other testimony from which the independence of the contract might be inferred.

In *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721, one of the facts specified, among those which tended to show that the person employed was an independent contractor, was that at the end of each week he received an amount of remuneration calculated at the rate of so many dollars per diem for each of the teams used by him in the performance of a contract for the haulage of materials, no separate sum being paid

nificance is regarded as being, for practical purposes, not less considerable than that of the circumstance mentioned in ¶ (1), is indicated by the cases in which it has been held to be sufficient, when combined with the element of an independent occupa-

as wages, either to him or his workmen.

In *Cohen v. Western Electric Co.* (1906; A. T.) 50 Misc. 660, 99 N. Y. Supp. 525, the court seems to have assumed that a trucking firm, paid by the month according to the number and description of the trucks used, was an independent contractor, but the only question actually discussed was whether the defendant could be held liable on the ground that it had exercised authority over the particular driver whose negligence had caused the plaintiff's injury.

In *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866, a portion of the evidence from which the independence of the contract was inferred was that, while the contract was in progress, the person employed was paid upon estimates, at the end of the week, only 50 per cent of the computed price of the work completed.

As elements tending to prove the independence of the contract, the facts that no provision was made as to the payment for the services rendered, and that the compensation was dependent upon the value thereof, were mentioned in *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

⁶ For cases in which persons employed to work by the piece were held to be servants, see the following:

California. — *Majors v. Connor* (1912) 162 Cal. 131, 121 Pac. 371; *Connell v. Harris* (1913) 23 Cal. App. 537, 138 Pac. 949; *Sacchi v. Bayside Lumber Co.* (1910) 13 Cal. App. 72, 108 Pac. 885.

Illinois. — *Decatur R. Co. v. Industrial Bd.* (1918) 276 Ill. 472, 114 N. E. 915.

Indiana. — *Munice Foundry & Mach. Co. v. Thompson* (1919) 70 Ind. App. 157, 123 N. E. 196; *Nissen Transfer & Storage Co. v. Miller* (1920) — Ind. App. —, 125 N. E. 652.

Iowa. — *Frisbee v. Hawkeye Land Co.* (1915) 170 Iowa, 540, 153 N. W. 85, 10 N. C. C. A. 228.

tion, to establish the independence of the contract. See §§ 21 and 33 of the monograph in 19 A.L.R. pp. 1168 et seq. But it is disregarded whenever the conclusion indicated by the remainder of the evidence is that the person employed was a servant.⁶ This

Kansas. — *Isnard v. Edgar Zinc Co.* (1910) 81 Kan. 765, 106 Pac. 1003.

Kentucky. — *Messmer v. Bell & C. Co.* (1909) 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; *Employer's Indemnity Co. v. Kelly Coal Co.* (1913) 156 Ky. 74, 49 L.R.A.(N.S.) 850, 160 S. W. 914; *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 795, 160 S. W. 731; *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 825, 160 S. W. 728; *Postal Teleg.-Cable Co. v. Murrell* (1918) 180 Ky. 52, L.R.A. 1918D, 357, 201 S. W. 462.

Louisiana. — *SWAIN v. KIRKPATRICK LUMBER Co.* (reported herewith) ante, 665.

Massachusetts. — *McAllister's Case* (1918) 229 Mass. 193, 118 N. E. 326.

Michigan. — *Lewis v. Detroit Vitri-fied Brick Co.* (1911) 164 Mich. 489, 129 N. W. 726.

Minnesota. — *Waters v. Pioneer Fuel Co.* (1893) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *State ex rel. Virginia & R. L. Co. v. District Ct.* (1914) 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

Missouri. — *Kiser v. Suppe* (1908) 133 Mo. App. 19, 112 S. W. 1005.

Montana. — *Allen v. Bear Creek Coal Co.* (1911) 43 Mont. 269, 115 Pac. 673; *McInness v. Republic Coal Co.* (1914) 49 Mont. 112, 140 Pac. 235.

New York. — *Liberatore v. Friedman* (1918) 224 N. Y. 710, 121 N. E. 876; *Peer v. Babcock* (1920) 230 N. Y. 106, 129 N. E. 224, reversing (1919) 187 App. Div. 925, 174 N. Y. Supp. 914.

Oklahoma. — See also *CHICAGO, R. I. & P. R. Co. v. BENNETT* (reported herewith) ante, 678.

Oregon. — *Macdonald v. O'Reilly* (1904) 45 Or. 589, 78 Pac. 753.

Pennsylvania. — *Foster v. National Steel Co.* (1907) 216 Pa. 279, 65 Atl. 618; *Kelley v. Delaware, L. & W. R. Co.* (1921) 270 Pa. 426, 118 Atl. 419.

Texas. — *Southern Cotton Oil Co. v. Wallace* (1899) 23 Tex. Civ. App. 12, 54 S. W. 638; *Wm. Cameron & Co. v. Realmuto* (1907) 45 Tex. Civ. App. 305, 100 S. W. 194; *Missouri, K. & T. R. Co. v. Romans* (1908) — Tex. Civ. App. —, 114 S. W. 157.

remark is applicable as regards contracts under which the standard of

remuneration is a percentage of the profits, gross or net, which accrue to

Washington. — *Barclay v. Puget Sound Lumber Co.* (1908) 48 Wash. 241, 16 L.R.A.(N.S.) 140, 93 Pac. 430; *Simila v. Northwestern Improv. Co.* (1913) 73 Wash. 285, 131 Pac. 831.

Wisconsin. — *Whitney v. Clifford* (1879) 46 Wis. 138, 32 Am. Rep. 703, 49 N. W. 835; *Murphy v. Herold Co.* (1909) 137 Wis. 609, 119 N. W. 294.

England. — *Charles v. Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32.

Canada. — *Campbell v. Dickie* (1903) 36 N. S. 40 (affirmed in (1903) 34 Can. S. C. 265, but this point was not referred to).

"No distinction can be drawn from the circumstance of a man being employed at so much a day, or by the job." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 119 Eng. Reprint, 209, 3 C. L. R. 760, 1 Jur. N. S. 677, 24 L. J. Q. B. N. S. 138, 3 Week. Rep. 181. What is meant by these words is evidently that this circumstance is not decisive.

In *Tucker v. Axbridge Highway Bd.* (1889; Q. B. Div.) 5 Times L. R. (Eng.) 26, 53 J. P. 87, where the defendant was held liable for the death of the plaintiff's husband, occasioned by his having driven a vehicle in the dark against a pile of stones deposited on a road by a man who had been hired to haul them at so much a load, *Pollock, B.*, according to the former of the reports specified, used the following language: "It was said, indeed, that the carter was not the servant of the board. He was, however, employed and paid by the board, and a servant could not be made a contractor merely because he was paid by piecework or by quantity. The man was simply employed by the board to cart the stones and put them by the side of the road. If he had been employed under a general contract to put the road in repair, it would have been different. But here, as in *Taylor v. Greenhalgh* (1876) 24 Week. Rep. (Eng.) 311, the man was only employed to find labor. He was, therefore, the servant of the board, and they were liable for his negligence." As reported in J. P., the learned judge's words were these: "The contractor here was a servant of the highway board. Mr. Poole contended that he was not a servant, but a contractor. It is, however, well estab-

lished that you cannot alter the relation between any two persons by merely applying to them terms of different signification. You must look at the facts, and judge from them. If a person does merely menial work then he is clearly a servant. If he does the work in pursuance of a general contract, the matter is different, —the work is to be done for a lump sum, or by the year or month, or at so much per yard,—it is an entirely different matter, and in that case the duty and liability are wholly transferred to the contractor. That point is rendered clear in *Pendlebury v. Greenhalgh* (1875) L. R. 1 Q. B. Div. 36, 45 L. J. Q. B. N. S. 3, 33 L. T. N. S. 472, 24 Week. Rep. 98, 12 Eng. Rul. Cas. 700."

In *Kelley's Dependents v. Hossac Lumber Co.* (1921) — Vt. —, 113 Atl. 818, 20 N. C. C. A. 902, a portion of the evidence from which the existence of the relationship of master and servant was held to be inferable was that the persons employed were carried on the employer's books with the per diem workmen; but the payroll sheets on which their names appeared were headed "jobbers."

The existence of independent sub-contracts with the persons who performed various distinct kinds of work for the principal contractor will not be inferred from the mere fact that they were paid by the piece. *Allen v. Willard* (1868) 57 Pa. 374.

In *De Sandro v. Missoula Light & Water Co.* (1915) 48 Mont. 226, 136 Pac. 711, it was laid down that the arrangement made for periodical settlements on a piecework footing "did not so conclusively establish the existence of an independent contract that the court was warranted in taking the case from the jury."

In a Quebec case it was declared to be "immaterial whether the workman is paid by the piece or by the foot, provided the work is done on the premises and under the supervision of the defendants." *Beaulieu v. Picard* (1912) 42 Rap. Jud. Quebec S. C. 455, 7 D. L. R. 2.

In *Rex v. King's Norton* (1741) Burr. Sett. Cas. (Eng.) 152, an employee, though paid by the piece, was held to be a servant for the purpose of obtaining a settlement under the Poor Law.

the employer from the services of the person employed.⁷

(3) The fact that the remuneration was computed with reference to the time during which the person em-

ployed should be engaged in the performance of the stipulated work tends strongly to prove that he was not an independent contractor.⁸ But its probative significance in this respect is

⁷ For cases in which it was held that, having regard to the whole of a contract for the employment of a salesman on a commission basis, it was not an independent one, see *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Riggs v. Standard Oil Co.* (1904) 130 Fed. 199; *Aisenberg v. C. F. Adams Co.* (1920) 95 Conn. 419, 111 Atl. 591.

In *Terry Dairy Co. v. Parker* (1920) 144 Ark. 401, 223 S. W. 6, where a man engaged to handle the produce of a dairy company was held, upon the evidence as a whole, to be an independent contractor, it was held that the fact of his having been paid for his services on a commission basis was not sufficient of itself to warrant that conclusion.

In *King v. Brenham Automobile Co.* (1912) — Tex. Civ. App. —, 145 S. W. 278, where the tort-feasor was a lad operating an automobile owned by the defendant, who furnished the lights and gasoline necessary to run it, and got the larger part of the money earned by the car. The existence of the relationship of master and servant, as indicated by these circumstances, was held not to be negated by the fact that he was to receive 20 per cent of the earnings. Such a fact, it was considered, tended to prove that this mode of pay was established to offer an incentive to seek for and obtain passengers for the car, rather than to show that the chauffeur was an independent contractor.

The circumstance that a driver employed by a baker was paid a percentage of the retail price of the bread delivered by him was held in *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288, not to be inconsistent with the conclusion that he was an "employee entitled to claim under a Workmen's Compensation Act." The court quoted the following remark, made in *Cameron v. Pillsbury* (1916) 173 Cal. 83, 159 Pac. 149: "It is not an uncommon thing for retail merchants, laundrymen, and the like, to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this cir-

cumstance created a distinct relationship in law."

In cases arising under the embezzlement statutes, the fact that a person employed to solicit orders for a commodity is paid by commission does not negative the inference that he is a servant. *Rex v. Carr* (1811) Russ. & R. C. C. (Eng.) 198; *Reg. v. May* (1861) Leigh & C. C. C. (Eng.) 13, 30 L. J. Mag. Cas. N. S. 81, 7 Jur. N. S. 147, 3 L. T. N. S. 680, 9 Week. Rep. 256, 8 Cox, C. C. 421; *Reg. v. Tite* (1861) Leigh & C. C. C. (Eng.) 29, 30 L. J. Mag. Cas. N. S. 142, 7 Jur. N. S. 556, 4 L. T. N. S. 259, 9 Week. Rep. 554, 8 Cox, C. C. 458; *Reg. v. Bailey* (1871) 12 Cox, C. C. (Eng.) 56, 24 L. T. N. S. 477.

⁸ For cases in which the doctrine was affirmed or taken for granted, see *Thompson v. Twiss* (1916) 90 Conn. 444, L.R.A.1916E, 506, 97 Atl. 328; *Messmer v. Bell & C. Co.* (1909) 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1 —citing 1 *Thomp. Neg.* §§ 579, 629; *Williams v. National Cash Register Co.* (1914) 157 Ky. 836, 164 S. W. 112 —citing the same authority; *Porter v. Withers Estate Co.* (1919) 201 Mo. App. 27, 210 S. W. 109; *Poor v. Madison River Power Co.* (1908) 38 Mont. 341, 99 Pac. 947; *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484; *Belanger v. Belanger* (1895) 24 Can. S. C. 678.

In *Texas Short Line R. Co. v. Waymire* (1905) — Tex. Civ. App. —, 89 S. W. 452, it was held error to refuse an instruction to the effect that, although the jury might find from the evidence that the plaintiff was under contract for a compensation to be measured by the time consumed in the work, yet if they also found that, under the terms of the contract, the defendant had no right to control plaintiff as to the manner of performing the work, they should render a verdict. The refusal of this charge is assigned as for the defendant.

In *Shea v. Reems* (1884) 36 La. Ann. 966, where it was laid down that the Louisiana Code ordinarily infers the power of control and discharge from the payment of wages, this was declared to be the common-law rule

disregarded, whenever the rest of the evidence shows that the employer was not invested with the right to exercise control over the details of the stipulated work.⁹

(4) The fact that the remuneration of the person employed was to be computed, either entirely or in part, with

also. This statement is, clearly too sweeping. The most that can be said, having a due regard to the general trend of the authorities, is that the payment of wages is a circumstance from which a jury would be justified in inferring the relation of master and servant, if there should be no antagonistic evidence pointing decisively to the opposite conclusion.

⁹ "One may be an independent contractor, although not to be paid a round sum for his work, as when paid by the day, or the cost of the work and a per cent." *Pooler v. Sargent Lumber Co.* (1915) 113 Me. 426, L.R.A. 1915F, 1125, 94 Atl. 754.

For other cases supporting the statement in the text, see the following:

Connecticut.—*Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63, 13 Am. Neg. Cas. 735.

Massachusetts.—*Dane v. Cochrane Chemical Co.* (1895) 164 Mass. 453, 41 N. E. 678 (carpenter employed under continuous contract at a specified rate per diem, but using his own discretion as to details, held to be an independent contractor).

Michigan.—*Gall v. Detroit Journal Co.* (1916) 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 36; *Holbrook v. Olympia Hotel Co.* (1918) 200 Mich. 597, 166 N. W. 876.

New York.—*Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Larow v. Clute* (1891; Sup. Ct. Gen. T.) 37 N. Y. S. R. 859, 14 N. Y. Supp. 616.

Pennsylvania.—*Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; *Karl v. Juniata County* (1903) 206 Pa. 633, 56 Atl. 78.

Texas.—*Groesbeck v. Pinson* (1899) 21 Tex. Civ. App. 44, 50 S. W. 620.

Virginia.—*Emmerson v. Fay* (1896) 94 Va. 60, 26 S. E. 386.

In *Norton v. Day Coal Co.* (1920) — **Iowa**, —, 180 N. W. 905, the fact the person employed was paid by the day was declared to be significant, but not conclusive, with regard to the

reference to the amount which he himself should disburse for the purpose of performing the stipulated work, tends to show that he was an independent contractor.¹⁰ But its significance in that regard is not decisive.

existence of the relationship of master and servant.

The statement in *Geer v. Darrow* (1891) 61 Conn. 220, 23 Atl. 1087, that the fact of the defendant's computation having been estimated by day's work was "quite immaterial," is inexact. Manifestly what the court meant was that this fact is not decisive.

In a prosecution under the embezzlement statutes, the fact that men following the same occupation (drover) as the prisoner were customarily paid by the day does not prove that he was a servant. *Reg. v. Hey* (1849) 2 Car. & K. (Eng.) 985, *Temple & M.* 209, 1 Den. C. C. 602, 3 Cox, C. C. 582, 14 Jur. 154.

¹⁰ In *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847, one Ordway contracted with the United States to furnish granite at specified prices from certain quarries, and to deliver it in Washington city, at such times as might be required. It was provided that he should furnish all the labor, tools, and material necessary "to cut, dress, and box at the quarries all the granite in such manner" as should be directed; that the United States was to pay him "the full cost of such labor," etc., "and also the insurance on the granite, increased by" 15 per cent on such cost; that he was to furnish such number of men as might be deemed necessary for the proper prosecution of the work by the United States; and that, in default of delivery at the times required by the United States, he should pay \$100 for each day thereafter. Claimant, having worked ten hours a day as an employee of the contractor, petitioned for compensation in respect of the two hours in excess of the eight specified by the Act of June 25, 1868, as constituting a day's work. Held, that the claimant's employer was an independent contractor, and consequently that the claim was not enforceable. It is clear, said the court, "that there was

§ 26. Employer entitled to terminate the employment.

The circumstance that the employer possessed the right of terminating the contract at any time, irrespective of whether there was or was not a

no privity between the appellee and the United States. Ordway employed him, and was to pay him, and did pay him. The United States had no interest in the rate or amount paid, save that the sums so paid, with 15 per cent in addition, was the measure of the amount to be paid to Ordway. The fact that Ordway procured the appellee's receipts, presented his own voucher to the government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for the government. The hands trusted the former, and, if he had failed to pay them, the loss would have been theirs." It was also remarked that the stipulation as to the penalty was "incongruous with the idea of his being an agent, and not a contractor."

Compare also statement quoted in note 9, *supra*, from the Pooler Case.

¹ For cases in which the person employed was held not to be an independent contractor, and, in which this element was one of those adverted to, see the following:

United States.—Standard Oil Co. v. Parkinson (1907) 82 C. C. A. 29, 152 Fed. 681 (either party might abandon contract at any time).

Arizona.—Arizona-Hercules Copper Co. v. Crenshaw (1919) 21 Ariz. 15, 184 Pac. 996.

Colorado.—Good v. Johnson (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439, 12 Ann. Cas. 137 (employer was empowered to reduce the force engaged upon the work, or suspend it for any length of time, or discontinue it and cancel the contract, upon paying the contractor all that was due to him, up to the time of suspension).

Connecticut.—Aisenberg v. C. F. Adams Co. (1920) 95 Conn. 419, 111 Atl. 591.

Illinois.—Decatur R. & Light Co. v. Industrial Bd. (1918) 276 Ill. 472, 114 N. E. 915; Bristol & G. Co. v. Industrial Commission (1920) 292 Ill. 16, 126 N. E. 599; Bernauer v. Hartman Steel Co. (1889) 33 Ill. App. 491.

Indiana.—Columbia School Supply

good cause for doing so, is indisputably an evidential element which tends strongly to show that the person employed was not an independent contractor.¹ There is even some apparent authority for the doctrine that

Co. v. Lewis (1917) 65 Ind. App. 339, 116 N. E. 1.

Louisiana.—Quayle v. Sewerage & Water Bd. (1912) 131 La. 26, 58 So. 1021 (employer's possession of right of discharging contractor at any time is mentioned in the syllabus of the court as one of several factors, the conjunction of which negated the independence of the contract).

Michigan.—Lewis v. Detroit Vitri-fied Brick Co. (1911) 164 Mich. 489, 129 N. W. 726..

New York.—Goldman v. Mason (1888) 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Muldoon v. City Fireproofing Co. (1909) 134 App. Div. 453, 119 N. Y. Supp. 320; Abromowitz v. Hudson View Constr. Co. (1919) 188 App. Div. 356, 177 N. Y. Supp. 187, affirmed in (1920) 228 N. Y. 509, 126 N. E. 898.

Texas.—Southern Cotton Oil Co. v. Wallace (1899) 23 Tex. Civ. App. 12, 54 S. W. 638.

Vermont.—Kelley's Dependents v. Hoosac Lumber Co. (1921) — Vt. —, 113 Atl. 818, 20 N. C. C. A. 902.

West Virginia.—Kniceley v. West Virginia Midland R. Co. (1908) 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811.

Canada.—Harold v. Montreal (1867; Q. B.) 11 Lower Can. Jur. 169 (contract might be set aside at the pleasure of the employer after twenty-four hours' notice).

Scotland.—Doharty v. Boyd [1909] Sc. Sess. Cas. 87, 46 Scot. L. R. 71, 2 B. W. C. C. 257.

In Cockran v. Rice (1910) 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570, it was said: "No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself." This statement is obviously too sweeping, for direct evidence going to show that the employer was entitled to exercise control over the details of the work, or actually exercised such control, is certainly more conclusive than the fact mentioned.

the probative force of the circumstance in this regard is virtually decisive.² But this doctrine is apparently not reconcilable with the language

used in the majority of the cases, and it is certainly inconsistent with those cases in which the persons employed were held to be independent contrac-

In *Keyes v. Second Baptist Church* (1904) 99 Me. 308, 59 Atl. 446, 17 Am. Neg. Rep. 526, the existence of a right of discharge was adverted to, but it seems to have been viewed not as a corroborative factor established by direct evidence, but as a circumstance deducible from the rest of the evidence.

In *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175, one of the provisions referred to as negating the independence of the contract was to the effect that the employer could discharge the contractor at any time, while the latter could terminate the contract only upon ten days' notice.

² In *Oldfield v. Furness* (1893; C. A.) 58 J. P. (Eng.) 102, 9 Times L. R. 515, where the plaintiff was injured by the fall of a chute which had been negligently fastened by a coservant, it was held that a jury could not have properly found that the immediate employer of the injured person was an independent contractor, where the evidence was that certain shipowners had arranged to have the goods arriving in a ship delivered through their agents, a firm which was one of the defendants in the action; that these agents had made a contract with one J., who had been a foreman on the dock quay, and who himself worked on the quay; that this contract provided that the agents might at any moment stop J. from going on with the work; and that, after the accident, the agents, in a letter to the plaintiff, had referred to J. as their "foreman." The court seems to have considered the nonsuit proper, even without reference to the last-mentioned detail.

In *Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578, the court laid it down that, if the employer retained, "outside of the written instrument embodying the contract, the right to discharge at will the person employed," the latter was not an independent contractor, and the instrument was not what it purported to be.

In *Evans v. Dare Lumber Co.* (1917) 174 N. C. 31, 93 S. E. 480, the court took the position that the right

of the employer to terminate the contract at any time "gave him potential control" over the person employed, and showed conclusively that the latter was not an independent contractor. The soundness of the doctrine thus adopted seems to be disputable. It is submitted that the employer's possession of a right to dismiss at any time the person employed does not necessarily import his possession of a right to control the details of the stipulated work.

In *Holliday v. National Teleph. Co.* [1899] 2 Q. B. (Eng.) 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658, reversing [1899] 1 Q. B. 221, 68 L. J. Q. B. N. S. 302, where the injury was caused by the negligence of H., a master plumber employed by a telephone company to connect the pipes which it was laying in a street for its wires, the evidence was that, according to the usual course of business, H. was sent for, and either came in person, or sent one or two men, generally, and did the work as soon as he could. But there was no agreement that he should come at any specified time. On the occasion in question H's brother came to do the work alone, as H. was otherwise engaged. The defendant's local manager visited the work several times a day to see that the joints were properly made, and he stated in evidence that, if the work were not satisfactory, he could put an end to the contract. A finding by the city of London court that H. was a servant was held by the divisional court not to be justified by the evidence; but the court of appeal was of opinion that the finding should be allowed to stand.

In 1 Thompson on Negligence, §§ 579 & 629, the rule is thus stated: "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists." This passage was quoted in *Williams v. National Cash Register Co.* (1914) 157 Ky. 836, 164 S. W. 112. But the

tors, although their employment was terminable at any time.³

Stipulations authorizing the employer to cancel, annul, forfeit, or revoke the contract under certain specified circumstances have sometimes

precedents cited by the learned author show that his statement has reference to the question whether a certain person was the servant of the defendant, or of someone else, and not to the question whether that person was an independent contractor or a servant.

³ *United States v. Standard Oil Co.* (1919) 258 Fed. 697 (employer was entitled to terminate contract on short notice); *Donlon Bros. v. Industrial Acci. Commission* (1916) 173 Cal. 250, 159 Pac. 715; *Luckie v. Diamond Coal Co.* (1919) 41 Cal. App. 468, 183 Pac. 178. See also *Gall v. Detroit Journal Co.* (1916) 191 Mich. 405, 19 A.L.R. 1164, 158 N. W. 36; *Wooton v. Dragon Consol. Min. Co.* (1919) 54 Utah, 459, 181 Pac. 593.

⁴ For cases in which contracts containing such stipulations were held not to be independent, see *Pottorff v. Fidelity Coal Min. Co.* (1912) 86 Kan. 774, 122 Pac. 120 (mining company empowered to annul the contract, if the "working of the mine was not agreeable to it"); *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303 (contract revocable on twenty-four hours' notice, if work was not done to the satisfaction of employer's superintendent); *Abromowitz v. Hudson View Constr. Co.* (1919) 188 App. Div. 356, 177 N. Y. Supp. 187 (contract terminable if work not done properly); *Sipe v. Pennsylvania R. Co.* (1909) 222 Pa. 400, 71 Atl. 847 (power reserved, by employer to annul and forfeit the contract if work was not done to his satisfaction); *West Lumber Co. v. Keen* (1920) — Tex. Civ. App. —, 221 S. W. 625 (person employed was subject to discharge for disobedience to orders).

In *GADSDEN v. CRAFT & Co.* (reported herewith) ante, 662, the stipulation under review was to this effect: "For failure to prosecute the work with an adequate force, or for noncompliance with his directions in regard to the manner of constructing it, or for failure to complete the work within the time limit, or for other delays in the performance of, or any omission or neglect of the requirements of, the agreement and specification on the

been viewed as having a tendency to show that the person employed was a mere servant.⁴ On the other hand, it has frequently been declared or assumed that they do not in any wise affect the independence of a contract.⁵

part of the party of the first part, the said engineer may, at his discretion, declare this contract, or any portion or section of it, forfeited."

In *Blake v. Thirst* (1863) 2 Hurlst. & C. 20, 159 Eng. Reprint, 9, 32 L. J. Exch. N. S. 189, 11 Week. Rep. 1034, 8 L. T. N. S. 251, the admission of the employer that he could have dismissed at any time a man engaged under a parol contract, if he was dissatisfied with the execution of the work, was one of the elements upon which the court based its decision that the contract was not an independent one.

⁵ Stipulations with respect to which this position has been taken are the following:

That the employer's engineer might declare the contract forfeited "for noncompliance with his directions in regard to the manner" of doing the work. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383.

That, in the event of the work being delayed, the architect supervising the work, as the representative of the employer, shall have the right to employ another person to carry out the contract. *Robinson v. Webb* (1875) 11 Bush (Ky.) 464.

That, in case of "improper or imperfect performance," the contract may be relet. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N. W. 1030, followed in *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17, affirming (1897) 69 Ill. App. 659, 3 Am. Neg. Rep. 16.

That if, at any time, the contractors are not employing men, tools, implements, and machinery, in kind and quantity, to the entire satisfaction of the chief engineer of the company, and necessary, in his opinion, to prosecute the work with due diligence and expedition, . . . the employer shall have the right to declare the contract annulled, after serving notice upon the contractor. *Burmeister v. New York Elev. R. Co.* (1881) 15 Jones & S. (N. Y.) 264.

That the employer may "terminate the contract immediately," if the con-

But it would seem to be at least an arguable proposition that they are essential elements of a neutral quality as respects their probative signifi-

tractor fails to prosecute the work with diligence, or to perform any proper directions. *Kelley v. Delaware, L. & W. R. Co.* (1921) 270 Pa. 426, 113 Atl. 419.

That the employer's agent "may, at his discretion, for the failure to prosecute the work with an adequate force, or for noncompliance with his instructions in regard to the manner of construction, or for any other omission or neglect of the requirements of this agreement and specifications on the part of the contractors, declare this contract abandoned." *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902.

That if the contractor shall fail to prosecute the work with an adequate force, or to comply with the directions of the engineer in regard to the manner of performing it, or in any other way neglect the requirements of the agreement and specifications, or do any portion of the work in an unfaithful and unworkmanlike manner, the engineer may, at his discretion, declare the contract forfeited. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

That the employer's agent may declare the contract forfeited "for non-compliance" with his directions in regard to the manner of performing the work. *Thomas v. Altoona & L. Valley Electric R. Co.* (Pa.) *supra*.

That the employer may annul the contract on failure of the contractor to comply with its provisions. *Hayes v. Chicago, O. & P. R. Co.* (1916) 203 Ill. App. 472.

That the employer's agent may forfeit the contract for imperfect work, and employ, at the expense of the contractor, such force and means as, in his judgment, shall be necessary to complete the work within the time provided for in the contract. *Ibid*.

That the employer shall be entitled to terminate the contract if the contractor refuses or neglects to supply tools or properly skilled workmen. *Stricker v. Industrial Commission* (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849.

That, if the work is not done by a subcontractor to the satisfaction of the principal employer's engineer, the contract is to be forfeited on two

cance, or, in other words, that they do not tend definitely either to prove or to disprove the independence of the contract. There is no little diffi-

days' notice. *Wray v. Evans* (1875) 80 Pa. 102. In this case the court said: "As long as Davis [the subcontractor] continued to progress with the work in a manner satisfactory to the engineer of the gas company, Wray had no more power over the work than an entire stranger. Had he volunteered advice as to the care necessary to preserve the public from danger, it would have been to no purpose, as he had no power to enforce it. The matter was out of his hands; he could not assume the control of the work until the subcontract should be forfeited by nonperformance."

The following cases also support the statement in the text:

United States.—*Chicago, R. I. & P. R. Co. v. Turner* (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342 (contract was terminable by either party upon fifteen days' notice, or by the company without such notice, upon the failure of the contractor to perform his duties).

California.—*Teller v. Bay & River Dredging Co.* (1907) 151 Cal. 209, 12 L.R.A.(N.S.) 267, 90 Pac. 942, 12 Ann. Cas. 779 (the employer, if dissatisfied with the work, might terminate the contract on payment of the amount then due).

Illinois.—*Hayes v. Chicago, O. & P. R. Co.* (1916) 203 Ill. App. 472 (contract terminable on notice given).

Iowa.—*Parrott v. Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352 (contract might be terminated by the employer's engineer "whenever he shall deem it for the best interests of the company").

Kansas.—*Maughlille v. Price* (1916) 99 Kan. 412, 161 Pac. 907 (any refusal of the lessee to comply with any provision of the agreement, for five days after his attention was called thereto in writing by the lessor, was to authorize a termination of all rights of the lessee upon ten days' notice).

Minnesota.—*Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866 (employer had the right to terminate the contract "whenever, in his opinion, it was necessary or expedient").

Missouri.—*Hilsdorf v. St. Louis*

culty in finding any satisfactory logical ground upon which it can be maintained that a provision which, by its terms, purports merely to regulate the right of rescission, has a distinct bearing upon the extent of the controlling powers which the employer is entitled to exercise while the work is in course of performance.

§ 27. Employer not entitled to terminate the employment.

The existence of the right of con-

(1869) 45 Mo. 94, 100 Am. Dec. 352 (power reserved to annul the contract).

North Dakota.—*Solberg v. Schlosser* (1910) 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91 (employer reserved right to terminate the contract in case the work was not being done in accordance with the plans).

Oregon.—*Scales v. First State Bank* (1918) 88 Or. 490, 172 Pac. 499 (employer empowered "to take full control and possession," and to prosecute the work to completion, in the event of the failure of the person employed to comply with any of the terms or conditions of the contract).

Pennsylvania.—*Foehr v. New York Short Line R. Co.* (1909) 40 Pa. Super. Ct. 7 (employer might stop or suspend work for reasons not specified in the contract).

Texas.—*Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495 (employer empowered to terminate employment for specified reasons).

West Virginia.—*Anderson v. Tug River Coal & Coke Co.* (1906) 59 W. Va. 301, 53 S. E. 713 (contract might be canceled, if not duly performed).

In *Svolos v. Harry Marsh Co.* (1921) 195 App. Div. 674, 186 N. Y. Supp. 689, a contract was held independent which contained a stipulation to the effect that, if there was any delay of more than eight hours, except such as might be due to weather conditions, the employer was at liberty to go on and complete the work.

In *Dayton v. Free* (1914) 46 Utah, 277, 148 Pac. 408, the defendant company reserved the right to terminate the contract, if the firm failed or refused for six months to do the amount of work stipulated in the specifications, or if the company had not sufficient funds to justify a continuance of the work; but, in the event of the

trolling the person employed in respect of the details of the work normally implies that the employer has also the right to discharge him. Accordingly, the existence of the relation of master and servant is ordinarily negatived, where it appears that the power of discharge was not an incident of the contract.¹ On the ground that an employer invested with the power of terminating the contract at any time is also invested,

contracts being terminated without fault on the part of the contractors, the company was to pay for all work completed, and to purchase from the firm at cost all machinery, appliances, tools, materials, etc., on hand.

In *Blumb v. Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, the court rejected the contention that a conditional clause of the type exemplified in the above cases was to be construed in such a sense that the defendant might be declared liable, as a matter of law, if its agent should be notified that the contractor's men were doing a part of the work in a negligent manner.

In *Hopper v. S. S. Ordway & Sons* (1911) 157 N. C. 125, 72 S. E. 839, the court, referring to the statement in 16 Am. & Eng. Enc. Law, p. 190, that "the fact that the employer may at any time terminate the employment, though strong evidence that the employee is a mere servant, is not conclusive in that regard," said that it was not applicable to the contract under consideration, because under it "there was no absolute right to terminate the contract at any time, but to put an end to it if the contractor was not performing it according to the stipulations."

¹ *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17.

In *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721, involving a claim under a Workmen's Compensation Act, the court thus commented on the finding that the employer had the right of discharging the applicant, "and ruling his team off the work," if the services rendered were unsatisfactory: "The conjunctive is very significant. Tittle could not, under the contract, discharge Stevens or dispense with the services of the team. The agreement was not

by implication, with the power of obtaining its modification by offering the employee the alternative of consenting to such modification, or of being discharged, it has been held that, where the consent of the employee to certain acts of the employer's agents which amount to an assertion of control over the details of the stipulated work is shown to have been procured by a threat of discharge, the employer is precluded from relying upon the defense that those acts were in violation of the provisions of the contract.²

§ 28. Contract not terminable without the consent of the person employed.

In the case cited below, a person employed under a contract which con-

tained a provision of this tenor was held to be a mere servant.¹ But the precise significance attached to it by the court is not apparent from the report.

§ 29. Employer entitled or not entitled to discharge the workmen hired by the contractor.

(a) Right vested in employer

That the circumstance of the employer's having possessed the right of discharging, by a direct exertion of authority, the servants of the person employed, tends in some degree to prove that that person was not an independent contractor, is a doctrine with regard to which there is apparently no difference of opinion.¹ That

thus divisible, and clearly Stevens was not the employee of Tittle."

In *Kiser v. Suppe* (1908) 133 Mo. App. 19, 112 S. W. 1005, the court used this language: "Not only was he [the contractor] to be paid 'by the piece' instead of by wages,—another important, but not conclusive, fact,—but he was to have full control over the manner of conducting the work, and was to employ, discharge, and pay his assistants. He owed defendants no obedience, and consequently they had no right to discharge him for disobedience. Their right to discontinue the sinking of the shaft, and thereby terminate his employment, was not the legal equivalent of the right to discharge him, and as long as work was conducted by him under the contract, he was a contractor, independent of their control."

²*Southern Cotton Oil Co. v. Wallace* (1900) 23 Tex. Civ. App. 12, 54 S. W. 638. There the contractor resisted the assertion of a power on the part of the officers of the company to require the retention of men whom he desired to discharge, to transfer his servant's men to other work, and to fix the hours of labor.

¹In *Bélanger v. Bélanger* (1895) 24 Can. S. C. 678, where the relation of the parties was determined with reference to the law of the province of Quebec, A. B. and C. B., who had published a newspaper as partners or joint owners, entered into a new agreement by which A. B. assumed payment of all the debts of the business, and became from that time sole

proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. The agreement provided that C. B. should become from the date of the contract director and editor of the newspaper; that his name should appear as such director at the head of the newspaper; that for his services A. B. should allow him a specified sum per annum; and that A. B. could not terminate this engagement without the consent of C. B. After the paper had been published for some time under this agreement as a supporter of a certain political party, C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B., asking for a declaration that he was "redacteur et directeur" of the newspaper, and claiming damages. His contention, that he was in a position of absolute independence with respect to A. B., was pronounced untenable, and it was held that the effect of the agreement was to make him the employee of A. B., as owner of the paper.

¹For cases in which the independence of the contract was negated with relation to evidence which included this element, see *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439; *Kinsman v. Hartford Courant Co.* (1919) 94 Conn. 156, 108 Atl. 562; *Chicago v. Joney* (1871) 60 Ill. 383; *Indiana Iron Co.*

this is the highest probative value which can logically be ascribed to such an element would seem to be the only reasonable position, having regard to the doctrine that the independence of a contract is not necessarily destroyed by the employer's

reservation of a right to terminate it at any time. See § 27, *supra*.² But in the cases cited below the decision seems to have proceeded upon the hypothesis that the element possessed a conclusive significance.³

Testimony to the effect that the em-

v. Cray (1897) 19 Ind. App. 565, 48 N. E. 803; *Employers' Indemnity Co. v. Kelly Coal Co.* (1913) 156 Ky. 74, 49 L.R.A.(N.S.) 850, 160 S. W. 914; *Bechnel v. New Orleans, M. & T. R. Co.* (1876) 28 La. Ann. 522; *Quayle v. Sewerage & Water Bd.* (1912) 131 La. 26, 58 So. 1021; *Van Simaeys v. George R. Cook Co.* (1918) 201 Mich. 540, 167 N. W. 925; *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866; *Gray v. Grand River Coal & Coke Co.* (1914) 175 Mo. App. 421, 162 S. W. 277; *Harmon v. Ferguson Contracting Co.* (1912) 159 N. C. 22, 74 S. E. 632; *Foehr v. New York Short Line R. Co.* (1909) 40 Pa. Super. Ct. 7.

In *Charles v. Taylor* (1878) L. R. 3 C. P. Div. (Eng.) 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, where the person employed was held to be a servant, one of the incidents of the contract was that he selected his workmen, but could not dismiss them without referring the matter to the employer.

In *Smith v. Ulen* (1914; Alberta Sup. Ct.) 28 West. L. R. 133, 6 West. Week. Rep. 678, 17 D. L. R. 400, it was held that the reservation of a power to suspend any workman for incompetency, drunkenness, negligence, or disregard of orders did not destroy the independence of the contract.

²In *Fay v. German General Benev. Soc.* (1912) 163 Cal. 118, 124 Pac. 844, the following instruction was held erroneous: "Where the owner of a building has certain work done thereon under another, and pays that other, as his compensation therefor, a percentage upon the cost of labor performed and materials furnished, and the owner pays for the materials used, and pays the men each week to perform the work, and has the power to discharge them, then, in that case, the owner is the master and the men who do the work are the servants of the master or owner, and the person who is thus paid such a percentage as his compensation is only the agent of the owner, and the men who do the work

in such a case are the servants of the owner of the building."

In *Kniceley v. West Virginia Midland R. Co.* (1908) 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811, the court observed, *arguendo*: "Nor is it more than a mere circumstance, having more or less probative force, that the general employer has not, or has delegated, this power to hire and discharge the men." The view taken in the text is supported in effect by this statement; though, in regarding the situation from the standpoint of a "delegation" of authority, the court has invoked what seems to be an entirely novel conception. It may be remarked, however, that the only two cases cited were *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; and *Jackson v. Norfolk & W. R. Co.* (1897) 43 W. Va. 381, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, 1 Am. Neg. Rep. 722; and that these involved merely the liability of a master to his servant for the negligence of a superior fellow servant. They have, therefore, no pertinency to the issue raised in cases which turn upon the question whether the immediate employer of the injured person was an independent contractor.

For cases in which contracts reserving the act of discharge were held to be independent, see *Hardaker v. Idle Dist. Council* [1896; C. A.] 1 Q. B. (Eng.) 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *United States v. Standard Oil Co.* (1919) 258 Fed. 697; *Louisville & N. R. Co. v. Newland* (1917) 176 Ky. 166, 195 S. W. 415; *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902.

³In *Borderland Coal Co. v. Small* (1914) 160 Ky. 738, 170 S. W. 8, where the defendant company was held liable as master for the death of a helper employed by a headminer, the decision was put upon the ground that the deceased was "in the service of the company, which not only paid him, but, under the evidence, had the

ployer's agent discharged, on one occasion, a servant of the contractor, has, manifestly, no tendency to show that this servant and his fellow servants were under the control and direction of the employer, if it also appears that, when he took this step, the agent was acting at the request of the contractor.⁴

(b) *Right not vested in employer.*

As a matter of abstract theory, it is doubtless possible to conceive of circumstances under which the relationship of master and servant may exist, even though the former does not possess the right of discharging the latter. But as such a right is normally incidental to that relationship,

right to discharge him. . . . In such cases the head miner or workman is not an independent contractor, but a servant, whose compensation depends upon the amount of coal he gets out; and while he pays his helpers, their pay is taken out of his pay. And where both are subject to the control of the mine owner, as here, they are equally his servants."

The syllabus of the court in *Talimage v. Tift* (1920) 25 Ga. App. 639, 104 S. E. 91, is as follows: "Where laborers employed by a contractor are subject to the control of the employer, and may be discharged by the latter, the contractor is, as respects the employment and control of the laborers, not an independent contractor," citing 14 R. C. L. 68.

⁴ *Marion Shoe Co. v. Eppley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220.

⁵ The qualifying word "usually" is here introduced, because the right to control the servants of the intermediate employer may be, and often is, absent, where that employer is an agent.

⁶ *Crudup v. Schreiner* (1901) 98 Ill. App. 337—relying on *Pioneer Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17. That case was also cited as a precedent in *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322, where it was laid down that evidence going to show that the defendant company had no power to discharge the driver of a wagon used by his immediate employers in the performance of a contract for the haulage of brick was conclusive

evidence which shows that a principal employer did not possess it with respect to the servants hired by the party who undertook to perform the work in question may reasonably be said to afford, in most instances, decisive proof that he was not their master—a conclusion which usually involves, by necessary implication, the further inference that the intermediate employer was an independent contractor.⁶ Such evidence has, in some cases, been viewed as being sufficient of itself to warrant that inference.⁶ In others it has been adverted to in conjunction with other elements which pointed to that inference.⁷

against the theory that the company was responsible for his negligence. But this particular ruling seems to apply merely to the second of the questions discussed, viz., whether, at the time when the plaintiff was injured, the driver was a special servant, pro tempore, of the company. If so, the earlier case was not in point, for it did not involve the question of special service. That question, however, was the one upon which the other authority cited (*Consolidated Fireworks Co. v. Koehl* (1901) 190 Ill. 145, 60 N. E. 87) actually turned.

In *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 743, the power of discharge was held not to have been conferred by a clause in the contract to the effect that no person or persons objectionable to the principal employer should be hired by the contractor.

⁷ For cases in which the independence of the contract was predicated partly on the ground that the right of discharge was not vested in the principal employee, see *Stanley v. Aurora, E. & C. R. Co.* (1911) 166 Ill. App. 132; *Kelleher v. Schmitt & H. Mfg. Co.* (1904) 122 Iowa, 635, 98 N. W. 482; *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107; *Crow v. McAdoo* (1920) — Tex. Civ. App. —, 219 S. W. 241; *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508 (defendants—here the contractors—selected, employed, and paid the workmen "out of their own funds," and the principal employer could not dismiss them).

In *Carleton v. Foundry & Mach.*

(c) *Bearing of these circumstances upon the question of special temporary service.*

The fact that the right to discharge the workman by whom the act constituting the gravamen of the claim was committed was or was not vested in the defendant is relevant with respect to the question whether the workman's position at the time when he committed the act was that of a special servant of the defendant for the purpose of the work then in course of performance, as well as with respect to the question whether his immediate employer was an independent contractor. The former question involves the effect of evidence applicable to a temporary situation; the latter is concerned with the nature of the relationship of the parties during the whole of the period covered by

the contract. It may be doubted, however, whether the courts have always written their opinions with a clear realization of the essential dissimilarity of the issues to be determined, according as the evidence is regarded as having a bearing upon the one or the other of these questions.⁸

§ 30. Employer empowered to control the employment and discharge of the workmen.

The preponderance of authority is in favor of the doctrine that the independence of a contract is in nowise affected by the insertion of a provision to the effect that the employer shall have the right to demand and procure the discharge of any of the contractor's workmen who may be disobedient, unskilful, negligent, or in any other way unfit to participate in the work.¹

Products Co. (1917) 199 Mich. 148, 19 A.L.R. 1141, 165 N. W. 816, a finding that the contractee was entitled to hire and discharge the contractor's workmen was held not to be warranted by evidence which merely showed that on one occasion a workman had appeared at the factory of the contractee in an exhausted condition, and that the manager, having inquired what the trouble was, and ascertained that he had been working all night at another factory, allowed him to lie off for the day. The court said: "This act of humanity is not evidence of the right to hire and discharge, and we emphasize the word 'right,' because, as we shall presently see, it is not what control was exercised, but what right of control existed."

In *Edmundson v. Coca-Cola Co.* (1912) — Tex. Civ. App. —, 150 S. W. 273, one of the clauses in the contract required the contractor, after the completion of the work, to submit the bills for material and his pay rolls to the contractee, to be checked and approved. Held, that "the right of approval extended only to the amounts paid for material and work, and could only be construed to give the company the right to disapprove the amounts paid for certain material and work if unreasonable, but cannot be construed to mean that the company would have the right to name the men who were to do the work, or the right to discharge men who were 20 A.L.R.—49.

doing the work, under employment by" the contractor.

⁸ See, for example, *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322, note 6, *supra*.

¹ In *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 244, 154 Eng. Reprint, 1201, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, 19 Eng. Rul. Cas. 168, the plaintiff's contention that, as the defendant was invested by the contract with the power of insisting on the removal of careless or incompetent workmen, it was responsible for their retention, was thus disposed of: "The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant."

For other cases in which contracts including provisions of this tenor were held to be independent, see the following:

United States. — *Atlantic Transp. Co. v. Coneys* (1897) 28 C. C. A. 388, 61 U. S. App. 570, 82 Fed. 177.

Alabama. — *Sloss-Sheffield Steel & Iron Co. v. Hubbard* (1915) 14 Ala. App. 139, 68 So. 571.

California. — *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

Connecticut. — *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

Georgia. — *Louisville & N. R. Co. v.*

§ 31. *Contract not to be assigned or sublet without the employer's permission.*

In several cases in which the per-

son employed was held to be a servant, the contract under review embraced a stipulation that no part of the work should be sublet without the

Hughes (1910) 134 Ga. 75, 67 S. E. 542.

Illinois.—Bayer v. Chicago, M. & N. R. Co. (1896) 68 Ill. App. 219.

Indiana.—Julius Keller Constr. Co. v. Herkless (1915) 59 Ind. App. 472, 109 N. E. 797.

Louisiana.—Robichaux v. Morgan's L. & T. R. & S. S. Co. (1912) 131 La. 727, 60 So. 206; Lutenbacher v. Mitchell-Borne Constr. Co. (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

Missouri.—Salmon v. Kansas City (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16; McGrath v. St. Louis (1908) 215 Mo. 191, 114 S. W. 611; McKinley v. Chicago, S. F. & C. R. Co. (1890) 40 Mo. App. 449; Ege v. Phoenix Brick & Constr. Co. (1906) 118 Mo. App. 630, 94 S. W. 999.

Nebraska.—Omaha Bridge & Terminal Co. v. Hargadine (1904) 5 Neb. (Unof.) 418, 98 N. W. 1071, s. c. on second appeal, 76 Neb. 729, 107 N. W. 864.

New Jersey.—Cuff v. Newark & N. Y. R. Co. (1870) 35 N. J. L. 17, 10 Am. Rep. 205.

New York.—Uppington v. New York (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Schular v. Hudson River R. Co. (1862) 38 Barb. 653.

North Carolina.—Denny v. Burlington (1911) 155 N. C. 39, 70 S. E. 1085, 3 N. C. C. A. 922 (arguendo); Harmon v. Ferguson Contracting Co. (1912) 159 N. C. 22, 74 S. E. 633.

Pennsylvania.—Foehr v. New York Short Line R. Co. (1909) 40 Pa. Super. Ct. 7.

South Carolina.—Rogers v. Florence R. Co. (1889) 31 S. C. 378, 9 S. E. 1059.

Tennessee.—Louisville & N. R. Co. v. Cheatham (1907) 118 Tenn. 160, 100 S. W. 902.

Texas.—Gulf, C. & S. F. R. Co. v. Delaney (1900) 22 Tex. Civ. App. 427, 55 S. W. 538.

Utah.—Callahan v. Salt Lake City (1912) 41 Utah, 300, 125 Pac. 863; Dayton v. Free (1914) 46 Utah, 277, 148 Pac. 408.

Washington.—Engler v. Seattle (1905) 40 Wash. 72, 82 Pac. 136, 19 Am. Neg. Rep. 49.

England.—Hardaker v. Idle Dist.

Council [1896] 1 Q. B. 335, 35 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

Australia.—Smith v. Ulen (1914) — Alberta L. R. —, 17 D. L. R. 400 (decision of single judge).

In one case it was remarked that the fact that the discharge is to be accomplished through a request to the immediate employer of the workman, instead of by the direct act of the principal himself, rather repels than creates the inference that the principal possesses the right to discharge. Harris v. McNamara (1892) 97 Ala. 181, 12 So. 103.

In another case the court, in commenting upon the fact that by the specifications the contractor was required to dismiss from his employment all incompetent or unfaithful persons, said: "In this we may observe that the statement that the city had a general power over the men employed by the contractor is too broad, for the contract is that he shall dismiss from his employment incompetent or unfaithful employees. Herein the fact of his superior and independent control over the workmen is recognized; for, if the city retained this power, why contract with Grant for the doing of that which it could, at any time, do itself." Erie v. Caulkins (1877) 85 Pa. 247, 27 Am. Rep. 642, 13 Mor. Min. Rep. 1.

In Callahan Constr. Co. v. Rayburn (1915) 110 Miss. 107, 69 So. 669, the independence of a contract for the construction of a railroad was held to be deducible from stipulations that the crew employed by the contractor on his construction trains should be such as were satisfactory to the company, and that any employees not found satisfactory should be discharged at its request. No precedents were cited.

In the following cases the reservation by the employer of a right to demand the discharge of the contractor's workmen deemed to be unsuitable was one of the elements with reference to which the independence of the contract was denied. Carlton County Farmers' Mut. F. Ins. Co. v. Foley Bros. (1912) 117 Minn. 59, 38 L.R.A. (N.S.) 175, 134 N. W. 311; Callahan

consent of the employer.¹ In other cases the independence of contracts which contained clauses of this purport was affirmed.²

The doctrine for which the cases belonging to the latter of these groups may be regarded as being in some degree authorities,—viz., that such clauses are to be classed among the elements which tend to prove the independence of a contract—derives some support from the consideration that they are very rarely inserted in contracts of hiring of service.

Constr. Co. v. Rayburn (Miss.) *supra*; *Chas. T. Derr Constr. Co. v. Gelruth* (1911) 29 Okla. 538, 120 Pac. 253; *Pressley v. Sallisaw* (1916) 54 Okla. 747, 154 Pac. 660; *Cooper v. Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887; *North Bend Lumber Co. v. Chicago M. & P. S. R. Co.* (1913) 76 Wash. 232, 135 Pac. 1017.

In *Muskogee Electric Traction Co. v. Hairel* (1915) 46 Okla. 409, 148 Pac. 1005, the two provisions which were there held to destroy the independence of the contract were (1) that any person in the employ of the contractor or of any subcontractor, who, in the opinion of the contractee, should not perform his work in a proper manner, or be riotous, etc., should forthwith be discharged by the contractor; and (2) that, if there should be any unsatisfied claims for damages to persons or property at the time when the final estimate was made, the contractee should have the right to deduct all sums paid in respect of such claims, from the amount due to the contractor as shown by the final estimate. As the latter of these provisions apparently has no relevancy to the question of the independence of the contract, the decision must apparently be regarded as resting upon the probative significance of the former alone.

¹ *Blake v. Thirst* (1863) 2 Hurlst. & C. 20, 159 Eng. Reprint, 9, 32 L. J. Exch. N. S. 189, 11 Week. Rep. 1034, 8 L. T. N. S. 251; *Carlton County Farmers' Mut. F. Ins. Co. v. Foley* (1912) 117 Minn. 59, 38 L.R.A. (N.S.) 175, 134 N. W. 311; *Corrigan v. Heubler* (1914) — Tex. Civ. App. —, 167 S. W. 159.

² *United States*. — *Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S.

In one case a clause providing that the person employed should, in the event of his subletting the work, remain liable to the employer as though there had been no subletting, was held to negative the independence of the contract.³ But in another case the independence of a contract which included such a clause was affirmed.⁴

The independence of a contract with a city is not destroyed by the insertion of a clause providing that only persons resident in the city shall be employed by the contractor.⁵

449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342.

District of Columbia. — *Philadelphia, B. & W. R. Co. v. Karr* (1912) 38 App. D. C. 193, — A.L.R. —.

Illinois. — *Hayes v. Chicago, O. & P. R. Co.* (1916) 203 Ill. App. 472.

Kansas. — *Maughlille v. Price* (1916) 99 Kan. 412, 161 Pac. 907.

Kentucky. — *Robinson v. Webb* (1875) 11 Bush, 464.

Nebraska. — *Omaha Bridge & Terminal R. Co. v. Hargadine* (1904) 5 Neb. (Unof.) 418, 98 N. W. 1071, s. c. on second appeal in (1906) 76 Neb. 729, 107 N. W. 864.

New Jersey. — *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205.

Tennessee. — *Louisville & N. R. Co. v. Cheatham* (1907) 118 Tenn. 160, 100 S. W. 902.

Texas. — *Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495.

In *Smith v. Bank of Commerce & T. Co.* (1916) 135 Tenn. 398, 18 A.L.R. 788, 186 S. W. 465, a provision against subletting without consent was followed by this clause: If "any portion of the work be let to subcontractors, the contractor covenanted that such subcontractors should be responsible, capable, and reputable persons, and the contractor should remain responsible for the performance of the work, notwithstanding any subcontract."

³ *Alabama Western R. Co. v. Talley-Bates Constr. Co.* (1909) 162 Ala. 396, 50 So. 341.

⁴ *Hayes v. Chicago, O. & P. R. Co.* (1917) 203 Ill. App. 472.

⁵ *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

§ 32. *Party by whom the wages of the contractor's servants paid.*

(a) *Payment by the contractee.*

The circumstance that the wages of the workmen hired by the contractor were paid by the principal employer is regarded as an element which tends,

¹ **Alabama.** — *Sloss-Sheffield Steel & Iron Co. v. Hubbard* (1915) 14 Ala. App. 139, 68 So. 571.

Arizona. — *Arizona-Hercules Copper Co. v. Crenshaw* (1919) 21 Ariz. 15, 184 Pac. 996.

California. — *Giacomini v. Pacific Lumber Co.* (1907) 5 Cal. App. 218, 89 Pac. 1059.

Connecticut. — *Thompson v. Twiss* (1916) 90 Conn. 444, L.R.A.1916E, 506, 97 Atl. 328.

Illinois. — *Linguist v. Hodges* (1911) 248 Ill. 491, 94 N. E. 94.

Indiana. — *Marion Shoe Co. v. Epley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220.

Kansas. — *Nelson v. American Cement & Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578.

Kentucky. — *Ballard & B. Co. v. Lee* (1909) 131 Ky. 412, 115 S. W. 732; *Employers' Indemnity Co. v. Kelly Coal Co.* (1913) 156 Ky. 74, 49 L.R.A.(N.S.) 850, 160 S. W. 914.

Massachusetts. — *Carey v. Baxter* (1909) 201 Mass. 522, 87 N. E. 901.

Minnesota. — *Klages v. Gillette Herzog-Mfg. Co.* (1902) 86 Minn. 458, 90 N. W. 1116, 12 Am. Neg. Rep. 488.

Missouri. — *Porter v. Withers Estate Co.* (1919) 201 Mo. App. 27, 210 S. W. 109.

New York. — *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835.

North Carolina. — *Midgette v. Branning Mfg. Co.* (1909) 150 N. C. 333, 64 S. E. 5.

Pennsylvania. — *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508.

Texas. — *Texas Bldg. Co. v. Reed* (1914) — Tex. Civ. App. —, 169 S. W. 211 (wages paid by checks, signed by principal employer, and countersigned by intermediate employer).

Washington. — *Erickson v. E. J. McNeeley & Co.* (1906) 41 Wash. 511, 84 Pac. 3; *James v. Pearson* (1911) 64 Wash. 263, 116 Pac. 852; *Fehrenbacher v. Oakesdale Copper Min. Co.* (1911) 65 Wash. 134, 117 Pac. 870.

In *Embler v. Gloucester Lumber Co.* (1914) 167 N. C. 457, 83 S. E. 740,

in some degree, to show that the contractor was himself a mere servant.¹ But it is clearly decisive in that regard.² Such prima facie significance as it possesses may be rebutted by proof that the wages were paid by the principal employer because the contractor was without the necessary funds,³ or

where the question of the independence of the contract was held to be for the jury, one of the items of evidence was that the wages of the workmen were deducted from the contract price of the work.

² *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740; *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107; *Scales v. First State Bank* (1918) 88 Or. 490, 172 Pac. 499; *Groesbeck v. Pinson* (1899) 21 Tex. Civ. App. 44, 50 S. W. 620 (person employed kept an account of the expenses incurred by him in hiring men and teams, and this amount was paid by the employer after the completion of the work); and the cases cited in the following notes.

In *Brown v. Munn Piano Co.* (1916) 172 App. Div. 372, 158 N. Y. Supp. 1026, evidence that the employer had agreed to reimburse the person employed, for wages paid to such assistants as he might have was held not to negative the conclusion that the latter was an independent contractor.

In *Paterson v. Lockhart* (1905) 7 Sc. Sess. Cas. 5th series, 954, 42 Scot. L. R. 755; 13 Scot. L. T. 193, this element seems to have been regarded as decisive. If so, the position taken is not in harmony with the cases as a whole.

³ For cases involving this situation, see *Stanley v. Aurora, E. & C. R. Co.* (1911) 166 Ill. App. 132 (element was mentioned, but not specially discussed); *Lawton v. Morgan, Fliedner & Boyce* (1913) 66 Or. 292, 131 Pac. 314, 134 Pac. 1037.

In *Bain v. Petroleum Iron Works Co.* (1909) 223 Pa. 96, 72 Atl. 279, the court thus commented upon certain undisputed evidence which showed that the wages of the men doing the work in question were paid by the defendant company, and not by their immediate employer: "This circumstance, unexplained, would warrant the inference that the contract between defendant and Robinson had been ignored or superseded. The defendant advanced an explanation

because the principal employer desired to protect his property against liens.⁴ It becomes, of course, an entirely negligible factor, where the evidence shows that the payment was made with money furnished by the person employed.⁵

wholly consistent with its position that the work was being done by Robinson under the contract when the accident happened. It was this: That Robinson reported to the company that he was without funds to pay the men he had employed, and asked that the company do so, and charge him with the advancement; that rather than have the work fail, or run the risk of liens, the company acceded to his request and paid the men directly. This raised a question of fact which necessarily drew the case to the jury. The explanation rested merely upon oral testimony, which, if believed by the jury, would leave the contract between the defendant and Robinson wholly unaffected by the circumstance that the defendant had paid the wages. If the explanation was a true statement of facts, it was more than sufficient to overcome the inference of an abandonment of the contract from the payment of the wages."

In *Harger v. Harger* (1920) 144 Ark. 375, 222 S. W. 736, where the evidence showed that the lessor of a mine advanced money to the lessee on his pay roll, and that he put himself on the pay roll covered by such advances, the court said: "This circumstance is without any probative force to establish the fact that appellant Harger was a mere employee, or agent of the coal company in the operation of the mine. It had the right to make advances under its purchases without the transaction being treated as a departure from the terms of the contract, and as a change of its nature."

In *Employers' Indemnity Co. v. Kelly Coal Co.* (1913) 149 Ky. 712, 41 L.R.A.(N.S.) 963, 149 S. W. 992, the fact that the coal company, with which the immediate employer of an injured miner had made a contract to get out coal at so much a ton, had paid the wages of that miner for the purpose of assisting his immediate employer in his business, was held not to be sufficient of itself to render that miner an "employee" of the coal company, within the meaning of a policy issued by the indemnity company.

(b) *Payment by the contractor.*

The fact that the wages of the workmen employed by the contractor were paid by him tends to prove that the contract was an independent one.⁶ But it does not possess a

⁴ *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439; *Bellamy v. F. A. Ames Co.* (1910) 140 Ky. 98, 130 S. W. 980.

⁵ Such rebutting testimony was given in *Bokoshe Smokeless Coal Co. v. Morehead* (1912) 34 Okla. 424, 126 Pac. 1033.

⁶ For cases in which the element was one of those with reference to which the independence of the contract was predicated, see the following:

Alabama. — *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Hubbard v. Coffin* (1914) 191 Ala. 494, 67 So. 697; *Connors-Weyman Steel Co. v. Kilgore* (1914) 189 Ala. 643, 66 So. 609.

Arkansas. — *St. Louis, I. M. & S. R. Co. v. Yonley* (1890) — Ark. —, 13 S. W. 333.

Connecticut. — *Burke v. Norwich & W. R. Co.* (1867) 34 Conn. 474, 13 Am. Neg. Cas. 662.

Illinois. — *Hale v. Johnson* (1875) 80 Ill. 185; *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242, affirming (1897) 68 Ill. App. 487; *East St. Louis v. Giblin* (1878) 3 Ill. App. 219; *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322 (holding that the fact of an occasional payment by the principal employer is immaterial, if it is made as an accommodation).

Indiana. — *Marion Shoe Co. v. Eppley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220.

Maryland. — *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56.

Michigan. — *Lenderink v. Rockford* (1904) 135 Mich. 531, 98 N. W. 4; *McBride v. Jerry Madden Shingle Co.* (1912) 173 Mich. 248, 138 N. W. 1077; *Perham v. American Roofing Co.* (1916) 193 Mich. 221, 159 N. W. 140.

Missouri. — *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S. W. 1077; *Kiser v. Suppe* (1908) 133 Mo. App. 19, 112 S. W. 1005; *Kipp v. Oyster* (1908) 133 Mo. App. 711, 114 S. W. 538; *Shroer v. Brooks* (1920) 204 Mo. App. 567, 224 S. W. 53.

Nebraska. — *Barrett-Selden Brock*

conclusive significance in that regard.⁷

(c) *Bearing of these circumstances upon the question of special, temporary service.*

The circumstance that the wages of the person whose act constitutes the basis of the claim were paid by the contractee, or by the contractor, has also a bearing upon the question whether that person was a servant of the former, or of the latter, at the time when the act was committed. The cases involving this question are

Constr. Co. (1919) 103 Neb. 850, 174 N. W. 866.

New Hampshire. — Knowlton v. Hoit (1891) 67 N. H. 155, 30 Atl. 346.

New York. — Butler v. Townsend (1891) 126 N. Y. 105, 26 N. E. 1017; Kueckel v. Ryder (1900) 54 App. Div. 252, 66 N. Y. Supp. 522, affirmed on opinion below in (1902) 170 N. Y. 562, 62 N. E. 1096; Cohen v. Western Electric Co. (1906) 50 Misc. 660, 99 N. Y. Supp. 525.

Oregon. — Dibert v. Giebisch (1914) 74 Or. 64, 144 Pac. 1184.

Pennsylvania. — Miller v. Merritt (1905) 211 Pa. 127, 60 Atl. 508.

South Dakota. — Polluck v. Minneapolis & St. L. R. Co. (1918) 40 S. D. 186, 166 N. W. 641.

Utah. — Stricker v. Industrial Commission (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849.

England. — Normile v. Braby (1866) 4 Fost. & F. 962.

Ireland. — Hughes v. Quinn [1917; C. A.] 2 Ir. R. 442.

Scotland. — Grant v. Shaw (1872; Ct. of Sess.) 9 Sc. L. Rep. 254.

In Smith v. Belshaw (1891) 89 Cal. 427, 26 Pac. 834, the fact that the wages of the contractor's workmen were paid at the store of the principal employer was treated as immaterial, as the money used in paying them was that of the contractor himself.

⁷ In Sempier v. Goemann (1917) 165 Wis. 103, 161 N. W. 354, Ann. Cas. 1918C, 670, a person who had charge of the stipulated work, boarded and paid the workmen, and was himself remunerated at piece rates, was held to be within the purview of a Workmen's Compensation Act, the evidence being to the effect that the arrangement as to the payment of the workmen's wages was "for convenience only."

For cases in which the payment of

reviewed, together with others which illustrate the wider subject to which it has relation, in Labatt on Master & Servant, § 19.

§ 33. Contractor bound to furnish the labor required for the work.

Among the specific elements adverted to in many cases in which the independence of the contract has been affirmed is evidence to the effect that the contractor was to furnish all the labor required for the performance of the stipulated work,¹ or that he was

the workmen's wages by the contractor was one of the facts proved, but the contract was, upon the whole evidence, held not to be independent, see Raftis v. McCloud River Lumber Co. (1917) 35 Cal. App. 397, 170 Pac. 176; Decatur R. & Light Co. v. Industrial Bd. (1918) 276 Ill. 472, 114 N. E. 915; Beninghoff v. Futterer (1913) 176 Ill. App. 579; Barg v. Bousfield (1896) 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; De Sandro v. Missoula Light & Water Co. (1913) 48 Mont. 226, 136 Pac. 711; Rankell v. Buckstaff-Edwards Co. (1909) 138 Wis. 448, 20 L.R.A.(N.S.) 1180, 120 N. W. 269.

The contract was held independent in Embler v. Gloucester Lumber Co. (1914) 167 N. C. 457, 83 S. E. 740, where the wages of the workmen were to be deducted from the contract price.

¹ See, for example:

United States. — Chicago, R. I. & P. R. Co. v. Bond (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342.

Arizona. — Hercules Copper Co. v. Crenshaw (1919) 21 Ariz. 15, 184 Pac. 996.

Illinois. — Meredosia Levee & Drainage Dist. v. Industrial Commission (1918) 285 Ill. 68, 120 N. E. 516.

Indiana. — LEET v. BLOCK (reported herewith) ante, 654.

Maryland. — Pierson v. Gohr (1915) 126 Md. 385, 94 Atl. 1021.

Michigan. — Bacon v. Candler (1914) 181 Mich. 373, 148 N. W. 194.

Pennsylvania. — Heidenwag v. Philadelphia (1895) 168 Pa. 72, 31 Atl. 1063; Miller v. Merritt (1905) 211 Pa. 127, 60 Atl. 508.

England. — Knight v. Fox (1850) 5 Exch. 721, 155 Eng. Reprint, 316, 20 L. J. Exch. N. S. 9, 14 Jur. 963; Bobbey v. W. M. Crosbie & Co. (1915; C. A.) 84 L. J. K. B. N. S. 856, 112 L. T.

to hire the persons who assisted him in the performance of the work.²

It is apparent, therefore, that the arrangement indicated by either of these forms of expression—which, it is obvious, are, for practical purposes, of identical import—is one of the facts which is regarded as having some tendency to prove the independence of the contract. On the other hand, it is not conclusive in that regard.³

In one point of view the *prima facie* significance of this element is, it may be supposed, suggested by the general idea which underlies the attribution of a similar significance to the fact that the person employed is to furnish

the instrumentalities of the work; viz., that in the ordinary course of business independent contractors hire their own assistants. In another point of view that significance may be referred to the consideration that a person who hires assistants for the purposes of work undertaken by him normally exercises over them that degree of control which is associated with the relationship of master and servant. The normality of this situation seems to afford an adequate basis for a presumption that such assistants are his own servants exclusively, and, if such a presumption is admitted, the further one may reasonably be said to arise that he himself

N. S. 900, 8 B. W. C. C. 236; *Barnes v. Evans* [1914; C. A.] W. C. & Ins. Rep. 109, 7 B. W. C. C. 24.

² *California*. — *Teller v. Bay & R. Dredging Co.* (1907) 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 942, 12 Ann. Cas. 779.

Connecticut. — *Burke v. Norwich & W. R. Co.* (1867) 34 Conn. 474, 13 Am. Neg. Cas. 662; *Aisenberg v. C. F. Adams Co.* (1920) 95 Conn. 419, 111 Atl. 591.

Illinois. — *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242.

Iowa. — *Kelleher v. Schmitt & H. Mfg. Co.* (1904) 122 Iowa, 635, 98 N. W. 482.

Louisiana. — *Lutenbacher v. Mitchell Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888; *Ryland v. Harve M. Wheeler Lumber Co.* (1920) 146 La. 787, 84 So. 55.

Michigan. — *Holbrook v. Olympia Hotel Co.* (1916) 200 Mich. 597, 166 N. W. 876.

Missouri. — *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Kiser v. Suppe* (1908) 133 Mo. App. 19, 112 S. W. 1005.

New York. — *Cohen v. Western Electric Co.* (1906; App. T.) 50 Misc. 660, 99 N. Y. Supp. 525; *Peer v. Babcock* (1920) 230 N. Y. 109, 129 N. E. 224, reversing (1919) 187 App. Div. 925, 174 N. Y. Supp. 914.

North Carolina. — *Embler v. Gloucester Lumber Co.* (1914) 167 N. C. 457, 83 S. E. 740; *Vogh v. F. C. Geer Co.* (1916) 171 N. C. 672, 88 S. E. 874.

Virginia. — *Veitch v. Jenkins* (1907) 107 Va. 68, 67 S. E. 574.

England. — *Vamplew v. Parkgate*

Iron & Steel Co. [1903] 1 K. B. 851, 72 L. J. K. B. N. S. 575, 67 J. P. 417, 51 Week. Rep. 691, 88 L. T. N. S. 756, 19 Times L. R. 421.

³ So laid down in *Arizona-Hercules Copper Co. v. Crenshaw* (1919) 21 Ariz. 15, 184 Pac. 996, and taken for granted in the other cases cited in notes 1 and 2, *supra*.

In *Beninghoff v. Futterer* (1913) 176 Ill. App. 579, a man employed to lay a roof testified that he frequently did this kind of work for the employer, sometimes "as an employee," and at other times "by contract." The only evidence from which it might be inferred that he laid this particular roof by contract, and not by day labor, was that he hired and paid the roofers, and that he was given no other directions as to the manner of doing the work than to make a good job of it. On the other hand, the materials used belonged to the employer, and it was alleged in the declaration, and not denied by any special plea, that the "defendants" were in possession and control of the premises at the time of the accident. Held, that the person employed was not an independent contractor.

For other cases in which the relationship created by a contract which included a stipulation of this tenor was held to be that of master and servant, see *Keyes v. Second Baptist Church* (1904) 99 Me. 308, 59 Atl. 446, 17 Am. Neg. Rep. 526; *American Steel Foundries v. Industrial Bd.* (1918) 284 Ill. 99, 119 N. E. 902; *Nissen Transfer & Storage Co. v. Miller* (1920) — Ind. App. —, 125 N. E. 652.

is not the servant of any third person.⁴

§ 34. Contractor bound to furnish the materials and appliances required for the work.

A doctrine complementary to that which is stated in the preceding section is that evidence which shows

that the person employed agreed to furnish all or a portion of the materials or appliances required for the performance of the stipulated work tends to prove that he was an independent contractor.¹ But such evidence is disregarded in cases where the appropriate deduction from the

⁴ The following passage of the opinion in *Callan v. Bull* (1896) 113 Cal. 598, 45 Pac. 1017, is somewhat relevant in this connection, though the standpoint of the court is not exactly that which is suggested in the text: "Unless, by the contract, this right is reserved to the employer, the contractor will be presumed to have the right of selection and control of all whom he employs. . . . The contract in the present case does not contain any provision by which the appellant was deprived of the power to employ such persons for the performance of the work as he might select. By the contract he was to supply all the materials, and perform all the labor necessary to construct the jetty according to the specifications, . . . and he himself testified that he employed all the laborers engaged in the work, and furnished all the materials."

¹ For cases involving contracts which cast this obligation on the person employed, and which were held upon the whole evidence to be independent, see the following:

United States. — *New Orleans, M. & C. R. Co. v. Hanning* (1872) 15 Wall. 649, 21 L. ed. 220; *Morning v. Cramp & Co.* (1909) 170 Fed. 364; *United Gas Improv. Co. v. Larsen* (1910) 105 C. C. A. 486, 182 Fed. 620; *The Satilla* (1916) 148 C. C. A. 552, 235 Fed. 58; *International Agri. Corp. v. Slappey* (1919) 261 Fed. 279.

Alabama. — *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Connors-Weyman Steel Co. v. Kilgore* (1914) 189 Ala. 643, 66 So. 609; *Hubbard v. Coffin* (1914) 191 Ala. 494, 67 So. 697.

California. — *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8; *Donlon Bros. v. Industrial Acci. Commission* (1916) 173 Cal. 250, 159 Pac. 715.

Colorado. — *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439.

District of Columbia. — *Philadelphia, B. & W. R. Co. v. Karr* (1912) 38 App. D. C. 193, — A.L.R. —.

Indiana. — *Indianapolis Northern Traction Co.* (1909) 174 Ind. 1, 30 L.R.A.(N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; *Marion Shoe Co. v. Eppley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220; *Switow v. McDougal* (1916) 184 Ind. 259, 111 N. E. 3; *Julius Keller Constr. Co. v. Herkless* (1915) 59 Ind. App. 472, 109 N. E. 797.

Iowa. — *STORM v. THOMPSON* (reported herewith) ante, 658.

Kansas. — *Maughlille v. Price* (1916) 99 Kan. 412, 161 Pac. 907.

Kentucky. — *Central Coal & I. Co. v. Grider* (1903) 115 Ky. 745, 65 L.R.A. 455, 74 S. W. 1058.

Louisiana. — *Robideaux v. Hebert* (1907) 118 La. 1089, 12 L.R.A.(N.S.) 632, 43 So. 887.

Maryland. — *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56.

Massachusetts. — *Connors v. Hennessey* (1873) 112 Mass. 96; *Harding v. Boston* (1898) 163 Mass. 14, 39 N. E. 411.

Missouri. — *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449.

Nebraska. — *Westover v. Hoover* (1911) 88 Neb. 201, 19 A.L.R. 215, 125 N. W. 285, 3 N. C. C. A. 471; *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866.

New York. — *Litts v. Risley Lumber Co.* (1918) 224 N. Y. 321, 19 A.L.R. 1147, 120 N. E. 730, reversing (1918) 184 App. Div. 919, 170 N. Y. Supp. 1093; *Cohen v. Western Electric Co.* (1906; App. T.) 50 Misc. 660, 99 N. Y. Supp. 525; *Hungerford v. Bonn* (1918) 183 App. Div. 818, 171 N. Y. Supp. 280; *Svolos v. Harry Marsch & Co.* (1921) 195 App. Div. 674, 186 N. Y. Supp. 689.

Oregon. — *Lawton v. Morgan, Flidner & Boyce* (1913) 66 Or. 292, 131 Pac. 314, 134 Pac. 1037.

Pennsylvania. — *Miller v. Merritt* (1905) 211 Pa. 127, 60 Atl. 508; *Bain v. Petroleum Iron Works Co.* (1909) 223 Pa. 96, 27 Atl. 279.

Tennessee. — *Louisville & N. R. Co. v. Cheatham* (1907) 118 Tenn. 160, 100 S. W. 902.

Texas. — *Southwestern Teleg. &*

facts as a whole is that full control over the details of the work had been reserved by the employer.²

§ 35. Contractor bound to furnish both the labor and appliances.

Both of the facts mentioned in the

Teleph. Co. v. Paris (1905) 39 Tex. Civ. App. 424, 87 S. W. 724.

Utah.—Callahan v. Salt Lake City (1912) 41 Utah, 300, 125 Pac. 863.

Virginia.—Veitch v. Jenkins (1907) 107 Va. 69, 57 S. E. 574.

Washington. — CAMPBELL v. JONES (reported herewith) ante, 671.

Wisconsin. — Whitney v. Clifford (1879) 46 Wis. 138, 32 Am. Rep. 703, 49 N. W. 835.

England.—Allen v. Hayward (1845) 7 Q. B. 960, 115 Eng. Reprint, 749, 15 L. J. Q. B. N. S. 99, 10 Jur. 92, 4 Eng. Ry. & C. Cas. 104 (machinery and materials).

Ireland. — Hughes v. Quinn [1917; C. A.] 2 Ir. R. 442 (tackle for sinking well).

Scotland. — Grant v. Shaw (1872; Ct. of Sc. Sess.) 9 Sc. L. Rep. 254, and the cases cited in note 3 of the preceding section.

For cases in which persons engaged in transportation work furnished their own vehicles and the teams or other motive power, see the following:

California. — Barton v. Studebaker Corp. (1920) — Cal. App. —, 189 Pac. 1025.

Indiana.—Zeitlow v. Smock (1917) 65 Ind. App. 643, 117 N. E. 665; Sugar Valley Coal Co. v. Drake (1917) 66 Ind. App. 152, 117 N. E. 937.

Iowa.—Pace v. Appanoose County (1918) 184 Iowa, 498, 168 N. W. 916, 17 N. C. C. A. 682.

Louisiana. — Muldry v. Fromherz (1917) 142 La. 1087, 78 So. 126; Ryland v. Harve M. Wheeler Lumber Co. (1920) 146 La. 787, 84 So. 55.

Massachusetts. — Eckert's Case (1919) 233 Mass. 577, 124 N. E. 421; Centrello's Case (1919) 232 Mass. 456, 122 N. E. 560; Robichaud's Case (1919) 234 Mass. 60, 124 N. E. 890.

Michigan.—Burns v. Michigan Paint Co. (1908) 152 Mich. 613, 16 L.R.A. (N.S.) 816, 116 N. W. 182; Sawtells v. Ekenberg Co. (1919) 206 Mich. 246, 172 N. W. 581.

New York. — Hopkins v. Empire Engineering Corp. (1912) 152 App. Div. 570, 137 N. Y. Supp. 478.

Ireland.—Ryan v. Tipperary, South Riding County Council (1912; C. A.) 46 Ir. L. T. 69, 5 B. W. C. C. 578; Clarke v. Bailieborough Co-op A. & D. Soc. (1913; C. A.) 47 Ir. L. T. 113.

In the following cases, some of the

appliances were furnished by the employer, and some by the contractor; Industrial Commission v. Maryland Casualty Co. (1918) 65 Colo. 279, 176 Pac. 288; Mayhew v. Sullivan Min. Co. (1884) 76 Me. 100; Kiser v. Suppe (1908) 133 Mo. App. 19, 112 S. W. 1005; Central Coal & I. Co. v. Grider (1903) 115 Ky. 745, 65 L.R.A. 455, 74 S. W. 1058.

One of the elements in a case where the person employed was held to be an independent contractor was that worn-out machinery was to be replaced by the employer, but that the expense of installing it should be borne by the contractor. Ziebell v. Eclipse Lumber Co. (1903) 33 Wash. 591, 74 Pac. 680, 15 Am. Neg. Rep. 457.

In Western Indemnity Co. v. Pillsbury (1916) 172 Cal. 807, 159 Pac. 721, the court, referring to the fact that the person employed drove his own team, said that it "saw nothing in this fact which made him a servant, and not a contractor." Considering that such a fact is generally regarded as having a positive tendency to show that the person employed was an independent contractor, the form of this remark is somewhat curious.

In Gay v. Roanoke R. & Lumber Co. (1908) 148 N. C. 336, 62 S. E. 436, a provision of a logging contract held to be independent was that the tramroads were to be built, and the locomotive and cars to be kept in good working order, at the contractor's expense.

² For examples of such cases see the following:

Alabama.—Drennen v. Smith (1896) 115 Ala. 396, 22 So. 442.

California.—Skell Co. v. Industrial Acci. Commission (1920) — Cal. App. —, 186 Pac. 163.

Kentucky.—Postal Teleg.-Cable Co. v. Murrell (1918) 180 Ky. 52, L.R.A. 1918D, 357, 201 S. W. 462.

Maine.—Keyes v. Second Baptist Church (1904) 99 Me. 308, 59 Atl. 446, 17 Am. Neg. Rep. 526.

Michigan.—Opitz v. Hoertz (1917) 194 Mich. 626, 161 N. W. 866.

Missouri.—Porter v. Withers Estate Co. (1919) 201 Mo. App. 27, 210 S. W. 109.

Texas.—Steger v. Barrett (1910) 58 Tex. Civ. App. 331, 124 S. W. 174.

Wisconsin. — Whitney v. Clifford

preceding sections are quite commonly mentioned together, in cases in which the independence of the contract was affirmed.¹

The probative force of the two in combination is presumably somewhat greater than that of each of them singly. But the cases do not throw any light upon this particular point.

(1879) 46 Wis. 188, 32 Am. Rep. 703, 49 N. W. 835.

Ireland. — *Moroney v. Sheehan* (1903; C. A.) 87 Ir. L. T. 166; *Clarke v. Bailieborough Co-op. A. & D. Soc.* (1913; C. A.) 47 Ir. L. T. 113.

In De Perri v. Motor Haulage Co. (1918) 185 App. Div. 384, 173 N. Y. Supp. 189, the circumstance that the trucks which a haulage contractor agreed to furnish for an indefinite period were to be paid for, whether in use or not, was regarded as an element which tended to negative the independence of the contract.

In Boniface v. Relyea (1866) 6 Robt. (N. Y.) 397, the fact that a man engaged by an undertaker to drive a carriage at a funeral was the owner of the carriage and horses which he brought seems to have been regarded as conclusive proof that he was not the servant of the undertaker. If this was really the theory of the court, it was manifestly erroneous.

¹ See, for example:

United States. — *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847 (a case involving a workman's claim for extra compensation).

Alabama. — *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103.

Arizona. — *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740.

California. — *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8.

District of Columbia. — *Philadelphia, B. & W. R. Co. v. Karr* (1912) 38 App. D. C. 193, — A.L.R. —; *Harrison v. Davis Constr. Co.* (1914) 42 App. D. C. 255.

Illinois. — *Bjornson v. Saccone* (1899) 88 Ill. App. 6; *Fell v. Chicago Bldg. & Special Constr. Co.* (1914) 187 Ill. App. 286; *Raxworthy v. Heisen* (1915) 191 Ill. App. 457, 8 N. C. C. A. 819, affirmed in (1916) 274 Ill. 398, 113 N. E. 699.

§ 36. Employer bound to furnish the materials and appliances required for the work.

In many of the cases in which the relationship of master and servant was held to have been created by the contract, one of the specific elements mentioned was that the employer furnished the materials or appliances re-

Indiana. — *Switow v. McDougal* (1916) 184 Ind. 259, 111 N. E. 3; *Mobley v. J. S. Rogers Co.* (1915) 68 Ind. App. 308, 119 N. E. 477.

Iowa. — *Bennett v. Mt. Vernon* (1904) 124 Iowa, 537, 100 N. W. 349; *Parrott v. Chicago G. W. R. Co.* (1905) 127 Iowa, 419, 103 N. W. 352.

Louisiana. — *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888.

Maine. — *Wilbur v. White* (1903) 98 Me. 191, 56 Atl. 657, 15 Am. Neg. Rep. 311.

Maryland. — *Symons v. Allegany County* (1907) 105 Md. 254, 65 Atl. 1067.

Michigan. — *Bacon v. Candler* (1914) 181 Mich. 372, 148 N. W. 194.

Missouri. — *Scharff v. Southern Illinois Constr. Co.* (1905) 115 Mo. App. 157, 92 S. W. 126.

Nebraska. — *Westover v. Hoover* (1911) 88 Neb. 201, 19 A.L.R. 215, 129 N. W. 285, 3 N. C. C. A. 471; *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866.

New York. — *Martin v. Tribune Asso.* (1883) 30 Hun, 391; *Carpenter v. New York* (1906) 115 App. Div. 552, 101 N. Y. Supp. 402; *Coolidge v. State* (1908; Ct. Cl.) 61 Misc. 38, 114 N. Y. Supp. 553.

Oregon. — *Lawton v. Morgan, Fliedner & Boyce* (1913) 66 Or. 292, 131 Pac. 314, 134 Pac. 1037; *Winniford v. MacLeod* (1913) 68 Or. 301, 136 Pac. 25; *Dibert v. Giebisch* (1914) 74 Or. 64, 144 Pac. 1184.

Pennsylvania. — *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles, 309; *Allen v. Willard* (1868) 57 Pa. 374.

Tennessee. — *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902.

Utah. — *Morris v. Salt Lake City* (1909) 35 Utah, 474, 101 Pac. 373.

Washington. — *Cary v. Sparkman & M. Co.* (1911) 62 Wash. 363, — A.L.R. —, 113 Pac. 1093.

quired for the stipulated work.¹ That fact, therefore, is one of those which

are to be regarded as having to prove that the person employed was not an

¹ See, for example:

United States.—*Singer Mfg. Co. v. Rahen* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175 (wagon for salesman); *Nyback v. Champagne Lumber Co.* (1901) 48 C. C. A. 632, 109 Fed. 732 (person employed operated in a factory a machine which the employer kept in running order at his own cost, and for which he furnished the necessary power); *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681 (wagon for salesman).

Alabama.—*Sloss-Sheffield Steel & Iron Co. v. Hubbard* (1915) 14 Ala. App. 139, 68 So. 571; *Stith Coal Co. v. Harris* (1915) 14 Ala. App. 181, 68 So. 797.

Arkansas.—*Homewood Rice Land Syndicate v. Suhs* (1920) 142 Ark. 619, 219 S. W. 333; *Terry Dairy Co. v. Parker* (1920) 144 Ark. 401, 223 S. W. 6.

California.—*Giacomini v. Pacific Lumber Co.* (1907) 5 Cal. App. 218, 89 Pac. 1059 (machinery in factory).

Connecticut.—*Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63, 13 Am. Neg. Cas. 735; *Aisenberg v. C. F. Adams Co.* (1920) 95 Conn. 419, 111 Atl. 591 (salesman furnished with blank forms for various purposes).

Georgia.—*Central R. & Bkg. Co. v. O'Hara* (1872) 46 Ga. 417.

Illinois.—*American Steel Foundries v. Industrial Bd.* (1918) 284 Ill. 99, 119 N. E. 902.

Indiana.—*Indiana Iron Co. v. Gray* (1897) 19 Ind. App. 565, 48 N. E. 803 (machinery in factory); *Caca v. Woodruff* (1919) 70 Ind. App. 93, 123 N. E. 120; *Nissen Transfer & Storage Co. v. Miller* (1920) — Ind. App. —, 125 N. E. 652; *Greene County v. Shertzer* (1920) — Ind. App. —, 127 N. E. 843.

Iowa.—*Kelleher v. Schmitt & H. Mfg. Co.* (1904) 122 Iowa, 635, 98 N. W. 482 (room and machinery in factory).

Kansas.—*Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578 (mules used in mining work).

Kentucky.—*Louisville & N. R. Co. v. Tow* (1901) 23 Ky. L. Rep. 408, 66 L.R.A. 941, 63 S. W. 27 (engine used to haul cars in tunnel under construction was supplied by railroad company); *Employers' Indemnity Co. v. Kelly Coal Co.* (1913) 156 Ky. 74, 49

L.R.A. (N.S.) 850, 160 S. W. 914 (cars and mules used in mining work).

Louisiana.—*Brady v. Jay* (1904) 111 La. 1071, 36 So. 132 (logging contractor was to be furnished with railroad and rolling stock, and keep them in repair, and defray all the expenses of operating the road).

Michigan.—*Lewis v. Detroit Vitri-fied Brick Co.* (1911) 164 Mich. 489, 129 N. W. 726 (cars and track furnished to miners); *Perham v. American Roofing Co.* (1916) 193 Mich. 221, 159 N. W. 140; *Bayne v. Everham* (1917) 197 Mich. 181, 163 N. W. 1002.

Minnesota.—*Barg v. Bousfield* (1896) 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; *Brown v. Douglas Lumber Co.* (1910) 113 Minn. 67, 129 N. W. 161 (machinery in sawmill); *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866 (tools and materials for erection of building).

Montana.—*Poor v. Madison River Power Co.* (1909) 38 Mont. 341, 99 Pac. 947 (materials for alteration of structure).

New York.—*Benedict v. Martin* (1862) 36 Barb. 288; *Goldman v. Mason* (1888; Gen. T.) 18 N. Y. S. R. 376, 2 N. Y. Supp. 337.

North Carolina.—*Midgette v. Branning Mfg. Co.* (1909) 150 N. C. 333, 64 S. E. 5 (mill which person employed agreed to operate, and logs sawed therein, were the property of employer); *Embler v. Gloucester Lumber Co.* (1914) 167 N. C. 457, 83 S. E. 740 (materials for building).

North Dakota.—*Ruehl v. Lidgerwood Rural Teleph. Co.* (1912) 23 N. D. 6, L.R.A. 1918C, 1063, 135 N. W. 793, Ann. Cas. 1914C, 680 (tools used in construction of telephone line).

Ohio.—*Andrew Bros. v. Burns* (1901) 12 Ohio C. D. 305, 22 Ohio C. C. 437 (machinery in factory).

Oklahoma.—*Chicago, R. I. & P. R. Co. v. Bond* (1915) 47 Okla. 161, 148 Pac. 103 (tools for handling coal).

Texas.—*Southern Cotton Oil Co. v. Wallace* (1900) 23 Tex. Civ. App. 12, 54 S. W. 638 (machinery furnished by employer and operated by power supplied by him).

Vermont.—*Kelley's Dependents v. Hoosac Lumber Co.* (1921) — Vt. —, 113 Atl. 818, 20 N. C. C. A. 902.

Virginia.—*Emmerson v. Fay* (1896) 94 Va. 60, 26 S. E. 386.

independent contractor. But such probative significance as it possesses is manifestly overcome, whenever the rest of the evidence points to the con-

clusion that the employer was not to exercise any control over the details of the work.²

It is, of course, an entirely negli-

Washington. — *James v. Pearson* (1911) 64 Wash. 263, 116 Pac. 852 (hoisting machinery used for building work); *Fehrenbacher v. Oakesdale Copper Min. Co.* (1911) 65 Wash. 134, 117 Pac. 870 (tools and machinery).

Wisconsin. — *Rankel v. Buckstaff-Edwards Co.* (1909) 138 Wis. 448, 20 L.R.A.(N.S.) 1180, 120 N. W. 269 (materials for building).

England. — *Blake v. Thirst* (1863) 2 Hurlst. & C. 20, 159 Eng. Reprint, 9, 32 L. J. Exch. N. S. 189, 11 Week. Rep. 1034, 8 L. T. N. S. 251 (bricks furnished to subcontractor); *Evans v. Penwyllt Dinas Silica Brick Co.* (1901; C. A.) 18 Times L. R. 58 (tools for quarrying).

Ireland. — *M'Connell v. Galbraith* (1913; C. A.) 48 Ir. L. T. 30, 7 B. W. C. C. 968 (traps furnished to trapper).

Scotland. — *M'Cready v. Dunlop* (1900) 2 Sc. Sess. Cas. 5th series, 1027, 37 Scot. L. R. 779, 8 Scot. L. T. 91.

In Vaughn v. Davis (1920) — **Mo. App.** —, 221 S. W. 782, the grounds upon which the defendants were held not to be independent contractors as regards the delivery of beer were thus stated: "They were delivering the brewery company's beer, stored, refrigerated, and preserved at the latter's expense, selling it at a price fixed by the brewery company, distributing it in a vehicle owned and furnished by the company, kept in accordance with its directions and at its expense, and insured for its benefit, not only as against loss on the truck itself, but also against liability on account of the truck's operation. If Davis & Sons were operating the truck of themselves, and independently of the brewery company's business, why was the indemnity insurance for operation taken out in favor of the brewery company, and why should the brewery company bear that expense and insist upon being insured? It is not clear just how the expenses, which it is conceded the brewery company bore, were paid, whether they were actually paid by the brewery company itself or through Davis & Sons, the expenses being deducted from the amounts due. At one place Davis said the driver was employed 'through' their firm. If the conceded expenses were paid by Davis & Sons, and credit

was taken against the brewery company for them, it is remarkable that the expense of the driver was not taken care of in the same way. But if it was the brewery company's beer that was being delivered, and its business that was being carried on thereby, then the driver was its agent or servant, even though the driver may have been employed and paid by Davis & Sons, and they directed him, as they naturally would, where to deliver."

In *Louisville & N. R. Co. v. Cheatham* (1907) 118 Tenn. 160, 100 S. W. 902, a supplemental contract regarding excavation work on a railroad provided as follows: "The railroad agrees to furnish necessary rails, splices, switches, and frogs for temporary track to be used in connection with steam-shovel work, without charge to the contractors." In the opinion of the court this stipulation did not throw any light upon the nature of the relationship. But, in view of the cases cited above, this ruling is of more than dubious soundness.

² The independence of the contract has frequently been affirmed, in cases in which this element was present.

United States. — *Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342 (tools).

Arkansas. — *Arkansas Land & Lumber Co. v. Secrist* (1915) 118 Ark. 561, 177 S. W. 37 (materials).

Colorado. — *Industrial Commission v. Maryland Casualty Co.* (1918) 65 Colo. 279, 176 Pac. 288 (materials).

Connecticut. — *Burke v. Norwich & W. R. Co.* (1867) 34 Conn. 474, 13 Am. Neg. Cas. 662 (machinery).

Indiana. — *Nissen Transfer & Storage Co. v. Miller* (1920) — **Ind. App.** —, 125 N. E. 652 (horses, feed, and wagons).

Kansas. — *Chute v. Moeser* (1908) 77 Kan. 706, 95 Pac. 398 (materials).

Kentucky. — *Bellamy v. F. A. Ames Co.* (1910) 140 Ky. 98, 130 S. W. 980 (materials); *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107.

Louisiana. — *Robideaux v. Hebert* (1907) 118 La. 1089, 12 L.R.A.(N.S.) 632, 43 So. 887 (tools and other appliances).

ble factor where the evidence shows that the instrumentalities procured from the employer were bought for the purposes of the work by the person employed.²

§ 37. Employer's surrender or retention of the control of the place of work.

(a) Control surrendered.

The circumstance that the premises

Minnesota. — Klages v. Gillette-Herzog Mfg. Co. (1902) 86 Minn. 458, 90 N. W. 1116, 12 Am. Neg. Rep. 488.

New York. — Litts v. Risley Lumber Co. (1918) 224 N. Y. 321, 19 A.L.R. 1147, 120 N. E. 730; Powley v. Vivian & Co. (1915) 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835 (fuel, oil, etc.)

North Carolina. — Vogh v. F. C. Geer Co. (1916) 171 N. C. 672, 88 S. E. 874 (machinery, etc.)

Virginia.—Veitch v. Jenkins (1907) 107 Va. 68, 57 S. E. 574 (materials, etc.).

Scotland. — Hayden v. Dick (1902) 5 Sc. Sess. Cas. 5th series, 152, 40 Scot. L. R. 95, 10 Scot. L. T. 380.

In Lampton v. Cedartown Co. (1909) 6 Ga. App. 147, 64 S. E. 495, the fact that the owner of a building furnished all the materials for its construction was referred to as being "not inconsistent" with the inference that the building contract was an independent one.

In Connolly v. Industrial Acci. Commission (1916) 173 Cal. 405, 160 Pac. 239, where the unsuccessful claimant under a Workmen's Compensation Act had been employed to build a shed, the court declared that there was "no force in the suggestion that, because the owner of the real property was to furnish the lumber, there was probably no contract except that for labor by the day; contracts are often made for sufficient labor to accomplish specific results with materials furnished by the person on whose property those results are to be produced."

In Ennis v. Baumann Rubber Co. (1917) 91 Conn. 425, 99 Atl. 1031, the court thus commented upon the instructions given by the trial judge: "The jury was told that if the agreement for the digging of the well was, as the plaintiff claimed it to have been, that he should simply do the work, and that the defendant should furnish all the tools, appliances, and materials,

on which the stipulated work was performed were, for the purposes of such performance, placed under the control of the person employed, is an element which tends to show that he was an independent contractor.¹ But it will be disregarded if the evidence, as a whole, is such as to require the conclusion that the contract was one of

the relation of master and servant was created. This instruction was supplemented by further statements to the same effect, so that the jury was clearly informed that, if the contract to sink the well contained an undertaking on the part of the defendant to furnish the tools, appliances, and materials required for the work, that fact would suffice to convert it into one of employment, and the relation of the parties under it into that of master and servant. This was erroneous, in that the vital and controlling factor of the defendant's right of control, or the lack of it, was ignored, and a comparatively immaterial incident made conclusive."

¹ For a case involving this situation, see Bokoshe Smokeless Coal Co. v. Morehead (1912) 34 Okla. 424, 126 Pac. 1033.

² Scammon v. Chicago (1861) 25 Ill. 424, 79 Am. Dec. 334; Jefferson v. Jameson & M. Co. (1896) 165 Ill. 138, 46 N. E. 272, reversing (1895) 60 Ill. App. 587; Allen v. Willard (1868) 57 Pa. 374; Kniceley v. West Virginia Midland R. Co. (1908) 64 W. Va. 278, 17 L.R.A. (N.S.) 370, 61 S. E. 811; Eastern Townships Bank v. DeKérangat (1907) Rap. Jud. Quebec 17 B. R. 232.

In Byrnes v. Western (1896) 17 New South Wales L. R. 80, the defendants sold at public auction the building materials of a house then standing. By the terms of sale the building materials became the property of the purchaser, who contracted under a penalty to pull them down and cart them away within two months, leaving the site cleared to the satisfaction of the vendor. One B. became the purchaser for the sum of £10. In pulling down the house he negligently caused injury to the adjoining house, by throwing bricks and rubbish onto it, and omitting to prop it up while the work was in progress. By Stowell, Ch. J., and Cowen, J., it was held that the contract was one essentially of sale,

hiring and service, or agency.² Its probative significance is a proper subject for consideration, irrespective of whether the right of control so vest-

ed was or was not exclusive.³ Nor is the relationship of the parties affected by the employer's reservation of a right to enter the premises for the

which transferred to B., for the time being, the ownership of the house, and that, while he was engaged in the demolition and removal of the building, he, and he alone, had all the responsibilities incident to ownership. By Stephen, J., it was considered that the essential effect of the contract was that the contractor agreed to pull down the house and take away the materials, and that the sale and purchase of the materials were simply an incident in the contract, and the method of paying for the work done. The conclusion at which he arrived, therefore, was that the defendants were liable, for the reason that the contract was one likely to be dangerous to the adjacent owner.

² In *Samyn v. McClosky* (1853) 2 Ohio St. 536, where a man employed to erect a building on the terms that he was to hire the workmen and indorse their bills, who had also undertaken to do the carpentry "at 27 cents on the bill," was held to be an independent contractor only in respect of the carpentry, and the employer's agent in respect of his other functions, the court remarked: "The so-called possession of Cameron was as the agent of Samyn, or, rather, he occupied the premises as mechanics usually do when making improvements. Dignifying a mere license thus to occupy, by calling it a surrender of possession, will not serve to avoid responsibility."

³ It is error to charge the jury that, in forming an opinion as to whether the employee was a servant or an independent contractor, they should inquire whether the contract "gave exclusive use and right to the contractor over the place," and how long this exclusive use and right were to continue. *Conlin v. Charleston* (1868) 49 S. C. L. (15 Rich.) 201.

In *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163, where it was contended that the right reserved by a railroad company to run its trains over a bridge during its construction by a contractor destroyed the independent contractor, without the court remarked that this amounted to an assertion of the doctrine that a railroad company or private individual cannot, in the one case, build its road

or other structures, or repair either, and, in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that, if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any agent or servant of the contractor. "The recognition of any such principle," it was declared, "would not only lead to the most absurd results, but would be to foster gross injustice and oppression. . . . In every such case the question is not whether the owner or proprietor retained any use of the property during the erection of the work, but who had the efficient control of the work contracted to be done. Such control, in cases like the present, is necessarily with the contractor; and, were it otherwise, independent employment would be degraded, its liability in a great measure destroyed, and the general efficiency of railroad service correspondingly impaired. Hence, the books teem with decided cases in which defendants were held not liable for torts committed on their premises by contractors, or their agents or servants, although there had not been an entire surrender of the possession of the premises to the contractor."

In *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94, the court was equally divided in opinion upon the question whether undisputed evidence to the effect that the tort-feasor was engaged in building the road, and was in possession of and using the engine and cars, for the transportation of rails and crossties, and of freight and passengers, and that he employed and paid the workmen, was *prima facie* sufficient to show that the tort-feasor was an independent contractor.

That the contract is not the less an independent one, because the employer has that power of interference which is derived from "that reversionary right which is necessarily reserved to every owner of land," was remarked, *arguendo*, in *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

purpose of seeing that the work is performed in accordance with the plans and specifications. Under such circumstances the person employed still remains in possession of the premises, and continues to perform the work under his contract, and not under the directions of the employer.⁴

The cases in which the effect of the employer's surrender of control has been discussed from the point of view indicated in the preceding paragraph

⁴ *Pfau v. Williamson* (1872) 63 Ill. 16.

⁵ In *Moore v. Sanborne* (1853) 2 Mich. 579, 59 Am. Dec. 209, two of the classes of cases in which the rule of respondeat superior is not applicable were thus specified: (1) Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confided to the employee. (2) In case of a like contract, the contract prescribing the mode of its execution, when possession of the property is surrendered to the employee to enable him to execute the contract.

In *Butler v. Lewman* (1902) 115 Ga. 752, 42 S. E. 98, it was laid down that the owners "relieved themselves of all responsibility in the matter, by making an absolute surrender, for the time being, of their possession of the building, and placing it under the complete control of independent contractors."

In *Hauver v. Whalen* (1892) 49 Ohio St. 69, 14 L.R.A. 828, 29 N. E. 1049, the masonry and woodwork of a building were let to contractors, but with respect to the remainder of the work, including the making of the excavations for cellars, areas, and coal vaults, there was no evidence tending to show that it was performed under the direction or control of anyone except the owner himself, and there was neither any stipulation giving the contractors the occupancy, possession, or control of the premises, nor any other evidence on the record which tended to show that they had, or were entitled to have, such occupancy, possession, or control. It was held that a requested instruction to the following effect was abstract, and had, therefore, been properly refused: "If the jury find from the evidence that the defendants

should be carefully distinguished from those in which the right of action has been determined with reference to the general principle under which an owner of property is ordinarily protected from liability for an injury resulting from a tort committed with respect to, or by means of, the property, if it is shown to have been out of his control at the time when the injury was received.⁵ In order to relieve the employer of

had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the materials on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or non-compliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors, or any of their employees, in not guarding the said area with proper protections or coverings."

In *Gilbert v. Beach* (1856) 4 Duer (N. Y.) 423, the court made the following remarks: "The employment of the contractor is, in its nature, just as independent of the will of the owner as the ordinary conduct of the tenant; and, when the contract is for the construction of an entire building, the ground upon which the building is to be erected is just as truly in the occupation of the contractor as the ground covered by a lease is in the occupation of the tenant. The possession, as necessary to the prosecution of the work to which the contract relates, is just as certainly vested in the contractor, by force of his contract, as the possession of demised premises is vested in the tenant, by force of his lease. It is said that the owner, whenever he may please, in the mere exercise of his own will, may remove the contractor from the possession; but if this power belongs to him as owner—which we neither affirm nor deny—it is not a power which he is bound to exercise, or can be justified in exercising, unless the known misconduct of the contractor has been such as to render its exercise a positive duty; and, until it is exercised,

liability on this ground it is sufficient that the contractor should have been placed in possession of the particular portion of the premises in which the work was performed.⁶

(b) *Control retained.*

There is a difference of opinion regarding the probative significance of

the possession of the contractor is the possession of the owner only in the same sense in which the possession of a tenant is, in judgment of law, that of his landlord. In each case, the possession is derived from the owner, and is held in subjection to his paramount title, but in both, the possession, so long as it continues, is exclusive. In our opinion, therefore, there is no reason whatever for holding that the responsibility of the owner for injuries to third persons during the continuance of this possession is greater in the one case than in the other."

In *Newburn v. Healey Real Estate & Improv. Co.* (1915) 17 Ga. App. 217, 86 S. E. 429, where the plaintiff's deceased husband, while working on a steel frame building, was struck by falling planks and thrown into an uncovered opening, a demurrer was held to have been properly sustained to a petition which merely alleged that the defendant was constructing in a specified city a building "now commonly known as the Healey Building," and that on the day he met his death the decedent "was employed by the B. Construction Company, which had the contract for the ironwork on said building." The court took the ground that, having regard to the rule that pleadings are always to be construed most strongly against the pleader, it might be safely assumed that, "so far as the allegations in the petition of the plaintiff are concerned, the contractor, and not the owner, was in the control of the premises, and had entire charge of all the work then being carried on, in pursuance of the general plan of the owner to finish and complete the sixteen-story building described in the petition."

In *Wodrocza v. Consolidated Gas Co.* (1899; App. T.) 29 Misc. 637, 61 N. Y. Supp. 186, the liability of the defendant for injury occasioned to personal property by the falling of part of the neighboring gas holder upon the building wherein the plaintiff was at work was denied on the ground that

evidence that the employer retained possession of the premises on which stipulated work was performed. By some courts such evidence is apparently considered to be incompatible with any other conclusion than that the person employed was not engaged on the footing of an independent contractor.⁷ The soundness of an unequal-

the only evidence relating to ownership consisted in a contract between the defendant gas company, and its codefendants, which disclosed that the latter had agreed to complete the holder within six months after the time when the foundation to be prepared by the owner for its reception was sufficiently advanced to allow the contractor to commence work." The court said: "There is nothing in the case to show that the work was completed. . . . If the contractors were still in control, they were the parties to look to; if the work had been completed and turned over, the gas company was the party to look to, provided it was, at the time, the owner, or in possession and control. In this particular the contract avails nothing, because it proves nothing as to possession or control by either of the defendants at the time of the accident."

In a case where the owner of a building employed a contractor to make an excavation in the sidewalk in front of it, the jury were instructed that the mere fact that the owner remained in possession of the building itself did not establish the fact of his control of the place where the excavation was made. *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

For cases in which the contractor was held liable on the ground of his being in possession of the premises in which the work was done, see *Kepperly v. Ramsden* (1876) 83 Ill. 354; *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 142, 46 N. E. 272; *Moline v. McKennie* (1888) 30 Ill. App. 419.

⁶ *Mohr v. McKenzie* (1895) 60 Ill. App. 575; *Geist v. Rothschild* (1900) 90 Ill. App. 324.

⁷ In *Glickauf v. Maurer* (1874) 75 Ill. 289, 20 Am. Rep. 238, where the landlord of a leased building employed a carpenter to put in three or four skylights, for which he was to be paid so much a piece, and the goods of a tenant were injured through his negligence in removing the roof and allowing the rain to get through, the court

ified doctrine of this purport is questionable. The logical reasons to which it was deemed to be referable are not apparent from the language used in the cases cited. An examination of the facts involved in those cases shows that it has so far been applied with reference only to inconsiderable operations. Whether it will be treat-

ed by the courts which have adopted it as being applicable to all kinds of work, however extensive, remains to be seen.

The position taken by other courts is that the situation established by such evidence is merely an element which tends more or less strongly, according to circumstances, to disprove

said that, while doing the work, the carpenter could only be regarded as the servant of the landlord. The fact that, according to the testimony of the carpenter, he had the entire control of the work, could not, it was declared, make any difference, as there was no such surrender of the entire possession of the premises to the workmen as could relieve the landlord of responsibility.

In *Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491, where the goods of a tenant were injured by the negligence of the servant of a person employed by the landlord to make some changes in the plumbing, the court said that, as the terms of the employment were not given, it must be assumed that no special terms were agreed on, and stated its conclusion as follows: The negligent person "was employed generally to do the required work, and was, for that purpose, the agent or servant of his employer. Possession or control of the building or plumbing, or any part of it, was not given to him. His employer had the right to control and direct the entire work, and might have discharged Ruh [the plumber] from the employment if he refused to obey her instructions."

In *Anderson v. Moore* (1903) 108 Ill. App. 106, the court thus stated its conclusion: "Appellant having employed a mechanic to make repairs upon premises occupied by appellee as a tenant, the plumber must be regarded as the landlord's servant, it not appearing that any contract had been let to the plumber as an independent contractor, or the premises surrendered to his control."

In *Ruehl v. Lidgerwood Rural Teleph. Co.* (1912) 23 N. D. 6, L.R.A. 1918C, 1063, 135 N. W. 793, Ann. Cas. 1914C, 680, one of the grounds upon which the defendant was held to be liable for injuries received by a child who fell into post holes dug by a laborer hired on a piecework footing was thus stated: "Nearly all of the

writers . . . agree that, where a person or corporation undertakes to do work upon the premises of the owner, or of him who is in possession, and such first person intrusts the performance of the work to a contractor or workman, but does not and is not authorized by the one in possession to give the control of the premises to the workman or contractor, such workman or contractor will be looked upon as a servant of the first party, and not as an independent contractor. In other words, the courts are inclined to hold, and we hold in this case, that, when the telephone company undertook to put the telephone in the house of Louis Ruehl, it impliedly agreed to put it in in a safe and proper manner, and not in a manner which would endanger the lives of the plaintiff and his family."

In *Murphy v. Herold Co.* (1909) 137 Wis. 609, 119 N. W. 294, the plaintiff fell into a hatchway left open in the sidewalk in front of the premises of the defendant company by one T., who was employed by it to deliver certain paper at so much per ton, and was, at the time of the accident, delivering a load by means of a skid. The contention that T. was an independent contractor was rejected for reasons thus stated: "It is established . . . that the appellant had control and possession of the premises, and received the paper delivered by Tews through this hatchway and upon an elevator which conveyed it into the basement of the building. So far as the evidence shows, possession and control of the building and premises, including the hatchway through which the paper was delivered, remained with appellant. . . . The evidence does not show that he was not under the control of the appellant in the prosecution of his work in delivering paper into the building occupied by the appellant. The means and methods of doing the work appear from the evidence to have been, to some extent at least, under the supervision of the appellant." But the

the independence of the contract.⁸ In this point of view, the employer's retention of possession does not necessarily operate so as to create the relation of master and servant between him and the person employed.⁹ The probative significance of such retention is deemed to be merely that of an element which bears upon the ultimate question to be determined, viz., whether the contractor had control of the work.¹⁰

The latter of these doctrines appears to be the more satisfactory. It is difficult to see upon what ground it can be maintained that there is such invariable connection between the power of controlling the details of the work, and the power of control-

retention of possession was obviously regarded as the determinant factor.

⁸ For cases in which this doctrine was assumed to be the correct one, see *Giacomini v. Pacific Lumber Co.* (1907) 5 Cal. App. 218, 89 Pac. 1059; *Benninghoff v. Futterer* (1913) 176 Ill. App. 579; *Isnard v. Edgin Zinc Co.* (1910) 81 Kan. 765, 106 Pac. 1003; *Paro v. Whitefield Sav. Bank & T. Co.* (1914) 77 N. H. 394, 92 Atl. 331; *Southern Cotton Oil Co. v. Wallace* (1899) 23 Tex. Civ. App. 12, 54 S. W. 638; *Barclay v. Puget Sound Lumber Co.* (1908) 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430.

In *Slayton v. West End Street R. Co.* (1899) 174 Mass. 55, 54 N. E. 351, 6 Am. Neg. Rep. 289, where the plaintiff was injured by coming into collision with a pile of rails deposited near a street railway in which they were to be laid, one of the considerations adverted to as having a tendency to negative the inference that the person who deposited the rails was an independent contractor was thus stated: "It is to be noticed that the railway which was under repair was in actual use for the transportation of passengers, and it is more natural that the control of the work of repairs, which would unavoidably affect the safety of operation, should be retained by the defendant, than committed to independent contractors whom the defendant could not control."

⁹ This proposition was explicitly laid down in *Pooles v. Sargent Lumber Co.* (1915) 113 Me. 426, L.R.A.1915F, 1125, 94 Atl. 754, where the tort-feasor was

ling the premises on which the work is done, that the exercise of the latter power necessarily implies the exercise of the former power also.

The mere fact of a municipality's having reserved the power to use a street on which a contractor is to construct a sewer does not render it responsible for injuries occasioned by his failure to take proper precautions for the protection of the public against the dangers incidental to the progress of the work.¹¹

It should be pointed out that the employer's retention of control of the place of work may, under some circumstances, be viewed as an element the significance of which has reference, not to the nature of the rela-

a man hired to remove refuse from the defendant's mill.

¹⁰ In *Mumby v. Bowden* (1889) 25 Fla. 454, 6 So. 453, the court proceeded on the theory that, in order to relieve the employer of liability for the negligence of the contractor, it must appear that the contractor had control of the work as well as of the premises.

In *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065, where the action was brought to recover for an injury sustained by the plaintiff through falling over a cleat which the servant of a contractor had negligently nailed to a staircase under construction, the court set aside a verdict against the employer on the ground that the contractor was proved to have been in control of the work, and that the fact of the defendants being in possession of the premises was immaterial.

¹¹ *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, where, in an action brought to recover for injuries received by a person who fell into a sewer trench at night, the reservation of such a power was assigned by the trial judge as a reason for refusing to give a general charge in favor of the defendant. The court said: "It must not be forgotten that the complaint is not that the street was used in an unlawful or unauthorized manner, but only that there was neglect in not erecting such guards, or in not maintaining such lights at night, as were necessary to protect the public from injury. Whether, therefore, the city did or did not retain the use of the street unoccupied by the work, is of no kind of significance."

tionship between him and the person employed, but to the question whether he was chargeable with personal negligence.¹² So far as regards cases of this type, it is clear that the torts of the person employed cannot be imputed to the employer on the mere ground that, while the work was in progress, the latter still retained, with respect to his premises, that ultimate right of control which is an inseparable incident of proprietorship.

§ 38. Arrangements with regard to the medical treatment of the workmen hired by the person employed.

Circumstances which have been viewed as having some tendency to disprove the independence of a contract are that the physician who was retained to treat the servants of the employer attended on a workman in the service of the person employed, and was paid by the employer for his services;¹ that the employer defrayed the medical expenses of the particular workman who was the claimant in the case;² and that the employer, when

paying the compensation earned by the person employed, deducted an amount sufficient to cover the hospital fees of the workmen hired by the latter.³ But it has been also laid down that the independence of the contract is not necessarily negated by the last-mentioned circumstance.⁴

The fact that the person employed was required by the terms of the contract to maintain a hospital service for his workmen was held, in the case cited below, to be one which tended to show that he was not an independent contractor.⁵

§ 39. Arrangements with regard to insurance against liability.

The circumstance that the principal employer had taken out a policy of insurance, entitling him to be indemnified for money expended in the satisfaction of claims in respect of injuries sustained by the workmen in the service of the person employed, has been treated in some cases as having a tendency to negative the independence of the contract.¹ But the pro-

¹² This was one of the aspects under which the facts were considered in *Sherman House Hotel Co. v. Gallagher* (1906) 129 Ill. App. 557.

¹ *Corrigan v. Heubler* (1914) — Tex. Civ. App. —, 167 S. W. 159.

² *Dibert v. Giebisch* (1914) 74 Or. 64, 144 Pac. 1184, the opinion was expressed that the significance of this fact would be very slight, in any event. But in the case under review any weight which it might have carried was destroyed by rebutting testimony which showed that the disbursements in question were made on the contractor's account, and at his request.

³ *Decatur R. & Light Co. v. Industrial Bd.* (1918) 276 Ill. 472, 114 N. E. 915; *West Lumber Co. v. Keen* (1920) — Tex. Civ. App. —, 221 S. W. 625, reversed in (1922) — Tex. Com. App. —, 237 S. W. 236.

⁴ *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740.

⁵ In *North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.* (1913) 76 Wash. 232, 135 Pac. 1017, a clause of this tenor was characterized as being "illustrative of the tendency of the contract to deal with matters not of concern to the employers, if its employees were independent contractors." But

this theory as to the significance of such a clause, and the reasons assigned by the court for its adoption, appear to be of very dubious soundness. That the workmen engaged in the performance of a contract should be in good physical condition is certainly a matter which does "concern" the principal employer very seriously. In this point of view it would seem to be an entirely permissible, if not necessary, conclusion that the circumstance of his exacting from the person employed a stipulation to keep up an institution which will promote this important object can have no tendency whatever to negative the independence of the contract.

¹ *Arizona-Hercules Copper Co. v. Crenshaw* (1919) 21 Ariz. 15, 184 Pac. 996; *Nissen Transfer & Storage Co. v. Miller* (1920) — Ind. App. —, 125 N. E. 652, Ann. Cas. 1912A, 590; *Robinson v. Hill* (1910) 60 Wash. 615, 111 Pac. 871; *Sempier v. Goemann* (1917) 165 Wis. 103, 161 N. W. 354, Ann. Cas. 1918C, 670.

In *Messmer v. Bell & C. Co.* (1909) 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1, there was the additional circumstance that, when the plaintiff sustained the injury in question, the defendant had reported it to the in-

curement of such insurance is not sufficient of itself to change the quality of a contract which is shown by the remainder of the evidence to have been an independent one.²

The fact that the person employed did not obtain indemnity insurance against injury to the workmen hired by him has been held to have some tendency to negative the independence of the contract.³

§ 40. Obligation of contractor to indemnify employer for injuries resulting from the work.

In many of the cases in which the

insurance company as an injury to one of its own employees.

² *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740.

³ *Arizona-Hercules Copper Co. v. Crenshaw* (Ariz.) supra.

¹ See, for example:

United States. — *Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. C. A. 342; *Morning v. Cramp & Co.* (1909) 170 Fed. 364; *United Gas Improv. Co. v. Larsen* (1910) 182 Fed. 620, 105 C. C. A. 486; *International Agri. Corp. v. Slappey* (1919) 261 Fed. 279; *The Satilla* (1916) 148 C. C. A. 552, 235 Fed. 58, affirming (1915) 221 Fed. 949.

Colorado. — *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439.

Indiana. — *Mobley v. J. S. Rogers Co.* (1915) 68 Ind. App. 308, 119 N. E. 477; *Stalder v. Huntington* (1899) 153 Ind. 354, 55 N. E. 88; *Julius Keller Constr. Co. v. Herkless* (1915) 59 Ind. App. 472, 109 N. E. 797.

Kansas. — *Maughlille v. Price* (1916) 99 Kan. 412, 161 Pac. 907.

Louisiana. — *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. 206, 67 So. 888; *Brady v. Jay* (1904) 111 La. 1071, 36 So. 132.

Maryland. — *Symons v. Allegany County* (1907) 105 Md. 254, 65 Atl. 1067.

Massachusetts. — *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

Missouri. — *Salmon v. Kansas City* (1912) 241 Mo. 14, 39 L.R.A.(N.S.) 328, 145 S. W. 16; *Thurston v. Kansas City Terminal R. Co.* (1914) — Mo. App. —, 168 S. W. 236.

Nebraska. — *Omaha Bridge & Terminal R. Co. v. Hargadine* (1904) 5 Neb. (Unof.) 418, 98 N. W. 1071; *Bar-*

rett v. Seldon-Breck Constr. Co. (1919) 103 Neb. 850, 174 N. W. 866.
New York. — *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236; *Cohen v. Western Electric Co.* (1906; App. T.) 50 Misc. 660, 99 N. Y. Supp. 525; *Carpenter v. New York* (1906) 115 App. Div. 552, 101 N. Y. Supp. 402.
North Carolina. — *Gay v. Roanoke R. & Lumber Co.* (1908) 148 N. C. 336, 62 S. E. 436 (provisions that a logging contractor should pay for any delays or damages that might occur to the railroad, if he failed to load the logs as stipulated by the contract between two railroad companies and the employer).

Pennsylvania. — *Allen v. Willard* (1808) 57 Pa. 374; *Wray v. Evans* (1876) 80 Pa. 102.

Tennessee. — *Louisville & N. R. Co. v. Cheatham* (1906) 118 Tenn. 160, 100 S. W. 902.

Utah. — *Callahan v. Salt Lake City* (1912) 41 Utah, 300, 125 Pac. 863; *Dayton v. Free* (1914) 46 Utah, 277, 148 Pac. 408; *Stricker v. Industrial Commission* (1920) 55 Utah, 603, 19 A.L.R. 1159, 188 Pac. 849.

England. — *Allen v. Hayward* (1845) 7 Q. B. 960, 115 Eng. Reprint, 749, 15 L. J. Q. B. N. S. 99, 10 Jur. 92, 4 Eng. Ry. & Cas. 104; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

In *Kirby v. Lackawanna Steel Co.* (1905) 109 App. Div. 334, 95 N. Y. Supp. 833, the conclusion of the court that the relation of master and servant did not exist between the defendant company and an engineering company which had contracted to operate

apparently furnished by the consideration that a provision of this tenor forms a part of contracts of hiring and service, and is very frequently inserted in contracts of an independent description. But it clearly must be treated as a negligible factor, if the other provisions of a contract are of such a nature as to negative its independence.

In a case where the contract bound the person employed to save the employer "harmless from all labor and materialmen's liens," and to pay "all railroad demurrage which might be incurred because of any negligence on his part," it was held that the presence or absence of such a stipulation "does not, in the slightest degree, tend to determine the nature of the relation created by the contract."² But this complete denial of any probative significance seems to be scarcely warrantable in view of the fact that stipulations of this general type are not uncommonly inserted in independent contracts, and very sel-

its plant was founded in part upon the consideration that the contract embraced a provision binding the defendant to repay the contractor all expenses incurred for insurance against accidents. Such a provision imported that the engineering company was to protect the defendant against liability for personal injuries. "This was provided as a matter of safety to the defendant. It might be claimed, as it is here, that defendant was liable on some theory. The engineering company was ultimately to protect the defendant against such liability. Insurance was provided for, and defendant agreed to pay the premiums therefor as one of the expenses of the business, but in the end, if the insurance company did not afford defendant protection, the engineering company was bound to do so."

A typical example of a stipulation of this sort is found in the report of *Smith v. Bank of Commerce & T. Co.* (1916) 135 Tenn. 398, 18 A.L.R. 788, 186 S. W. 465: "The contractor will, at his own expense, protect in a suitable manner the work and ground, so as to avoid any injury to the property of adjacent owners or of others, and damage to their persons, or employees, or any other persons. The contractor

dom, if ever, in contracts of hiring and service.

§ 41. Contractor a stockholder in employing company.

In one case it was held that the minutes of the meetings of the stockholders and directors of the defendant company were properly admitted in evidence as tending to show not only that the person employed was not an independent contractor, but that he substantially owned the company, and that, as the owner of a majority of the stock, he was in a position to change at will the contract under which it was claimed he was working.¹

§ 42. Contractor a director of employing company.

In a case where the action was brought by an injured servant, it was held that where a railway company employs one of its directors to construct the floor of a building by day's work, and pays him a commission on the actual cost of the work, he is, as

will be responsible for all damages of every nature whatsoever done to persons or property during the progress of the work, and occasioned by its own acts or neglect, or that of any of its subcontractors, foremen, laborers, or other employees or agents, and shall have executed and maintained in force bonds as provided in the specifications."

In *North Bend Lumber Co. v. Chicago, M. & P. S. R. Co.* (1913) 76 Wash. 232, 135 Pac. 1017, where the contract was held to create the relationship of master and servant, the court remarked, with regard to a clause which provided that the contractor should hold the contractee free from damages arising from any accident to any person or property: "It is unnecessary to say . . . that the clause of the contract making contractors liable for losses caused by the negligent performance of the work is a mere *brutum fulmen* as to strangers to the contract." The possible significance of such a clause, as an element tending to prove the independence of the contract, was not adverted to.

² *Scale v. First State Bank* (1918) 88 Or. 490, 172 Pac. 499.

¹ *Watson v. Black Mountain R. Co.* (1913) 164 N. C. 176, 80 S. E. 176.

regards the performance of such work, a mere contractor, and that notice to him of any defect in the instrumentalities is not notice to the company.¹ The rule thus adopted is doubtless a proper one in any case in which the injured party was chargeable with knowledge of the actual relations between the company and the director. But it seems clear that, under some circumstances, a person who is employed by a director to assist him in doing work which is for the benefit of the company will be justified in assuming that, in respect of the contract of employment, he was acting as the representative of the company.

§ 42a. Contracting company an auxiliary of the employing company.

In the case cited below the nonliability of the defendant railroad company for injuries resulting from the collision of a train with a wagon, at a crossing on a line constructed by another company, was referred to a doctrine of the purport thus stated: "Where a parent company, operating a long line of road in the state, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line in the name of another company, and, in strictly pursuing the provisions of the statute, merely furnishes aid as a stockholder, or bondholder, or a guarantor of bonds of the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent in such construction of the

parent company; and the parent company is not, on account of being a stockholder, or bondholder, or guarantor of bonds of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."¹

§ 43. Custom or usage.

In one case the ruling of the trial judge that a fisherman was the servant of the defendant packing company was held not to be warranted by testimony which merely showed that throughout the district in question a general usage prevailed that the fishermen delivering fish to a packing company were in its service.¹

In another case evidence going to show that there was a custom on the part of the employer's foreman to exercise over the work of persons engaged for the same purpose as the one whose status was in question, a degree of control sufficient to render them servants, was held inadmissible for the reason that it was not affirmatively shown that the custom was known to that person, and that he had contracted with reference to it.²

§ 44. Miscellaneous facts—tending to show that the person employed was an independent contractor.

To this category belong the following facts:

That the terms of the contract were such as to leave the person employed at liberty to work for other persons besides the employer.¹

¹ *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. (N. Y.) 283.

² In *Atchison, T. & S. F. R. Co. v. Davis* (1885) 34 Kan. 209, 8 Pac. 530. The judgment rendered at the earlier hearing in (1885) 34 Kan. 199, 8 Pac. 146, was set aside.

¹ *Oregon Fisheries Co. v. Elmore Packing Co.* (1914) 69 Or. 340, 138 Pac. 862. The court relied partly upon the consideration that no such custom had been pleaded, and partly upon the declaration in § 727, L. O. L., that evidence may be given of "usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible

except as a means of interpretation." This provision necessarily imported that, if nothing but custom was shown, there was no proof of a contract arising between the two parties.

² *Tuttle v. Embury-Martin Lumber Co.* (1916) 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664.

¹ *Ex parte Johnson* (1839) 7 Dowl. P. C. (Eng.) 702 (man who had contracted "to print certain pieces of woolen-cotton goods" was held not to be within the Master and Servants Act, 4 Geo. IV. chap. 34, § 3); *Byrne v. Baltinglass Rural Dist. Council* (1911; C. A.) 45 Ir. L. T. 206, 5 B. W. C. C. 566; *Winters v. American Radiator Co.* (1915) 128 Minn. 508, L.R.A.

That the person employed was a free agent as to his hours of labor.²

That the employment was not continuous.³

That neither the persons employed, nor the workmen hired by him, were carried in the books of the employer.⁴

That neither party to the contract was to be liable in any way for any loss or damage sustained by the other, or by third persons, through the fault of the other party.⁵

That as long as the appliance which the contract obligated the person employed to furnish for the purposes of the stipulated work was capable of performing the work, the employer was to use no other.⁶

That the contract was to be binding upon, and for the benefit of, the heirs, executors, administrators, successors, and assigns of the respective parties thereto.⁷

That time was to be of the essence of the contract, and that the work was to be completed before a specified date.⁸

That the contract under review contained a stipulation that the person employed was to pay a specified sum, in default of delivery of certain materials at the times required by the employer's agent.⁹

That the tort-feasor was the donee of the articles by the handling of which he caused the injury complained of.¹⁰

1915D, 476, 151 N. W. 277 (transfer company, whose servant caused the injury complained of, delivered goods for other persons besides the defendant); *Hopkins v. Empire Engineering Corp.* (1912) 152 App. Div. 570, 137 N. Y. Supp. 478 (drayman in question had, on the day before the plaintiff was injured through his negligence, been working for a person other than the defendant).

² *Curtis v. Plumptre* (1913; C. A.) 6 B. W. C. C. (Eng.) 87 (contractor and the men engaged by him did the work as and when they liked, and were not bound to work every day, unless they thought fit to do so); *Hayden v. Dick* (1902) 5 Sc. Sess. Cas. 5th series, 152, 40 Scot. L. R. 95, 10 Scot. L. T. 380; *Ryan v. Tipperary, South Riding County Council* (1912; C. A.) 46 Ir. L. T. 69, 5 B. W. C. C. 578; *Chisholm v. Walker* [1909] S. C. 31, 2 B. W. C. C. 261, 46 Scot. L. R. 24 (not obliged to come on any particular day); *Donlon Bros. v. Industrial Acci. Commission* (1916) 173 Cal. 250, 159 Pac. 715; *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288; *Robichaud's Case* (1919) 234 Mass. 93, 124 N. E. 890 (person employed did the work at his own convenience, and in connection with other business); *Schroer v. Brooks* (1920) 204 Mo. App. 567, 224 S. W. 53; *Peer v. Babcock & Co.* (1920) 230 N. Y. 106, 129 N. E. 224, reversing (1919) 187 App. Div. 925, 174 N. Y. Supp. 914 (truckmen "were free to make such deliveries at their pleasure, and were not subject to the directions of Babcock & Company in re-

spect of the time they should work or the manner in which the same should be accomplished)."

³ *Crow v. McAdoo* (1920) — Tex. Civ. App. —, 219 S. W. 241.

⁴ *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 159 Pac. 721.

⁵ *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Aarnes v. Great Northern R. Co.* (1915) 129 Minn. 467, 152 N. W. 866.

⁹ *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847.

¹⁰ In *Swart v. Justh* (1905) 24 App. D. C. 596, the evidence showed that, after a man employed to construct a skylight for a lump sum in the roof of the defendant's building had completed the work and received payment therefor, he expressed a wish to have the old materials, that the defendant consented to his taking them, and that, while he was throwing them from the roof, one of the planks struck a person who was passing along an alley. The court approved instructions to the effect (1) that if the contractor had undertaken the removal of the old materials at the request, or by direction, of the owner, then the contractor was acting as the agent or employee of the defendant, in such manner as to render the defendant liable for his negligence in performing the work, whether he himself was or was not present and in actual direction of the work; and (2) that, if the

§ 45. —*tending to prove that the person employed was a servant.*

To this category belong the following facts:

That the person employed could not terminate the contract without giving a month's notice.¹

That the person employed was required to devote his whole time to the stipulated work.²

That a person employed for an indefinite period to perform a certain description of work devoted the principal part of his time to that work.³

That the person employed was not at liberty to do the same kind of work for anyone except the employer.⁴

That the person employed, when for

materials had become the property of the contractor by gift from the defendant, and if in removing them he acted for himself alone, and without any direction from the defendant, then the defendant would not be liable for the contractor's negligence in removing them in his own way. The court intimated that if the gift had been coupled with the requirement of removal, the defendant might have been liable for the acts of his contractor. The authority cited was *Burke v. Shaw* (1881) 59 Miss. 443, 42 Am. Rep. 370. As that decision was one which denied the liability of the donor, and there is apparently nothing in the opinion to justify citing it as a precedent for the doctrine suggested, the conclusion that the court misapprehended its rationale seems unavoidable. It is somewhat curious that the liability of the defendant was not discussed with reference to the applicability of the rule which imposes upon the owners of property adjacent to a highway an absolute duty to see that persons using the highway shall not be injured by conditions existing thereon, which can be obviated by the exercise of reasonable care. *Pollock, Torts*, Wade's Am. ed. p. 638.

¹ *Re Bailey* (1854) 3 El. & Bl. 607, 118 Eng. Reprint, 1269, per Wightman, J., in a case involving the criminal liability of a servant for desertion.

² *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Brown v. Industrial Acci. Commission* (1917) 174 Cal. 457, 163 Pac. 664; *Williams v. National*

any reason he could not work at the stipulated job, performed other kinds of work for the employer.^{4a}

That the employer agreed to find work for the person employed, or pay wages.⁵

That the person employed received a guaranty that his remuneration, as fixed upon a quantitative basis, should not fall below a specified sum.⁶

That the risk of all fluctuations in the scale of wages was taken by the principal employer, and not by the immediate employer of the men hired to perform the stipulated work.⁷

That the relationship of master and servant had existed between the em-

Cash Register Co. (1914) 157 Ky. 836, 164 S. W. 112; *Southern Cotton Oil Co. v. Wallace* (1900) 23 Tex. Civ. App. 12, 54 S. W. 638.

For cases in which a portion of the evidence held to establish the relationship of master and servant was that the employer was the only party for whom the person employed was working, see *Bristol & G. Co. v. Industrial Commission* (1920) 292 Ill. 16, 126 N. E. 599; *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303.

In *O'Donnell v. Clare County Council* [1913; C. A.] W. C. & Ins. Rep. 273, 6 B. W. C. C. 457, 47 Ir. L. T. 41, one of the items of evidence mentioned was that the person employed was at liberty to work for anyone else, when he was not wanted by the employer.

³ *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681.

⁴ *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484.

^{4a} *Kelley's Dependents v. Hoosac Lumber Co.* (1921) — Vt. —, 113 Atl. 818, 20 N. C. C. A. 902.

⁵ *Re Bailey* (1854) 3 El. & Bl. 607, 118 Eng. Reprint, 1269, per Crompton, J., in a case involving the criminal liability of a servant for desertion.

⁶ *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288 (delivery of bread on commission); *Midgette v. Branning Mfg. Co.* (1909) 150 N. C. 333, 64 S. E. 5 (sawing of logs at so much per 1,000 feet).

⁷ *Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578.

ployer and the person employed before the latter undertook the work in question.⁸

That the employer fixed the hours during which the stipulated work was to be carried on by the person employed.⁹

That the person employed did not receive any profit on the work, or on the daily wages of the workmen hired by him.¹⁰

That, when no work of the kind stipulated was available, the person employed assisted the servants of the employer in the performance of their duties.¹¹

That the person who was alleged to be operating a certain department of the defendant's business as an independent contractor, and also the men hired by him, occasionally performed work in the other departments.¹²

That the owner of the vehicle which was to be used for the purpose of performing the contract was to be paid a specified sum for each day that it was laid off by the employer.¹³

That the principal employer "may at any time pay any moneys directly to the employees and others having claims against the contractor for work done and material furnished."¹⁴

That the employer listed for taxation all the property used in the construction and operation of the logging road used by the person employed.¹⁵

That up to the time of the trial no statement of his account had been furnished to the person employed, nor any balance struck between him and the employer.¹⁶

That a vehicle used by the person employed for the purposes of the stipulated work bore signs on which were painted the name of the employer and his business address.¹⁷

That in an action brought against the employer he rested the case without having introduced any evidence which bore upon the nature of the relation between him and the person employed.¹⁸

That employer engaged a night watchman to protect his premises while a building contract was in course of performance.¹⁹

§ 46. —not inconsistent with the inference that the person employed was an independent contractor.

To this category belong the following facts:

That the person employed was required to exercise the greatest of care and precaution in avoiding all fires in and about the premises on which the work was to be performed.¹

That the servants of the employer co-operated to some extent with those of the person employed.²

That the servants of the contractor sometimes worked for the principal

⁸ *Ruth v. Surrey Commercial Dock Co.* (1891; C. A.) 8 Times L. R. (Eng.) 116; *Van Simaey v. George R. Cook Co.* (1918) 201 Mich. 540, 167 N. W. 925.

⁹ *Southern Cotton Oil Co. v. Wallace* (1899) 23 Tex. Civ. App. 12, 54 S. W. 638.

¹⁰ *Thompson v. Twiss* (1916) 90 Conn. 444, L.R.A.1916E, 506, 97 Atl. 329.

¹¹ *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484. Contrast the ruling in *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107, § 46. note 3, *infra*.

¹² *Giacomini v. Pacific Lumber Co.* (1907) 5 Cal. App. 218, 89 Pac. 1059 (verdict finding that a person operating shingle department of lumber mill was not an independent contractor held to be warranted by evidence which included this element).

¹³ *De Perri v. Motor Haulage Co.* (1918) 185 App. Div. 384, 173 N. Y. Supp. 189.

¹⁴ *GADSDEN v. CRAFT & Co.* (reported herewith) ante, 662.

¹⁵ *Craft v. Albemarle Timber Co.* (1903) 132 N. C. 151, 43 S. E. 597.

¹⁶ *Dibert v. Giesbisch* (1914) 74 Or. 64, 144 Pac. 1184.

¹⁷ *Bristol & G. Co. v. Industrial Commission* (1920) 292 Ill. 16, 126 N. E. 599; *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484.

¹⁸ *Slayton v. West End Street R. Co.* (1899) 174 Mass. 55, 54 N. E. 351, 6 Am. Neg. Rep. 289.

¹⁹ *Mann v. Max* (1919) 93 N. J. L. 191, — A.L.R. —, 107 Atl. 417.

¹ *Scales v. First State Bank* (1918) 88 Or. 490, 172 Pac. 499.

² *Reisman v. Public Service Corp.* (1911) 82 N. J. L. 464, 38 L.R.A.(N.S.) 922, 81 Atl. 838 (servants of owner of

employer when the contractor had nothing for them to do, and that the servants of the principal employer sometimes helped the contractor when he was in need of assistance.³

That the employer made advances to the contractor while the work was in progress.⁴

That the employer defrayed certain expenses which the person employed had legitimately incurred for the purposes of the stipulated work.⁵

That a servant of the principal employer kept the time of the men working for the contractor.⁶

That one of the members of a con-

tracting partnership was an employee of a partnership,⁷ or a company⁸ for whom the stipulated work is to be performed. Contrast decisions cited in § 41, *supra*.

That a person engaged for logging operations was bound to maintain, at his own expense, in good working order, the locomotive and cars furnished by the employer for the work, and to return them after the work was finished.⁹

That the person who let a contract for the stonework of a building was himself a builder, and was doing the woodwork.¹⁰

pleasure resort kept the crowd back from the place where the person employed was giving an exhibition of fireworks).

³ *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107. Contrast the ruling in *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861, 2 N. C. C. A. 484, § 45, note 4, *supra*.

⁴ *Edmundson v. Coca-Cola Co.* (1912) — Tex. Civ. App. —, 150 S. W. 273. The court pointed out that a possible explanation of this fact was that the contractor had expended his own money, or materials and labor, and that the employing company, after having been informed of his purchases and payment, had been induced to make the advances.

⁵ *Edmundson v. Coca-Cola Co.* (Tex.) *supra*, where a portion of the evidence relied upon in support of the contention that one Tufts who had undertaken the erection of a building was not an independent contractor, was the fact that the company paid certain bills for his outlay on telephone messages, printing, and stamps, and the cost of his trip to the place where the work was to be done, and paid him his percentage on these items, treating and considering them as a part of the contract price of the building. The court said: "It is true if Tufts was the agent or employee of the company, he would charge them with such expenses; also, if he was to receive a lump sum for the building, such items should be considered as covered by such sum. But it does not follow that he would not, under a contract like the one in this case, charge the company with such items, even though an independent contractor. They appear to have been

legitimate expenses incurred in carrying on the work, and, though not mentioned in the contract, may have been considered by the company and Tufts as just portions of the claim against the company for erecting the building."

⁶ *Fay v. German General Benev. Soc.* (1912) 163 Cal. 118, 124 Pac. 844.

⁷ *Hedge v. Williams* (1901) 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

⁸ *Chicago Hydraulic Press Brick Co. v. Campbell* (1904) 116 Ill. App. 322. There one of the contentions of the plaintiff was that the defendant company and K. & D., the firm for which the tort-feasor was working, were one and the same concern, and that the employment of the firm by the defendant was a mere device by the firm to shift responsibility for the torts of the teamster employer. The decision in *Chicago Economic Fuel Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66, was held not to be controlling, in view of the evidence which showed that, while the business relations between the defendant and K. & D. were intimate, and that D. was at the time in question, and for a long time prior thereto, employed by the defendant as a salesman, the firm did a separate and independent business of its own, not only in the teaming, but in the stone business. It is observable that the conception of a "device to shift responsibility," that is to say, of a positively culpable motive actuating the employing company, was not involved in the decision cited.

⁹ *Gay v. Roanoke R. & Lumber Co.* (1908) 148 N. C. 336, 62 S. E. 436.

¹⁰ *Johnson v. Helbing* (1907) 6 Cal. App. 424, 92 Pac. 360.

That if the person employed should, through sickness, disability, death, or any other cause, be unable properly to look after and manage the work, the employer was to have the right to take charge of the work, and carry out the terms of the agreement at the cost and expense of the person employed.¹¹

§ 47. —not inconsistent with the inference that the person employed was a servant.

The fact that a person who had undertaken to perform work on a piece-work basis was permitted to hire an assistant is not sufficient of itself to show that a finding to the effect that the undertaker was a servant was erroneous.¹

The fact that the person employed undertook to give satisfaction, or to replace the product of the work as performed by him, if it did not endure for a certain length of time, has been held not to be decisive with respect to the question whether he was an "employee," within the meaning of that term as used in a Workmen's Compensation Act.²

§ 48. —Irrelevant or immaterial.

"Where there is a binding contract for the performance of a specific job by the contractor and those whom he may employ for a price agreed, it matters not, in determining the question whether he who has undertaken such job is to be regarded as the mere servant of the other party, what kind of work was the subject of the contract, or whether it was, or was not, a portion of the regular work which the party contracting for it is carrying on, or some piece of work incidental-

ly connected with it as necessary or convenient."¹

The terms on which the contractor had, on previous occasions, been employed by the official predecessors of the contractees, have no relevancy with respect to the question whether the contract was an independent one.²

With reference to that class of cases in which the claimant is seeking to charge the defendant with liability for an injury sustained by him while working under the person alleged by the defendant to be an independent contractor, it has been declared to be "wholly immaterial whether he knew for whom he was working, the real inquiry being who in fact was his employer."³ But the rule thus laid down is, in effect, sometimes qualified by the operation of the doctrine of estoppel. See § 51 *infra*.

The fact that the employer when speaking to a workman hired by the contractor, referred to the contractor as his foreman, has been held not to be of sufficient probative value to raise an issue.⁴

§ 49. Bad faith on employer's part in respect of making a contract independent in form.

In some cases a doctrine which may be thus formulated has been applied: The fact that the ostensible terms of the contract were such as to render the person employed an independent contractor will not protect the employer from liability in respect of his torts, if the evidence also shows that the actual relation between the parties was that of master and servant, and that the contract was a device adopted for the purpose of enabling

¹¹ *McBride v. Jerry Madden Shingle Co.* (1912) 173 Mich. 248, 138 N. W. 1077.

¹ *Re Bailey* (1854) 3 El. & Bl. 607, 118 Eng. Reprint, 1269, per Lord Campbell.

² *Rheinwald v. Builders' Brick & Supply Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598. But it is doubtful how far this particular ruling has been affected by the subsequent condemnation of the case as regards the main conclusion arrived at. See (1916) 174 App. Div. 935, 160 N. Y.

Supp. 1143, reargument denied in (1916) 175 App. Div. 957, 161 N. Y. Supp. 1142, which is affirmed in (1918) 223 N. Y. 572, 119 N. E. 1074.

¹ *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 107.

² *Karl v. Juniata County* (1903) 206 Pa. 639, 56 Atl. 78.

³ *De Sandro v. Missoula Light & Water Co.* (1915) 48 Mont. 226, 136 Pac. 711.

⁴ *Kipp v. Oyster* (1908) 133 Mo. App. 711, 114 S. W. 538.

the employer to escape the liabilities incident to that relationship. The earliest allusion to the theory that bad faith in regard to the formation of the contract might be an element proper to be considered with reference to the question whether it should

be treated as independent seems to be that which is found in some remarks made by the court, *arguendo*, in a case decided in 1866.¹ But all the cases in which the theory has been categorically adopted are of a much more recent date.²

¹In *Kellogg v. Payne* (1866) 21 Iowa, 575, where the action was brought by a farmer to recover for damage caused to his property by a fire negligently set out on the land of defendant, it was observed, without any citation of precedents: "If a responsible proprietor, having a work to perform the execution of which would be necessarily attended with danger and probable injury to third persons, should let the doing of the work by contract to an irresponsible party, with the view and for the purpose of avoiding personal liability for any damages that might result from its execution in the manner required, we will not say that such proprietor would not be liable for such damage. But his liability in such case, if it existed at all, might well be held to rest upon the fraud or mala fides of such proprietor." This statement was approved in *Dibert v. Giebisch* (1914) 74 Or. 64, 144 Pac. 1184.

²"A party may not be permitted to employ a contract, which by its terms assumes to establish the relation of an independent contractor as to one of the parties, as a cloak or shield to avoid liabilities arising out of the relation of master and servant, when such relation exists in fact." *Stanley v. Aurora, E. & C. R. Co.* (1911) 166 Ill. App. 132 (*arguendo*).

In *Deep Vein Coal Co. v. Raney* (1916) 62 Ind. App. 608, 112 N. E. 392, it was recognized that if the leasing of its mine was, as contended by counsel, "a mere subterfuge resorted to in an attempt to safeguard the lessor from consequences likely to flow from negligent operation," the lessor would have been liable for injuries caused to a servant of the lessee by the fall of a rock from the roof of a tunnel. But the court refused to consider the case under this aspect, because the plaintiff had sued on the theory that his immediate employer was working the mine as lessee.

In *Laffery v. United States Gypsum Co.* (1910) 83 Kan. 349, 45 L.R.A. (N.S.) 930, 111 Pac. 498, Ann. Cas. 1912A, 590, the evidence showed that

in 1900 the B. V. Plaster Company, the former owner of the gypsum mine and mill operated by the United States Gypsum Company, entered into a written contract with one Drake, by which it was agreed that he should mine and deliver such gypsum as the plaster company might require at its mills, on the terms that the company should furnish cars and rails to transport the material from the mine, that the deliveries should be at the plaster company's cable, and that Drake should be paid at the rate of 45 cents per ton. The contract contained the following stipulations: "It is further agreed that said party of the first part shall in no wise have control of the mine from which said gypsum is taken, or any authority respecting the manner of, or means employed in and about, mining said gypsum." This agreement was, by its terms, to remain in force for one year. Drake had been superintendent of the mine for several years before this contract was made, and he continued to direct its operations afterward. In 1902 the mills and mines were transferred to the gypsum company, and Drake continued until 1906 to supervise the operation of the mines, employing and discharging the laborers, and superintending the work in the mines generally, and the separation of the material from the earth, and its delivery at the mill. The claim of the defendant company was that he acted solely as an independent contractor, under the contract with the plaster company, adopted and in force between the transferee and the contractor. The claim of the plaintiff was that Drake acted as superintendent of the mines for the defendant company, without reference to the contract, and that the contract was set up as a cover to relieve the company from responsibility for the negligence of its own superintendent. Evidence was offered tending to support the claims of each party. The court took the position that, "if Drake was really acting for the company as its superintendent in overseeing and directing the mining

Facts mentioned by the courts as having some tendency to show bad

operation, by its authority, direction, or agreement, or if the written contract was not in force between the company and Drake, or if, with or without the contract, the company really controlled and directed the operation of the mine, then it is liable for any actionable negligence on his part or the part of the company." It was accordingly held that the actual relationship of Drake to the defendant was a question for the jury.

In *Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578, where the action was brought to recover for the death of a workman in a gypsum mine, who had been killed by a blast set off without any warning in the room adjacent to the one in which he was working, the defendant company, in its answer, alleged that, at the time of the accident Nelson was in the employ of one Jenkins, an independent contractor, engaged, together with one Messenger, under a written contract made between them and the Great Western Plaster Company, the defendant's predecessor in the ownership of the mine; that this contract provided that the contractors should do all the work in the mine in a good and workmanlike manner, according to the plans and specifications to be furnished by the company, and deliver the gypsum rock for the mill at the mouth of the mine at a stipulated price per ton; and that it was expressly stipulated that Messenger and Jenkins should employ and discharge the men who worked in the mine, and have full supervision and control over them, and that the owner of the mine was to have nothing whatever to do with the men, or the manner in which the work should be conducted, or anything that moved to the safety of the men in the work of getting out the rock. The answer also alleged that, after the withdrawal of Messenger from the work, Jenkins took over the performance of the work and under the terms of the written contract, and that after the mine had been purchased by the defendant, he continued to work under and by virtue of the same contract. The conclusions of the court in one point of view were thus stated: "In our opinion there was no substantial evidence showing that the written contract relied upon was in force, or that Jenkins, at the

time of the accident, sustained to the company the relation of an independent contractor. . . . It is apparent from the evidence and all the circumstances connected with the contract that it was entered into as a scheme and subterfuge to enable the Great Western Plaster Company to avoid its liability for injuries to its employees, caused by its own negligence. Neither Messenger nor Jenkins was possessed of any means or capital. That of itself would not make the contract unlawful, but it is only one of several circumstances indicating the purpose of the arrangement. When the alleged contract had been in existence about two years, the Great Western Plaster Company, acting through a Mr. Paul who was a part owner and superintendent of the plant, discharged Messenger, and Jenkins continued to operate the mine, to all appearances under the same arrangement, until 1904, when the contract was taken up by the Great Western Plaster Company on the advice of its attorney, and because a suit had been brought against it for an injury to one of the workmen in the mine, and the scheme was apparently not working successfully. If the company which owned the mine and made the contract with Messenger and Jenkins retained, outside of the written instrument, the right to discharge at will one of the parties to the contract, who was evidently a partner of the other, the contractors were not independent, but dependent upon the company, and the written instrument was not what it purported to be." The following comments upon the circumstances existing after the sale of the mine were also made: "The mine continued to be worked in the same way as before, Jenkins hiring the men, and the defendant company paying them every two weeks in checks made out to the individual workmen, the pay roll being kept by Jenkins and furnished to the company. The company weighed the rock at the mouth of the mine, and paid Jenkins sometimes 40, sometimes 42½, and at other times 45 cents per ton of rock, and charged him a stipulated price for oil used in the miners' lamps and for powder used in blasting. The company owned the mules and furnished their feed. The testimony shows that the price paid to Jenkins

faith are that the contract was executed after the claimant's injury was re-

per ton of rock was changed from time to time, to allow for the difference he had to pay for wages of the workmen, so that in effect the company, and not Jenkins, took the risk of all fluctuations in the scale of wages caused by the supply of labor. When work in the harvest fields attracted the men, and higher wages had to be paid, Jenkins was not so independent but that he could, by merely asking, obtain from the company whatever additional price per ton was required to make him whole. This plan was continued with the defendant company, and they had three prices which they paid him as the scale of labor demanded. . . . The inference is quite strong that the written contract was an afterthought, and that the defendant intended to rely upon its arrangement by which Jenkins was to hire and discharge the men at the mine, and was to be paid a price per ton for the rock mined. The arrangement, whether it was in writing as alleged in the answer, or merely verbal as Jenkins testified, had, we think from all the circumstances, but one purpose, which was to enable the defendant to escape liability for injury to its own employees arising out of negligence for which it would in law be responsible. . . . Considering the case in this aspect as one of first impression, we think it is clear that courts ought not to permit the employer to avoid liability for injuries to his workmen resulting from his own negligence, by a colorable arrangement such as this appears to have been. To hold thus would pervert a wise and useful principle of law to a purpose for which it was never intended. Whenever the courts can say from all the circumstances that the contractor is not independent of the owner, and that the contract, whatever its terms, is only a device or scheme to avoid the liability of a master to his servants for his failure to perform a duty which the law imposes upon him, the defense that the injury was caused by an independent contractor should not be permitted to prevail." It was accordingly held that the error of the trial judge in refusing to instruct the jury that if the deceased was in the employ of an independent contractor no recovery could be had against the defendant, and the further error in giving an in-

struction to disregard all the evidence tending to show that the superintendent of the mine was an independent contractor, were rendered immaterial by the special finding that the deceased, at the time he was injured, was in the employ of the defendant, and that the superintendent was acting for the company.

In *White v. Olive Hill Fire Brick Co.* (1916) 169 Ky. 835, 185 S. W. 107, the following circumstances were relied upon as tending to show that A., a person employed to do plastering work, was merely a boss or foreman for the defendant brick company:—that A. was doing the work for a less sum than it could reasonably be done for; that when the plasterers for any reason did not have any plastering to do during the progress of the work, they put in the time working for the brick company; that when A. needed help to assist in the plastering, the brick company's men performed the service needed; that the plasterers employed by A. were paid by the brick company; that H., the general superintendent of the brick company, had occasionally, during the progress of the work, made some objections to the manner in which it was being done; and that the company furnished the material. The court said: "These circumstances we do not think at all sufficient to show that the contract between Abrams and the company was a mere device to relieve the company from responsibility, or to overcome the direct and uncontradicted evidence we have set out, nor do we think they were of sufficient probative value to take the case to the jury. There seems to us no reason why the owner of property may not make a contract with an independent contractor, under the terms of which all these things that the brick company did might not be done without changing the relation of the parties, or converting the independent contractor into a boss or foreman for the owner."

In *Young v. Fosburg Lumber Co.* (1908) 147 N. C. 26, 16 L.R.A.(N.S.) 255, 60 S. E. 654, the contention that, notwithstanding the language of the written contract, the tort-feasor was, as a matter of fact, the mere servant and employee of defendant, and that the writing was a device resorted to for the purpose of protecting defendant from liability, was thus dis-

cussed: "It is clear that Ferrell does not become an independent contractor simply because the writing so styles him. Whether he is one depends upon the terms upon which he, in truth, enters upon and cuts the defendant's timber. If, as a fact, notwithstanding the language of the writing, defendant exercises a control over him in the selection and employment of the laborers,—if defendant pays them, and directs the manner in which they perform the service,—in other words, if the writing does not truthfully set forth the agreement between Ferrell and defendant, and the jury should so find, then he is not an independent contractor. If he was not acting under the written contract, but as the servant or employee of defendant, and the laborers who cut the trees are the servants of defendant, it would, of course, be liable for their negligence." The court, however, declined to consider the evidence alleged to support the contention thus advanced, as the case had not been tried or submitted to the jury in this point of view.

In *Johnson v. Caroline, C. & O. R. Co.* (1911) 157 N. C. 382, 72 S. E. 1057, the theory thus excluded from consideration by the circumstances under which the appeal in the earlier case was prosecuted was expressly approved.

In *Midzette v. Branning Mfg. Co.* (1909) 150 N. C. 340, 64 S. E. 5, where an action was held to be maintainable for a fatal injury received by a servant of the lessee of a sawmill, the following remarks were made: "Merely calling a man an independent contractor cannot make him so. We should hesitate to hold that a person or corporation could, under the form and semblance of an independent contract, operate a secondhand mill in bad repair, dangerous to employees, for the purpose of having its logs cut into lumber, and escape liability for injuries sustained by the employees, who, in good faith and upon reasonable grounds, supposed that they were employed by and were working for the owner of the mill."

In *Bokoshe Smokeless Coal Co. v. Morehead* (1912) 34 Okla. 424, 126 Pac. 1033, the doctrine that "a contract which upon its face creates the relation of owner and independent contractor will not protect the owner from liability for negligence of the

contractor, if it is designed as a mere subterfuge to shield the owner from liability for his negligence," was laid down in the syllabus of the court. But the conclusion that the defendant coal company was really operating the mine in which the plaintiff was injured while working for one Henderson was held not to be warranted by evidence to the effect that the plaintiff, when he applied to the company's superintendent for employment, was sent by him to Henderson, with whom, he was told, he could get on; that Henderson's employees drew their wages once or twice from the coal company's office; that Henderson procured from the company some scales, two pit cars, some rails, and some timbers for use in the mine; and that the company's superintendent was at the mine frequently, and at one time offered a suggestion with reference to the repair of an engine.

In *Dorn v. Snare & T. Co.* (1909) 62 Misc. 269, 114 N. Y. Supp. 820, where the court, in ordering a new trial, remarked that the plaintiff must look for her relief to the subcontracting company whose servant caused her injury, unless "she could prove that that company was a mere cover under which the defendant was really doing the work."

In *Mitchell v. Elizabeth River Lumber Co.* (1917) 174 N. C. 119, 93 S. E. 464, the defendant lumber company held a lease of the plaintiff's timber, under a contract giving him a right of way across the tract on which it stood. On that right of way the defendant Bradshaw had laid a track, and furnished an engine, and was operating a lumber road to his mill. The lumber company, and Bradshaw, and Davis had entered into a tripartite agreement the purport of which was that the lumber company put in its timber contract and right of way, that Bradshaw put in the engine, railroad track, and saw mill which he was operating, and that Davis was to cut the timber, haul it, and saw it up into lumber, and load it on the railroad cars at a certain station. It was stipulated in the contract that Davis was to be an "independent contractor," and that neither the lumber company nor Bradshaw was to be "responsible to any person for any damage, injury, or loss occasioned to, or sustained by, such persons on account of, or in connection

ceived, and dated back so as to cover the time of the accident,^{2a} and that it did not embrace any express provisions with regard to certain apparently essential matters.³

with, the work to be done." In an action brought to recover for the damage caused by a fire communicated to the plaintiff's timber from the engine, a verdict in his favor was sustained for reasons thus stated: "In the present instance the lumber company owned the timber and the right of way. It did not convey away either, and the defendant Bradshaw laid down the track, and furnished the engine and cars, and was operating the road on the lumber company's right of way, and the sawmill. They were practically, therefore, a partnership, operating said railroad to get out the lumber company's timber to market. The operation of the railroad and mill plant by Davis, who seems to have been irresponsible, cannot have the effect to relieve the other two defendants from liability for negligence either as to employees or the owner of the land, whose woods were set fire to by the negligence in the operation of the engine. If this could be done it would be a very simple device to put some nominal or irresponsible party in the control of the railroad and mill plant, and thereby exempt the owners of the same from all liability."

See also *Swansea Lease v. Molloy* (1919) 20 Ariz. 531, 183 Pac. 740 (evidence held insufficient to establish allegation that the contract was a "device and means contrived and put into effect by the defendant, for the purpose and with the intent of enabling the defendant to exempt himself from the liability created" by the Employers' Liability Law); and *Good v. Johnson* (1907) 38 Colo. 440, 8 L.R.A. (N.S.) 876, 88 Pac. 439 (question of good faith erroneously submitted to the jury in the absence of evidence tending to prove bad faith); *Talmage v. Tift* (1920) 25 Ga. App. 639, 104 S. E. 91 (syllabus of court—no opinion—actions for injury sustained by laborer) and the cases cited in § 50, note 2, *infra*.

In *Coal City Min. Corp. v. Davis* (1919) 17 Ala. App. 22, 81 So. 358, where the claimant had been injured while working in a leased mine, the court observed: "It seems to be the

The doctrine formulated above seems to be open to criticism. In the first place, the introduction of the notion of a device or subterfuge for the purpose of enabling the claimant to

rule that, as between third persons in interest and the owner and lessee, it is always a question as to the bona fides of the lease contract, and, where there is any evidence tending to show that the owner is using the lessee as a subterfuge to cover its own operation, it becomes a question for the jury to say whether the owner is the party in contractual relation with the party in interest." The authority cited was *Amerson v. Corona Coal & I. Co.* (1915) 194 Ala. 175, 69 So. 601. But, so far as the opinion shows, the element of "subterfuge" did not enter into the discussion in that case. The actual point decided was that the direction of a verdict for the defendant, on the theory that the mine in question was being operated by a lessee on the day when the plaintiff was injured, was error, as there was some evidence pointing to the opposite conclusion. On the second appeal, the case was again held to be one for the jury, there being some evidence tending to show that the plaintiff's intestate was in the employ of the defendant company.

^{2a} *De Sandro v. Missoula Light & Water Co.* (1915) 48 Mont. 226, 136 Pac. 711.

³ In *Johnson v. Great Northern Lumber Co.* (1908) 48 Wash. 325, 93 Pac. 516, where a blast set off without warning injured the plaintiff, while engaged upon excavation work by his immediate employer, one Veratt, the omissions emphasized by the court as tending to impeach the good faith of the principal employer were thus adverted to: "The contract provided that the appellant should furnish the powder, the tools, and such helpers as Veratt might require in the performance of the work, at its own cost and expense, and fixed Veratt's compensation at a given sum, yet it placed no limitation whatever on the quantity of powder, the character of the tools, or the number of helpers Veratt might lawfully exact under it. It provided, also, that Veratt might hire and discharge his helpers, but was silent as to the wages he might lawfully contract, on the appellant's behalf, to pay them."

assert his remedial rights is, so far as appears, entirely superfluous. It is, at least, reasonably certain that such evidence as that which was presented in all the cases in which that notion has hitherto been relied upon would have justified the inference that the measure of control which the contractee had reserved with respect to the details of the work was sufficiently extensive to negative the independence of the contract. In the second place, the fact that it is impossible, in a logical point of view, to confine the application of the theory to the class of cases now under discussion, is suggestive of a serious difficulty. There would seem to be no escape from the conclusion that, if the desire of an employer to secure himself from loss is once recognized as being evidence of bad faith, the operation of the general doctrine as to the nonliability of an employer for the torts of an independent contractor would be narrowed to an incalculable degree. It is notorious that in a very large proportion of instances that desire operates as the motive which

determines the form of the contract, and, having regard to the broad considerations of public policy to which the juristic incidents of an independent contract are referable, it is submitted that there is no valid ground upon which such a motive can be treated as an indicium of bad faith. In view of these two serious objections to the adoption of the theory under discussion, it seems to be permissible to question its soundness. It is apprehended that the element of a desire on the part of the employing company or firm to escape liability should not be treated as evidence of bad faith, unless it is combined with some specific circumstance which may be reasonably regarded as tending affirmatively to show the existence of a fraudulent purpose. The fact that the company or firm engaged to perform the work was irresponsible financially constitutes the most obvious instance of such a circumstance. The views thus expressed are supported by the language used in the cases cited below.⁴

⁴In *Larsen v. Home Teleph. Co.* (1911) 164 Mich. 295, 129 N. W. 894, one of the points taken on behalf of the plaintiff was "that the contract was a sham and the construction company a fictitious entity,—practically the Home Telephone Company,—the construction company being a mere tool of the telephone company, and therefore not an independent contractor." In support of this claim counsel urged a similarity in the personnel of the officers of the two companies, and many provisions of the contract of an alleged tendency to show the reservation of control of the construction company and its employees by the telephone company. Discussing this contention Hooker, J., (whose position seems to have been approved by the majority of the court, although they differed from him with regard to the import of the contract in question), made the following remarks: "In the present case there is no testimony from which the want of bona fides can be inferred, unless it be the statement in the contract that the telephone company shall not be liable for damages on account of injuries to third persons. It will not be gainsaid
20 A.L.R.—51.

that the telephone company had a right to let its contract to an independent contractor, and that, if it did, the legal effect would be to make the latter, only, liable for accidents. The bona fides of such a contract could not depend on the absence of a motive to avoid such liability; for, in the first place, it is not an unlawful motive or an immoral one, and is not a blow to anyone's rights, if an actual bona fide contract is made; and for that reason we say that the presence of such a motive, even though it was the sole motive, is as consistent with the bona fides of the contract as with the absence thereof, and we have seen, in the cases cited regarding legal entity, the presumption of bona fides exists if such motive is all the evidence upon which a different claim is based. In this case it is shown that two valid corporations existed, and that both had capital and assets, and that they made a contract which on its face is valid. Indeed, they joined with another corporation in a tripartite contract which is inconsistent with any other view than bona fides as to the first contract. Even if counsel's contention that these contracts

§ 50. *Virtual identity of employing and employed companies or partnerships.*

There is a considerable body of precedents for a doctrine which may be thus formulated: Where the contracting parties were both corporations or partnerships, the contract, although it was independent in quality so far as its actual terms were concerned, will, for the purposes of an action brought by a third person, be treated as one which constituted the relationship of master and servant, or

established the fact that the relation of master and servant was created were true, it does not tend to prove that the contract was not bona fide, for the parties were competent to make such contracts as well as others, and we understand that this is not disputed."

In *Connor v. Pennsylvania R. Co.* (1904) 24 Pa. Super. Ct. 241, it was held that, in the absence of specific evidence which "tended to throw doubt upon the good faith of a railway company of a cab in leasing it to the driver from whose negligence the injury in suit arose, the trial judge had improperly left it to the jury to say whether the arrangement was merely a "cover" to accomplish the object of exempting the company from responsibility." The court said: "The motive of the company in determining the conditions of the contracts into which it entered was not material; if it was unwilling to assume the responsibility of an employer of the drivers of cabs, it had a right to decline to enter into that relation."

¹In *Joseph R. Foard Co. v. Maryland* (1914) 135 C. C. A. 497, 219 Fed. 827, affirming (1914) 213 Fed. 51, where an explosion of dynamite was caused by the negligence of the servants of the General Stevedoring Company, which had been employed by the Foard Company to load it on a ship, the contention that the former company was an independent contractor was rejected for reasons thus stated: "Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the business of the Foard Company as shipbrokers and agents. The two com-

panies had the same officers; the stevedoring company handled no funds, except through the Foard Company; its losses were paid by the Foard Company, and dealt with as if they were that company's own losses. All of the profits of the stevedoring company were kept by the Foard Company as a charge for managing the business. There are other like circumstances, but these are sufficient to show that the stevedoring company was organized and controlled, and its affairs so conducted, as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded as, to the outside public, identical. . . . But, even if the usual current of business of the two corporations had been separate, in this instance the contract to load the vessel was with the Foard Company, and the evidence tends to show that it made no separate contract with the stevedoring company, but co-operated with and completely controlled it. The two companies, therefore, will be treated as one in this discussion, to be referred to as the Foard Company."

principal and agent, if it appears that the corporations or partnerships were bodies virtually identical, as being composed of, or controlled by, the same parties. An examination of the decisions shows that the liability to which the employer is subjected under this doctrine has been predicated on two distinct grounds.

In one point of view the contracting corporation or partnership becomes, under the circumstances mentioned, a mere agent of the contractee.¹ The

panies had the same officers; the stevedoring company handled no funds, except through the Foard Company; its losses were paid by the Foard Company, and dealt with as if they were that company's own losses. All of the profits of the stevedoring company were kept by the Foard Company as a charge for managing the business. There are other like circumstances, but these are sufficient to show that the stevedoring company was organized and controlled, and its affairs so conducted, as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded as, to the outside public, identical. . . . But, even if the usual current of business of the two corporations had been separate, in this instance the contract to load the vessel was with the Foard Company, and the evidence tends to show that it made no separate contract with the stevedoring company, but co-operated with and completely controlled it. The two companies, therefore, will be treated as one in this discussion, to be referred to as the Foard Company."

In *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66, affirming (1896) 64 Ill. App. 270, where the injury complained of was caused by an explosion of gas while it was being conveyed through carelessly constructed pipes, the evidence relied upon by the court as sustaining its conclusion was as follows: That all the officers and employees of the construction company who testified in the case were either at the same time connected in some way with the defendant company, or passed alternately from the service of one to the service of the other; that the natural gas which caused the explosion was let into the pipes by the order of the person who acted as the president of both

independence of the contract is clearly negatived by the existence of such a relationship, for it necessarily

implies that the details of the stipulated work remained under the control of the contractee. In another

companies; and that he was unable to state whether he gave such order as the president of the gas company, or as the supervising engineer of the construction company. It was considered to be just as legitimate to suppose that he gave the order in the former of these capacities as that he gave it in the latter capacity. "The law is quite clear," said the court, "that a corporation cannot thus shift its responsibility upon another corporation, which is its mere agent and tool."

In *Kankakee & S. R. Co. v. Horan* (1890) 131 Ill. 288, 23 N. E. 621, where land was flooded by reason of the obstruction of a watercourse, resulting from the construction of a railroad by the Kankakee & Seneca Railway Company, the right of the owner to recover damages from the codefendant of that company, the Cincinnati, Indianapolis, St. Louis, & Chicago Railroad Company, was predicated partly on the ground that the evidence warranted the conclusion that the Kankakee Company was organized and designed as a mere instrument in the hands of the Cincinnati Company for the construction of a line of railroad for the use, and to subserve the purposes, of that company, said company being the real and ultimate principal in the enterprise.

In *West Chicago Street R. Co. v. Morrison, A. & A. Co.* (1896) 160 Ill. 288, 43 N. E. 393, where part of a building tenanted by the Morrison Company was wrecked and dismantled by an employee of a tunnel company, as a preliminary to commencing the construction of a tunnel under a contract made with the defendant street railroad company, the evidence showed that the street railroad company had procured the passage of an ordinance by the city of Chicago, authorizing it to construct the tunnel in question, and that it then organized the West Chicago Street Railroad Tunnel Company, which became the apparent builder and owner of the tunnel. The whole of the capital stock of the tunnel company, except five shares held by the five directors for the purpose of qualifying them to act as such, was held by one Yerkes, president of the

street railroad company, as trustee for its stockholders. The rentals of the lands acquired by the tunnel company for uses and purposes of the tunnel were to go, as far as might be, to pay interest on the company's bonds, taxes, insurance, and other expenses, and the street railroad company was to make up the deficiency. It was further shown that the tunnel was to be under the exclusive control of the street railroad company for 999 years, and that it was to be kept in repair at its expense; that the street railroad company was to guarantee all of the tunnel company's bonds; that the tunnel company was to receive a yearly toll on each and every car drawn by the street railway company through the tunnel during the 999 years; that the amount of such toll was to be fixed afterwards, but was in any event to be enough to make good any deficiency between the net rentals and the interest on the tunnel company's bonds; that the bonds and the mortgage were to be renewed, or extended, from time to time, upon the request of the street railroad company; and that the construction by the tunnel company of the tunnel was to "be taken and considered as and for the construction of a tunnel by the street railroad company itself." It was held that this evidence "clearly tended to show that the tunnel company was a mere means or mode adopted by the street railroad company for the construction of its tunnel,—a mere instrument, or tool, used for that purpose,—and that the tunnel company was organized and acted simply as the agent or servant of the street railroad company." In this point of view it manifestly followed that the street railroad company was responsible for the injuries caused by the trespass complained of. But the decision in favor of the plaintiff was based partly upon the circumstance that Yerkes, acting as president of the street railroad company, had given the order for taking possession of and demolishing the building in question; the formal conclusion of the court being that from the evidence as a whole, considered in the light of the surrounding circumstances, the jury was authorized to find that the street rail-

point of view the position is taken that, having regard to the closeness of the connection between the parties

to the contract, the arrangement as made may properly be regarded as evidence of bad faith, in respect of its

road company was a party to the trespass.

In *Peoria, B. & C. Traction Co. v. O'Connor* (1909) 149 Ill. App. 598, the question whether a railroad company and a construction company were identical in fact, although apparently separate and distinct organizations, or whether the relation of the construction company was that of an independent contractor, was held to have been properly submitted to the jury, where the evidence tended to show that the construction company had, since its formation, done work for the railroad only; that both companies occupied the same offices, and that their funds were deposited in the same bank, although under separate and distinct accounts; that the checks given to plaintiff, a servant of the construction company, in payment of his wages, had printed upon their face the words, "For Peoria, Bloomington, & Champaign Traction Company, No. N. 15;" and that McComb, the auditor of the construction company, afterward occupied a similar position with the appellant company.

In *Asplund v. Conklin Constr. Co.* (1911) 165 Ill. App. 44, the evidence introduced in support of the claim of a workman who had been injured while working for a company engaged in constructing a line for a telephone company, its codefendant, was as follows: One Parsons was district manager of the telephone company, and superintendent of the construction, and financial man for the construction company at Joliet, and had full charge and control of the work, employed the men, saw to the paying of them, and directed their movements. The two companies had the same general officers, and, at Joliet, they occupied the same office, used the same warehouse, and the same man acted as foreman for both companies. The men who worked for the construction company were often called upon to do repair work for the telephone company, and vice versa, no separate account of their time being kept. If it rained so that they could not work on construction outside, they often worked inside for the telephone company. The wages of all the men at Joliet, working for either company, were paid by the same kind of

a check. Parsons determined what men should work for the construction company, and what men should work on repair work for the telephone company. He also determined what wagons should be used on construction work, and what wagons should be used on repair work. He determined what materials should be put into the construction work, and what materials should be put into repair work. He determined who should act as boss of the gang, whether it was working on construction work or on repair work. The conclusion arrived at was that the evidence clearly tended to show that the construction company was a mere means or mode adopted by the telephone company for the construction of the telephone line, that the construction company was acting as the agent or servant of the telephone company, and that the telephone company was liable to the plaintiff for the negligence of the construction company. On the first appeal, a verdict for the plaintiff had been reversed for error in certain instructions. See (1911) 154 Ill. App. 164.

In *Nicholson v. Atchison, T. & S. F. R. Co.* (1915) 95 Kan. 13, L.R.A. 1915C, 417, 147 Pac. 1123, where it was held that the conductor of a construction train was entitled to recover for injuries caused by the sinking of the track, the contention that the plaintiff was, at the time when the accident occurred, an employee of a certain railway company which had been created by the defendant for the accomplishment of its purposes in building the section of road in question, was rejected. "The branch company," said the court, "was a mere instrumentality of the Santa Fé Company. To be more plain, the Dodge City & Cimarron Valley Railway Company was a ledger heading in the Santa Fé Company's system of accounting, which did not break the relation of master and servant existing between the plaintiff and the defendant, when the plaintiff was placed in charge of the construction train."

In *Williams v. Cape Fear Lumber Co.* (1918) 176 N. C. 174, 96 S. E. 950, where the Camp Manufacturing Company, while engaged in cutting timber which had been "granted and sold" to

being indicative of the conclusion that the contractee intended to secure the advantages of an exercise of full control over the stipulated work,

without incurring the responsibilities ordinarily incident to the possession of such control.²

it by the defendant company, wrongfully cut some trees on the plaintiff's land, and removed them, the decision in favor of the plaintiff was based largely upon the theory that the grantor and grantee were identical companies, though they had different names. On the earlier appeal in (1916) 172 N. C. 299, 90 S. E. 254, this aspect of the facts was not discussed.

It may be advisable to refer, in passing, to a rule laid down in a case which did not involve the question of the independence of a contract—that the mere fact that the same men were officers of both of two companies is not sufficient evidence to justify a finding that the companies are one and the same. *Athison, T. & S. F. R. Co. v. Davis* (1885) 34 Kan. 202, 8 Pac. 146.

²In *Holbrook, C. & R. Corp. v. Perkins* (1906) 77 C. C. A. 462, 147 Fed. 166, where an action was held to be maintainable against the defendant partnership, by a brakeman who had been swept from the top of a car by the guy rope of a derrick, used by the Atlantic Construction Company for the purpose of performing work it had undertaken in pursuance of a subcontract, one of the provisions of this subcontract was as follows: "The corporation shall, at its own proper cost and expense, well and truly furnish all labor and materials and do all things required to complete and perform the work called for in the contract. . . . And while engaged therein the corporation shall have the entire control, management, and direction of the work, and of the employees and persons engaged thereon, and shall do whatever is necessary to guard properly the safety of such employees, and all persons engaged in and about the premises, and all others to whom the firm or corporation may owe such a duty, and the firm is hereby wholly discharged from all duties and liabilities in respect of the foregoing." The firm was to furnish and lease to the corporation all machinery, apparatus, tools, and appliances necessary, the corporation to pay as a rental therefor the sum of \$100 each month, and, upon the termination of the agreement, a further sum equal to

the difference between the present value of said machinery, apparatus, tools, and appliances, and the market value. The corporation was to employ all workmen, laborers, and employees. As compensation for the execution of the work and the furnishing of said materials, the firm was to pay the corporation a sum equal to the actual cost of said work and materials, and $\frac{1}{2}$ of 1 per cent of such cost in addition. The court said: "We are of the opinion that there was very strong evidence tending to show that the so-called contract with the construction company was a mere pretense; that the parties thereto did not comply with, but, on the contrary, violated, its terms; that there was no actual and bona fide contract; and that the execution of the document was a mere piece of circumvention, devised to avoid legal liability for accidents, and the attachment of property in tort actions. The testimony of Mr. Rollins was commendably frank, and most explicit, to the effect that the Atlantic Construction Company was organized for the sole purpose of avoiding attachments, and that it was without capital. It had the same superintendent as the plaintiff in error, and was composed substantially of the same individuals who composed the firm of Holbrook, Cabot, & Rollins, which firm subsequently was incorporated under the name of Holbrook, Cabot, & Rollins Corporation. . . . It is quite true that individuals are permitted to form corporations for the purpose of conducting business with a limited individual responsibility. It is not true that individuals are permitted to form corporations solely for the purpose of avoiding ordinary legal liabilities. Incorporation is permitted in furtherance of business enterprises; but a franchise is not granted for the sole purpose of destroying legal accountability. If the Holbrook, Cabot, & Rollins Corporation had put out of its hands all of its property merely in order to avoid legal liability for torts which it might commit in the course of its operations, we think there can be no question that such a conveyance would be void. We see no substantial

difference in the arrangement made in this case. Instead of putting its property out of the hands of the Holbrook, Cabot, & Rollins Corporation, the persons associated in that corporation attempted to put out of its hands the work authorized by its franchise, and for which the corporation was created, and thus, by an artificial division of its work and property, secure for the joint operations of the two corporations an immunity which could not be secured for the principal corporation. The immunity from attachment accruing to the Atlantic Construction Company is to be due to the fact that it will have no attachable assets. The immunity of the Holbrook, Cabot, & Rollins Corporation is to be due to the fact that it will put all of its contracts into other hands. This arrangement between the Atlantic Construction Company and the Holbrook, Cabot, & Rollins Corporation was merely a piece of circumvention which may be regarded either as a nullity, or as making the Atlantic Construction Company the agent, or alter ego, for whose acts the defendant, as true principal, is liable."

In *Towles v. Miles* (1915) 131 Tenn. 79, 173 S. W. 439, where the action was brought by Miles to recover for injuries received while he was in the employ of Straley & Company, a corporation which held a subcontract for railroad construction work under the defendants, *Towles & Company*, a partnership, a judgment for the plaintiff was affirmed on the ground that the evidence warranted both the conclusion that the work was directed and controlled by *Towles & Company*, and the conclusion that the contract by which the subsection of 4 miles was sublet to the corporation was a subterfuge; that the members of the firm were the moving spirits in the creation of the company, and incorporators, directors, and officers of *Straley & Company*, and caused members of their office force—a stenographer and a commissary keeper—to lend their names to make the requisite five incorporators; and that the affairs of the corporation were directed and controlled by the firm. The court said: "The ease with which a corporate charter may be procured, and the facility with which a corporate entity may be manipulated by its creators and made a shield for their protection, should dispose a

court to look through any such intended veil into the face of the individual or individuals behind. In this case it is apparent that the firm was, and was meant to be, the prime controlling influence over the corporation. The corporation was lacking in that element of independence of action required to constitute it an independent contractor. Imposed on it, in respect of management and control, was the will of another entity, the firm. A corporation will be treated as a distinct legal entity, ordinarily, and until proof is adduced to the contrary. But that notion will not prevail when the result would be to give countenance and effect to a mere sham, and work injustice." The precedent principally relied upon was *McDonald v. Charleston, C. & C. R. Co.* (1893) 93 Tenn. 281, 24 S. W. 252, involving the enforceability of a lien.

Attention may be directed to another case which, as regards its facts, illustrates the doctrine as to the effect of identity, although that aspect of the defendant's liability was only referred to incidentally. In *Kansas C. R. Co. v. Fitzsimmons* (1879) 22 Kan. 686, 31 Am. Rep. 203, the evidence held sufficient to warrant the jury in finding that the defendant railway company was liable for injuries received by a boy while playing with a turntable was as follows: That there were only three stockholders in the improvement company, by which, according to the defendant's theory, the section of road on which the accident occurred was then being operated; that the paid-up subscriptions amounted only to \$1,250; that since its completion this section of road had been operated and managed in the name of the defendant company; that all the engines, cars, and other property which had any name upon them were marked with that name; and that the improvement company was not known to the public; or to parties doing business with the railway. The court said: "The jury may have thought that the claim that the railway was operated and managed by the Washington Improvement Company, and not by the Kansas Central Railway Company, was a mere sham and fraud; and if they did so think, we cannot say that they were wrong. Even the existence of the Washington Improvement Company seems to be mythical. . . . For the purposes of this case, suppose that the

§ 51. Estoppel of employer to aver independence of contract.

A person employed to perform work upon terms which render him free from the control of his employer in respect of the details of that work will, in cases involving torts incident to transactions between the employer and third parties with regard to the

product of the work, be treated as an agent, if the conditions under which the employer's business is carried on are such as to induce in those parties the belief that the relationship of principal and agent exists between him and the person employed.¹

In a case where the action is brought to recover for injuries sus-

Washington Improvement Company did operate the railway at the time when the accident occurred (and there was some evidence tending to show that it did), still the jury were justified in finding, if they did so find, that it operated the same not for itself alone, but for the railway company and as its agent and servant, and, therefore, that the railway company, the master, operated the road through its servant, the improvement company."

See also *Larsen v. Home Teleph. Co.* (1911) 164 Mich. 295, 129 N. W. 894, reviewed in the preceding section, note 4. Some observations with regard to the soundness of the general doctrine applied in the cases decided in this point of view will be found in the preceding section.

¹ In *Durst v. Burton* (1872) 47 N. Y. 167, 7 Am. Rep. 428, affirming (1869) 2 Lans. 137, where an action brought to recover damages for fraud committed by a lessee with respect to the manufacture of cheese was held to be maintainable, the circumstances were as follows: The cheeses made at the factory in question were made from milk furnished by the defendants and their associates. They were manufactured for the defendants and their associates by one Campbell, under an agreement by which the factory was leased by defendants for the term of one year, to one Clark, who was to manufacture the milk furnished to the factory into cheese, and prepare it for market, receiving therefor \$1.75 per 100 pounds. The defendants were part owners of the milk and cheese, and were authorized to, and did, sell it for themselves and their associates. The evidence proved that some curd was used in the cheeses sold to plaintiff—a fraud which seriously impaired their value. The conclusion of the court in one point of view was thus stated: "If the liability of the defendants depended upon the existence of the relation of principal and agent, or master and servant, between them and Campbell, and that

is to be determined alone by the written contract, it would be difficult to sustain the judgment. By the terms of the contract, Campbell, as between him and the defendants, became the lessee of the cheese factory and premises, agreeing to pay a fixed rent, and all taxes and assessments. He also contracted to manufacture the cheese at a specified sum per 100 pounds. He had the employment, payment, and control of the necessary help for carrying on the work. No right of supervision was reserved. The details of the business were under his supervision and management. The defendants bargained for results only, and had no power to direct or control the details, nor could they control the servants employed to do the work." The court was, however, of the opinion that, having regard to the evidence, the relation of the parties as between themselves was not controlling, and that the cases proceeding on the ground that the doctrine of respondeat superior was not applicable were not decisive. The reason for distinguishing cases of that type from the one under review were thus stated: "In those cases the injury was done by the alleged agent or servant in the course of his employment, so as to create a liability against himself. The principal or master had no interest in, or connection with, and received no benefit from, the act causing the injury, but his liability depended solely upon the established relation which existed between them. . . . This case is entirely different in material circumstances from any of those referred to. The defendants represented a voluntary association which owned the factory in question, and were engaged in the business of manufacturing cheese. The business was carried on by the defendants, with materials mainly furnished by themselves and their associates. They appeared to the public, and held themselves out, as manufacturers. The cheese in question was sold by them as an ar-

tained by the claimant while assisting in work performed in pursuance of an independent contract made between the defendant and the person under whose direction it was being carried on, the fact that the claimant had no knowledge of the contract, although it has no relevancy with respect to the actual character of the relationship created by the contract, will operate so as to enlarge his remedial rights, if the evidence shows that his ignorance of the real situation resulted from conduct or words which were of

such a nature as to estop the defendant from denying that the relationship of master and servant existed between him and the claimant.²

An estoppel against raising the defense that the tort-feasor was an independent contractor is manifestly predicable, where it appears that, after the commission of the tort, the employer admitted himself to be liable for any loss resulting from the tort, and that the plaintiff brought the action in reliance on this statement.³

ticle manufactured by themselves, and they thus assumed and adopted the responsibility of the manufacture. They assumed the character of principals, both in the manufacture and the sale, and dealt with the plaintiff as such. As to the plaintiff and the public, they are chargeable with the defects fraudulently produced by those who appeared to be in their employ. It is not material what the legal nature of the arrangement between the defendants and those who did the work was, as between themselves. So far as the public was concerned, the business was that of the defendants acting on behalf of the patrons, and they must be held responsible for its proper prosecution. If they desired to limit the responsibility incident to their apparent position, they should have done so by proper provisions in the contract of sale, or, at least, by disclosing the arrangement with their subordinates."

² In *Johnson v. Owen* (1871) 83 Iowa, 512, the following remarks were made: "The acts and conduct of defendant which induced the plaintiff to believe that Nash [plaintiff's immediate employer] was defendant's servant, and to act on that belief, if intended to have that effect, would estop defendant to deny his liability for Nash's acts. But it would be obviously unjust to hold him responsible on account of acts and conduct which might be done by one not an employee, yet which would be reasonable cause of belief, in the mind of another, that he was in fact the employee. If such belief existed in the mind of plaintiff on account of the acts of defendant, and plaintiff, acting thereon, entered or remained in the service of defendant, or the like, and defendant intended to create, by his acts that belief, he would be

liable. And the same would be true if such belief were the natural consequence of defendant's acts. But a bare belief of plaintiff, though founded on a reasonable cause, that Nash was defendant's servant, which in no way had influenced his action, which was not intended to be created by defendant, and which was not the natural result of his acts, could not make him liable as the employer of Nash." An instruction by which the existence of a "reasonable belief" on the part of the plaintiff that he had engaged as a laborer under the defendant was made the test of his liability was disapproved.

In *Texas Bldg. Co. v. Reed* (1914) — Tex. Civ. App. —, 169 S. W. 211, Kaye, an agent of the defendant company, had hired the plaintiff to work for daily wages upon the construction of a railroad. Kaye mentioned that he was then working for the defendant company, and on the day of hiring he took the plaintiff to a hotel, paid for his lodging until he could be sent out over the road on to the work, paid his expenses at the hotel, and bought him a ticket, telling him that the conductor would put him off at the place where the work was in progress. The work was being done under the superintendence of one Clarke, and one of the grounds on which the plaintiff's claim was based was that he did not know that Clarke had made with the company the ostensibly independent contract which the company pleaded as a defense to his action for injuries sustained by him in the course of his employment. The court apparently attached a definite probative value to this want of knowledge; but its precise position is left obscure by the language of the opinion.

³ *Ripley v. Priest* (1912) 169 Mich. 383, 135 N. W. 258. C. B. L.

Alice Geary
v.
William J. Geary, Appt.

Nebraska Supreme Court — May 17, 1918.

(102 Neb. 511, 167 N. W. 778.)

Judgment — foreign — enforcing duty of parent.

1. An Iowa decree, if confined to divorcing husband and wife and to awarding the custody of their minor children, is not effective in Nebraska for the purpose of enforcing the continuing duty of the father to support such children after they and their parents have become residents of Nebraska.

[See note on this question beginning on page 815.]

Parent and child — duty to support — dissolution of marriage.

2. "The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children, and will not defeat an action therefor." Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340.

[See 9 R. C. L. 479; 2 R. C. L. Supp. 812.]

Infant — ward of state.

3. Resident minor children are wards of the state in whom the government is interested.

[See 14 R. C. L. 267; 3 R. C. L. Supp. 203.]

Headnotes by ROSE, J.

Courts — jurisdiction to protect minors.

4. General jurisdiction to protect minors domiciled in Nebraska, and to enforce paternal obligations to offspring has been committed by law to the district courts.

Constitutional law — enforcement of foreign judgment.

5. Nebraska courts are required to give to an Iowa judgment the effect only to which it is entitled in Iowa.

[See 15 R. C. L. 923, 929.]

— protection of procedure.

6. Mere procedure resulting in a judgment, or in the modification thereof, is not protected by the full faith and credit clause of the Federal Constitution.

APPEAL by defendant from an order of the District Court for Wayne County (Welch, J.) in favor of plaintiff in a suit to compel defendant to support two of his minor children while in plaintiff's custody. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. T. M. Zink and A. R. Davis, for appellant:

Where a question arises under the Constitution of the United States, which requires good faith and credit to be given to a judgment of another state, the court of Nebraska will take judicial notice of the laws of the state of Iowa, and it is not necessary to plead any of the jurisdictional facts.

Trowbridge v. Spinning, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; Kunze v. Kunze, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; State ex rel. Nipp v. District

Ct. 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256; Mills v. Green, 159 U. S. 651, 658, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132.

Plaintiff, under the statutes and laws of Iowa, has no right or remedy for alimony, and no right or remedy thereunder to recover from the defendant any past support of the minor children in her custody, which she may have furnished them.

Spain v. Spain, 177 Iowa, 249, L.R.A. 1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225; Ostheimer v. Ostheimer, 125 Iowa, 523, 101 N. W. 275; Blythe v. Blythe, 25 Iowa, 266; Wilde v. Wilde, 36 Iowa, 319; Kinney v. Kin-

ney, 150 Iowa, 225, 129 N. W. 826; Lindquist v. Lindquist, 148 Iowa, 259, 126 N. W. 1109; Reid v. Reid, 74 Iowa, 681, 39 N. W. 102; Blachly v. Blachly, 169 Iowa, 489, 151 N. W. 447; Ferguson v. Ferguson, 111 Iowa, 158, 82 N. W. 490; Schlarb v. Schlarb, 168 Iowa, 364, 150 N. W. 593; Peitzman v. Peitzman, 147 Iowa, 704, 125 N. W. 218; Crockett v. Crockett, 132 Iowa, 388, 106 N. W. 944; Andrews v. Andrews, 15 Iowa, 423; Shaw v. McHenry, 52 Iowa, 182, 2 N. W. 1096; Jennings v. Jennings, 56 Iowa, 288, 9 N. W. 222; Hamman v. Van Wagenen, 94 Iowa, 399, 62 N. W. 795; Johnson v. Barnes, 69 Iowa, 641, 29 N. W. 759; Vest v. Kramer, — Iowa, —, 14 L.R.A.(N.S.) 1032, 114 N. W. 886; Skillman v. Wilson, 146 Iowa, 601, 140 Am. St. Rep. 295, 125 N. W. 343; Murdy v. Skyles, 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; Schrauer v. Hoover, 80 Iowa, 243, 45 N. W. 734; Smedley v. Felt, 41 Iowa, 588; Foote v. De Poy, 126 Iowa, 366, 68 L.R.A. 302, 106 Am. St. Rep. 366, 102 N. W. 112; Delbridge v. Sears, 179 Iowa, 526, 160 N. W. 218; Graves v. Graves, 132 Iowa, 206, 10 L.R.A.(N.S.) 216, 109 N. W. 709, 10 Ann. Cas. 1104; White v. White, 75 Iowa, 218, 39 N. W. 277; Schrader v. Hoover, 80 Iowa, 243, 45 N. W. 734.

Neither party to the divorce has any right to maintain an independent action for alimony, custody, or support of children in the courts of a sister state, but must resort to the court of the state in which the decree of divorce was granted for modification of the decree.

Mayer v. Mayer, 154 Mich. 386, 19 L.R.A.(N.S.) 245, 129 Am. St. Rep. 477, 117 N. W. 890; Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; Wagner v. Wagner (Wagener v. Latham) 26 R. I. 27, 65 L.R.A. 816, 57 Atl. 1058, 3 Ann. Cas. 578; Barber v. Barber, 21 How. 582, 16 L. ed. 226; Sampson v. Sampson, 16 R. I. 456, 3 L.R.A. 349, 16 Atl. 711; Livingston v. Livingston, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555, 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296; Israel v. Israel, 9 L.R.A.(N.S.) 1168, 79 C. C. A. 32, 148 Fed. 576, 8 Ann. Cas. 697; Hunt v. Monroe, 32 Utah, 428, 11 L.R.A.(N.S.) 249, 91 Pac. 269; Nixon v. Wright, 146 Mich.

231, 109 N. W. 274, 10 Ann. Cas. 547; Howell v. Howell, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770, 772; Chapman v. Parsons, 66 W. Va. 307, 24 L.R.A.(N.S.) 1015, 135 Am. St. Rep. 1033, 65 S. E. 411, 19 Ann. Cas. 543; Wood v. Wood, 59 Ark. 441, 28 L.R.A. 157, 43 Am. St. Rep. 42, 27 S. W. 641; Sprague v. Sprague, 73 Minn. 474, 42 L.R.A. 419, 72 Am. St. Rep. 636, 76 N. W. 268; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 705, 35 N. E. 1055; Julier v. Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661; Bassett v. Bassett, 99 Wis. 344, 67 Am. St. Rep. 863, 74 N. W. 780; Roe v. Roe, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 808; Dawson v. Dawson, 110 Ill. 279; Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Chandler v. Dye, 37 Kan. 765, 15 Pac. 925; Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307, 9 Atl. 623; Plaster v. Plaster, 47 Ill. 290; Johnson v. Onsted, 74 Mich. 437, 42 N. W. 62; Brown v. Smith, 19 R. I. 319, 30 L.R.A. 680, 33 Atl. 466; Holt v. Holt, 42 Ark. 495; Connett v. Connett, 81 Neb. 777, 116 N. W. 658; Camp v. Camp, 158 Mich. 221, 122 N. W. 521; Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580, 13 Ann. Cas. 293; Jennison v. Jennison, Ann. Cas. 1912C, 446, note; Warren v. Warren, 116 Minn. 458, 133 N. W. 1009; Aldrich v. Aldrich, 166 Mich. 248, 131 N. W. 542; Hector v. Hector, 51 Wash. 434, 99 Pac. 13; Fulton v. Fulton, 52 Ohio St. 229, 29 L.R.A. 678, 49 Am. St. Rep. 720, 39 N. E. 729; Kell v. Kell, 179 Iowa, 647, 161 N. W. 634; State ex rel. Hookey v. Elifritz, 100 Neb. 320, 160 N. W. 113; McNees v. McNees, 97 Ky. 152, 30 S. W. 207; Karren v. Karren, 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465; Leming v. Sale, 128 Ind. 317, 27 N. E. 619; Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701, Ann. Cas. 1916B, 873; Wilkins v. Wilkins, 84 Neb. 206, 133 Am. St. Rep. 618, 120 N. W. 907; Durland v. Durland, 67 Kan. 734, 63 L.R.A. 959, 74 Pac. 274; Sistare v. Sistare, 80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772, 218 U. S. 1, 54 L. ed. 905, 28 L.R.A.(N.S.) 1068, 30 Sup. Ct. Rep. 682, 20 Ann. Cas. 1061; Rogers v. Rogers, 46 Ind. App. 506, 89 N. E. 901, 92 N. E. 664; Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65; Bleuer v. Bleuer, 27 Okla. 25, 110 Pac. 736; Van Horn v. Van Horn, 48 Wash. 388, 125 Am. St. Rep. 940, 93 Pac. 670; Guess v. Smith, 100 Miss. 457, 56 So. 166,

Ann. Cas. 1914A, 300; State ex rel. Nipp v. District Ct. 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256; Taylor v. Stowe, 218 Mass. 248, 105 N. E. 890; Alderson v. Alderson, 84 Iowa, 198, 50 N. W. 671; Farr v. Emuy, 121 La. 91, 15 L.R.A.(N.S.) 744, 46 So. 112; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; McAllen v. McAllen, 97 Minn. 76, 106 N. W. 100; Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993; Spencer v. Spencer, 97 Minn. 56, 2 L.R.A.(N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 485, 7 Ann. Cas. 901; Brow v. Brightman, 136 Mass. 187; Fitler v. Fitler, 33 Pa. 50; Finch v. Finch, 22 Conn. 411; Hancock v. Merrick, 10 Cush. 41; Ramsey v. Ramsey, 121 Ind. 215, 6 L.R.A. 682, 23 N. E. 69; Johnson v. Johnson, 36 Ill. App. 152; Burritt v. Burritt, 29 Barb. 124; Wilson v. Wilson, 45 Cal. 399; Call v. Call, 65 Me. 407; Harvey v. Lane, 66 Me. 536; King v. Miller, 10 Wash. 274, 38 Pac. 1020; Cox v. Cox, 25 Ind. 303; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Chester v. Chester, 17 Mo. App. 657; State v. Phillips, 1 Penn. (Del.) 11, 39 Atl. 453; Glynn v. Glynn, 94 Me. 465, 48 Atl. 105; Baldwin v. Foster, 138 Mass. 449; Hall v. Green, 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796; Foss v. Hartwell, 168 Mass. 66, 37 L.R.A. 589, 60 Am. St. Rep. 366, 46 N. E. 411; Libbe v. Libbe, 157 Mo. App. 610, 138 S. W. 688.

The decree of divorce granted to the defendant by the district court of Iowa in and for the county of Plymouth is within the good faith and credit clause, § 1 of article 4, of the Constitution of the United States, and must be governed by and construed in accordance with the statutes and laws of the state of Iowa, and the rights and remedies of the plaintiff thereunder determined thereby.

Bolton v. Bolton, 86 N. J. L. 622, 92 Atl. 389, Ann. Cas. 1916E, 938; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284; Taylor v. Stowe, 218 Mass. 248, 105 N. E. 890; Clarke v. Lyon, 82 Neb. 625, 20 L.R.A.(N.S.) 171, 118 N. W. 472; Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555, 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979; Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 28 L.R.A.(N.S.) 1068, 30 Sup. Ct. Rep. 682, 20 Ann. Cas. 1061, 80 Conn. 6, 125 Am. St. Rep. 102, 66 Atl. 772;

Hunt v. Monroe, 32 Utah, 438, 11 L.R.A.(N.S.) 252, 91 Pac. 269; Mayer v. Mayer, 154 Mich. 391, 19 L.R.A.(N.S.) 248, 129 Am. St. Rep. 477, 117 N. W. 890; Arrington v. Arrington, 127 N. C. 190, 52 L.R.A. 202, 80 Am. St. Rep. 791, 37 S. E. 212; Gilbert v. Gilbert, 83 Ohio St. 265, 35 L.R.A.(N.S.) 521, 94 N. E. 421; Julier v. Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661; Weidman v. Weidman, 57 Ohio St. 101, 48 N. E. 506; Wagner v. Wagner (Wagener v. Latham) 26 R. I. 28, 65 L.R.A. 816, 57 Atl. 1058, 3 Ann. Cas. 578; Israel v. Israel, 9 L.R.A.(N.S.) 1168, 79 C. C. A. 32, 148 Fed. 576, 8 Ann. Cas. 697; Trowbridge v. Spinning, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296; Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; Barclay v. Barclay, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636; Van Horn v. Van Horn, 48 Wash. 389, 125 Am. St. Rep. 940, 93 Pac. 670; Barber v. Barber, 21 How. 582, 589, 16 L. ed. 226, 229; Welch v. Sykes, 8 Ill. 199, 44 Am. Dec. 689; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614, 69 Neb. 4, 94 N. W. 995; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Hanley v. Donoghue, 116 U. S. 1, 4, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; Maxwell v. Stewart, 21 Wall. 71, 22 L. ed. 564; Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Commonwealth Mut. Ins. Co. v. Hayden Bros. 61 Neb. 457, 85 N. W. 443; Felt v. Felt, 59 N. J. Eq. 606, 47 L.R.A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Fred Miller Brewing Co. v. Capital Ins. Co. 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023; Taylor v. Runyan, 3 Iowa, 474; Crafts v. Clark, 31 Iowa, 77; Melhop v. Doane, 31 Iowa, 400, 7 Am. Rep. 147; Clemmer v. Cooper, 24 Iowa. 185, 95 Am. Dec. 720; Pollard v. Baldwin, 22 Iowa, 332; Goodnow v. Wells, 67 Iowa, 654, 25 N. W. 864; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129;

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679; Ryan v. Southern Bldg. & L. Asso. 50 S. C. 185, 62 Am. St. Rep. 833, 27 S. E. 618; Hansen v. Schlesinger, 125 Ill. 230, 17 N. E. 718; Crim v. Crim, 162 Mo. 544, 54 L.R.A. 502, 85 Am. St. Rep. 521, 63 S. W. 489; F. Mayer Boot & Shoe Co. v. Falk, 89 Wis. 216, 61 N. W. 562; Benton's Succession, 106 La. 494, 59 L.R.A. 135, 31 So. 123; Forrest v. Fey, 218 Ill. 165, 1 L.R.A.(N.S.) 740, 109 Am. St. Rep. 249, 75 N. E. 789; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; Wilson v. Elliott, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946.

Messrs. R. E. Evans, J. P. Shoup, and T. P. Cleary, for appellee:

The common-law duty of a father to support his minor children is a continuous one, and is not terminated by the decree of divorce, and exists thereafter.

Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; McCloskey v. McCloskey, 93 Mo. App. 393, 67 S. W. 669; Riggs v. Riggs, 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; Bondies v. Bondies, 40 Okla. 164, 136 Pac. 1089; Graham v. Graham, 38 Colo. 453, 8 L.R.A.(N.S.) 1270, 88 Pac. 852, 12 Ann. Cas. 137; Spencer v. Spencer, 97 Minn. 56, 2 L.R.A.(N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 483, 7 Ann. Cas. 901; Ditmar v. Ditmar, 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; Alvey v. Hartwig, 106 Md. 254, 11 L.R.A.(N.S.) 678, 67 Atl. 132, 14 Ann. Cas. 250; Brown v. Brown, 132 Ga. 712, 131 Am. St. Rep. 229, 64 S. E. 1092; Bennett v. Robinson, 180 Mo. App. 56, 165 S. W. 856; Debrot v. Marion County, 164 Iowa, 208, 145 N. W. 467; Connett v. Connett, 81 Neb. 777, 116 N. W. 658; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340.

Action for support of a minor child furnished after the divorce by the mother can be maintained against the father in a state other than where the divorce was granted, where the father is a resident of the foreign state.

Riggs v. Riggs, 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; Bondies v. Bondies, 40 Okla. 164, 136 Pac.

1089; Graham v. Graham, 38 Colo. 453, 8 L.R.A.(N.S.) 1270, 88 Pac. 852, 12 Ann. Cas. 137; Spencer v. Spencer, 97 Minn. 56, 2 L.R.A.(N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 483, 7 Ann. Cas. 901; Ditmar v. Ditmar, 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Debrot v. Marion County, 164 Iowa, 208, 145 N. W. 467; Com. v. Acker, 197 Mass. 91, 125 Am. St. Rep. 328, 83 N. E. 312; Re Alderman, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126.

An allowance for the support of children is not, strictly speaking, an award of alimony.

Ostheimer v. Ostheimer, 125 Iowa, 523, 101 N. W. 275; Spain v. Spain, 177 Iowa, 249, L.R.A.1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225; Kirkpatrick v. Kirkpatrick, 83 Neb. 578, 119 N. W. 1118.

Agreements in contemplation of divorce, relating to property rights or support of children, must be fair and reasonable, and, if not, cannot be used as a defense, and will not be approved or enforced by the courts.

Slattery v. Slattery, 139 Iowa, 419, 116 N. W. 608.

The question of the support of a minor is one affecting the interests of the minor and the public, and any contract in relation thereto by the father and mother is not binding upon the courts in determining the necessity and needs of the minor.

Kirkpatrick v. Kirkpatrick, *supra*; Ostheimer v. Ostheimer, 125 Iowa, 523, 101 N. W. 275; Spain v. Spain, 177 Iowa, 249, L.R.A.1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225.

Where a question of changed condition has a bearing upon the question of custody, or additional allowance for support of a minor, such changed conditions can be shown in the foreign court, and questions relating thereto do not come under the faith or credit clause of the United States Constitution.

Ex parte Mylius, 19 N. M. 278, L.R.A.1915B, 154, 142 Pac. 918, Ann. Cas. 1916B, 941; Kentzler v. Kentzler, 3 Wash. 166, 28 Am. St. Rep. 21, 28 Pac. 370; Re Alderman, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126; People ex rel. Allen v. Allen, 105 N. Y. 628, 11 N. E. 143.

Laws of a state where a divorce is granted, relating to a modification thereof, do not affect the right of action against the father in a foreign

state, where the father is a resident of such state, for support of a minor child furnished after the decree.

Riggs v. Riggs, 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; *Bondies v. Bondies*, 40 Okla. 164, 136 Pac. 1089; *Graham v. Graham*, 38 Colo. 453, 8 L.R.A.(N.S.) 1270, 88 Pac. 852, 12 Ann. Cas. 137; *Spencer v. Spencer*, 97 Minn. 56, 2 L.R.A.(N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 483, 7 Ann. Cas. 901; *Ditmar v. Ditmar*, 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340; *Com. v. Acker*, 197 Mass. 91, 125 Am. St. Rep. 328, 83 N. E. 312; *Re Alderman*, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126; *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825; *Woodworth v. Spring*, 4 Allen, 321.

A state has full power and control over the status of parents and minors within its borders, and is not bound in relation thereto by the laws of any other state, and exercises its own judgment and enforces its own laws in the matter, and is, in relation thereto, in no way affected by the full faith and credit clause of the United States Constitution.

Re Alderman, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126; *Seeley v. Seeley*, 30 App. D. C. 191, 12 Ann. Cas. 1058, 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 570; *Woodworth v. Spring*, 4 Allen, 321; *Com. v. Acker*, 197 Mass. 91, 125 Am. St. Rep. 328, 83 N. E. 312; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825; *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143; *Kentzler v. Kentzler*, 8 Wash. 166, 28 Am. St. Rep. 21, 28 Pac. 370; *Ex parte Mylius*, 19 N. M. 278, L.R.A.1915B, 154, 142 Pac. 918, Ann. Cas. 1916B, 941.

Rose, J., delivered the opinion of the court:

As presented on appeal this is an independent suit in equity brought in the district court for Wayne county, Nebraska, to enforce the duty of defendant to support two of his minor children while in the custody of plaintiff, their mother. To defeat the action defendant pleaded a divorce procured by him in the district court for Plymouth county, Iowa, August 12, 1907, and an exe-

cuted contract for the payment of alimony. Plaintiff and defendant have eleven children. In the Iowa divorce court three minors were committed to the father and four minors to the mother. The decree of divorce and the contract for alimony are silent on the subject of support for the children. The district court for Wayne county, Nebraska, found that two of the minors committed to plaintiff are self-supporting, but made allowances for the other minors committed to her; their names being Frank Geary and Stella Geary. For the period between the bringing of the present action July 15, 1914, and the entry of the decree October 9, 1916, plaintiff was allowed \$1,800. Beginning October 18, 1916, defendant was ordered to pay \$30 a month for the support, maintenance, and education of Frank Geary while attending school during his minority, and \$30 a month for the support, maintenance, and education of Stella Geary during her minority. It is from this decree that defendant has appealed.

In ordering defendant to support the two minor children named, did the district court for Wayne county, Nebraska, give "full faith and credit" to the Iowa judgment, within the meaning of that term as used in the Constitution of the United States? This is the question presented by the appeal. On issues raised by the pleadings the following facts are established by the evidence:

Plaintiff and defendant were married in Iowa, June 29, 1881. In a suit in which the district court for Plymouth county, Iowa, had jurisdiction of the subject-matter and of the parties, while both were domiciled in that county and state, the marriage tie was dissolved August 12, 1907. The decree of divorce did not mention alimony for the wife or support for the children, but the custody of four minors, including Frank Geary and Stella Geary, was committed to their mother. The

parents had entered into a contract obligating the husband to pay the wife \$7,250 in full of all alimony. This sum he subsequently paid, but out of it the wife had obligated herself to pay the claims of a number of creditors. He had been a resident of Nebraska five years when sued here. Plaintiff, with the minor children in her custody, had been a resident of Nebraska nearly two years when the decree in her favor for the support of Frank Geary and Stella Geary was rendered. During her entire residence in Nebraska she has been without sufficient means to support, maintain, and educate the minor children named, and they are not self-supporting. Their father is abundantly able to support them, but refuses to perform his paternal duty in that respect. The allowances made by the district court for Wayne county, Nebraska, are both reasonable and necessary. These facts and those narrated in the preliminary statement herein are fully established by the evidence. The contract for the payment of alimony does not, on its face, include support for the minor children. In the divorce suit there was no plea for their support or for alimony. The decree of divorce did not touch those subjects.

Under the laws of Nebraska it is the continuing duty of a father to support his minor children, and his obligation to do so cannot be evaded by neglect, improper contract, or other unjustifiable means. After parents have been judicially divorced, reasonable and necessary allowances for the support of minor children in the custody of the mother, if not formerly adjudicated, may be made in an independent suit by her against the father. Resident minor children are wards of the state in whom the government is interested. Education of children is compulsory as a public function. Gen-

eral jurisdiction to protect minors domiciled in the state, and to enforce paternal obligations to offspring, has been committed by law to the district courts.

Courts—jurisdiction to protect minors.

Does the Iowa judgment, confined as it is to the divorce and the order relating to the custody of the minor children, suspend the power of the Nebraska court to protect them in an independent suit; parents and children now being residents of this state? The Nebraska court did not attempt to change the divorce or the custody of the children—the only questions adjudicated in the Iowa divorce court. The father argues, however, that the Iowa court first acquired, and afterward retained, jurisdiction to enforce his paternal duty to his minor children, and that their mother is limited to supplemental proceedings in that forum. If this proposition is sound, the state of Nebraska as *parens patriæ*, represented by the judicial department of government, must withhold from its resident wards needed relief. In that event the mother must leave her home and residence in Nebraska, go into a court in Iowa to procure for the first time an order on a nonresident of Iowa to pay to another nonresident of Iowa money for the support of minors domiciled in Nebraska. If the father's position is tenable, the mother must open up Iowa litigation that has been slumbering in executed judgment for many years, make new pleas, pray for new relief, and adduce new proofs. If she should prevail, the Iowa court would be without power to enforce its new judgment in Nebraska, and in the end she would be required to resort again to the district court for Wayne county, Nebraska. The full faith and credit provision of the Federal Constitution does not require her to pursue such a course. The Nebraska court is only required to give to the Iowa judgment the effect to which it is entitled in Iowa. *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867,

Constitutional law—enforcement of foreign judgment.

Parent and child—duty to support—dissolution of marriage.

Infant—ward of state.

26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679. In Iowa the decree of divorce is not

Judgment—
foreign—en-
forcing duty of
parent.

effective for the purpose of enforcing the continuing duty of the father to support his minor children, and the extraterritorial effect is no greater. Mere procedure resulting

Constitutional
law—protection
of procedure.

in a judgment or in the modification thereof is not protected by the full faith and credit clause. That part of the supreme law is directed to the judgment. The power of the Iowa divorce court to make provision for the support of the minor children while they were residents of Iowa was not invoked or exercised. The new conditions which justified the relief granted to the mother by the Nebraska court were not in existence when the Iowa divorce was granted, and could not then have been pleaded or proved. They arose in Nebraska after parents and children became residents of Nebraska. Some courts have gone far enough to hold: "A judgment of a court of one state awarding the custody of minor children in

a divorce proceeding is not res judicata in a proceeding before a court of another state, except as to facts and conditions before the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently thereto, it has no controlling force, and the courts of other states are not bound thereby." 15 R. C. L. p. 940, § 417; Re Alderman, 157 N. C. 507, 39 L.R.A. (N.S.) 988, 73 S. E. 126.

The District Court for Wayne county, Nebraska, however, did not disturb the custody of the children, the divorce of the parents, or the stipulated alimony, but, on changed conditions, enforced only the unadjudicated, continuing duty of the father to support his own children after they and their parents had become residents of Nebraska. This was not a violation of the full faith and credit provision of the Federal Constitution.

Affirmed.

Hamer, Letton, and Sedgwick, JJ., not sitting.

Dismissed by the Supreme Court of the United States, November 17, 1919, 251 U. S. 535, 64 L. ed. 401, 40 Sup. Ct. Rep. 55.

ANNOTATION.

Extraterritorial effect of provision in decree of divorce as to custody of child.

- I. In general, 815.
- II. As affected by fraud or lack of jurisdiction, 818.
- III. Modified decree, 820.
- IV. Charged circumstances:
 - a. In general, 822.

I. In general.

With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud, or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the cir-

IV.—continued.

- b. Death of parent to whom custody awarded, 824.
- V. As affecting independent action or proceeding against father for support, 826.

cumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.

United States. — Bennett v. Bennett (1867) Deady, 299, Fed. Cas. No. 1,318.

District of Columbia. — *Church v. Church* (1921) — App. D. C. —, 270 Fed. 359.

Alabama.—*Burns v. Shapley* (1917) 16 Ala. App. 297, 77 So. 447.

California. — *Re Wenman* (1917) 33 Cal. App. 592, 165 Pac. 1024.

Connecticut. — *Morrill v. Morrill* (1910) 83 Conn. 479, 77 Atl. 1 (arguendo).

Georgia.—*Taylor v. Jeter* (1862) 33 Ga. 195, 81 Am. Dec. 202; *Hammond v. Hammond* (1892) 90 Ga. 527, 16 S. E. 265; *Milner v. Gatlin* (1912) 139 Ga. 109, 76 S. E. 860; *Milner v. Gatlin* (1915) 143 Ga. 816, L.R.A.1916B, 977, 85 S. E. 1045; *Woodland v. Woodland* (1922) — Ga. —, 111 S. E. 673.

Illinois.—*People ex rel. Hickey v. Hickey* (1899) 86 Ill. App. 20.

Indiana. — *Hardin v. Hardin* (1907) 168 Ind. 352, 81 N. E. 60.

Iowa. — *Wakefield v. Ives* (1872) 35 Iowa, 238.

Kansas. — *Woodall v. Alexander* (1920) 107 Kan. 632, 193 Pac. 185; *Pinney v. Sulzen* (1914) 91 Kan. 407, 137 Pac. 987, Ann. Cas. 1915C, 649.

Mississippi. — *Haynie v. Hidgins* (1920) 122 Miss. 838, 85 So. 99.

Missouri. — *Re Leete* (1920) 205 Mo. App. 225, 223 S. W. 962.

Montana. — *State ex rel. Giroux v. Giroux* (1897) 19 Mont. 149, 47 Pac. 798; *State ex rel. Nipp v. District Ct.* (1912) 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256.

New Jersey. — *Dixon v. Dixon* (1909) 76 N. J. Eq. 364, 74 Atl. 995.

New Mexico. — *Mylus v. Cargill* (1914) 19 N. M. 278, L.R.A.1915B, 154, 142 Pac. 918, Ann. Cas. 1916B, 941.

New York. — *People ex rel. Allen v. Allen* (1886) 40 Hun, 611, appeal dismissed in (1887) 105 N. Y. 628, 11 N. E. 143; *Re Stewart* (1912) 77 Misc. 524, 137 N. Y. Supp. 202.

Oregon. — *Griffin v. Griffin* (1920) 95 Or. 78, 187 Pac. 598.

Tennessee. — *Kenner v. Kenner* (1917) 139 Tenn. 211, L.R.A.1918E, 587, 201 S. W. 779, rehearing denied in (1917) 139 Tenn. 700, L.R.A.1918E, 592, 202 S. W. 723.

Texas. — *Wilson v. Elliott* (1903) 96 Tex. 472, 97 Am. St. Rep. 928, 43 S. W. 946, ruling on question certified

followed in (1903) 32 Tex. Civ. App. 483, 75 S. W. 368; *Ex parte Boyd* (1913) — Tex. Civ. App. —, 157 S. W. 254; *Vickers v. Faubion* (1920) — Tex. Civ. App. —, 224 S. W. 803.

Washington. — *Groves v. Barto* (1919) 109 Wash. 112, 186 Pac. 300.

Wyoming.—*Linch v. Harden* (1918) — Wyo. —, 176 Pac. 156.

In *State v. Rhoades* (1902) 29 Wash. 61, 69 Pac. 389, the court, in affirming a conviction of the father of the crime of kidnapping in taking a child away from the mother, to whom its custody had been awarded by a decree of divorce in another state, apparently assumed the conclusiveness of that decree as entitling the mother to the continued custody of the child, if it was within the jurisdiction of the court which rendered it; and it was held to be within such jurisdiction, the father having appeared in the action, and the child having been with the mother in the state where the divorce was granted at the time the action was commenced, although he had left the state before the decree was rendered.

In *Re Lorenz* (1905) 7 Quebec Pr. Rep. 101, 9 Can. Crim. Cas. 158, the court recognized and gave effect to a decree of divorce awarding the custody of a child to the father, by holding that the mother was subject to extradition on a charge of kidnapping the child.

In *Re Davis* (1894) 25 Ont. Rep. 579, it was held in effect that a decree of divorce in New York awarding the custody of a child to the mother, though not entitled to recognition as a matter of absolute right, was entitled to great weight in determining the proper custody of the child in a habeas corpus proceeding in Ontario; and the other circumstances being in favor of the wife, the court directed that the custody of the child be given to her until or unless some further order was made.

A decree of divorce rendered in Alabama while both parties were residing there, which gives the custody of a child of the marriage to the mother, puts the mother, as to the control of the child, in the place of the father,

and makes her custody and control legal. Therefore, habeas corpus will not issue in Georgia at the instance of the father for the possession of the child, on the ground that it is illegally detained by the mother. *Hammond v. Hammond* (1892) 90 Ga. 527, 16 S. E. 265.

Intimations against general rule.

There are a few cases that lend some color to the view that, the interests of the child being paramount, a court before which the question of the child's custody properly comes is not bound by a provision of the decree of another state awarding the custody of the child, regardless of any question as to change in the circumstances after that decree was rendered. In some of these cases, in which the actual controversy was between the parents over the custody of the child, it is declared in effect that, while the decree of another state is binding and conclusive as between the parties, it is not conclusive as to the child.

Probably on their facts the results in these cases could have rested upon change of circumstances, and thus harmonized with the general rule.

In *Re Alderman* (1911) 157 N. C. 507, 39 L.R.A. (N.S.) 988, 73 S. E. 126, holding that a judgment in a divorce proceeding giving the father the right to receive visits from a child whose custody was awarded to the mother is not, under the full faith and credit clause of the Federal Constitution, binding upon the courts of another state to which the child and mother remove and where they take up their domicile,—the court said in effect that it was bound to give full faith and credit to the decree of the other state so far as it dissolved the marriage, but that the infant child of their union was not property, and the father could have no vested right in the child or its services under a decree divorcing the parents, the decree as to the child having no extraterritorial effect beyond the boundaries of the state where it was rendered.

In *Re Bort* (1881) 25 Kan. 308, 37 Am. Rep. 255, the court, in an opinion written by Brewer, J., takes the position—which in that case was applied 20 A.L.R.—52.

to such a provision in a decree rendered in another state,—that a provision in a decree of divorce awarding the custody of the children may bind the parties inter sese, but does not conclude the court as to the best interests of the children. And this principle was recognized in *Avery v. Avery* (1885) 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 418, though in that case the question was as to the propriety of making such a provision in a domestic decree; and the case did not involve a decree of another state.

In *Kentzler v. Kentzler* (1891) 3 Wash. 166, 28 Am. St. Rep. 21, 28 Pac. 370, the trial court, apparently upon the ground that a decree of divorce rendered in another state awarding the custody of a child to the mother was conclusive, awarded such custody to her in a habeas corpus proceeding, but the decision was reversed by the supreme court upon the ground that the father was the more suitable person to have the custody of the child, and that in the best interests of the child its custody should be given to him. The supreme court did not, expressly at least, base its decision upon a change in the circumstances since the decree in the other state; but the decision could, perhaps, have been justified on that ground even if the decree of the other state had been regarded as conclusive as to the facts and conditions existing at the time of its rendition.

In *Keenan v. Keenan* (1906) 5 Ohio N. P. N. S. 12, the court seemed to be of the opinion, in the interest of the child, the award of its custody by the decree of divorce in the other state might be disregarded, even apart from the question of jurisdiction of that court to decide as to the custody.

So, in *Vetterlein's Petition* (1884) 14 R. I. 378, the court expressed a doubt whether a decree of divorce rendered in another state, so far as it affects the custody of a child, could have any force outside the jurisdiction in which it was rendered, even if it were effective to divorce the husband and wife. It does not expressly appear where the husband, against whom the decree was rendered, was

domiciled at the time of its rendition; but he was probably a nonresident, since it appears that he had no notice of the petition. The question, however, was not decided, since the divorce was held invalid for all purposes because of the nonresidence of the wife, who procured it.

In *Woodall v. Alexander* (1920) 107 Kan. 622, 193 Pac. 185, the court said in effect that a decree of divorce rendered in another state, awarding the custody of an infant child to the mother, was only *res judicata* as to the custody of the child so long as the situation of the parties was unchanged; and that, moreover, the welfare of the child being the paramount consideration, the circumstances pertaining to its custody may always be inquired into, and any order relating thereto may be made whenever the child's best interest so demands.

II. As affected by fraud or lack of jurisdiction.

As to the recognition of a modification of the original award of custody as affected by the question of jurisdiction, see the next heading, "Modified decree."

It will be noted that the rule as stated at the beginning of the annotation is qualified by the assumption that the decree of the other state is not impeachable for fraud or lack of jurisdiction; and in a number of cases the courts, upon one or the other of these grounds, have refused to give effect to the decree of another state awarding the custody of a child. (Any statements in these cases as to the facts which will show fraud or lack of jurisdiction rest upon their own authority, and there is, of course, no intention to discuss the soundness or unsoundness of their decisions on those points.)

An award of the custody of a child by a decree rendered in another state against a nonresident, upon constructive service, will not be regarded as a conclusive adjudication of the disposition of the child, where the evidence shows that the judgment was obtained by fraudulent misrepresentations in order to obtain jurisdiction. *Matthews v. Matthews* (1912) 139 Ga.

123, 76 S. E. 855. The court observed that a decree of divorce in another state based on constructive service does not fall within the full faith and credit clause of the Federal Constitution, and is not entitled to obligatory enforcement; and that no principle of comity can be invoked to give extraterritorial effect to a judgment obtained by fraud and without notice.

In *Seeley v. Seeley* (1907) 30 App. D. C. 191, 12 Ann. Cas. 1058, certiorari denied in (1908) 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 570, it was held that a decree of divorce rendered in Illinois—which was apparently conceded to be binding so far as the dissolution of the marriage was concerned—did not preclude a court of the District of Columbia from determining the custody of a child who was awarded to the father by the decree, but who was, with his mother, within the District when the proceeding for divorce was instituted, and had remained there ever since, the court said: "We are of opinion the Chicago court was without power to pass a decree preventing the court below from deciding concerning the custody and care of this infant all the while physically within its own jurisdiction. The welfare of infants is a matter of paramount consideration at all times and under all circumstances."

The vexed question whether a decree of divorce rendered upon constructive service of process against a nonresident who did not appear is entitled to recognition in another state, either under the full faith and credit provision of the Federal Constitution or upon principles of comity, so far as it purports to dissolve the marriage relation, is, of course, beyond the scope of the annotation. It will be observed, however, that in some cases where it was assumed that a decree rendered in such circumstances would be given full force and effect in another state so far as it purported to dissolve the marriage, it was held that it would not be given such effect so far as it purported to award the custody of the children, since in that regard it was in *personam*, and not in *rem*.

Thus, in *Kline v. Kline* (1881) 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825, it was held that a decree of divorce rendered in Wisconsin in favor of the husband, who was domiciled there, upon constructive service against the wife, who had acquired a separate domicile elsewhere, was valid and entitled to recognition in Iowa, so far as the status of the husband and wife were concerned, but was without jurisdiction and not entitled to recognition so far as it attempted to fix the custody of the minor children, who, at the time of the divorce, were living with the wife in Iowa. The decision in *Kline v. Kline* (Iowa) supra, is followed in *Mollring v. Mollring* (1918) 184 Iowa, 464, 167 N. W. 524; and to the same effect is *Rodgers v. Rodgers* (1896) 56 Kan. 483, 43 Pac. 779.

The refusal of the court in *Harris v. Harris* (1894) 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187, to give any effect in a habeas corpus for the custody of a child, to a decree of divorce in favor of the wife in another state, was upon the ground that such decree was a nullity in North Carolina; it having been rendered upon constructive service against the husband, who was a resident of North Carolina.

The decision in *Dekraft v. Barney* (1862) 2 Hayw. & H. 405, Fed. Cas. No. 18,288, that a decree of divorce rendered in Iowa in favor of the wife, which awarded the custody of the children to her, was not conclusive, or even admissible as evidence, that the father was an unfit person to have the custody of the children, in a subsequent proceeding in the District of Columbia, was upon the ground that the decree having been rendered upon constructive service of process against the husband, a nonresident of Iowa, could have no effect as a personal judgment or decree. It does not appear where the children were at the time the divorce was rendered.

But a decree of divorce rendered in another state, though upon constructive service against a nonresident, unless modified, reversed, or set aside for cause shown to the jurisdiction,

will be held conclusive in a habeas corpus proceeding in Iowa for the custody of a child which was awarded to the mother by the decree, it appearing that the child was born in the state where the decree was rendered, and was living there at the time the decree was rendered. *Wakefield v. Ives* (1872) 35 Iowa, 238.

The rule that a decree of divorce rendered in one state is conclusive on the parties so far as it awards the custody of a child of the marriage to one of them, when the question arises in a court of another state, was applied in *Kenner v. Kenner* (1917) 139 Tenn. 211, L.R.A.1918E, 587, 201 S. W. 779, rehearing denied in (1917) 139 Tenn. 700; L.R.A.1918E, 592, 202 S. W. 723, where the mother of the child, who had been previously domiciled with her husband in Tennessee, because of his misconduct went with the child to Alabama, where she became domiciled and secured a divorce on constructive service of process upon the defendant, who did not appear. Upon returning with the child to Tennessee for a visit, the father instituted proceedings to obtain the custody of the child, which, however, was denied him upon the ground that he was precluded by the Alabama decree, awarding the custody of the child to the mother, and that there had been no change in the circumstances which rendered it essential, in the best interests of the child, to make a new disposition. The court held that the Alabama court had jurisdiction to award the custody of the child, who was present with her mother in that state, even upon the assumption that the Tennessee domicile of the father remained that of the child. It may be observed that the court was of the opinion that the effect of the decree to dissolve the marriage relation should be recognized as a matter of comity, although not within the full faith provision of the Constitution.

One of the grounds in *Keenan v. Keenan* (1906) 5 Ohio, N. P. N. S. 12, for refusal to give effect to a decree of another state awarding the custody of the child to the father upon his cross

petition in a suit instituted by the mother was that the transcript failed to show service of notice of the cross bill either upon the mother or her counsel, and that whether or not the court had jurisdiction, as in a proceeding in rem, to dissolve the marriage,—a point not decided,—it had no jurisdiction to determine the custody of the child.

In *State ex rel. Hahn v. King* (1902) 109 La. 161, 33 So. 121, the binding effect of a foreign judgment giving the custody of a child to one of the parents, which was attacked upon several grounds going to the jurisdiction of the court that rendered it, was recognized on the ground of estoppel. In that case, the father was ordered, under a writ of habeas corpus, to place a minor child, of whom he had possession, in the custody of its mother, under the terms of a judgment of divorce which the latter obtained in another state, he being estopped from contesting that judgment because on the trial of the writ he testified that, under its authority, he had contracted a second marriage.

Although the question as to the facts necessary to give the court jurisdiction in a divorce suit to award the custody of the children of the marriage is not within the scope of the annotation, attention is called to the case of *Anderson v. Anderson* (1914) 74 W. Va. 124, 81 S. E. 706, holding that a decree in a suit for divorce may be valid and binding upon the parties in another state in so far as it awards the custody of the children, even though so much of it as grants the divorce may be void, and the children may have been beyond the jurisdiction of the court at the time of its rendition.

In *Milner v. Gatlin* (1915) 143 Ga. 816, L.R.A.1916B, 977, 85 S. E. 1045, the court, while recognizing that as a general rule it is not permissible for a party to attack a judgment for fraud in a collateral proceeding, held that it was permissible in a habeas corpus proceeding by a mother in Georgia, in which state the parties had become residents, to secure the custody of a child, to show that the provision in

the decree of divorce rendered in another state, disposing of the custody, was obtained by fraud. Two of the members of the court, while concurring in the result, dissented from that proposition upon the ground that under the full faith and credit clause a judgment of a court having jurisdiction of the parties and subject-matter rendered in another state, and valid on its face, cannot be collaterally attacked for fraud. Their concurrence in the conclusion was apparently upon the ground that the custody of the child may be changed if the circumstances arising since the decree in the other state make such a change in the best interests of the child.

So, the father may be awarded custody of the child notwithstanding that custody was awarded to the mother in a suit for divorce in another jurisdiction in consequence of her fraudulent testimony, at least if it does not appear to be for the child's interest to stay with the mother. *Ryser v. Ryser*, 7 West. Week. Rep. (Can.) 1275.

III. Modified decree.

Subject to the right of the court of another state to change the custody when a change in circumstances warrants it, the rule which gives effect to the provision of a decree of divorce awarding the custody applies to a modification of such provision by the court which entered the original decree, assuming that it had not lost jurisdiction.

Thus, where, after the rendition of a divorce decree by a court of record of general jurisdiction in Nebraska, awarding the custody of a minor son of the parties to the father, and impliedly prohibiting the latter from removing the son from the jurisdiction of the court, the father did remove the son to another state (Montana), in contempt and violation of the prohibition contained in the decree, whereupon the mother, upon the ground of such contempt and violation, filed in the Nebraska court a petition praying that the decree be so modified as to award the custody of the son to her, and the court, after the appearance of

the father and his filing an answer resisting the petition, and after a hearing, modified the decree in accordance of the prayer of the petition,—the modified decree concludes the right of the parties, upon subsequent habeas corpus proceedings by the mother to obtain possession of the son in Montana, to which state the father has again removed him in violation of the modified decree, unless there has been a change in the fitness or condition of the mother, or other circumstances have occurred since the amendment was made, which require the Montana court, in the interest of the son, to order otherwise. *State ex rel. Nipp v. District Ct.* (1912) 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256. To the similar effect is *Burns v. Shapely* (1917) 16 Ala. App. 297, 77 So. 447, *supra*.

In *Pinney v. Sulzen* (1914) 91 Kan. 407, 137 Pac. 987, Ann. Cas. 1915C, 649, where, after the death of the mother, to whom the custody of the child was awarded by a decree of divorce in another state, the custody was awarded to the father, by the same court upon notice, it was held that that modification was not controlling in a habeas corpus proceeding in Kansas as to the fitness of the father, but was competent evidence thereof; and the Kansas court awarded the custody of the child to him.

But in *Milner v. Gatlin* (1912) 139 Ga. 109, 76 S. E. 860, the court refused to give effect to the modification by a Texas court of its decree of divorce by changing the award of the custody of the child from the father to the mother, the father and child having in the meantime become residents of Georgia, and there having been no provision in the original decree against taking the child beyond the jurisdiction of the court. Though the decision in *Milner v. Gatlin* (1915) 143 Ga. 816, L.R.A.1916B, 977, 85 S. E. 1045, a subsequent habeas corpus proceeding to obtain the custody of the child, was in favor of the mother, the correctness of the foregoing proposition as to the noneffect of the modification of the Texas decree seems to have been assumed.

And the refusal in *Griffin v. Griffin* (1920) 95 Or. 78, 187 Pac. 598, to recognize or give effect to a modification by a court of another state of a decree of divorce, by transferring the custody of the children from the mother, to whom they were originally awarded, to the father, was upon the ground that the court of the other state had no jurisdiction to make the modification, because of lack of proper service.

In *Groves v. Bartow* (1919) 109 Wash. 112, 186 Pac. 300, the court refused to recognize or give effect to a modification by the court of another state of its decree of divorce, transferring the custody of the child to the father, from the maternal grandmother, to whom the custody was awarded by the original decree, upon the ground that the modification was without jurisdiction, it having been based upon substituted service after both the mother and child had become domiciled in Washington. The original decree doubtless contemplated the removal of the child to Washington, as the grandmother was domiciled in that state.

In *Clarke v. Lyon* (1908) 82 Neb. 625, 20 L.R.A.(N.S.) 171, 118 N. W. 472, the court said that the courts of Nebraska were not required to enforce an order made by a court of Illinois awarding the custody of children to the father after the death of the mother, to whom they had been awarded by decree of divorce in the latter state, such order having been made without notice to the persons with whom the children were at the time living in Nebraska. In that case, however, the Illinois court itself, after its attention was called to the death of the mother, apparently treated the order as made without jurisdiction.

In the cases just cited the modification was made in the state where the decree was rendered. In *GEARY v. GEARY* (reported herewith) ante, 809, where no such modification had in fact been made the court, in reply to the argument that the court of the other state retained jurisdiction to enforce the paternal duty to the minor children, and that the mother was limited

to supplemental proceedings in that forum, observed that mere procedure resulting in the judgment or in the modification thereof is not protected by the full faith and credit clause.

IV. Changed circumstances.

1a. In general.

It is a corollary of the general rule previously stated that, where the decree of divorce in one state awards the custody of a child to one of the parties, the other may lawfully obtain possession of the child in another state only upon grounds which arose since that decree. That is implied in practically all of the cases cited in support of that general rule; and is emphasized in some of them. See *Church v. Church* (1921) — App. D.C. —, 270 Fed. 359; *Ex parte Wenman* (1917) 33 Cal. App. 592, 165 Pac. 1024; *Wilson v. Elliott* (1903) 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946.

Thus, a decree of divorce in another state, in which the custody of the child is awarded to the father, is conclusive as between the parties to the decree as to his right and fitness for such custody at that time, but is not conclusive for all time. In a subsequent proceeding by habeas corpus for the possession of the child, between the parties to the decree, evidence as to the unfitness of the father will be confined to matters transpiring subsequently to the decree. *Milner v. Gatlin* (1912) 139 Ga. 109, 76 S. E. 860.

The proposition just cited from the *Milner Case* is quoted with approval in *Woodland v. Woodland* (1922) — Ga. —, 111 S. E. 673, a case not strictly within the scope of the annotation as the decree of the other state awarding the custody of the children to the father was not rendered in a suit for a divorce. The court was of the opinion that the evidence showing that the status of the children had materially changed subsequently to the rendition of the decree in the other state justified the decision of the court below in awarding the custody of the children to the mother.

In *Vickers v. Faubion* (1920) — Tex. Civ. App. —, 224 S. W. 803, the

court observed that the decree of divorce in the other state foreclosed the matters in relation to cruelty, except so far as they may corroborate the subsequent conduct of the mother, to whom the custody of the child was awarded.

In *Dixon v. Dixon* (1909) 76 N. J. Eq. 364, 74 Atl. 995, an order awarding the custody of children of a marriage to the mother, in a proceeding instituted in New Jersey for that purpose by the father, having been modified by directing the mother to send the children to visit the father at certain intervals, and the mother having subsequently, in a suit for a divorce in Maine, procured an order awarding the sole custody of the children, pendente lite to her, the New Jersey court refused to give effect to that order upon an application for the enforcement of its own modified order, upon the ground that that modified order was conclusive on the Maine court as to the facts and conditions existing at the time that it was made, and that, while it would not preclude the Maine court from making a new order for the custody of the children, the order of that court was not in fact based on a change of circumstances, but upon a state of facts and conditions as to which the New Jersey order was conclusive.

The question as to what will amount to a change in the conditions or circumstances which will authorize the court of one state to change the custody of the child as fixed by the decree in the other state is beyond the scope of the annotation. It may be said generally, however, that the decision is largely within the discretion of the court, to be exercised in the interest of the child's welfare just as it is when a modification by reason of changed circumstances is sought after an award of custody by a domestic decree. In *Dixon v. Dixon* (N. J.) *supra*, the court, after stating that the rule is that in any controversy between parents relating to the custody of their children the award made by a competent tribunal is *res judicata*, and cannot thereafter be questioned on the same state of facts, said: "But

the adjudication is an adjudication upon the issue presented, and upon that only. So far as children are concerned, the situation is, or may be, constantly varying. The parent fit to have the custody of his children to-day may, by reason of changed circumstances, become unfit to-morrow. The above rule does not prevent the courts of the state within whose limits the children may be, from considering whether a change in the situation may not call for a new disposition. But the changing circumstances must be, obviously, those that affect the children,—not those that concern the parents. To illustrate by the case in hand. In her petition, presented to the Maine tribunal, Mrs. Dixon says that she lived with her husband until May, 1904, and that while so living he treated her with extreme cruelty, whereby her health and life became endangered. It is manifest that evidence bearing upon his disposition, and upon his conduct towards his wife, might have an important bearing upon his fitness to have the custody of his children, either for two months in the year or for any lesser period; and that it must or should have been considered by this court when the order of July 24, 1907 [a New Jersey order antedating the Maine suit] was made. By reason of the effect of the doctrine of *res judicata* this evidence could not be made the basis of an independent adjudication by another court. If this were not so, the rule established by the decisions to which I have referred would be nullified. But, on the other hand, it is equally manifest that it might be shown that, since the date of the prior adjudication, the father had so conducted himself as to have become unfit to associate with his children; that any association with him would be injurious to their morals or welfare."

The case of *Morrill v. Morrill* (1910) 83 Conn. 479, 77 Atl. 1, is not strictly within the scope of the annotation, as it involves merely the power and propriety of a modification by a Connecticut court, of a provision of its own decree awarding the custody of the children to the mother, after the

mother and children had become residents of a foreign country. The court, however, in arguing for the continuing power to modify the decree, said: "The utmost which is asserted for the extra-territorial effect of such orders is that they should, in the exercise of the customary comity of states and nations, be recognized and enforced, and in the states of our Union, by force of the full faith and credit clause of the Federal Constitution, must be recognized and enforced so long, and only so long, as the circumstances attending their adoption remain unchanged."

The judgment of a court of a sister state in a divorce proceeding granting a wife a divorce, and awarding to her the custody of a minor child, will be given full faith and credit, and taken as decisive of the facts and conditions existing at the time of the divorce; but, in a proceeding between the parents for the custody of the child in this state, the previous adjudication has no controlling force and effect upon facts and conditions subsequently arising after the decree of divorce. *Haynie v. Hidgins* (1920) 122 Miss. 838, 85 So. 99.

A judgment of a court of a sister state awarding the custody of minor children in a divorce proceeding is not *res judicata* in a proceeding before a court of this state, except as to facts and conditions before the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently to the foreign decree, it has no controlling force, and our courts are not bound thereby in awarding such custody. *Mylius v. Cargill* (1914) 19 N. M. 278, L.R.A.1915B, 154, 142 Pac. 918, Ann. Cas. 1916B, 941.

A valid decree of divorce rendered in favor of the wife, in another state, where both parties then resided, awarding the custody of a child of the marriage to the wife, is conclusive as between the husband and wife as to the fitness and competency of the one, and the unfitness and incompetency of the other, to have the care and control of the child, and that question will not be re-examined by the courts of New York. The decision, however, is

binding upon the child only for the time being, and as soon as the circumstances of the custodian change, or other circumstances arise which will make it for the best interest of the child that there should be a change, it will be the duty of the court in which the decree was originally made, or if any other court having jurisdiction, to make such change. But as between the parties to the action, the parents of the children, they are bound by the matters adjudged and determined in the action, and cannot again retry the questions therein determined. *People ex rel. Allen v. Allen* (1886) 40 Hun (N. Y.) 611. The court cited *Thorndyke v. Rice*, 24 Month. L. Rep. 20, as holding that a decree of a tribunal as to the custody of a child is never final and that the same tribunal or another where the child is either temporarily or permanently staying may consider the case upon the facts then existing, and, looking at the welfare of the child, determine whether any and what change should be made in regard to its custody.

An appeal in the *Allen Case* was dismissed in (1887) 105 N. Y. 628, 11 N. E. 143, for the reason that the courts below, in view of all the existing facts relating to the welfare and interests of the infants, exercised its discretion in awarding to the mother the custody of the children; and in so doing gave to the foreign decree not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it.

In *Kenner v. Kenner* (1917) 139 Tenn. 211, L.R.A.1918E, 587, 201 S. W. 779, rehearing denied in (1917) 139 Tenn. 700, L.R.A.1918E, 592, 202 S. W. 723, the court said that "as between the parents, parties to the litigation, the decree of the foreign court awarding the custody of the children is *res judicata* subject as between those parties, to modification only by the court that granted the decree [citing cases]. However, we think this doctrine should be understood with the

qualification that, in case of the removal of the child to another state, even within the custody of the parent to whom that custody had been awarded by the foreign decree of divorce, the courts of the state to which the removal has been effected will have the power, on a change of circumstances showing such course essential to the best interests of the child, to make a new disposition of the child."

It is settled, and not doubted, that an order of the court awarding custody of the child to the parent is a judgment that should be given faith and credit by the courts of other states, as required by the Federal Constitution (*Wilson v. Elliott* (1903) 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946, followed in (1903) 32 Tex. Civ. App. 483, 75 S. W. 368). But an order awarding custody of a child is not considered *res judicata* except for so long as the material circumstances existing at the time of the order remains unchanged, for it is not the object of the proceeding to award custody to establish a permanent custody. And the rule is that, where a new state of facts between the parties in relation to the child has arisen subsequently to the prior adjudication, the matter should not be adjudged *res judicata*. *Ex parte Boyd* (1913) — Tex. Civ. App. —, 157 S. W. 254.

The case of *Re Leete* (1920) 205 Mo. App. 225, 223 S. W. 962, is an instance where the rule which gives effect to the decree of the other state awarding the custody of the children was the controlling factor in the decision, the court, while of the opinion that the mother was a proper person to have the custody of the child, nevertheless held that the evidence disclosed no such change in circumstances and conditions as warranted it denying the right of the father, to whom the custody had been awarded by the decree.

b. Death of parent to whom custody awarded.

The rule that the decree of the other state is conclusive only as to the rights of the parties under the then existing circumstances, and does not

prevent a change of custody of the child if, by reason of changed circumstances, it is for the child's best interests, has been applied in some cases where the parent to whom the custody of the child was awarded had died and the other parent was seeking the custody of the child. See *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202.

Where the court of a sister state has granted a divorce and awarded the temporary custody of the children to the mother, who becomes a resident of this state and dies here, leaving such children in the hands of relatives, who are appointed guardians by the county court, the fact that the court rendering such divorce retained jurisdiction for the purpose of making further orders does not deprive the courts of Nebraska of jurisdiction to determine the merits of a controversy between the divorced father and such guardians over custody of such children,—especially where the court rendering the divorce has expressly refused to determine the material question in issue. *Clarke v. Lyon* (1908) 82 Neb. 625, 20 L.R.A. (N.S.) 171, 118 N. W. 472.

In *Pinney v. Sulzen* (1914) 91 Kan. 407, 137 Pac. 987, Ann. Cas. 1915C, 649, it appeared that the petitioner and his wife, having two children, a son and a daughter, had been divorced in Iowa, the decree awarding to the husband the custody of the son, and to the wife the custody of the daughter; subsequently, the divorced wife died, leaving the daughter in the custody of her sister and the latter's husband, who (his wife having since died) was the respondent in a habeas corpus proceeding instituted by the father, in Kansas, to recover the custody of his daughter. In these circumstances, the court held that, upon the death of the wife, the right to the custody of the daughter naturally and legally passed to the father, and should be given to him unless he was manifestly unfit and incapable of performing his parental obligations to the child. It also appeared that the petitioner, after the death of his divorced wife, and upon notice served

on the respondent, had applied to the Iowa court, which granted the divorce for a modification of the judgment so as to give him the custody of the daughter; and that, subsequently to the institution of the habeas corpus proceeding in Kansas, the Iowa decree had been amended as desired by the petitioner, the Iowa court finding that the welfare of the children demanded that both of them be given into the absolute custody of the petitioner. Regarding this, the supreme court of Kansas, in discussing the fitness of the petitioner at the time to have the custody of his daughter, as bearing upon the question whether she should be given into his custody in these proceedings, said: "It has been held that a decree of divorce of another state awarding the custody of children to a father is not conclusive in a proceeding brought by the mother in this state to obtain their custody, but that the court has the power to change the custody if the best interests of the children require it. . . . While the action of the Iowa court in modifying the decree of divorce as to the custody of Helen [the daughter] is not conclusive, it is worthy of consideration."

In *Wilson v. Mitchell* (1910) 48 Colo. 454, 30 L.R.A. (N.S.) 507, 111 Pac. 21, holding that upon the death of a parent to whom the child was awarded by a decree of divorce the other parent becomes entitled to its custody unless such parent is disqualified, or the interests of the child require such other disposition of his person, it is not clear whether the decree of divorce was rendered in another state or not.

The courts of the state to which a child was brought by the mother after the custody was awarded to her in divorce proceedings will not, upon her death, refuse to permit the father to take it to his home in another state, and into the jurisdiction of the court which granted the divorce, merely because it is thereby being taken beyond their jurisdiction. *Ex parte Barnes* (1909) 54 Or. 548, 25 L.R.A. (N.S.) 172, 104 Pac. 296, 21 Ann. Cas. 465.

V. As affecting independent action or proceeding against father for support.

The question involved in cases like *Mayer v. Mayer* (1908) 154 Mich. 386, 19 L.R.A. (N.S.) 245, 129 Am. St. Rep. 477, 117 N. W. 890, and *Rowe v. Rowe* (1915) 76 Or. 491, 149 Pac. 533, whether a provision in a decree of divorce rendered in one state for the support of the child may be enforced in another state, is not within the scope of the present annotation, as it involves considerations relating to the finality of the decree in this regard and its liability to modification common to such provisions and provisions for alimony, which are beyond the present inquiry.

The decision in *GEARY v. GEARY* (reported herewith) ante, 809, that a decree of divorce in one state awarding the custody of the children to the mother, but making no provision for their support, does not preclude an independent suit in another state for the purpose of enforcing the continuing duty of the father to support such children after they and their parents have become residents of the latter state, is supported by a number of other cases.

Thus, in *Davies v. Fisher* (1917) 34 Cal. App. 137, 166 Pac. 833, it was held that a wife who had procured a divorce in Nevada awarding the custody of a child to her, but not making any provision for its support, could maintain an action in California, where both parties then resided, for a judgment requiring the husband to contribute to the support of the child.

And in *Re McMullin* (1913) 164 Cal. 504, 129 Pac. 773, the court, while holding that a father was not criminally liable for a failure to support a child after a decree of divorce, obtained in another state upon substituted service of summons, granting the custody of the child to the mother, but without a provision for their child's support, and after she has sought and obtained letters of guardianship of the child in California, said that it was within the power of the wife under supplementary proceedings brought in California, with personal service upon the former husband, to

have procured, if the facts warranted, an award of the custody of the children, with provision for her own and their support.

And in *Riggs v. Riggs* (1914) 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809, it was held that a decree of divorce in another state in favor of the wife, awarding the custody of the children to her without making any provision for her support or maintenance, did not preclude an action in Kansas, in which the parties had become residents, by the divorced wife to compel her former husband to contribute to the support, education, and maintenance of the children.

So, a decree of divorce rendered in another state, which awards the custody of the children to the mother, but makes no provision for their support, does not preclude an action by her against the estate of the deceased father to recover for necessities expended by her in support of the children after the divorce and while the parties were residents of Missouri. *Winner v. Shucart* (1919) 202 Mo. App. 176, 215 S. W. 905.

But it has been held that a mother who obtained a decree of divorce in another state awarding the custody of a child to her, without providing for their support or for alimony, cannot maintain a suit in equity in Michigan to compel the father to make provision for the future support of herself and the child. *Judson v. Judson* (1912) 171 Mich. 185, 137 N. W. 103. In the reply to the contention that, under the comity of courts and the full faith and credit provision, the mother was entitled to have the bill sustained as supplemental to the proceedings in the other state, the court said that the statute gave no authority to base an award for the support of the child on a decree of divorce obtained in a foreign jurisdiction; and that neither the Constitution nor comity authorizes or requires the chancery court of one state, limited in its jurisdiction by statute, to take over by supplemental proceedings a suit begun in the courts of another state. Viewing the suit as an independent one, the court held that, in the absence of appropriate

legislation, alimony (including apparently provision for support of the child) could not be allowed in courts of equity, independently of divorce proceedings and existence of marriage relation.

In *Burritt v. Burritt* (1859) 29 Barb. (N. Y.) 124, denying recovery in an action by the mother against the father for the support of an infant child whose custody had been awarded to the mother by a decree of divorce in another state, which made no provision for the support of the child, the court said that the award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary; or, at least, to relieve the father from the obligation to furnish such support upon the call of the mother; and that to make the father liable in such case there must be special circumstances averred in the complaint or appearing in the evidence, from which the obligation must arise or may be reasonably inferred.

The court also expressed a doubt whether the bill for divorce in the other state having prayed for the custody of the child, the omission to ask that defendant contribute to its further support, would not be an estoppel upon the plaintiff. The point, however, was not decided, the decision being upon the ground above stated.

A mother who has obtained a decree for alimony and for the support of herself and minor child in another state cannot maintain an original action at law in Georgia to recover necessary expenditures made by her after such decree, for the support of the child. *Brown v. Brown* (1919) 24 Ga. App. 512, 101 S. E. 315.

In *White v. White* (1903) 65 N. J. Eq. 741, 55 Atl. 739, it appears that the authority to make provision for children who are inhabitants of the state after a divorce of their parents in another state or country was expressly conferred by statute; and the question in that case was in relation to the notice necessary to support a modification of such a provision.

G. H. P.

KATE STAFFORD

v.

WILLIAM NATHAN STAFFORD.

MARY DUGGAN, Plff. in Certiorari.

Illinois Supreme Court — October 22, 1921.

(299 Ill. 438, 132 N. E. 452.)

Parent and child — keeping child within jurisdiction of court.

1. The court will not award custody of a child to its aunt in preference to its father, to prevent the father taking it out of the jurisdiction of the court where its property is located.

[See note on this question beginning on page 838.]

Courts — jurisdiction — custody of child.

2. A court acquiring jurisdiction of a divorce proceeding may, in such proceeding, dispose of the custody of children of the marriage.

[See 9 R. C. L. 472.]

— when jurisdiction terminates.

3 The court does not lose jurisdiction of orders in a divorce proceeding where a motion to open the judgment is made at the term at which they were entered, and continued from time to time as necessary.

Appeal — question raised for first time.

4. The objection that a bond for appeal to an intermediate appellate court was not filed in time, and that, therefore, the intermediate appellate court had no jurisdiction, cannot be raised for the first time on appeal to the supreme court.

Trial — consolidation of cases.

5. The court may of its own motion consolidate for one hearing an appeal from an order appointing a guardian for the infant child of a marriage and a motion to modify an order for its custody entered in a divorce proceeding between its parents.

Appeal — how far finding of facts binding in divorce proceeding.

6. The supreme court is not bound by the finding of facts by the appellate court in a divorce proceeding, since it is an equitable cause.

[See 2 R. C. L. 209.]

Trial — finding of jury advisory — divorce proceeding.

7. Upon the question of separate maintenance and custody of child in a divorce proceeding, the verdict of the jury is merely advisory.

Parent and child — right to custody of child — effect of drinking liquor.

8. A man is not utterly disqualified from having the care, control, and education of his child because he has occasionally taken a drink of intoxicating liquor.

— right of father to custody of child.

9. A father who is not shown to have forfeited such right has the right to the custody of his minor child as against the world.

[See 9 R. C. L. 471; 12 R. C. L. 1106; 20 R. C. L. 599.]

— effect of absence of property.

10. That a father was at one time without property because he had transferred it to his wife is no ground for denying him the custody of his minor child.

— effect of fact that guardian has more property than father.

11. That one appointed by the court as guardian for a minor has more property than the minor's father, or is more thrifty in accumulating property than the father, is no legal reason for depriving the father of the custody of the child.

[See 20 R. C. L. 599.]

— weight to be given preference of child.

12. The preference of a child to remain with his aunt who was appointed as guardian, rather than to go with his father, is not conclusive on the court on the question of guardianship, if he seems to have no serious objection to going with his father, for whom he has affection.

[See 12 R. C. L. 1106, 1107.]

Guardian and ward — right to change domicile of ward.

13. A guardian by nature, or a testamentary guardian, may in good faith change the ward's domicile from one state to another.

[See 12 R. C. L. 1121.]

— interest of child controls.

14. The interests of the child are controlling upon the question of its guardianship.

[See 9 R. C. L. 475; 12 R. C. L. 1106; 2 R. C. L. Supp. 810.]

— effect of divorce for father's fault on right of stranger.

15. The rule that, in case of a divorce against a father for his fault, the custody of the children will be awarded to the mother, does not apply in favor of other persons after the mother's death.

[See 9 R. C. L. 478.]

Judgment — awarding custody of child — effect on right to make testamentary disposition.

16. A final decree of court awarding the custody of a minor child to its father divests all rights which the mother had to make a testamentary disposition of it.

CERTIORARI to the Appellate Court, Third District, to review a judgment affirming a judgment of the Circuit Court for Moultrie County (Sentel, J.) modifying a decree of divorce, granting defendant custody of his minor child, and awarding guardianship of its property to the sister of the deceased plaintiff, in a proceeding for her appointment as guardian of the child, consolidated with defendant's motion to open a divorce decree. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. J. Miller, W. E. Redmon, and C. R. Patterson for plaintiff in certiorari.

Messrs. John R. Fitzgerald and McLaughlin & Billman, for defendant in certiorari:

A motion to modify a decree at the same term leaves the decree subject to the control of the court to amend, change, or vacate it, as justice may require.

Danforth v. Danforth, 105 Ill. 603; Cooper v. Gum, 152 Ill. 471, 39 N. E. 267; Griswold v. Smith, 116 Ill. App. 223; Shannahan v. Stevens, 139 Ill. 428, 28 N. E. 804.

The fact that the hearing on the motion to modify the decree is continued from term to term does not affect the power of the court to modify the decree, but that power remains in the court until the motion is finally disposed of.

Shannahan v. Stevens, *supra*; Windett v. Hamilton, 52 Ill. 180; Hibbard v. Mueller, 86 Ill. 256.

In a suit for divorce, although the death of one of the parties of itself dissolves the marriage relation, and that part of the action abates, the remainder of the suit may be continued for the purpose of adjusting the other rights of the parties concerned.

Wren v. Moss, 7 Ill. 72; Wren v. Moss, 6 Ill. 560; Danforth v. Danforth, 111 Ill. 236; Chatterton v. Chatterton, 231 Ill. 449, 121 Am. St. Rep. 339, 83 N. E. 161; Mallory v. Mallory, 160 Ill. App. 417.

A parent is the natural guardian of his children, and his right to their care and custody is paramount.

People ex rel. Good v. Hoxie, 175 Ill. App. 563; Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; Wohlford v. Burckhardt, 141 Ill. App. 321; Sullivan v. People, 224 Ill. 468, 79 N. E. 695.

The court may at any time modify its decree as to the custody of minor children.

Gillett v. Bryant, 203 Ill. App. 322; Draper v. Draper, 68 Ill. 17.

Upon the death of one parent the usual rule and the proper practice demand that the child's custody be awarded to the other parent.

Wilson v. Mitchell, 48 Colo. 454, 30 L.R.A. (N.S.) 507, 111 Pac. 21; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202.

The custody of the child should be awarded the father. The evidence shows such to be the case, and upon

the grounds of natural affection and humanity the court's order should stand.

Mahon v. People, 218 Ill. 171, 75 N. E. 768; Cohn v. Scott, 231 Ill. 556, 121 Am. St. Rep. 342, 83 N. E. 191; People ex rel. Parker v. Bryson, 203 Ill. App. 325; People ex rel. White v. Culver, 189 Ill. App. 141; Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717; Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; Wohlford v. Burckhardt, 141 Ill. App. 321; Sullivan v. People, 224 Ill. 468, 79 N. E. 695.

The appellant waived all questions as to the jurisdiction of her person in the matter of the appeal, by failing to plead in abatement or by special motion to dismiss for want of jurisdiction of her person, and by proceeding to trial on the merits of the case.

Louisville & N. R. Co. v. Industrial Bd. 282 Ill. 136, 118 N. E. 483; Kinsella v. Cahn, 185 Ill. 208, 56 N. E. 1119; Franklin L. Ins. Co. v. Hickson, 197 Ill. 117, 64 N. E. 248; Metropolitan Trust & Sav. Bank v. Perry, 194 Ill. App. 277; Corbett v. Physician's Casualty Asso. 135 Wis. 505, 16 L.R.A. (N.S.) 177, 115 N. W. 365; State ex rel. Lane v. District Ct. 51 Mont. 503, L.R.A. 1916E, 1083, 154 Pac. 200.

The guardianship matter, being heard in the circuit court on appeal, was a trial de novo, therefore the burden of proof was on appellant.

Holcomb v. People, 79 Ill. 409; Gilkerson v. Scott, 76 Ill. 509.

Circumstances, humanitarian conditions, and particularly the paramount right of the surviving parent to have the custody of the person of his child, may justify the award to him.

Cummins v. Cummins, 29 Ill. 452; People ex rel. Good v. Hoxie, *supra*; Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; Wohlford v. Burckhardt, 141 Ill. App. 321; Sullivan v. People, *supra*.

Duncan, J., delivered the opinion of the court:

William Nathan Stafford, defendant in error, and Kate Duggan, now deceased, were married in Oklahoma on October 29, 1907. John William Stafford was born to this union on August 28, 1908, and in 1913 defendant in error, with his

wife and child, moved to Dalton City, Illinois, the former home of his wife. He retained some business interests in Oklahoma, and on February 21, 1917, while he was absent in Oklahoma on business, his wife filed in the circuit court of Moultrie county her bill for divorce and the custody of their child, charging that he was guilty of extreme and repeated cruelty to her, had been guilty of habitual drunkenness for more than two years last past, and was wholly unfit to have the care, custody, and education of the child. He employed an attorney at Dalton City and answered the bill, specifically denying all the charges therein contained, and the cause was continued to the September term, 1917. Defendant in error's attorney enlisted in the Navy before the September term of court and notified Stafford of that fact. He employed another attorney in Oklahoma, but the cause was tried at the September term during his absence, and he was found guilty of extreme and repeated cruelty and of habitual drunkenness, and that he was not a suitable person to have the care and custody of the minor child, and a decree granting the divorce was entered and the custody of the child awarded to the mother, who died November 3, 1917, leaving a last will and testament, by which she bequeathed and devised all her property to her minor son. The will provided that the court should appoint some suitable person who should have control of her estate willed to her son until he arrived at the age of twenty-one years, and out of the income of the estate support, maintain, and educate him, and that such person should look after her son and satisfy himself that any money paid over to anyone for his use and benefit should be used for the purpose intended, and should from time to time, if practicable, visit her son at the expense of her estate, and satisfy himself that he was properly taken care of and educated.

Defendant in error was informed

of the death of his wife, and came from Oklahoma to her funeral, and there for the first time learned that she had obtained a divorce from him and the custody of the child. On December 7, 1917, at the September term, 1917, he filed his motion in the circuit court, supported by affidavit, to open up the decree for divorce and the custody of the child, and for leave to introduce further testimony. On November 9, 1917, Mary Duggan, plaintiff in error, the sister of Kate Stafford, filed her petition in the county court of said county asking for the appointment of herself as the guardian of said child. Defendant in error received no official notice, but on said date appeared in person with his attorney and objected to the petitioner being appointed guardian, and the matter was set for hearing on November 17, 1917, eight days later. Before the day of the hearing defendant in error was called back to Oklahoma on urgent business, and, although his attorney applied for a further continuance, that cause was heard by the county court and Mary Duggan was appointed guardian of the person and property of the child; the petition being amended on the day of the hearing to show that the petitioner asked to be appointed guardian of the person as well as of the property of the child. The guardian was required to give bond in the sum of \$30,000. The property of the ward was inventoried at a valuation of \$19,200. Defendant in error perfected his appeal to the circuit court of said county from the order of the county court appointing such guardian, and a trial de novo was had March 8, 1919, and the circuit court confirmed the order of the county court and appointed Mary Duggan as guardian of the estate and person of said minor; the order and judgment of the court being based largely upon the decree and finding of the circuit court in the divorce proceedings, the decree at that time being in full force and effect and unmodified. At the same

March term defendant in error moved to open up this latter order and judgment, and for leave to introduce further testimony therein, and in support of the motion he alleged that the hearing of his motion to open up the decree for divorce and to have the same modified was pending for hearing in the circuit court for May 10, 1919. The motion was granted, and the further hearings of the appeal case and of the motion to modify the decree in the divorce suit were consolidated, of the court's own motion and for its convenience in properly disposing of both matters at one and the same time. On May 10, 1919, both causes were heard by the circuit court on the evidence, and the court modified the decree of the circuit court, striking therefrom the findings that the defendant was guilty of habitual drunkenness and was an unfit person to have the care and education of the child, and the order awarding the care and custody of such child to Kate Stafford, and inserting in lieu thereof the findings that he was not guilty of habitual drunkenness and was not given to excessive use of intoxicants, but is a sober, industrious citizen and a kind and indulgent father, having great affection for his son, and that he is a fit person to have the care, custody, control, and education of his son, and has been guilty of no act or conduct to forfeit his right as a father; and further modified the decree so as to provide that he should have the care, custody, control, and education of his son, but left the decree for divorce for extreme and repeated cruelty still standing, on that ground alone. In the appeal case in the matter of the appointment of a guardian, Mary Duggan was found a fit person to be guardian of the property of the minor and was appointed guardian of his property only. Mary Duggan excepted and perfected her appeal to the appellate court for the third district, and that court affirmed the decree of the circuit court, and also the order and judgment in the ap-

peal case, at its April term, 1920. This court granted a writ of certiorari for further review of the record on error.

The main and controlling question on this record is whether or not defendant in error, the father, is a fit and suitable person to have the care, custody, control, and education of his child. This question arises between him and Mary Duggan, the plaintiff in error and aunt, of the child. The question as originally before the circuit court in the divorce proceeding was between defendant in error and his wife, Kate Stafford, the child's mother. That court was the first court to obtain jurisdiction to settle the question of the custody of the Courts—jurisdiction—custody of child. child, and there can be no sort of question of the right and jurisdiction of the court to dispose of the custody of the child in the divorce proceedings. That court not only had the right and the jurisdiction to settle the question in the first instance, but it continued to have the right to reconsider the question upon proper application, and to make changes in its order as to the custody of the child whenever new conditions warranted it under the evidence produced. This right to modify the decree as to the custody of the minor child from time to time, as shall appear reasonable and proper, is expressly given by § 18 of our Divorce Act, which has been sustained frequently by the decisions of this court. Hurd's Stat. 1917, p. 1076; Draper v. Draper, 68 Ill. 17.

"County courts in their respective counties may, when it shall appear necessary or convenient, appoint guardians to minors, inhabitants of or residents in the same county, and to such as reside out of this state and have an estate within the same, in the county where the real estate or some part thereof may lie; or if he has no real estate, then in any county where he may have personal property." Hurd's Stat. 1917, chap. 64, § 2.

By § 4 of this act it is provided that the guardian of a minor shall have, under the direction of the court, the custody, nurture, and tuition of his ward, and the care and management of his estate; but the parents of the minor, if living, and, in the case of the death of either, the surviving parent, they being respectively competent to transact their own business and fit persons, shall be entitled to the custody of the child and the direction of its education. Section 6 of the act expressly provides that "the guardianship of the infant's estate may be appointed to one, and the custody and tuition of the minor to another."

It was therefore competent for the county court to appoint Mary Duggan guardian of the property of the minor, and at the same time, by its order, give the father the custody of the person of the child and the direction of its education, had it chosen to do so and such order had been warranted by the evidence. It was entirely competent for the circuit court, either in the appeal case or in the divorce case (which were both heard by it at the same time), to make the order appointing Mary Duggan guardian of the property of the child and at the same time award the care, custody, control, and education of the child to the defendant in error, as it did do, if the evidence before it justified such order. The circuit court had not lost jurisdiction of the order in the divorce proceedings, as the motion of the defendant in error to open up that judgment was made at the same term of court in which the divorce decree was entered, and such motion was continued from time to time until its final disposition, May 10, 1919.

—when jurisdiction terminates.

Plaintiff in error makes the point in this court that the appeal bond in the appeal case was not filed in time, and that for that reason the circuit court had no jurisdiction of the appeal. The appeal was twice

heard before the circuit court, and no such objection was made by plaintiff in error at either hearing, and therefore no such question can properly arise on this record. *Grier v. Cable*, 159 Ill. 29, 42 N. E. 395. It was also perfectly proper and competent for the court, of its own motion, to consolidate for one hearing the case on the appeal and the motion to modify the order in the divorce case. The main question in each case was principally one and the same, and the greater part of all of the evidence in one case was admissible on the main issue in the other case. It was a timesaver for the court and also for the parties, and neither party can possibly be prejudiced by such action, as the court announced that it would hear all of the evidence in both cases and consider the evidence in each case properly bearing on the issues therein.

Appeal—question raised for first time.

Trial—consolidation of cases.

We hold, upon the question whether or not this court is bound by the finding of the facts by the appellate court, that we are not so bound. The divorce proceeding is regarded as a chancery proceeding. In such a case, upon the simple question of divorce, the parties are entitled to a jury, and upon all the issues affecting the right of divorce the verdict of the jury is not advisory merely, but is binding upon the lower court, and consequently binding upon the appellate court and this court to the extent that it cannot be set aside unless it is manifestly against the weight of the evidence. Upon the question of separate maintenance or of the custody of the child the rule is the other way, that is, a verdict of the jury would only be advisory, even though the questions arose in the same suit and upon an issue that would affect the right to a divorce, were that question alone to be decided. *Berg*,

Appeal—how far finding of facts binding in divorce proceeding.

Trial—finding of jury advisory—divorce proceeding.

v. Berg, 223 Ill. 209, 79 N. E. 13.

The only fact alleged against the competency and fitness of the defendant in error to have the custody, care, control, and education of his child, is the alleged fact that he is an habitual drunkard. The evidence in the record is overwhelmingly against the contention that the defendant in error is an habitual drunkard and an unfit person to have the care, custody, control, and education of his child. Five of his neighbors and citizens, four of whom had known him intimately for fifteen years in Oklahoma and the other of whom had known him intimately for eleven years, testified positively and unequivocally that they were acquainted with him, and had lived near him, and done business with him, and were acquainted with the people with whom he associated and did business. They further positively and unequivocally testified that they were acquainted with his general reputation in the vicinity where he lived as to being a sober, industrious, and law-abiding citizen, and that his reputation is good; also, that they personally knew that he was not a drunkard and not addicted to intemperance; that they never saw him drunk, but state that it is a fact that he occasionally took a drink of intoxicants; that for several years he had been in the stock business, and in the last three years had made good money in buying and selling horses and mules for our allies and for the government; that he is devoted to the child and has always provided well for his family; that his credit has always been good, and that he has at all times paid his debts; and that he is a fit and suitable person to have the custody, control, and education of his son. One of the witnesses was a banker at Beaver, Oklahoma, and had resided in the same vicinity with the defendant in error, formerly as a neighbor and farmer in the country and latterly as a neighbor and banker in the same town. The second witness was a merchant of the same town and a neighbor,

20 A.L.R.—53.

who saw him several times a week. The third was a stock raiser, having the same intimate acquaintance with him. The fourth was his family physician, of the same intimate acquaintance with him and his wife; and the fifth was an abstractor. The testimony of these five witnesses is corroborated by the depositions of another set of witnesses from Oklahoma, ten in number, who appear to be substantial, reliable business men of various callings. Defendant in error was further supported in this particular by twelve apparently substantial and reliable citizens of Dalton City, Illinois, who knew him intimately while he lived in that city, which is also the residence of plaintiff in error and was the former residence of his wife. Several of the witnesses were relatives of the plaintiff in error.

Opposed to defendant in error's evidence, plaintiff in error only produced two witnesses who testified contrary to the witnesses of the defendant in error. The first was Henry Nichols, who testified, in substance, that the reputation of the defendant in error is that he is "addicted to the use of intoxicating liquor." On cross-examination he stated by way of explanation that when a man drinks intoxicating liquor he is addicted to the use of it. He further testified that he considered that everybody who drinks is wrong; that the people consider Stafford a jolly good fellow, and that about the worst witness can say against him is that he takes too much liquor; that he would not state that he was unfit to have the custody of his child. The other witness was George H. Wright, who testified that he is a teetotaler and that he had seen defendant in error drunk more times than he had fingers. He also stated that his reputation as a drinking man was bad, and that he is what is known as a confirmed drunkard. Although questioned repeatedly, he could not and did not state any time or place that he had ever seen him drunk.

He also stated that he did not think a man who drinks is capable of taking care of his children. He further testified that a man who had taken a drink of intoxicating liquor would be less competent to raise a child than if he had not taken a drink, and that his competency would be lessened as the amount and frequency of the drinking increased.

The sum and substance of our conclusions on the evidence in this record is that the evidence does not show that defendant in error is an habitual drunkard, or that he has been guilty of drinking liquor to excess at any period of time, but that he has for fifteen years been a man who has occasionally taken a drink of intoxicants. The evidence also shows that he has abstained from drinking almost entirely for the last two years. There is not a blemish on his character outside of the charge of taking an occasional drink, and there is no contention in this record to the contrary. This court would not feel warranted in holding that a man is utterly disqualified from having the care, control, and education of his children

Parent and child
—right to
custody of child
—effect of drink-
ing liquor.

because of the fact that he has occasionally taken a drink of intoxicating liquor. If we were to adhere to that rule it would disqualify a very large per cent of men in this country in all of the occupations and professions in which men are engaged. Taking a drink of intoxicants in the presence of a child would be setting a bad example for it. So would smoking or chewing tobacco likewise be a bad example. It may be admitted that the occasional taking of a drink of liquor or the smoking or chewing of tobacco is not a special aid to a man or a recommendation, but we apprehend that no court would undertake to hold, as a matter of law, that either or both would absolutely disqualify a man from having the custody of his child, or be considered sufficient ground for giving the

custody of his child to another who has no such habit or any other bad habit.

Under the evidence in the record, defendant in error is entitled to the custody, care, control, and education of his son as against plaintiff in error. He is its father and has the natural right to have such custody. As against him the plaintiff in error has no right whatever, under the law, to the custody of the child, no more than an absolute stranger, unless it can be shown that he has in some way forfeited his right. Under the evidence he is strongly attached to the child, and has always treated it kindly, and has been a good provider for it and his wife. As father of the child he has the right to its

—right of father
to custody of
child.

custody as against the world, because there is no showing that he has forfeited such natural right. *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Cormack v. Marshall*, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256; *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 8 Am. Rep. 645; 21 Cyc. 34.

Much stress is laid upon the fact that defendant in error is shown to have had no property in his name at one time before the divorce proceedings were begun and while he and his wife were living in Oklahoma. Defendant in error admits that fact and has not sought to explain it. He has, at no time, made any claim in this litigation for any of the property of his wife. He has frankly declared that he wants nothing except his child and is willing to support it, and he has shown that he is able to support it. He has accumulated about \$4,000 worth of property since the period of time referred to when he had nothing. The explanation of his having no property at that time, if that fact is seriously to be considered, is that he had transferred it all to his wife. It does appear from the testimony of witnesses that both he and his wife homesteaded and each owned 160 acres of land in Okla-

homa, and that he transferred his 160 acres to her, and that she owned it all at her death. There is no evidence that he could not and did not accumulate property. It certainly ought not to be taken against him in this suit that his wife was the benefactor of his accumulations before her death, and that he has not

—effect of
absence of
property.

seen fit to contest
with his child for
any of the property

in his wife's name. The remainder of the property of which she died seised she inherited from her mother. Neither is there anything in the claim that the defendant in error has interfered with Mary Duggan in the collection of the rents from his wife's estate in Oklahoma. On the contrary, it positively appears that he paid \$25 of the rent to her or for her that the tenant had not paid, and relied on the tenant to repay him, when he was under no obligation to do so. We may add that the mere fact that plaintiff in error

—effect of fact
that guardian
has more prop-
erty than father.

may have more
money or property
of every form than
defendant in error,

or might be more thrifty in accumulating property of every form than defendant in error, is no legal reason for depriving him of the custody of his child.

It is also adverted to as a reason for giving the custody of the child to Mary Duggan that the child has expressed a preference for remaining with her. The undisputed testimony of the plaintiff in error is that, just before returning to Oklahoma after attendance at his wife's funeral, defendant in error bought a trunk for his child and made arrangements to take the child back with him, to which there was no objection. At the trial his son testified that he remembered when he lived with his father and mother in Oklahoma; that his father always treated him kindly and bought nice things for him; that he bought the trunk for him; that his father talked to him about going with him, but that he did not remember what

he did tell his father then; that he has talked to his aunt sometimes about going with his father; that she talked to him two or three times about it and thought he was better off by staying with her, as she would treat him better; that he believed what she told him; that he has written several letters to his father since that time, and that his father has written several to him; that he loves his father and loves his Aunt Mary and wants to live with her; and that he likes to go to school where he now goes and to play with the children there. In a very doubtful case the wish of the child is to be considered and given weight, but we do not think that the wish of the child in this case should have any great weight in determining the question of custody. The testimony of the child is that he may be equally satisfied to remain with his father after he goes with him, and that he does not have any serious objection to going with his father and will not be seriously grieved by being separated from his aunt.

—weight to be
given preference
of child.

It is argued that defendant in error is a resident of Oklahoma, and that it is against the policy of the law of this state and the holdings of this court that the father should be allowed to take his child to his home out of the jurisdiction and control of this court. The cases of *Miner v. Miner*, 11 Ill. 43, *Alford v. Bennett*, 279 Ill. 375, 117 N. E. 89, and other such cases, are referred to as authority for this statement. In the *Miner* Case there was a question between the father and mother as to the custody of their child, and this court held that when the aid of the court is thus invoked it will not permit the one or the other to remove the child beyond its jurisdiction. The reason for the rule in that case was that the parties both had a natural right to the custody of the child, and neither would be allowed to entirely deprive the other of his or her parental right of seeing and visiting the child. In

this case there is no reason for such a rule. Plaintiff in error has no natural right to the custody of the child or to visit it. Defendant in

-keeping child within jurisdiction of court.

error has the natural and legal right to the custody of the child and to take it to his own domicile. No court, as against his right, ought to say that it will retain jurisdiction of the child and deny him its custody simply because of the fact that the child has property in this state in the hands of the guardian of its property. To deny the right of the father to his child under such circumstances would be to deny him a civil and legal right without any just ground whatever. The thought of a father having his legal and civil right to the possession of his child thus denied by a court would be simply intolerable. The right of this child to its property can be just as legally and just as effectually guarded by this court if the child lives with its father in Oklahoma as it can if it lived in Illinois. No legal or natural right of Mary Duggan will be taken away from her by giving the custody of the child to its father. None of the legal or political rights of the child will be taken away from it by allowing its father to take it home with him. Its father's domicile is now its domicile; the mother being dead. A guardian by nature, or a testamentary guardian, may in good faith

Guardian and ward—right to change domicile of ward.

change his ward's domicile from one state to another, or from one county to another county in the same state. As respects natural guardians, this doctrine amounts to no more than that the domicile of the parent is the domicile of the child. 21 Cyc. 63; Cummins v. Cummins, 29 Ill. 452; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; Wood v. Wood, 5 Paige, 596, 28 Am. Dec. 451; Re Benton, 92 Iowa, 202, 54 Am. St. Rep. 546, 60 N. W. 614; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. 221.

An examination of these author-

ities will show that the power of a court to prevent the removal of an infant out of the state by its natural or testamentary guardian should be exercised only in extreme or special cases, where such interference is necessary to prevent the guardian from working a fraud upon the infant by depriving it of the enjoyment of its full right of succession to property belonging to it. No such wrong can possibly be inflicted upon the child in question by his father, as the property is to remain in the custody of the local guardian and subject to the jurisdiction of the county court to see to its proper distribution. We are mindful of the fact that the interests of this child

-interest of child controls.

should be controlling in this case. Defendant in error has secured or arranged for a good home for his child in Oklahoma, where it will have the advantages of good, Christian influence and the benefit of good schools, and where he can be with it and personally look after it; and it is our conclusion, taking all matters into consideration, that it is for the best interest of the child to be in the custody of its father. *Alford v. Bennett*, supra, above cited by plaintiff in error, has no application to this case.

Decisions of this court have been cited by plaintiff in error to the effect that where a divorce has been granted against the father for his fault, and he has thus caused the breaking up of the family, the mother, the other natural parent, will be decreed the custody of the child when she is shown to be a proper person for such custody. That rule does not go to the extent of giving a preference over the father to another person who has not the natural right to the child, after the mother has died, where the evidence shows that the father is a competent and fit person to have the custody of his child.

-effect of divorce for father's fault on right of stranger.

It is contended that defendant in error is guilty of perjury because of the fact that he stated that in Judge Meese's family, where he had arranged to board with his child, there were only two boys, and that they were grown and were away from home, having enlisted for the war. We do not think the record warrants any such charge against him. He voluntarily produced Judge Meese as a witness in this case for him. Judge Meese did say that he had some boys in his family of the ages of seven years and upward, but he also said that these boys were "working out" and his two oldest boys were enlisted in the Army. The testimony also discloses that defendant in error made his arrangements with Mrs. Meese and that Meese sent him to his wife for that purpose. Her testimony is not in the record, and there is no showing in the record that he did not have that understanding with her. The fact that the small boys were away from home at work is no doubt the reason for defendant in error thinking that there were no small boys at home. We are satisfied that defendant in error did not make any intentional misstatement of the facts, as he afterwards introduced Judge Meese to prove the very facts he had stated concerning his arrangement to have his child make his home there. It clearly appears that the children of Judge Meese are unobjectionable companions for defendant in error's child.

We have already recited the substance of Kate Stafford's will with reference to the disposition of this child. It contains no testamentary disposition of the child. It does not undertake to give the custody of the child to Mary Duggan, but merely asks the county court to appoint a guardian for the child. Besides, the final decree of the circuit court

awarding the custody of the child to defendant in error divested all right of Kate Stafford to make a testamentary disposition of the

Judgment—
awarding
custody of child
—effect on right
to make testa-
mentary dis-
position.

child. That decree, as modified and as affirmed by the appellate court, vested the right of the custody in the father, and neither Mary Duggan nor anyone else, can assert any legal authority over the child by virtue of the will. In fact, the will of Kate Stafford seems to contemplate that the custody of her child would go to her husband. Defendant in error claims that Kate Stafford told him, in substance, that if she died she wanted him to have the custody of the child, as he would treat it better than anyone else. Plaintiff in error claims that she told her the same thing, in substance, just before she died. Whatever may be the facts in that regard, the wish or desire of Kate Stafford can have no positive significance in this case, as she did not have the right, under the divorce decree as it now stands, to dispose of her child. Plaintiff in error has established by this record that she is an entirely fit and competent person to have the care and custody of the child. There is no ground or claim for any other view of the matter so far as the question of her personal fitness is concerned, but the natural and legal right to the custody of the child belongs to the father, and he has done nothing to forfeit it.

By all the competent evidence in the record we think it clearly appears that the Circuit Court and the Appellate Court have correctly and properly disposed of the questions involved in this case, and the judgment of the Appellate Court ought to be, and is, affirmed accordingly.

Petition for rehearing denied.

ANNOTATION.

Nonresidence as affecting one's right to award of custody of child.

- I. Scope, 838.
- II. In general, 838.
- III. Preference of resident over nonresident custodian, 840.
- IV. Choice of father as child's custodian as affected by his residence, 841.
- V. Consideration of child's welfare if put in custody of nonresident, 842.
- VI. Award of child's custody to one known or believed to intend removing it beyond the court's jurisdiction, 844.

I. Scope.

As its title indicates, the purpose of this annotation is to show the consideration paid by the courts to the nonresidence of one seeking the custody of a child as a factor in the awarding of such custody. The effect in one state of a decree or order made in another state in respect of the custody of a child is not within the scope of the annotation, except as the court may have considered the element of nonresidence in determining whether the custody of the child should be awarded to the person to whom it was awarded by the foreign order or decree, or to another. The question excluded, so far as it involves the recognition and effect in one state of a provision for the custody of a child in an order or decree in a suit for divorce in another state, is treated in the annotation following *Geary v. Geary* (Neb.) ante, 809.

II. In general.

In judicial appointments of custodians for children, the residence, actual or prospective, of the appointee, is now a factor of minor importance,—a subordinate consideration. Although residence is not wholly ignored, it has become, in modern times at least, altogether a secondary element, influencing the court in deciding whether or not to appoint an applicant. The primary questions to be answered before that of residence arises, when a child's custodian is to be named, relate to the conservation and promotion of its interests; the safety of its estate; its welfare and happiness in a changed environment; the fitness, ability, and suitability of the proposed custodian to be intrusted with the

child's care, education, and maintenance; the age, sex, and circumstances of the child, and the comparative claims of kinship to it among those from whom the choice of custodian must be made. It is only when all these questions have been satisfactorily answered in favor of the applicant that the question of residence is considered by the court, in the light of its advantages and disadvantages as a dwelling place for the child. If, then, these are favorable, the mere fact that the home is located outside of the state seems to be immaterial.

The power, when unrestrained by statute, of a court vested with jurisdiction of the subject, to appoint, when necessary, a nonresident custodian of a resident child, is everywhere conceded.

A court of competent jurisdiction in the premises, if unhampered by a statute, may commit an infant to the guardianship of a nonresident under a given set of circumstances. *Speight v. Knight* (1847) 11 Ala. 461.

The residence without the state, of a mother who seeks the custody of her child in the domestic courts, is no obstacle to an order awarding her such custody. *Adams v. Adams* (1864) 1 Duv. (Ky.) 168.

Nothing short of a statutory inhibition will abridge the power of the chancellor to award the custody of an infant to whomsoever its welfare and happiness demand, whether the proposed custodian does or does not reside within the state. *Workman v. Workman* (1921) 191 Ky. 124, 229 S. W. 379.

It is not an indispensable prerequisite to the appointment of a parent as tutor or tutrix for his or her own child that the appointee be domiciled in

Louisiana. *Gaines's Succession* (1890) 42 La. Ann. 699, 7 So. 788.

The court, in *Miner v. Miner* (1849) 11 Ill. 43, adverting, in a divorce case, to a purpose of the wife, if given the custody of the child of the marriage, to take it out of the state, said: This cannot be tolerated and must be guarded against. While the mother is given the custody of the child, the father must not be wholly deprived of its society, and must be allowed access to it on all reasonable occasions. The child is a ward of court, and it would be a contempt of court for either parent to attempt to alienate its affections from the other; an abuse which the court would consider it a solemn duty to prevent. (The question, however, as to whether one to whom the custody of a child is awarded may properly remove it from the jurisdiction, or as to the consequences of doing so, is not within the scope of the annotation.)

A surviving parent whose fitness is unquestioned, and after the other parent is dead, is entitled to the custody of a child as against its grandparents, despite nonresidence and a purpose to remove the child out of the state. *Wilson v. Mitchell* (1910) 48 Colo. 454, 30 L.R.A.(N.S.) 507, 111 Pac. 21; *Rallihan v. Motschmann* (1918) 179 Ky. 180, 200 S. W. 358; *Barnes v. Long* (1909) 54 Or. 548, 25 L.R.A.(N.S.) 172, 104 Pac. 296, 21 Ann. Cas. 465.

The courts of South Carolina have held that they have jurisdiction to award the custody of minor children whose best interests and welfare demand it, to suitable and proper persons who may reside in other states. *Ex parte Martin* (1834) 11 S. C. Eq. (2 Hill) 71; *Ex parte Davidge* (1905) 72 S. C. 16, 51 S. E. 269; *Hartley v. Blease* (1914) 99 S. C. 92, 82 S. E. 991; *Jennings v. Anderson* (1920) 114 S. C. 506, 104 S. E. 189; *Watkins v. Rose* (1921) 115 S. C. 370, 105 S. E. 738.

If it be granted that one who seeks the custody of a child is qualified in law to be its custodian; that he or she is a fit and proper person to have its custody, able and willing adequately

to care and provide for it; that the child's interests will be safe and its welfare assured if the seeker shall be intrusted with its keeping; and if the circumstances are such as to incline the court favorably towards the sought-for appointment,—the mere fact that the person under consideration for custodian does not reside within, or purposes soon to leave, the jurisdiction of the court, does not, unless there is a statute to the contrary, restrict the exercise of the court's discretion to designate him or her as custodian.

The chancellor may, and in a proper case should, award the custody of an infant to its nonresident parent. *Workman v. Workman* (1921) 191 Ky. 124, 229 S. W. 379.

A judge having statutory power to appoint guardians for incompetent persons, and not restricted by statute to the appointment of residents of the state, may, at discretion, appoint a nonresident such a guardian, in given circumstances making for its propriety. *Berry v. Johnson* (1866) 53 Me. 401.

A court of competent jurisdiction, if not hampered by statute, may give the care and custody of a child of divorced parents to a parent who resides out of the state. *Stetson v. Stetson* (1888) 80 Me. 483, 15 Atl. 60.

The court in this case, referring to the Maine statute conferring authority on a court decreeing a divorce to award either parent the care and custody of a child of the marriage, said: "We find no qualification or restraint of the power given, except such as may be imposed by the sound discretion of the justice presiding. That the result of the decree may cause the removal of the child beyond the limits of the state is not of itself an objection. This may be the effect in any case. Though the parent receiving the custody may at the time be a resident within the state, there is no authority, except in cases of crime, to prevent an immediate removal from the state." *Ibid.*

Afterwards, these views were approved and adopted by another court

in *Griffin v. Griffin* (1920) 95 Or. 78, 187 Pac. 598.

In a case where guardians had been appointed in Ireland for Irish infants there domiciled, brought up, and educated, with fortunes in court in England, Lord Langdale, Master of the Rolls, adopted the proceedings in Ireland and appointed the same persons guardians, with authority to receive the maintenance money notwithstanding they resided out of the jurisdiction. *Daniel v. Newton* (1845) 8 Beav. 485, 50 Eng. Reprint, 191.

On the petition of one as next friend of two infant daughters of his brother who had died intestate residing in Ireland, the mother, who resided permanently in England, was, with her own consent, by Lord Chancellor Ashbourne, removed from her office as guardian of the girls, and the petitioner, an Irish resident, was appointed guardian in her stead. *Re Lemons* (1887) 19 L. R. (Ir.) 575.

The appointment of a nonresident guardian for a resident minor is not void, but at most only irregular, and is good until revoked in a proper proceeding. *Martin v. Tally* (1882) 72 Ala. 23.

III. Preference of resident over nonresident custodian.

As a rule, a court, in appointing a guardian for an infant, even where no statute has placed any restriction on its power of choice, will prefer a resident to a nonresident. *Speight v. Knight* (1847) 11 Ala. 461.

Granting the judicial power to award the custody of a child in habeas corpus proceedings to one purposing to remove it out of the United States, to a foreign country, that power ought not to be used except upon clear and satisfactory proof that the best interests of the child require it to be exercised. *Mahon v. People* (1905) 218 Ill. 171, 75 N. E. 768.

Although it may not be improper, in given circumstances, to award the custody of an infant child to a nonresident parent as against the other parent, yet such an award ought not to be made pending an appeal in a

divorce litigation. Page v. Page (1914) 166 N. C. 90, 81 S. E. 1060.

The primary consideration being the welfare and advantage of the infant in the appointment of a guardian, a court, having to choose between two candidates for the office equally worthy, made choice of one not related, with whom the child lived and enjoyed school, church, and social privileges, and to whom it had become attached, in preference to the other, a relative who resided out of the state. *Willet v. Warren* (1904) 34 Wash. 647, 76 Pac. 273.

The orphans' court in Philadelphia, having a second application by a minor over fourteen years old for the appointment of another guardian, a resident of Philadelphia, in place of one residing elsewhere who had been named, but had not given the required bond, granted the request, saying: "Were we to consider nothing but the personal fitness of the minor's first nominee, or had security been entered, we should be disposed to refuse the present petition; but as we entertain the opinion that it is a better and safer practice not to approve a minor's choice of a guardian residing out of the county, we decide to allow the minor to choose the guardian named in the petition before us. It is perhaps a sufficient reason that the statutes relating to attachments do not enable us to direct that process without our jurisdiction, and we ought not at the outset to sanction a selection which makes this remedy nugatory. . . . But there is an additional consideration moving us to our present decision. All our powers relating to guardians are statutory, and we think that they are to be ascertained by that canon of construction which declares that powers granted must be set forth in express terms or by necessary implication, and that they are not given merely because they are not forbidden. It is not forbidden to us to appoint a guardian who resides in another county, but we are not authorized to make such an appointment. . . . There may be cases where the true interests of the minor could not be promoted by the appoint-

ment of a guardian residing in the county; such cases are exceptions, . . . and . . . we hold the rule by which our judicial discretion should be guided to be that we will not approve of selections of guardians whose domicils are without our jurisdiction." *Hanbest's Estate* (1875) 11 Phila. (Pa.) 63, 32 Phila. Leg. Int. 135.

In the past the English courts of chancery were prone to insist upon residents of England as custodians of children, whenever they were called upon to appoint a custodian. Lord Eldon, on being asked to name a guardian living in Edinburgh for infants who resided in Scotland, each having an income for maintenance of £20 a year, denied the request, saying someone residing in the jurisdiction of the court must be appointed,—that there must be someone answerable to the court. *Logan v. Fairlee* (1821) Jacob, 193, 37 Eng. Reprint, 822, 3 L. J. Ch. 152, 23 Revised Rep. 28.

About a score of years afterwards it was held in another case that, although Scotch testamentary tutors and curators by parental appointment of a child born and domiciled in Scotland, but temporarily dwelling in England, might have the exclusive control and administration of all its property, and be fully accountable to the Scotch courts, yet they could have no authority over the child in England, or power there to protect it, and were not entitled, by virtue of either the parental deed or international law, to be confirmed or appointed guardians in England. *Johnstone v. Beattie* (1843) 10 Clark & F. 42, 8 Eng. Reprint, 657, 7 Jur. N. S. 1023. That case arose upon a bill in chancery filed by the child's grandfather, an Englishman, in the name of the infant, praying that the child be made a ward of court and be prevented from returning to Scotland, where it was born of Scottish parents, but brought to England upon considerations of health by the mother, and there left an orphan after a sojourn of three years. The House of Lords (two law judges dissenting) held, affirming the decision of the court be-

low, that there was jurisdiction of the suit, and that the court was constrained to appoint resident English guardians of the infant, notwithstanding her domicil and entire estate were in Scotland, and her father had, by a deed there executed in due form, appointed as her guardians sundry Scots who had qualified as tutors and curators, and who still survived. The power of chancery to appoint a non-resident who might be otherwise qualified and worthy, as guardian of a resident infant, jointly with a suitable person residing permanently within its jurisdiction, was conceded in the last-cited case.

Vice Chancellor Stuart, being later called upon to name in England a guardian there for the infant daughter of an expatriated Englishman, naturalized in the United States and married there to an American wife, the mother of the child, both parents being dead, and the infant having been clandestinely brought to England by a paternal aunt, while recognizing the validity of an appointment by the surrogate of New York county of an American maternal aunt as guardian of the infant, nevertheless declined to appoint her as such solely in England, but did appoint her jointly in association with the English aunt and a disinterested English gentleman, with liberty, after usual and proper inquiries in his court respecting the age, fortune, and relations of the infant, to submit a plan for her residence, maintenance, and education. *Re Dawson* (1854) 2 Smale & G. 199, 65 Eng. Reprint, 364, 1 Jur. N. S. 37, 2 Week. Rep. 314.

IV. Choice of father as child's custodian as affected by his residence.

It is ancient tradition of the common law that a father is the natural guardian of his child, and has ordinarily the superior right to its custody. In general this right is unimpaired by the father's nonresidence.

The custody, however, of the children of divorced parents, is not determined solely by the legal rights of the parents. These are entitled to due consideration, but there are several

other important factors in the matter. *Campbell v. Campbell* (1875) 37 Wis. 206.

It is not a good reason for refusing a father who is a fit and suitable person in every other respect the custody of his own child on habeas corpus; where the welfare and interest of such child does not require it to remain where it may be, that the father does not reside in the state, and intends to take his child to his home in another state. *Ex parte Davidge* (1905) 72 S. C. 16, 51 S. E. 269.

A father who has divorced his wife, and who lives in another state, and is a man of good character and a proper person to have the custody of his minor son, should not be required to give security to bring his son back into the jurisdiction and abide the order of court as a condition of being awarded the custody of such son. *Parrish v. Parrish* (1914) 116 Va. 476, L.R.A. 1915A, 576, 82 S. E. 119.

As between a resident sister and a nonresident father of a girl in her teens, conceding the father to be a proper person to have the custody of his child and to have the ability to care for her, and taking into consideration the welfare and happiness of the child, the discretion of the court, in awarding her to her father in habeas corpus proceedings, will not be interfered with on the ground that the father resides out of the state. *Hammond v. Murray* (1921) 151 Ga. 816, 108 S. E. 203.

As against maternal grandparents, the mother being dead, a nonresident father, if a proper and suitable person, is entitled to the custody of his child and to take it out of the state. *Rallihan v. Motschmann* (1918) 179 Ky. 180, 200 S. W. 358.

The custody of a child of parents living apart will not be awarded on habeas corpus to its mother if she is a nonresident of the state of the forum, and the husband is domiciled in that state and a proper person to be custodian, and it does not appear that the child will be benefited by transferring it to the mother. *Harris v. Harris* (1894) 115 N. C. 587, 44 Am. St. Rep. 452, 20 S. E. 187.

A divorced wife who had been given the custody pendente lite of her infant son, but not by the final decree, who married again and removed to another state, is not entitled to recover the child on habeas corpus in the state where the marriage was dissolved, from the father domiciled in still another state, where both parents temporarily were sojourning in the first state, since the child's home is with his father. *Lanning v. Gregory* (1907) 100 Tex. 310, 10 L.R.A.(N.S.) 690, 123 Am. St. Rep. 809, 99 S. W. 542.

Upon default being made in a divorce suit, and a decree being in order for the husband, his counsel moved for an order awarding the custody of the children to their grandfather, as the father was a railway engineer employed in India, but Mr. Justice Wilde, judge ordinary, replied: I cannot do that, but I will make the order to the father or his agent, which will serve your purpose equally well. *Ling v. Ling & Prior* (1866) 13 L. T. N. S. (Eng.) 683.

V. Consideration of child's welfare if put in custody of nonresident.

In modern times it has come to be the established rule that, in awarding the care and custody of children to other persons, the welfare and interest of the child is the paramount consideration, and to it all others must yield. That rule has governed in many cases in which was involved the question of residence of the proposed custodian. The rule was applied to deny to an aunt domiciled abroad the custody of a girl in her early teens whom it was purposed to take away, where the child was living in the home of worthy people who had been kind to her and were capable of caring properly for her, and whom she had loved from her infancy. *Mahon v. People* (1905) 218 Ill. 171, 75 N. E. 768.

If no statute prohibits, a nonresident parent should be awarded the custody of an infant child upon proving its custodian morally unfit and its environment bad. *Workman v. Workman* (1921) 191 Ky. 124, 229 S. W. 379.

The court may allow a parent to

whom it awarded the custody of a child in a divorce suit to take the child to another state or country, should the welfare of such child require or be promoted by its removal. *Re Krauthoff* (1915) 191 Mo. App. 149, 177 S. W. 1112.

Conceding the power of the court to appoint a nonresident general guardian of the person and estate of a resident infant over fourteen years of age, whose father resided in a distant state, and was charged to be lacking in ability and integrity for the trust, and where the person nominated by the infant resided without the state and his fitness for the office was challenged, the court having the appointment under consideration was of the opinion, in the case in hand, that the welfare of the infant would be subserved best by the appointment of another person who was fit and disinterested. *Johnson v. Borden* (1885) 4 Dem. (N. Y.) 36.

It has been held error for a trial court which granted a divorce to the wife, and the custody of her infant son, to forbid her to take the boy beyond the limits of the state, where the father was unfit to be intrusted with the child, and the allowances for alimony and support were inadequate, and the mother's parents resided in another state, so that her own and her child's welfare might require her to return and dwell with her parents and among her friends. *Griffin v. Griffin* (1898) 18 Utah, 98, 55 Pac. 84.

In *Re Alderman* (1911) 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126, Ann. Cas. 1913C, 232, a father divorced in Florida by a decree in favor of his wife which awarded to her the custody of his child, but allowed him to visit such child and the child to visit him in turn, sought in North Carolina the enforcement of that right of visiting and of entertaining the child, his wife having taken up her abode with her father in North Carolina, and carried the child with her there to reside. The North Carolina courts refused the relief sought chiefly because they held it inimical to the welfare of the

child to grant the father's prayer. The fitness of the father to have the custody of the child in preference to the mother was found against him, and then the court declared: "The child is now a citizen of North Carolina, and as such peculiarly under its guardianship, and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interests of the child."

In South Dakota, in recent years, the supreme court was confronted with the dilemma of deciding which of two divorced parents should have the custody of their seven-year old daughter for the entire school year. Both parents were considered proper persons to have such custody. The father's home was in Illinois, the mother's in New Jersey. The court held that the best interests of the child required it to remain in one school the entire school year, and therefore left it in the mother's custody for the time being. *Wallace v. Wallace* (1916) 26 S. D. 229, 128 N. W. 143.

In Virginia a father who resided in Tennessee was refused the custody of his daughter, thirteen years old, who lived with her maternal grandparents, where she was contented and healthful, and was well cared for, when the evidence showed that, after several attempts to live in Tennessee, she was, while there, continually ill. *Hutchinson v. Harrison* (1921) — Va. —, 107 S. E. 742.

In *Re Boyd* [1917] 2 Ir. R. 98 (distinguishing *Re O'Hara* [1900] 2 Ir. R. 232) a mother who was a professional nurse without a permanent home, and whose husband's whereabouts were unknown, on habeas corpus, sought to obtain her son, aged thirteen years, from her sister, in whose care she had left the boy; she purposed taking her son to live in a foreign country; but the court, after examining the boy in chambers, refused the mother his custody, because it concluded that it would be for the child's benefit to leave him where he was.

VI. Award of child's custody to one known or believed to intend removing it beyond the court's jurisdiction.

It will be noted that in the reported case (*STAFFORD v. STAFFORD*, ante, 827) the custody of the child is awarded to the nonresident father, notwithstanding that the court assumes that the father will remove the child to his home. That has probably been the assumption in most of the cases in which the custody of the child was awarded to a nonresident. The point, however, has been emphasized in some of the cases.

It has been said that the argument that awarding the custody of a child to its father, a nonresident, would be in effect the permission of a court to take the child out of its jurisdiction, is unfounded upon any good reason. *Rallihan v. Motschmann* (1918) 179 Ky. 180, 200 S. W. 358.

The fact that a father seeking the custody of his child after the death of its mother resides in a distant state, and intends to take the child to his home, does not militate against his right to have the custody of such child. *Brem v. Swander* (1911) 153 Iowa, 669, 132 N. W. 829.

The circumstance that a father seeking the custody of his child, after the death of his divorced wife, who had been awarded it by the decree, purposes to take the child out of the state, to his home in another state, does not militate against giving him the custody as against other persons, where he is not unfit. *Ex parte Barnes* (1909) 54 Or. 548, 25 L.R.A.(N.S.) 172, 104 Pac. 296, 21 Ann. Cas. 465.

The fact that a mother seeking from her husband's parents the custody of her son after her husband's death, where he had a divorce awarding him the child, intends to take the boy out of the United States to live in England, affords no reason why the courts should deny her the possession of the child. *Wilson v. Mitchell* (1910) 48 Colo. 454, 30 L.R.A.(N.S.) 507, 111 Pac. 21.

The refusal of a trial court to take from a divorced mother the custody of a boy twelve years old awarded to her in early infancy, and transfer

him to his father, where the mother had married again and contemplated removal to another state with her husband, taking her son along, cannot be deemed an abuse of its discretion reviewable on appeal, where the contesting parties are equally able and willing to support and educate the boy, and are both of good moral character, and the child's welfare does not require a change of guardianship. *Darnall v. Mullikin* (1856) 8 Ind. 152.

To the contention that the court was without jurisdiction in a habeas corpus proceeding to order minor children into a foreign jurisdiction, the domicil or prospective domicil of their father who sought their custody, the court replied: Without reference to the merits of this cause, it would hardly be contended that this court would be impotent to aid a father to recover the custody of his child illegally detained in this state, merely because he intended to take it to his home in another state. *Ex parte Davidge* (1905) 72 S. C. 16, 51 S. E. 269.

The right of a mother to continue to have the custody of her children awarded her in a decree of divorce from their father is unaffected by the circumstance that she has married again, a British subject, and has thus lost her American citizenship, where she continues to make her home within the state. *Gillett v. Bryant* (1917) 203 Ill. App. 322.

Mr. Justice Brewer, writing for the Kansas supreme court in a habeas corpus proceeding resulting in an award of the custody of an orphan girl to her grandmother in England, said: I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty to do so is clear and absolute. Nevertheless it is a matter always to be considered. With pardonable partiality we look upon our own land, its laws, institutions, and social life as the best; and not lightly should a child be deprived of the benefit of them. Yet we may not ignore the fact that the mother country is a land of liberty and law, of education and social refinement, of

morality and religion; and it would be wrong to make the matter of expatriation an excuse for depriving this little girl of that which would promote her welfare. Further, the grandmother has been appointed by the courts of England the guardian of this little girl, and if now this petition is granted she will pass under the special care of those courts, the faithfulness of whose watch in cases of this kind is a matter of universal recognition. *Re Bullen* (1882) 28 Kan. 781.

An objection to an award of the custody of a child of divorced parents to the mother after the father's death, on the ground that she intended to take the child out of the United States to bring it up in England, was made in *Wilson v. Mitchell* (1910) 48 Colo. 454, 30 L.R.A.(N.S.) 507, 111 Pac. 21, and overruled. The court disposed of it by saying: Plaintiffs in error assert that where other things are equal, this court should choose to make of an American boy an American citizen rather than a British subject, and that he be educated as an American, and not as an Englishman. Permitting him to be taken to England will not necessarily change his citizenship. He is American born, and must remain an American citizen until he reaches an age of maturity, and determines for himself that he shall make a change of his allegiance, or, at least, until such change occurs by some procedure recognized by the courts. "If this child were to be taken to some country governed by a despot, or where liberty under the law was not an inalienable right of a citizen, or where there were no educational advantages, or where its education would be contrary to Anglo-Saxon traditions, the objection to expatriation would require grave and serious consideration and might be insurmountable. But we take judicial notice of the fact that the Kingdom of Great Britain is a government of liberty and law, and its people accustomed to receive educational and social advantages equal to those obtainable in the United States."

But in *Percy v. Provan* (1840) 15 La. 69, the courts of Louisiana were

held unable to give effect to and enforce a testamentary provision for a tutor of the testator's minor child, with a direction to deport it to a foreign country to live with its grandparents, because the laws of the state did not allow the expatriation of an infant under tutelage of a resident tutor.

In *Nannestad v. Nannestad* (1921) 44 S. D. 241, 183 N. W. 541, the court refused a father the custody of his infant son, who lived with his maternal uncle and wife, and was well cared for and regarded by them with affection, because the father was afflicted with pulmonary tuberculosis, and was about to go to California to live, and had no home of his own.

Although the question whether the child should be permitted to leave the jurisdiction as distinguished from the question as to the award of the custody of a child to a nonresident is not within the scope of the annotation, it may be noted here that the English courts generally have long been loath to allow infants and other wards to leave the Kingdom, even temporarily, and where persuasive considerations of comfort, economy, education, or health appeared in favor of such a course, and when departure was allowed, the courts usually required the parent or guardian to give security for the child's or ward's return to the jurisdiction when required. *Jeffrys v. Vanteswarstworth* (1740) Barnard. Ch. 141, 27 Eng. Reprint, 588; *Creuze v. Hunter* (1790) 2 Cox, Ch. Cas. 242, 2 Ves. Jr. 157, 30 Eng. Reprint, 113, 570, 2 Revised Rep. 38; *Mountstuart v. Mountstuart* (1801) 6 Ves. Jr. 363, 31 Eng. Reprint, 1095; *DeManneville v. DeManneville* (1804) 10 Ves. Jr. 65, 32 Eng. Reprint, 767, 7 Revised Rep. 340; *Anonymous* (1821) cited, *Jacob*, 265, 37 Eng. Reprint, 849 (and said in note to *Stephens v. James* (1833) 1 Myl. & V. 627, l. c. 631, 39 Eng. Reprint, 821, to be *Jackson v. Hankey*); *Wellesley v. Wellesley* (1828) 2 Bligh, N. R. 124, 4 Eng. Reprint, 1078; 1 Dow, & C. 152, 6 Eng. Reprint, 481; *Stephens v. James* (1833) 1 Myl. & K. 627, 39 Eng. Reprint, 820, *supra*; *Lethem v. Hall* (1834) 7 Sim. 141, 58 Eng.

Reprint, 790; *Biggs v. Terry* (1836) 1 Myl. & C. 675, 40 Eng. Reprint, 535; *Campbell v. Mackay* (1836) 2 Myl. & C. 25, 40 Eng. Reprint, 550; *Johnstone v. Beattie* (1843) 10 Clark & F. 42, 8 Eng. Reprint, 657, 7 Jur. N. S. 1023; *Re Jones* (1844) 1 Phill. Ch. 461, 41 Eng. Reprint, 707; *Re Stair* (1846) 1 Coop. t. Cott. 227, 47 Eng. Reprint, 832; *Dawson v. Jay* (1854) 3 DeG. M. & G. 764, 43 Eng. Reprint, 300, 2 Week. Rep. 366; *Re Agar-Ellis* (1878) L. R. 24 Ch. Div. 317, 53 L. J. Ch. N. S. 10, 50 L. T. N. S. 161, 32 Week. Rep. 1, 13 Eng. Rul. Cas. 30; *Re Callaghan* (1884) L. R. 28 Ch. Div.

(Eng.) 186, 54 L. J. Ch. N. S. 292, 52 L. T. N. S. 7, 83 Week. Rep. 157; *Ex parte Preston* (1847) 5 Dowl. & L. (Eng.) 233, 17 L. J. Q. B. N. S. 21, 2 Saund. & C. 169, 11 Jur. N. S. 1039; *Re Plumley* (1883) 47 L. T. N. S. (Eng.) 283; *Stuart v. Moore* (1861) 4 Macq. H. L. Cas. (Eng.) 1, 9 Week. Rep. 722, 7 Jur. N. S. 1129, 4 L. T. N. S. 382.

The courts of Ireland have likewise manifested reluctance to permit wards to be taken out of the country. *Re Medley* (1871) Ir. L. R. 6 Eq. 339; *Re Birch* (1892) Ir. L. R. 29 Eq. 274; *Re Hackett* (1854) 3 Ir. Ch. Rep. 375.

J. B. G.

SHUBERT THEATRICAL COMPANY

v.

GEORGE RATH et al., Appts.

United States Circuit Court of Appeals, Second Circuit — February 16, 1921.

(271 Fed. 827.)

Contract — fairness — appearance under rival management.

1. A contract providing that a theatrical performer shall not, during the term of his employment by the other contracting party, publicly appear under any other management or in connection with a rival company, is not unfair.

[See note on this question beginning on page 861.]

Injunction — against breach of contract — unique theatrical performance.

2. Injunction lies to prevent one who has contracted to render services in giving a theatrical performance of an extraordinary and unique nature for the other contracting party, and not to render them for any other, from breaching the contract by performing for another.

[See 14 R. C. L. 386; 3 R. C. L. Supp. 223.]

— when damages are irreparable.

3. Damages for breach of a contract for personal services which can be estimated only by conjecture, and not by any accurate standard, are irreparable within the rule giving equity jurisdiction to restrain the breach.

Contract — mutual — employment of actor.

4. A contract binding a theatrical

manager to employ an actor for at least twenty weeks in a year at a stipulated salary, and binding the actor to perform for that number of weeks at the salary stated exclusively for the manager, is not void for lack of mutuality so as to prevent the issuance of an injunction against its breach.

[See 14 R. C. L. 389; see also note in 9 A.L.R. 1480.]

— closing option — mailing reply.

5. The mailing of a letter exercising an open option to employ another's services for a specified time, properly stamped and addressed, closes the contract.

[See 6 R. C. L. 613.]

Definition — "option."

6. An option when based on sufficient consideration is a contract by which one binds himself to sell property or perform services, and leaves it discretionary with the other to take

the property or accept the services on the terms specified.

[See 6 R. C. L. 603.]

Option — acceptance by mail.

7. One having a right to exercise in writing an option to secure the services of another who may, when the acceptance is exercised, be in another city, may communicate the acceptance by mail.

[See 6 R. C. L. 606.]

— mistake in date — effect.

8. An exercise of an option to secure services from September to September is not void because of the mis-

use of the word "October" for "September," if it is stated to be "in accordance with the terms of the contract."

Sunday — contract for Sunday theatrical performance — validity.

9. A contract for Sunday performance of a theatrical nature in places where such performances are permitted by law is not invalid.

[See 25 R. C. L. 1434.]

— performance for twenty weeks.

10. An agreement to render theatrical performances for twenty weeks is not a contract to perform on Sunday.

APPEAL by defendants from a decree of the District Court of the United States for the Southern District of New York (Manton, Cir. J.) in favor of complainant in a suit brought to enjoin defendants from performing for any manager other than complainant, and from performing in any other theater or place of public amusement, or in any other company except that of complainant until the expiration of the term mentioned in an agreement made between them. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Hough, Circuit Judges.

Mr. Nathan Burkan for appellants.

Messrs. William Klein and Charles H. Tuttle, for appellee:

Plaintiffs are not seeking specific performance, but merely an injunction against the breach of an express negative covenant.

McCall Co. v. Wright, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516; Hoyt v. Fuller, 47 N. Y. S. R. 504, 19 N. Y. Supp. 962; Duff v. Russell, 39 N. Y. S. R. 266, 14 N. Y. Supp. 134, affirmed in 133 N. Y. 678, 31 N. E. 622; Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Guffey v. Smith, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; Stocker v. Wedderburn, 3 Kay & J. 393, 69 Eng. Reprint, 1162, 26 L. J. Ch. N. S. 713, 5 Week. Rep. 671; Standard Fashion Co. v. Siegel-Cooper Co. 30 App. Div. 564, 52 N. Y. Supp. 433, affirmed in 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408; Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co. 1 Holmes, 253, Fed. Cas. No. 12,904; Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. 516; Lacy v. Heuck, 12 Ohio L. J. 209; Dietrichsen v. Cabburn, 2 Phill. Ch. 52, 41 Eng. Reprint, 861, 1 Coop. t. Cott. 72, 10

Jur. 60; 2 High, Inj. § 1166; Warren v. Ray County Coal Co. 200 Mo. App. 442, 207-S. W. 883.

The evidence amply established the fact that the services of the defendants were extraordinary and unique; and the finding of the trial judge based thereon, and on his own view of their performance, should not be disturbed.

Bijur Motor Lighting Co. v. Eclipse Mach. Co. 156 C. C. A. 298, 243 Fed. 600; Brookheim v. Greenbaum, 141 C. C. A. 89, 225 Fed. 763; Comstock v. Lopokowa, 190 Fed. 599; Edwards v. Fitzgerald, N. Y. L. J. Jan. 16, 1895, p. 949; Daly v. Smith, 6 Jones & S. (N. Y.) 158; Metropolitan Exhibition Co. v. Ward, 24 Abb. N. C. 393, 9 N. Y. Supp. 779; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Shubert v. Angeles, 80 App. Div. 625, 80 N. Y. Supp. 146.

The defense of illegality by reason of any breach of the Sunday observance law must be pleaded, in order to be available.

Re Rule, 178 Iowa, 184, 159 N. W. 699; Finley v. Quirk, 9 Minn. 194, Gil. 179, 86 Am. Dec. 93; Riech v. Bolch, 68 Iowa, 526, 27 N. W. 507; Chlein v. Kabat, 72 Iowa, 291, 33 N. W. 771; Ray v. Catlett, 13 B. Mon. (Ky.) 532; Roop v. Roop, 35 Pa. 59; Fox v. Mensch, 3 Watts & S. 444; Herndon v. Henderson, 41 Miss. 584.

The contract is not illegal on its face, but its alleged illegality must depend upon certain alleged extraneous facts. Since those facts are not pleaded, the defense of illegality is not available to the defendants.

Fish v. Delaware, L. & W. R. Co. 211 N. Y. 374, 105 N. E. 661; *Frank V. Strauss & Co. v. Hammerstein*, 152 App. Div. 128, 136 N. Y. Supp. 613; *Nelson v. A. H. Woods Prod. Co.* N. Y. L. J. Jan. 9, 1913; 27 Am. & Eng. Enc. Law, 2d ed. p. 389; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Baltimore & O. R. Co. v. Lowenstein*, 171 App. Div. 137, 157 N. Y. Supp. 5; *Zenatello v. Hammerstein*, 231 Pa. 56, 79 Atl. 922; *Quast v. Fidelity Mut. L. Ins. Co.* 226 N. Y. 270, 123 N. E. 494; *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454, 28 N. E. 31; *Drake v. Siebold*, 81 Hun, 178, 30 N. Y. Supp. 697.

The contract as renewed did not necessarily require the performance of any prohibited act on Sunday in violation of any Sunday observance law, and therefore was not void.

Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; *Zenatello v. Hammerstein*, 231 Pa. 56, 79 Atl. 922; *Nelson v. A. H. Woods Prod. Co.* N. Y. L. J. Jan. 9, 1913; *Frank V. Strauss & Co. v. Hammerstein*, 152 App. Div. 128, 136 N. Y. Supp. 613; 37 Cyc. 568; *Kelly v. London Pavilion*, 77 L. T. N. S. 215; *Goddard v. Morrissey*, 172 Mass. 594, 53 N. E. 207; *Bergere v. Parker*, — Tex. Civ. App. —, 170 S. W. 808.

The plaintiff proved both an oral and a written notice of renewal.

Treat v. Farmers' Loan & T. Co. 108 C. C. A. 98, 185 Fed. 760.

The plaintiff is not prevented by anything in the complaint or the record from showing its oral exercise of the option.

Hovey v. American Mut. Ins. Co. 2 Duer (N. Y.) 554; *Fowler v. Martin*, 1 Thomp. & C. 317.

Irrespective of the oral notice of renewal, and irrespective of the evidence of the receipt of the written notice of renewal, the incontestable fact that this written notice was duly mailed shows a complete compliance with the provisions of the contract relating to the option on defendants' services for another year.

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; *White v. Corlies*, 46 N. Y. 467; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Mactier v. Frith*, 6

Wend. (N. Y.) 103, 21 Am. Dec. 262; *Vassar v. Camp*, 11 N. Y. 441; *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688; 21 Am. & Eng. Enc. Law, 2d ed. 924.

The notice of June 7, 1920, is not vitiated by the typographical error of inserting "October 1st" instead of September 1st.

29 Cyc. 1124; 1 McAdam, Land. & T. p. 60; *People ex rel. Gleahill v. Schackno*, 48 Barb. (N. Y.) 551; *Burns v. Bryant*, 31 N. Y. 453.

Even if the notice of June 7 were defective or ineffective in itself, the conversations and correspondence of July 15 constituted acquiescence by the defendants in its sufficiency and in a renewal of the contract.

Leslie v. Robie, 84 N. Y. Supp. 289.

Rogers, Circuit Judge, delivered the opinion of the court:

The plaintiff corporation is organized under the laws of the state of New York, is in business as a theatrical manager and producer of plays, and for a number of years last past was and still is engaged in producing plays and attractions at various theaters in the city of New York. It likewise presents plays on the road in a tour of the United States and Canada and among the plays so produced is one known as "The Passing Show of 1919," in which the defendants appear.

The plaintiff on July 8, 1919, entered into a written agreement with the defendants by the terms of which the plaintiff engaged them to render their exclusive services to it for a period of one year commencing from September 1, 1919. It was agreed therein that the defendants should appear at all times as directed by the plaintiff during the year, and it was guaranteed that they should be employed for twenty weeks in the minimum, and their salary was fixed at the sum of \$250 per week while appearing in the city of New York and \$275 per week while on the road. It was further provided that the plaintiff had an option on the services of the defendants for the theatrical year begin-

ning September 1, 1920, and ending September 1, 1921, provided plaintiff gave notice of its desire to exercise such option prior to July 1, 1920. If the plaintiff exercised the option reserved to it, the agreement provided that the guaranty of twenty weeks should again apply for the period, but that the salary should be \$300 per week while appearing in the city of New York and \$325 per week while appearing on the road. On June 7, 1920, the plaintiff, pursuant to its option, employed the defendants for the year beginning on September 1, 1920. Notwithstanding this, the defendants advised the plaintiff that they refused to perform according to their agreement; and it appears that they have contracted with a rival manager to appear in a production to be presented in a rival theater in the city of New York.

An injunction is asked to restrain the defendants from performing for any managers other than the plaintiff, or from performing in any other theater or place of public amusement, or in any other company, except that of the plaintiff, until the expiration of the term mentioned in the agreement made between the plaintiff and the defendants. The court below granted the injunction as prayed.

The contract is found in a letter addressed by the plaintiff to the defendants and signed "Shubert Theatrical Company, by J. J. Shubert." Then follows:

We have read the foregoing. The same contains our full understanding, and, with our signatures at the bottom hereof, let this be deemed a contract between us.

Geo. & Dick Rath,
by Geo. H. Rath.

The letter (contract) contains the following: "You [the defendants] agree throughout the term hereof that you shall not render your services, nor will you appear publicly for any other firm or corporation, whether moving pictures or otherwise, without our written

20 A.L.R.—54.

consent first had and obtained, and shall you attempt to appear for any other management or in moving pictures, we shall have the right to apply to any court having competent jurisdiction for an injunction restraining your appearance, and you agree, for the purpose of such lawsuit, that your services are extraordinary and unique, and you cannot be replaced, except for Morris Gest."

The performances which the defendants contracted to give are acrobatic in character. The testimony shows that their feats are unique and extraordinary. A prominent theatrical manager and producer of wide experience, and not associated with the plaintiff, testified. One of the feats of the defendants' performances, as he described it, is that one of the defendants, with one hand, raises the other defendant, a full-grown man, from the floor, his body being stretched at full length upon the floor. The witness, in describing it, said this was done without apparent effort, "just as easy as you would lift a straw." In reply to a question by the court, he declared: "It is a fact that it is the most marvelous thing that has ever been before."

He added that it had never before been done with a grown-up man in the history of this country. Another theatrical manager, of whom defendants' counsel said, "I will concede that he is a great manager and producer, and cannot be equaled in the theatrical business," and who was asked by the court whether the performances of the defendants were unique and unusual, answered, "Absolutely." He added that he did not know of any imitator in the world. Another theatrical producer, having an experience of nearly thirty years and who is widely known, testified that their performance was "absolutely unique and extraordinary."

This is an excerpt from his testimony:

One of the moves they make is taking a man underneath his body;

and raising him right over his shoulder, and standing him up straight on his hands, something that has never been done, as long as my experience has been in the show business. I have never seen anything like it.

Q. Are you an athlete yourself?

A. I am.

Q. And do these features impress you as being peculiarly difficult?

A. It has never been done as long as I remember seeing anything in the show business.

Q. Yes. Do you know from your experience whether it would be possible to replace that act by other people?

A. Absolutely impossible.

The finding of the trial court that the performances of the defendants are unique and unusual is amply justified by the testimony. The services of the defendants are extraordinary, unique, and cannot be replaced.

These services were to be given to the plaintiffs exclusively, and the contract contains an express negative covenant that they would not be given under any other management during the period named. By

**Injunction—
against breach
of contract—
unique
theatrical
performance.**

a negative covenant the covenantor promises that something shall not be done. The relief

appropriate to a breach of such a contract is an injunction. The leading authority, as respects covenants of personal service, is the well-known case of *Lumley v. Wagner*, 1 De G. M. & G. 604, 42 Eng. Reprint, 687, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652. In that case a famous singer agreed to sing in the opera house of the complainant for a certain time, and not to sing for anyone else during that time. The opinion in that case reviews the authorities and contains what is regarded as a very able and convincing discussion of the principle applicable in such cases. As the services contracted for were those of a person possessing special and extraordinary qualifications,

Lord Chancellor St. Leonards granted an injunction restraining the defendant from singing at any other theater than that belonging to the plaintiff. It was held that the fact that the court would have been unable to enforce specifically the defendant's affirmative covenant to sing at the plaintiff's theater did not affect the complainant's right to an injunction to restrain a violation of the negative covenant not to sing elsewhere.

In *McCaull v. Braham* (C. C.) 16 Fed. 37, Judge Addison Brown continued an injunction restraining Lillian Russell from the breach of a negative covenant not to sing in comic opera during the season at any other than the plaintiff's theater. In addition to the negative covenant, the contract contained an affirmative covenant to sing in the employment of the plaintiff whenever required. In the course of his opinion Judge Brown said: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction is now the settled law of England."

In *Cincinnati Exhibition Co. v. Marsans* (D. C.) 216 Fed. 269, the complainant had employed defendant as a ball player for a certain specified period, and defendant had covenanted not to render similar service to others during the continuance of the contract. An injunction issued to prevent the breach of the negative covenant. The court, by Judge Sanborn, said: "It is a settled rule of law that where a person agrees to render services that are unique and extraordinary, and which may not be rendered by another, and has made

a negative covenant in his agreement whereby he promises not to render such service to others, the court may issue an injunction to prevent him from violating the negative covenant in order to induce him to perform his contract. The facts of this case seem to me to bring it under this rule."

In *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973, it was held that, where a baseball player had contracted to play with a particular club for a certain term, he would be enjoined from playing with another club during the continuance of the term, where the evidence showed that he was an expert player in any position, and had a great reputation among the patrons of the sport for his ability and skill.

In *Pomeroy on Specific Performance*, p. 31, the principle is stated as follows:

"Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employee, so that in case of a default the same services could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach."

The basis upon which the decisions rest in all such cases is that the damages for the breach of such contracts cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same services from others. The injury in such cases is irreparable. Damages which can be estimated in cases of this class only by conjecture, and not by any accurate standard, constitute such an irreparable injury as courts of equity will restrain by injunction.

In 5 *Pomeroy's Equity Jurisprudence*, § 289, p. 518, it is said that the doctrine of *Lumley v. Wagner*

has been generally accepted, both in England and in this country, upon a similar state of facts. The author also states that "the most frequent application has been in cases of actors and actresses of established reputation. Contracts for their services often stipulate that they shall not perform elsewhere during their engagement with a particular manager. Their services being extraordinary and special, an injunction is generally granted against the breach of such a stipulation. It will likewise be granted when an artist agrees to work for the complainant and for no one else."

In the argument in this court counsel for the defendants insisted that the contract between the parties is so lacking in equitable mutuality that a court of equity should not enforce it. We are not impressed by the argument. The contract binds the complainant to give the defendants employment for at least twenty weeks in the theatrical year, "not necessarily consecutive," for which the plaintiff is bound to pay a certain specific amount. The contract also binds the defendants to render their services to the plaintiff for a like number of weeks at least, and to do so for the specified salary. That there is mutuality of obligation in such an agreement is too plain for controversy, and mutuality of obligation is sufficient to justify the issuance of an injunction to restrain the breach of the agreement if the services to be rendered are unique, special, or extraordinary, and the contract be not otherwise inequitable or oppressive. Whether the contract is inequitable or oppressive will be considered in a subsequent part of this opinion.

An application for an injunction in a case like this does not depend, as counsel for the defendants in his argument in this court seemed to think, upon the principle applicable to cases for specific performance. It is not necessary in the present case for us to inquire as to what the

Contract—
mutual—
employment of
actor.

—when damages
are irreparable.

doctrine of mutuality means in cases of specific performance. There is a distinction between actions brought to compel the specific performance of an affirmative covenant and those which are brought to restrain by injunction the breach of a negative covenant in the same agreement. It is familiar doctrine that courts of equity do not exercise their jurisdiction to grant the remedy of an affirmative specific performance of a contract for personal services. This they decline to do, because they cannot in any direct manner compel an actor to act or a singer to sing. But the rule is established in England and in this country that the courts of equity may restrain by injunction the breach of a negative covenant by which an actor or a singer of unusual gifts has agreed not to act or not to sing in a specified period, except under the management of the other party to the contract. That this may result or may not result in indirectly compelling the specific performance of the affirmative covenant is not a matter with which this court needs in the present case to concern itself. There has been a great difference of opinion, especially in the English courts, over the question whether an injunction can issue to prevent the breach of a contract unless it contains an express negative covenant. But with that question also we are not concerned in this case, as the contract here involved does contain an express negative covenant. It is sufficient for our present purpose that a distinction exists between suits brought to compel specific performance of an affirmative covenant for personal services, and suits brought to restrain by injunction the violation of a negative covenant respecting such services. *McCall Co. v. Wright*, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516.

The contract gave the plaintiff an option to renew its contract for the theatrical year from September 1, 1920, to September 1, 1921, provided it gave defendants notice in writ-

ing or orally of its desire to exercise such option prior to July 1, 1920. If the option was not exercised according to its terms, the contract has expired, the defendants have not violated it, and no injunction can issue.

The testimony shows that Mr. Shubert, the vice president of the plaintiff corporation, and who had full charge of such matters, dictated to his stenographer on June 7, 1920, a letter exercising the option; that she typed it and then handed it to Shubert, who signed it and gave it back to her; that she then handed it, properly addressed, to the head of the mailing department in the Shubert office, telling her that it was important and to mail it herself; and that the latter person stamped it and herself mailed it on the same day in a regular United States government postoffice box. The letter was mailed in a Shubert envelop having a return address stamped on it, and it was never returned for nondelivery. The letter was addressed to defendants, in care of the Detroit Opera House, Detroit, Michigan, where the defendants were engaged for the week beginning on that day.

The court below has found as a fact that the letter was written and mailed. We concur with him in that finding. The court also said that in writing and mailing the letter the plaintiff did all that was required of it under the contract. In that proposition we also fully concur; the letter having been written prior to the expiration of the option. Prior to that

—closing option
—mailing reply.

time the defendants are deemed in law to have been making to the plaintiff a continuing offer, and the mailing of the letter was an acceptance of it. An option, when based on a sufficient consideration, is a contract by which one binds himself to sell property or perform services, and leaves it discretionary with the other to take the property or accept the services

Definition—
"option."

on the terms specified. In such a contract two elements exist: First, the offer to sell or to render service which does not become a contract until accepted; second, the completed contract to continue the offer or leave it open for the time named. *Black v. Maddox*, 104 Ga. 157, 162, 30 S. E. 723.

An option is said in *Milwaukee Mechanics' Ins. Co. v. Rhea*, 60 C. C. A. 103, 123 Fed. 11, to be nothing more than a continuing offer to sell. In *Standiford v. Thompson*, 68 C. C. A. 425, 430, 135 Fed. 996, it is defined as "an unaccepted offer to sell," and it is said to be "a continuing offer until the expiration of the time limited." In *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220, it is said that an option is an unaccepted offer, which becomes a binding contract when the holder of the option signifies that he accepts the offer within the time fixed. And an option is defined in *Adams v. Peabody Coal Co.* 230 Ill. 469, 82 N. E. 645, as a continuing offer, which the offerer may not withdraw until the expiration of the time limited. In *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, it is said that "an option contract to purchase is but a continuing offer to sell." In 35 Cyc. 56, it is said that an option is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time. And see *Ganss v. J. M. Guffey Petroleum Co.* 125 App. Div. 760, 110 N. Y. Supp. 176, 177; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411; *Bates v. Woods*, 225 Ill. 126, 80 N. E. 84; *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961.

The law is settled that, if a letter accepting an offer is made in the manner either expressly or impliedly indicated by the party making the offer, it makes no difference whatever that the letter is never received because of some mistake of the postoffice authorities, or through accident in transmission, or

because in some way it becomes lost. *Patrick v. Bowman*, 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. Rep. 811, 866; *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Burton v. United States*, 202 U. S. 344, 384-386, 50 L. ed. 1057, 1072, 1073, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *White v. Corlies*, 46 N. Y. 467; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co.* 87 Conn. 691, 89 Atl. 909; *Perry v. Mt. Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632. The law of England is to the same effect, *Brogden v. Metropolitan R. Co.* 2 App. Cas. 666, 6 Eng. Rul. Cas. 94; *Re Imperial Land Co. L. R.* 15 Eq. 18, 42 L. J. Ch. N. S. 372.

It is necessary, therefore, to inquire whether, under the circumstances, the plaintiff had a right to use the mails for the purpose of communicating its exercise of its option. The plaintiff was expressly authorized by the defendants to exercise the option in writing orally. We think that this gave

Option—acceptance by mail.

it the right to communicate by mail its written acceptance of the offer. Authorization to communicate acceptance by mail is implied in two cases:

(1) Where the post is used to make the offer, and says nothing as to how the answer is to be sent.

(2) Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance. *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. N. S. 373, 66 L. T. N. S. 439, 40 Week. Rep. 433; *Carey v. Roots*, 5 Alberta L. R. 125, 21 West L. R. 795, 2 West Week. Rep. 678, 5 D. L. R. 670; *Ellis v. Block*, 187 Mass. 408, 73 N. E. 475; *Campbell v. Beard*, 57 W. Va.

501, 509, 50 S. E. 747. See 13 C. J. p. 300, § 116.

Where authority is given to accept in writing an offer which was made orally, the offeree has a right to understand, in our opinion, that he is at liberty to send his answer by post; and if he incloses the writing in an envelop properly stamped and addressed, and deposits it either in the postoffice or in a street letter box, which is a part of the postoffice system for the transmission of mail, he has done all that is required. *Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. Rep. 597, 28 N. W. 162.

It appears, however, that the written notice which was deposited in the mails was not in all respects accurate. The notice was in the following form:

June 7, 1920.

Dear Sirs:—In accordance with the terms of our contract dated July 8, 1919, we hereby notify you that we exercise our option for your services to continue with us, commencing October 1, 1920, and expiring on October 1, 1921, at salary as contained in said contract.

Very truly yours,

Shubert Theatrical Company,
by J. J. Shubert.

Rath Bros. Passing Show, Detroit
Opera House, Detroit, Michigan.
JJS/HC

Under the contract the period of renewal, as before pointed out, was from September 1, 1920, to September 1, 1921. The notice as given substituted "October" for "September." But the notice distinctly described itself as a renewal "in accordance with the terms of our contract" "at salary as contained in said contract." The mention of "October" for "September" was a pal-

—mistake in
date—effect.

pable slip, which could have misled no one, and which did not vitiate the notice. Where a contract is specifically mentioned in a notice given under it, the terms of the contract are controlling. A notice given under a contract is to be construed according to the intention of the contract. 29 Cyc. 1124.

Counsel for defendant insisted in this court that the contract is illegal and cannot be enforced, because it requires the defendants to give acrobatic performances in the city of New York on Sundays, the giving of which is prohibited by the Penal Law of the state of New York (Consol. Laws, chap 40). Section 2143 of that law is as follows: "All labor on Sunday is prohibited, excepting the works of necessity and charity. In work of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community."

Section 2152 of the law expressly mentions acrobatic performances among the performances the rendition of which on Sunday is declared unlawful and punishable as a misdemeanor. The provision is found in part in the margin.¹

The statute of 29 Charles II. chap. 7, 1676, seems to have laid the foundation for the Sunday observance laws of England and of those in this country. It provided in its first section that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's Day, or any part thereof (works of necessity and charity only excepted)."

In 27 Am. & Eng. Enc. Law, 389, it is said that "at common law judi-

¹ "The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden; and every person aiding in such exhibition, performance or exercise by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition, performance or exercise, or who assents to the use of the same, for any such purpose, if it be so used, is guilty of a misdemeanor. . . ."

cial proceedings only were prohibited on Sunday. A person was not prohibited from doing his ordinary labor on Sunday, and the making of contracts was lawful."

In 37 Cyc. 545, it is also said that "at common law all business other than judicial proceedings could be lawfully transacted on Sunday."

In Frolich on the Law of Motion Pictures & Theater, p. 391, it is said: "Sunday was not a dies non under the common law, and all regulations respecting the observance of Sunday and the prohibition of particular lines of activity are purely of statutory creation."

The law as above stated is supported by a number of court decisions. See *Heisen v. Smith*, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965; *Merritt v. Earle*, 29 N. Y. 116, 86 Am. Dec. 292; *Boynton v. Page*, 13 Wend. 429; *Eden v. People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198. In *Richardson v. Goddard*, 23 How. 28, 42, 16 L. ed. 412, 417. Mr. Justice Grier, of the Supreme Court of the United States, calls attention to the fact that in England formerly the courts sat even on Sunday, and that contracts made on that day were not regarded as void till the statute of 29 Charles II. chap. 7 (not 27, as he erroneously states), was enacted.

We assume that, in the absence of a statute, participation in innocent amusements on Sunday is lawful. We also assume that contracts to perform on Sunday something prohibited by statute are void. It has been held that, where a contract provides for the performance on Sunday of acts prohibited by the statute, the entire contract is void, and no recovery can be had for the part performance on a secular day. *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020; *Handy v. St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L.R.A. 466, 16 Am. St. Rep. 695, 42 N. W. 872; *Williams v. Hastings*, 59 N. H. 373.

The contract here involved, as expressly stated in its opening paragraph, is an engagement of the exclusive services of the defendants at any place or places that the plaintiff designates in the United States of America and Canada. So far as Sunday performances are referred to, the contract provides as follows: "In states where Sunday performances are expressly permitted by law, you agree to appear and perform."

And it also provided that "we have the right to the use of your services in any theaters wherein we shall give Sunday concerts, and you shall appear and play in such concerts whenever we shall give you two (2) days' notice prior thereto of our desire to have you appear and naming the place where. Should you be out of the city of New York if such notice reaches you, you shall pay your expenses to the city where said concert is given and the return to your city of engagement."

An examination of these clauses shows not only that the parties did not agree to violate any Sunday observance statute, but that the intention was that there should be no performances by the defendants on such days, except in states where Sunday performances "are expressly permitted by law." The two clauses of the contract relating to Sunday perform-

ances must be read together, and they in no way bind the defendants to ap-

Sunday—contract for Sunday theatrical performance—validity.

appear anywhere in violation of any Sunday law. The reference to the city of New York, found in the second clause, is not a reference to that city as a place of performance, but as fixing the length of notice. If the plaintiff undertook to require the defendants to perform on Sunday in any state where such performances are prohibited by statute, the defendants would have been under no obligation to appear, and their refusal would not have involved any breach of contract.

An agreement to perform for twenty weeks is not an agreement to perform on Sunday. *Goddard v. Morrissey*, 172 Mass. 594, 53 N. E. 207. In *Kelley v. London Pavilion*, 77 L. T. N. S. 215, where a music hall artiste engaged to perform "every evening," this was held to mean "every evening on which the music hall may be legally opened and the artistes called upon to perform." In *Zenatello v. Hammerstein*, 231 Pa. 56, 79 Atl. 922, the plaintiff had bound himself to sing certain operas "each day of the week" in New York and elsewhere in the United States. The court said the law would not presume that the parties intended an unlawful thing. The presumption was that the plaintiff would not be required to sing on Sundays, except in places where such singing was permitted; and in the instant case it cannot be said that the contract in any way violates the Sunday observance law of the state of New York.

It certainly will not be claimed by anyone that there is anything intrinsically immoral or any immoral tendency connected with an athletic performance such as that given by these defendants. In this connection it is interesting to note a decision under the Sunday law of Missouri. The statute prohibited horse racing, cock fighting, or playing cards or games of any kind on Sunday. The statute was construed in *St. Louis Agri. & Mechanical Assn. v. Delano*, 37 Mo. App. 284. In an opinion written by Judge Seymore D. Thompson, he said that "this court is of opinion that this prohibition is against games of chance or other games of an immoral tendency, and that it does not involve a prohibition of athletic games or sports, which are not of an immoral tendency, but which tends to the physical development of the youth, and are rather to be encouraged than discouraged."

The case was affirmed by the supreme court in 108 Mo. 217, 18 S. W. 1101.

But it is said that a court of equity does not grant an injunction to prevent the breach of a negative covenant where the contract is inequitable, or harsh, or in any way oppressive. We do not dispute the statement. It is not applicable to the particular contract under review. We have examined its provisions with care, and we have failed to discover that it contains anything which can be regarded as unfair, oppressive, or in any way inequitable. It guarantees to the defendants a salary for the year of the renewal of at least \$6,000, with a possible maximum of \$16,900. In accordance with its provisions and during the first year of the contract the defendants received from the plaintiff over \$10,000.

During the year of the renewal the defendants were to receive a larger salary, and might realize in that year about \$28,000, or \$29,000 from the contract. The salary paid them was three times the salary received by the usual acrobatic performers. There is nothing unusual or unfair in the provision that during the period of their engagement with the plaintiff the defendants are not publicly to appear under another management or in connection with a rival company. The contract was not induced by fraud or misrepresentation. The defendants made it of their own free will and with full knowledge of all that it contained. Contracts are made to be kept, and not broken, and the parties who make them are in duty and in law bound to perform them. The injunction should issue as prayed.

Decree affirmed.

NOTE.

The validity and enforceability of restrictive covenants in contracts of employment are the subject of the annotation in 9 A.L.R. 1456, which is supplemented by the annotation following *MENTER Co. v. BROCK*, post, 861.

Contract—fairness—appearance under rival management.

MENTER COMPANY, Appt.,

v.

ARTHUR M. BROCK et al., Respts.

Minnesota Supreme Court — December 24, 1920.

(147 Minn. 407, 180 N. W. 553.)

Injunction — against breach of contract — absence of damage.

The employee, upon entering the service, agreed that, for a certain period after the service ceased, he would not, directly or indirectly, engage in the same business as the employer in the city. Within the prescribed period he engaged in a like business in the city. In this action to enjoin him from working in the new employment, plaintiff failed to show that it had sustained or was likely to sustain irreparable damage on account of his conduct, and for that reason the dismissal ordered when plaintiff rested was right.

[See note on this question beginning on page 861.]

Headnote by HOLT, J.

APPEAL by plaintiff from a judgment of the District Court for Hennepin County (Waite, J.) dismissing an action filed to enjoin defendants from carrying on the same business in which plaintiff was engaged. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kingman, Cross, & Cant and Henry W. Haverstock, for appellant:

A restrictive covenant forbidding an individual from carrying on a business within a single town is not unreasonable.

Kronsnabel-Smith Co. v. Kronsnabel, 87 Minn. 230, 91 N. W. 892; Southworth v. Davison, 106 Minn. 119, 19 L.R.A.(N.S.) 769, 118 N. W. 363, 16 Ann. Cas. 253; Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415.

The restriction is not more extensive than the protection of plaintiff's interests requires.

Owl Laundry Co. v. Banks, 83 N. J. Eq. 230, 89 Atl. 1055; American Ice Co. v. Lynch, 74 N. J. Eq. 298, 70 Atl. 138.

Plaintiff, by the contract, was given the right to elect whether it would sue for damages at law, or in equity for injunctive relief, and insists that the negative covenant be observed and the contract performed.

Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Simms v. Burnette, 15 Ann. Cas. 697, note; Ropes v. Upton, 125 Mass. 258; Smith v. Bergengren, 153 Mass. 236, 10 L.R.A. 768, 26 N. E. 690; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Zimmerman v. Ger-

zog, 13 App. Div. 210, 43 N. Y. Supp. 339; A. L. & J. J. Reynolds Co. v. Dreyer, 12 Misc. 368, 33 N. Y. Supp. 649; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; American Ice Co. v. Lynch, 74 N. J. Eq. 298, 70 Atl. 138; Harris v. Theus, 149 Ala. 133, 10 L.R.A.(N.S.) 204, 123 Am. St. Rep. 17, 43 So. 131; Bradshaw v. Millikin, 173 N. C. 432, L.R.A.1917E, 880, 92 S. E. 161; Grant County v. Allphin, 152 Ky. 280, 153 S. W. 417; Wills v. Forester, 140 Mo. App. 321, 124 S. W. 1090; Gillis v. Hall, 2 Brewst. (Pa.) 342.

Mr. William B. Anderson, for respondents:

The employment of defendant Brock as the manager of plaintiff's establishment created no such intimate relationship with its customers as to warrant the issuance of an injunction.

H. W. Gossard Co. v. Crosby, 132 Iowa, 155, 6 L.R.A.(N.S.) 1115, 109 N. W. 483; Osius v. Hinchman, 150 Mich. 603, 16 L.R.A.(N.S.) 393, 114 N. W. 402; Strowbridge Lithographic Co. v. Crane, 20 N. Y. Civ. Proc. Rep. 24, 35 N. Y. S. R. 474, 12 N. Y. Supp. 899; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986; Simms v. Burnette, 55 Fla. 702, 16 L.R.A.(N.S.) 389, 127 Am. St. Rep. 201, 46 So. 90, 15 Ann. Cas. 690; Hahn v. Concordia Soc. 42 Md. 460; Martin

v. Murphy, 129 Ind. 464, 29 N. E. 1118; Magid v. Tannenbaum, 164 App. Div. 142, 149 N. Y. Supp. 445; O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946; Dills v. Doeblér, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 343, 26 Atl. 398; Miller v. Chicago Portrait Co. — Tex. Civ. App. —, 195 S. W. 619; Stafford v. Shortreed, 62 Iowa, 524, 17 N. W. 756.

Holt, J., delivered the opinion of the court:

The action is to enjoin defendants from carrying on the same business which plaintiff is engaged in in the city of Minneapolis. When plaintiff rested, the court dismissed the action. The appeal is from the judgment of dismissal.

No error is claimed in the dismissal of any defendant other than Brock. As to Brock the facts are these: Plaintiff operates a chain of clothing stores in many of the large cities of this country. It has one in Minneapolis, and Brock became its manager on April 4, 1916, at the weekly salary of \$35. The contract of employment was in writing, signed by both parties. It contains numerous covenants and agreements to be kept and performed by Brock; but we look in vain for one to be carried out or kept by plaintiff. It does not agree to keep him in its employ for a single day, nor does it, in terms, agree to pay the salary he bound himself to accept. In March, 1918, Brock and two other employees of plaintiff organized a corporation to engage in a business similar to plaintiff's, rented a store two blocks away from plaintiff's, and are now conducting a business there. The basis of the asserted hold on Brock is a paragraph in the contract mentioned, which provides, in substance, that in consideration for the employment by the week, and the knowledge thereby obtained in plaintiff's method and trade secrets, Brock agreed that, for a period of four years after his employment by plaintiff should cease, he would not, directly or indirectly, enter into or engage in the same business as plaintiff in the city of Minneapolis,

or work in such line of business. If his employment ceased before the end of one year, the prohibited period should be four times as long as the time he actually worked. In case of a violation of the foregoing covenant Brock must forfeit and pay to plaintiff \$3,000, which is "agreed upon as liquidated damages therefor and shall be considered as such, and not as a penalty."

The proof showed that, when Brock notified plaintiff that he desired to quit its employ, no difficulty was experienced in at once supplying his place, and in fact more business was transacted thereafter than during Brock's management. While some witnesses for plaintiff referred in general terms to trade secrets and special methods of doing business possessed by plaintiff, when required to name any in particular they failed utterly, or else pointed out methods known and practised generally in carrying on business like plaintiff's. The only tangible evidence is that Brock ordered for the use of his corporation books of account and records similar in form to plaintiff's and from the same firm that supplies it. However, it does not appear that the books and records used by plaintiff are copyrighted, or that there is any special peculiarity about them whereby their use by a competitor could cause loss to the plaintiff's business.

The record does not indicate the grounds for the dismissal. Counsel for appellant seemingly thinks that, because of the provision in respect to the payment of liquidated damages, the court concluded the only remedy was an action at law; for much effort is expended in combating that proposition. We think that question was not reached by the court below, and, as the proof stands, need not be considered here.

Equity will not enjoin the breach of a negative covenant in a contract, unless it is made to appear that irreparable injury has resulted, or will in all probability result, to complainant from such breach. In cases where an established business

or trade and its good will have been sold, and as part of the transaction the seller has covenanted not to engage in the same business in the vicinity for a certain period, the mere breach strongly points to irreparable injury, in that the old business built up by him and his name will lose by having its customers drawn to a similar new enterprise when he enters it. By the purchase the buyer, upon a supposedly adequate consideration, secured a going business and its protection by the covenant from encroachment by the seller. Examples of such cases are furnished by *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415; *Andrews v. Kingsbury*, 212 Ill. 97, 72 N. E. 11; *Ropes v. Upton*, 125 Mass. 258; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419. We think the breach of a like covenant in an employment contract does not so readily indicate irreparable injury to the employer. Injury is not shown by the mere fact that the employee has left the service and has entered the employ of a rival concern. In *McCall Co. v. Wright*, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. W. 516, the rule applicable is, in substance: Where the services have been of such a character that the employee's name carries with it the good will of the employer's business, or where the employee has obtained knowledge of secrets in such business the disclosure of which would result in irreparable damage to the employer, it appearing that the subsequent employment was to obtain the benefit of the secrets, or there was danger that such secrets would be disclosed in the subsequent employment, injunctive relief will be granted. See, also, *Simms v. Burnette*, 55 Fla. 702, 16 L.R.A. (N.S.) 389, 127 Am. St. Rep. 201, 46 So. 90, 15 Ann. Cas. 690; *Osius v. Hinchman*, 150 Mich. 603, 16 L.R.A. (N.S.) 393, 114 N. W. 402. Tested by that rule this case fails. There is no evidence that Brock, in the position of manager, came in

contact with customers of plaintiff so as to obtain any personal hold upon the good will of the business, or that he had made or threatened to make any effort to secure or attract plaintiff's patrons. Plaintiff's business is selling men's and women's clothing on the instalment plan, the purchaser of the garment signing a contract to pay for the same in small future instalments. We have already adverted to the absence of any so-called trade secrets or peculiar methods possessed only by plaintiff in conducting this business; hence no reason exists for an injunction to protect these, under the rule of such cases as *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. Supp. 792. Nor is this case like one where a person is hired to work up a route or territory and serve the customers obtained therein, as, for instance, a milk or laundry route, and the like. There the employee comes directly in contact with the customers. They may be attracted to him personally, and are likely to go with him should he enter the service of a competitor. Typical cases of this sort are found in *Mutual Milk & Cream Co. v. Heldt*, 120 App. Div. 795, 105 N. Y. Supp. 661; *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 Misc. 368, 33 N. Y. Supp. 649; *American Ice Co. v. Lynch*, 74 N. J. Eq. 298, 70 Atl. 138; *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L.R.A. (N.S.) 119, 131 N. W. 412. The right to injunction there is rested on the principle that the employer's business is wrongfully interfered with, and such interference readily appears when the former employee invades the route in behalf of a new employer. Of course, cases relating to services of a unique kind, such as those of an opera singer, actor, or person of special qualifications, are not in point here.

It is readily seen that courts are and should be cautious in complying with the request of an employer to enjoin a former servant who has violated a covenant of this sort, from earning a livelihood. It may

well be surmised that such a covenant finds its way into an employment contract, not so much to protect the business, as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable. There-

**Injunction—
against breach
of contract—
absence of
damage.**

fore some proof of irreparable damage ought to be adduced in such a case before equitable relief by way of injunction will issue. In *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314 (affirmed in 142 N. Y. 621, 37 N. E. 564, on opinion of court below), where the defendant, in bad faith, flagrantly violated his agreement to work for the plaintiff, injunctive relief was nevertheless denied, the court saying: "It was shown that the plaintiff, immediately after defendant had broken his contract, substituted in his place another; and, while there is some slight evidence to show that the effect of the withdrawal of the defendant Hunt and the substitution of another resulted, for the time being, in some loss of advertising to the plaintiff's paper, yet it failed to establish what is required in cases of this kind; viz., that the injury was irreparable."

We quote from *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795: "Whether equity will intervene to restrain by injunction the violation of a restrictive covenant in relation to personal services depends in large measure upon whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract."

The substitute in the case at bar did, and no attempt was made to show an injury by any attempt to

seek or solicit plaintiff's customers or trade. *Magid v. Tannenbaum*, 164 App. Div. 142, 149 N. Y. Supp. 445.

Injunction will not be granted to enforce the provisions of a contract unless the court is satisfied that the enforcement will be just and equitable and will not work hardship or oppression. *Bradshaw v. Millikin*, 173 N. C. 432, L.R.A. 1917E, 880, 92 S. E. 161. As already remarked, this contract is so one sided as to obligations that the court might well hesitate at the enforcement of the one now invoked, and which is in restraint of the right to labor. Here when Brock was offered a position of uncertain tenure at a modest salary, he must also needs sign an ironclad contract binding him to do and refrain from doing many specified things, while plaintiff, the employer, assumed no obligation whatever. In *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348, the court refused to enjoin one who, when employed by the complainant as a collector in its business, conducted somewhat like plaintiff's here, had agreed not to work in the same line for a certain period after ceasing to work for complainant, saying of the latter: "He wants the court to restrain the defendant from working at a particular employment in two of the largest cities of the state. To many persons the right to labor is the most important and valuable right they possess; it is their fortune, constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice."

We think the situation presented relief asked. The dismissal was by the evidence in this record shows right. the absence of every element that Judgment affirmed. would incline a court to grant the

ANNOTATION.

Validity and enforceability of restrictive covenant in contracts of employment.

I. General considerations:

- a. In general, 861.
- b. Distinction between a covenant ancillary to the sale of a business and to a contract of employment, 863.
- c. Distinction between covenants applicable during term of employment and subsequently thereto, 863.

[No later decisions herein.]

II. Covenant not to accept service from anyone except employer during term of contract:

- a. In general, 864.
- [No later decisions herein.]
- b. As affected by character of service to be performed, 864.

III. Covenant not to engage in similar or competing business after termination of the contract:

- a. In general, 864.
- b. Reasonable restrictions; illustrative cases:
 1. Contracts for employment in mercantile or manufacturing business, 865.

This annotation supplements an annotation on the same subject in 9 A.L.R. p. 1456.

I. General considerations.

a. In general.

(Supplementing annotation in 9 A.L.R. 1456.)

A covenant by an employee not to engage in a business similar to that to which his employment relates, even where restricted as to time and territory, is not necessarily subject to enforcement to the extent of adjoining a breach thereof, since equity jurisdiction will be denied as an aid to the employer if, under all the circumstances, such relief would be unduly oppressive upon the employee, or if it is sought to protect the em-

III. b—continued.

2. Contracts for employment in professional capacity, 866.

- c. Unreasonable restrictions as to period of restraint, 867.
- d. Unreasonable restrictions as to territory, 867.
- e. [New.] Unreasonable restrictions as to character of business, 867.

IV. Effect of want of equity in contract:

- a. In general, 869.
- [No later decisions herein.]
- b. Sufficiency of consideration, 869.
- [No later decisions herein.]
- c. Lack of mutuality of obligation, 869.

V. Effect of provision for liquidated damages or penalty, 870.

VI. Injunctive relief as affected by comparison of injury to the parties, 870.

[No later decisions herein.]

VII. Effect of infancy of employee, 870.

[No later decisions herein.]

ployer as to matters which, under the circumstances, he is not entitled to be protected; and this is true even though, under some circumstances, the restraint as to time and space might be held to be reasonable. In this regard it may be observed that an employer is not entitled to be protected from competition by his former employee unless there is bad faith or unfair conduct by the employee, or the taking of an unfair advantage, or making an unfair use of his former employment. The late English cases show a tendency to restrict the enforcement of these covenants by employees unless the primary purpose thereof is to protect the employer from unfair practices or conduct by the employee in taking ad-

vantage of the prior relationships (See *infra*, III. e, "Unreasonable restrictions as to character of business.")

In *Attwood v. Lamont* [1920] 3 K. B. (Eng.) 571, in refusing to enforce any portion of an agreement by an employee, of this character, on the ground that it was too wide as to the character of the business, Lord Sterndale said that the tendency of the later decisions on the subject is towards a stricter application of the rule of enforcement, hence the result is that statements in some of the earlier cases require, in the light of the later decisions, considerable modification before acceptance.

In the same case *Younger, J.*, remarked: "The restraint must be reasonable not only in the interests of the covenantee, but in the interests of both the contracting parties. This disposes of the almost passionate protest of *Neville, J.*, in *Henry Leatham & Sons v. Johnstone White* [1907] 1 Ch. Eng. 189, 76 L. J. Ch. N. S. 119, 23 Times L. R. 144, that no agreement was invalid, provided the restriction was reasonably necessary for the protection of the employer, however oppressive to the employee and fatal to his chance of obtaining his own living in this country it might be. This is no longer so, although under *Bowen, L. J.*'s rule the statement was, I think, justified. This modern view of the House of Lords does not, however, involve the restoration of the old principle at one time obtaining, that the consideration received by the employee for his covenant must be adequate. It has not. 'The court no longer considers the adequacy of the consideration in any particular case,' says Lord Parker in *Herbert Morris v. Saxelby* [1916] 1 A. C. (Eng.) 688, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537, but it does involve, per Lord Shaw in the same case, and the consideration is of importance in the present case, that as the time of restriction lengthens or the space of its operation grows, the weight of the onus on the covenantee to justify it grows, too."

In *Bowler v. Lovegrove* [1921] 1 Ch. (Eng.) 642, 124 L. T. N. S. 695, 37 Times L. R. 424, [1921] W. N. 88, 65 Sol. Jo. 397, 90 L. J. Ch. N. S. 356, the court, referring to the later decisions on the subject, said that these decisions show clearly that when, as in the present case, the covenant is between employer and employee, the clause is *prima facie* invalid, and that to establish its validity it is incumbent on the plaintiff to prove that there existed some special circumstances which rendered it reasonably necessary for the protection of the plaintiff's business.

Upon this point in *Kaumagraph Co. v. Stampagraph Co.* (1921) 197 App. Div. 66, 188 N. Y. Supp. 678, the court said: "Covenants ancillary to a contract of employment restricting the employees' right to labor along the same line, either for themselves or others, upon the termination of their employment, are not favored by the law, and will not be enforced, unless there are special circumstances that render the restriction a reasonable protection to the employer's business, to prevent the employee from using knowledge that he has acquired in the course of his employment, of the secrets of the trade, methods, or processes of the employer. If the covenant, taking these circumstances into consideration, is not more extensive as to time or space than will afford a reasonable protection to the employer's business, it will be enforced. . . . Where, however, the employee brings to the employment skill previously acquired, and does not obtain, in the course of his employment, knowledge of the methods and processes which are exclusively within his employer's control and right to use, it cannot be said that such a restraint is reasonably necessary to the employer's protection. . . . In contradistinction to the sale of a business an employee ordinarily receives no consideration other than the fact of present employment; his labor is a full return for his wage. Contracts by employees, unreasonably limiting their right to pursue their trade or occupation in

the future, are held to violate public policy, because the employees' means for procuring a livelihood for themselves and family are thereby diminished. They are deprived of the power of usefulness, and the public is deprived of the benefit of the exercise by them of their knowledge and skill."

For the employer successfully to invoke equitable aid, he must also make it appear that he had suffered or would suffer irreparable damage on account of the breach complained of. *MENTER CO. v. BROCK* (reported herewith) ante, 857. It is also pointed out in this case that the courts should be cautious in enjoining the breach of covenant by an employee not to engage in a similar business, since it may well be surmised that such a covenant is incorporated into employment contracts, not so much to protect the employer's business, but needlessly to fetter the employee, and prevent him from seeking to better his condition.

b. Distinction between a covenant ancillary to the sale of a business and to a contract of employment.

(Supplementing annotation in 9 A.L.R. 1462.)

As observed in the annotation in 9 A.L.R. 1456, the courts are not less inclined to restrain the breach of a negative covenant by an employee, in effect obligating him not to engage for himself or as employee in a competing business, than they are to restrain the breach of similar covenants entered into by the seller of a business. This tendency upon the part of the courts is emphasized in late House of Lords decisions.

Upon this point in *Attwood v. Lamont* [1920] 3 K. B. (Eng.) 571, Younger, L. J., remarked: "Now, we are here dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy. Its modern developments have grown up under the shadow of the 'laissez faire' school of economics, and, until recently, have, in consequence, been uni-

formly in the direction of extending the principle of freedom of contract in relation to such bargains, a tendency that has not yet ceased to be operative when the covenant in question is one exacted from a vendor on the sale of the good will of his business. But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords, itself bound by comparatively few of the numerous previous decisions on the subject, took the opportunity in 1918, when the validity of a restrictive covenant entered into by an employee came in question before it, to examine the whole problem afresh, with the result that the supreme tribunal, for the guidance of every court, has now placed upon the permissibility of such covenants a limit which the general interest, including, of course, that of employees themselves, had not previously seemed to require. In consequence it must now, I think, be recognized in all courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service and the same covenant when found in an agreement for the sale of good will; and the dispute between the parties in this action must be decided with due regard to that difference. This declared difference is, as I have said, a matter of recent development, and although it has not been put forward by the House of Lords as a new departure, its effect upon previously accepted views has already been as complete as if it were. Moreover, it may be doubted whether all of its incidental consequences have even now become apparent."

And see *Kaumagraph Co. v. Stampagraph Co.* (1921) 197 App. Div. 66, 188 N. Y. Supp. 678, supra.

c. Distinction between covenants applicable during term of employment and subsequently thereto.

(No later decisions herein. For earlier cases, see annotation in 9 A.L.R. 1460.)

II. Covenant not to accept service from anyone except employer during term of contract.

a. In general.

(No later decisions herein. For earlier cases, see annotation in 9 A.L.R. 1463).

b. As affected by character of service to be performed.

(Supplementing annotation in 9 A.L.R. 1463.)

In *SHUBERT THEATRICAL CO. v. RATH* (reported herewith) ante, 846, it is held that an injunction would issue to restrain the breach of an agreement by acrobats giving the complainant an option upon their services for a continued term, where it appeared that the performance of these acrobats was so unique in character that substitutes could not be procured.

III. Covenant not to engage in similar or competing business after termination of the contract.

a. In general.

The grounds upon which the breach of a negative covenant by an employee is restrained appear in *Clark Paper & Mfg. Co. v. Stenacher* (1919) 108 Misc. 399, 177 N. Y. Supp. 614, affirmed in (1920) 193 App. Div. 924, 184 N. Y. Supp. 914, wherein the court said: "Following his entry into plaintiff's employ he was given full access to his business, taught its details and methods, and generally received careful and prolonged instruction therein, particularly in the branch of sales of wrapping paper. Notwithstanding this painstaking care, he was unable to earn for plaintiff sufficient profit during the first year to offset his salary and expenses. He was, nevertheless, retained, and the second year, partly by reason of improved business conditions and partly because of his increased experience and knowledge his earnings justified his employer's confidence in his ability when trained, and a profit was recovered from his work, in which he shared by increase of compensation. Presumably his third year would have had results equally good, if not better. In April, however, he left plaintiff's employ

without notice or warning. Competition in plaintiff's line of business is exceedingly vigorous, and, before leaving plaintiff, defendant had procured a position with one of his employer's competitors at a salary in excess of that which he was receiving. His work for plaintiff had been, as originally contemplated, almost entirely in the city of Rochester, where he had become well and personally known to all of plaintiff's customers. The value to him, as well as to a competitor of plaintiff, of the knowledge with which he had been supplied and the experience gained at plaintiff's expense, may be understood from the fact that he obtained his new employment largely on the strength of his acquaintance with the Rochester trade, and immediately upon leaving plaintiff was set at work to procure that trade for his new employer. This alone may or may not be deemed sufficient to demand the enforcement of his negative covenant to plaintiff, but another matter still more surely impugning his good faith and honesty of purpose must be considered therewith. He had, as said, been made fully acquainted with plaintiff's business, and almost immediately after entering the competitor's employ disclosed to that competitor certain matters connected therewith, generally unknown to the trade, and knowledge of which in the possession of a competitor could undoubtedly be used to plaintiff's great damage and loss. How many other of plaintiff's affairs he divulged to his new employer may only be surmised, but with his knowledge thereof, and his willingness to use same improperly, so established, the danger to plaintiff is evident. He had been trained at his request and solicitation until his services had become special, extraordinary and not easily replaced. He had become possessed of complete knowledge of plaintiff's customers, trade methods, and confidential information. He had disclosed some, and the inference that he will, if permitted, disclose others, is irresistible. The very nature of the situation is such that no action for money dam-

ages can avail to protect or recompense plaintiff for the wrong done and threatened; only the equity power of the court can be usefully interposed in his behalf."

b. Reasonable restrictions; illustrative cases.

1. Contracts for employment in mercantile or manufacturing business.

(Supplementing annotation in 9 A.L.R. 1468.)

In *Srolowitz v. Roseman* (1919) 263 Pa. 588, 107 Atl. 322, the court enjoined the breach of a provision by an employee not, for one year after the termination of the employment, either directly or indirectly to enter into a competing business, either for himself or in the employ of anyone engaged in a competing business within the city of Philadelphia. See *infra*, V., as to the effect of provision in this case for "liquidated damages."

In *J. & J. G. Wallach Laundry System v. Fortcher* (1921) 116 Misc. 712, 191 N. Y. Supp. 409, although expressing some doubt as to the validity of the covenant, the breach of the same was restrained where the employee of a laundry company, who was employed as a driver and solicitor over a specific route, covenanted in effect, upon leaving the plaintiff's employ, to surrender to it a full list of its customers, and that he would not solicit, directly or indirectly, similar work from any of the plaintiff's customers, and that for a period of two years after the termination of his services he would not, directly or indirectly, engage in the laundry business within a prescribed district; to wit, the route upon which he had served.

In *the Eastman Kodak Co. v. Powers Film Products* (1919) 189 App. Div. 556, 179 N. Y. Supp. 325, leave to appeal denied in (1920) 190 App. Div. 970, 179 N. Y. Supp. 919, where it appeared that the employer taught the employee a certain line of work in connection with the making of films and gave him possession of various processes and formulas secret in character, he agreeing not to disclose the same to others, and also

not to engage in a similar business for himself or for others in any part of the United States except Alaska, for the period of two years after the termination of his employment, the breach of this negative covenant was enjoined. Upon the merits the court said: "It is also apparent that the value of Warren's services to the defendant company arises from his experience while in the plaintiff's employ, growing out of the practical application of these trade secrets, and not otherwise. It is because of his special training and special knowledge that the defendant company must necessarily involve his bringing to its aid such knowledge as he has and which is entirely developed in connection with these secret processes. In this view, if he is permitted to enter this employ, injunctive relief in form against the imparting of such special knowledge is more than likely to prove inefficient. The mere rendition of the service along the lines of his training would almost necessarily impart such knowledge to some degree. Warren cannot be loyal both to his promise to his former employer and to his new obligations to the defendant company. Quite evidently it was exactly this situation which led to the making of the contract. We cannot say that the period of two years specified therein is unreasonable. Probably that lapse of time will have developed still further improvements and changes such as would render the knowledge now possessed by Warren more or less ineffectual in harm of the plaintiff. The contractual provision against his going into the photographic business is clearly aimed at preventing the acquisition by competitors of his special knowledge. Affirmance of the modifying order being so likely to render nugatory in practical effect the injunctive province against the imparting of knowledge and the resulting damage to the plaintiff, possessing such possibilities of serious interference with its lawful business and such extensive resulting damage, we should not, in advance of trial, give our

sanction to Warren's taking his special training, dependent and interwoven as it is, with his special knowledge of the secret processes of the plaintiff, into the camp of a competitor obviously engaged in systematic effort to acquire to itself precisely that benefit."

In *Fred A. H. Garlich's Agency Co. v. Anderson* (1920) — Mo. App. —, 226 S. W. 978, an employee of a company who was also a director thereof, was restrained from breaching a covenant not to engage in a competing business for the period of five years. The covenant provided that the employee should not, either for himself or for his employees or associates in any capacity, as a partner or otherwise, with any person or persons or corporation, directly or indirectly, through an office located in Buchanan county, Missouri, or at any other place, engage in any branch of the insurance business, or permit any other person, corporation, or association to use his name in any branch of such business within the limits of Buchanan county, for a period of five years after the termination of the contract; it also provided that the contract might be terminated by the agency company for wrongful conduct of the employee; it was held that this provision applied where the agency company terminated the contract for wrongful conduct of the employee in violation of the provisions of the contract.

In *Spence v. Mercantile Bank* [1921] 37 Times L. R. (Eng.) 745, there was involved the question of the validity of a provision in the contract of employment, in effect that no employee subscribing to a pension fund would be entitled to any return in respect of contributions to the fund if he left the service of the employer and entered the service of "any other Eastern exchange bank." Since the validity of the provision was presented to the court in the footing that the rule was to be treated in the same way as if it had been a covenant in restraint of trade, the court dealt with the question on that basis, and held that the rule was not wider than

was reasonably necessary to protect the employer.

2. Contracts for employment in professional capacity.

(Supplementing annotation in 9 A.L.R. 1472.)

In *Fitch v. Dewes* [1921] 2 A. C. (Eng.) 158, a covenant by a person accepting employment as a solicitor's clerk not to engage in the same profession within 7 miles of the town hall in the place of employment was held valid, and a breach thereof was enjoined. It appeared in this case that the employee had for many years been in the employment of the employer, and during this time he had come in contact with a large portion of the latter's clients.

Upon the point that a covenant, although unlimited as to time, will nevertheless be held valid where it was reasonably limited as to space in the last cited case, Viscount Cave said: "Where there is a good will to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself, but also to his successors in the business, and this although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. Here the practice to be protected is that of a solicitor, to which a good will is no doubt attached. It is manifest that a person employed in such a practice as managing clerk must, in the course of his duties, acquire a knowledge of the affairs, the documents, and the disposition of the clients of the business, such as to give him a special equipment which he could, if not restrained by contract, use in obtaining employment as their legal adviser, and that in this manner the good will of the employer's business might be impaired and perhaps destroyed. Now, the object being to protect the employer's business against the use of that special advantage, was it unreasonable to extend this covenant to the life of the employee? I think not. It is impossible to say that there must

in every case be some specified limit of time defined by a figure. Nor can we say that the contract ought to be confined to the life of the covenantee, for he might die in the next year or so, and the good will might then be lost to his successors. It 'was no doubt thought necessary to continue the protection throughout the period during which the covenantee and his successors in interest might carry on the practice, and for that purpose to bind the appellant (so far as the limited area was concerned) for the remainder of his life. I cannot think that in the circumstances of this case the restriction imposed was unreasonable from any point of view."

c. Unreasonable restrictions as to period of restraint.

(Supplementing annotation in 9 A.L.R. 1473.)

In *Kaumagraph Co. v. Stampagraph Co.* (1921) 197 App. Div. 66, 188 N. Y. Supp. 678, the appellate division reversed the action of the lower court in enjoining the breach of a negative provision by employees, in effect, not to engage in a similar business at any time, it being unlimited as to time and not limited as to territory, except within the United States, east of the Mississippi, and the Dominion of Canada, and it not appearing that the employee had gained any of the business secrets of the employer; and it also appearing that he had been engaged in the same business for many years prior to accepting employment with the complainant. The court said that the purpose of the covenant was not to protect the plaintiff from the revelation or use of the secrets of its business, but was to remove from possible competition one whose knowledge and skill acquired before he came into its employ, had been found valuable to it, and to prevent that same knowledge and skill being utilized for the benefit of the employee and others after he had ceased to be employed by the plaintiff. Such a covenant, the court said, was an unreasonable restraint of trade and competition, and

will not be enforced in a court of equity.

d. Unreasonable restrictions as to territory.

(Supplementing annotation in 9 A.L.R. 1473.)

A contract is a restraint of trade and void where it prohibits an employee from, directly or indirectly, giving any person any information in regard to the whole or any part of the plant or processes of the employer, and from doing anything which might injure, by competition or otherwise, the employer, its successors or assigns, in the business, since the restraint is unlimited as to time and place. *Victor Chemical Works v. Iliff* (1921) 299 Ill. 532, 132 N. E. 806.

In *Ropeways Limited v. Hoyle* (1919) 88 L. J. Ch. N. S. (Eng.) 446, 120 L. T. N. S. 538, 35 Times L. R. 285, the court refused to enforce a covenant world wide in its territorial scope, not to engage in a business of a certain kind, on the ground that the employee would be unable to divulge any trade secrets of the employer or solicit from the employer's customers, since the character of the business of the employer was of such a nature as to make it extremely improbable that the employee could have obtained any influence with the employer's customers.

So, in *Clarke, S. & Co. v. Solomon* (1921) 37 Times L. R. (Eng.) 176, affirming (1920) 36 Times L. R. 759, the court refused to restrain the breach of a covenant by a person entering the employ of another as a commercial traveler, where the covenant as to territory was broader than the field covered by the employee. The court held, also, that the contract was not severable.

e. Unreasonable restrictions as to character of business.

While the case (*Bowler v. Lovegrove* [1921] 1 Ch. (Eng.) 642) was really disposed of upon the ground that the covenant was not violated, nevertheless the court also considered the validity of a covenant not to engage in a certain business for a

period of time within a designated place. In holding the agreement to be invalid, since it was not necessary in order to protect the employer from the wrongful use by the employee of any confidential information he received, the court clearly distinguished between the right of the employer so to protect himself and his right to protect himself against competition, and his right in the latter regard is denied. On this point the court said: "In my opinion this attempt fails. It is true that the defendant came into personal contact with the plaintiffs' customers. But this fact loses its significance when the nature of the business carried on by the plaintiffs and the duties of the defendant in such business are considered. The plaintiffs' customers with whom the defendant came into personal contact were not the ordinary recurring customers such as exist in most businesses. Although Mr. Blake asserted that not all of the customers of the plaintiffs in their auctioneers' and estate agents' business were customers in one isolated transaction only, and said that such of their customers as had more than one property to sell sometimes came again if the plaintiffs had effected a good sale for them, yet when pressed he could not remember the name of a single customer who had done so. Moreover the plaintiffs admitted that (as is usual in this class of business) persons in Portsmouth and Gosport who are desirous of selling or letting their properties generally placed such properties in the hands of other estate agents in Portsmouth besides the plaintiffs, and advertised them for sale in the newspapers, and that persons in Portsmouth and Gosport who were desirous of becoming purchasers or tenants of property went to other estate agents in Portsmouth besides the plaintiffs, to see what they had on their registers, and also advertised their wants in the local newspaper. So, the wants of every customer were generally known in the locality, and each customer was open to be (and no doubt was in fact) canvassed by every estate agent in the district.

The fact is that it is the essence of the plaintiffs' business of auctioneers and estate agents to obtain a perpetual succession of new customers by canvassing, and it was expressly for this purpose that the defendant and the other canvassing and negotiating clerks were employed. In these circumstances it is difficult to see what knowledge or information the defendant could have obtained in the course of his employment which he could, if he had been so minded, have misused to the injury of the plaintiffs after he had left such employment. Any skill and efficiency in canvassing or negotiating, and any knowledge of the locality which the defendant had acquired in the plaintiffs' service, are his own to make use of, if he chooses, for competing with the plaintiffs."

In *Whitmore v. King* (1918) 119 L. T. N. S. (Eng.) 533, it is held that a covenant is invalid as embracing in its scope more than was necessary to protect the employer, where it provided that the employee was not to engage within the prohibited area in any business whatsoever in any way connected with the wood business and the slate business, the employer being engaged in the buying at wholesale and selling at retail of wood and slate. The court said that the restriction was not limited to the wood business or the timber business as carried on by the employer. It was urged by counsel for the plaintiff that what was really meant was that the defendant was not to engage in any business which was a section of a branch or department of the trade carried on by the employer. But the language does not bear that interpretation; and so to hold "would be to remodel the agreement altogether; to redraw it in a different sense. The restriction is against carrying on any business whatsoever in any way connected with the wood business within the prohibited area. . . . The language as so drawn is much wider than anything necessary for the reasonable protection of the business of the vendors, and that being so, it is a covenant which the courts will not enforce."

In *Attwood v. Lamont* [1920] 3 K. B. (Eng.) 571, there was a negative covenant by a person accepting employment as the head of one department in a retail department business, that at any time thereafter, either in his own behalf or in behalf of others, he would not engage in the trade of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentleman's, ladies, or children's outfitter, at any place within a radius of 10 miles of the employer's place of business; this provision was held to be broader than necessary to protect the employer against any knowledge that the employee might gain as to the employer's business, and hence, broader than necessary for the legitimate protection of the employer. It was also held not to be a severable agreement so that the agreement might be confined to that portion of the business of which the employee had charge, and hence the entire agreement was held to be invalid and unenforceable.

It is pointed out by Younger, J., that "an employer is not entitled by a covenant taken from his employee to protect himself after the employment had ceased against his former servant's competition per se, although a purchaser of good will is entitled to protect himself against such competition on the part of his vendor. There are at least two reasons given for this distinction. An employer may not, after his servant has left his employment, prevent that servant from using his own skill and knowledge in his trade or profession, even if acquired when in the employer's service. That skill and knowledge are only placed at the employer's disposal during the employment. They have not been made a subject of sale after that employment has ceased: . . . The employer's good will is always necessarily subject to the competition of all persons, including the employee, who choose to engage in a similar trade. 'The employer in such a case is not endeavoring to protect what he has, but to gain a special advantage he could not otherwise secure.' Accordingly covenants against competition by a former serv-

ant are as such not upheld; and the permissible extent of any covenant imposed upon a servant must be tested in every case with reference to the character of the work done for the employer by the servant while in the service, and by the consideration whether in that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the covenantee. 'The reason, and the only reason,' says Lord Parker in *Morris v. Saxelby* [1916] 1 A. C. (Eng.) 700, 'for upholding such a restraint on the part of an employee, is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.' "

IV. Effect of want of equity in contract.

a. In general.

(No later decisions herein. For earlier cases, see annotation in 9 A.L.R. 1478.)

b. Sufficiency of consideration.

(No later decisions herein. For earlier cases, see annotation in 9 A.L.R. 1479.)

c. Lack of mutuality of obligation.

(Supplementing annotation in 9 A.L.R. 1480.)

Although an agreement by an employee not to engage in a competing business with his employer for a period of eight years is unilateral in form, there being no reciprocal agreements by the employer, and there being no definite time for the employment, it being possible for either party to terminate the same at any time, the stipulation will nevertheless be enforced where the parties have carried the contract out according to its intent, and the employment

therein provided for has been fully and completely given for so long a period as the employee desired it to continue, and has been finally terminated by him, he during this time having possessed himself of the very knowledge and opportunities misuse of which by him the negative covenant was intended to guard against. *Clark Paper & Mfg. Co. v. Stenacher* (1919) 108 Misc. 399, 177 N. Y. Supp. 614, affirmed in (1920) 193 App. Div. 924, 184 N. Y. Supp. 914.

V. Effect of provision for liquidated damages or penalty.

(For earlier cases, see annotation in 9 A.L.R. 1481.)

In *Srolowitz v. Roseman* (Pa.) supra, III. b, 1, breach of the covenant was enjoined notwithstanding that there was a provision for what was denominated "liquidated damages," but there was also a provision to the effect that the payment of "liquidated

damages" should not preclude the employer from taking such legal actions or proceedings as he may have against the other party in law and in equity for the breach of the covenant, and that the liquidated damages should be payment in addition to the other damages, and not in substitution thereof. The decree granting an injunction was affirmed on the conclusions below, which included a conclusion that "the penal sum or sums named in the contract are not liquidated damages, and do not oust the jurisdiction of a court of equity.

VI. Injunctive relief as affected by comparison of injury to the parties.

(No later decisions herein. For earlier cases, see annotation in 9 A.L.R. 1482.)

VII. Effect of infancy of employee.

(No later decisions herein. For earlier cases see 9 A.L.R. 1483.)

A. G. S.

FRANCIS H. LEE, Claimant.

WASHBURN & HAYWOOD CHAIR COMPANY, Employer.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Appt.

Massachusetts Supreme Judicial Court — March 2, 1922.

(— Mass. —, 134 N. E. 268.)

Workmen's compensation — injury by play of fellow employees — arising out of employment.

Injury to a workman by being pushed by the body of a fellow workman who himself was pushed by a third in play in which the injured workman took no part, while they were on their way to ring out on the time clock at the noon hour, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 882.]

APPEAL by the insurer from a decree of the Superior Court for Suffolk County in favor of claimant in a proceeding under the Workmen's Compensation Act to recover compensation for personal injuries received while in the course of his employment. *Reversed.*

It was found by the industrial accident board that the injury to plaintiff arose out of and in the course of his employment; that "the conditions

under which the work of registering time was required to be performed called for all employees to ring out at 12 o'clock noon." One member of the board dissented.

Further facts appear in the opinion of the court.

Messrs. Sawyer, Hardy, Stone, & Morrison and Gay Gleason for appellant.

Crosby, J., delivered the opinion of the court:

While the employee was on the premises of his employer, and, after leaving the building in which he worked, was about to enter the one where the time clock was, in order to ring out his time at noon, he was knocked down, by a fellow workman who was pushed out of the doorway of that building by another employee, and received injuries for which he seeks compensation.

The claimant's injuries were the result of fooling or horseplay of fellow employees, in which he took no part. The board member found that he "was the innocent victim of a friendly scrap between three other employees, one of whom was thrown out of the doorway, his body striking the claimant and throwing him to the ground, causing the injury to his shoulder and back."

As he was on his way to the time clock during the noon hour to ring out his time, it is obvious that his injuries were received in the course of his employment. The question remains whether the injuries arose out of his employment. It has been held by this court that, where an employee is injured as a result of fooling or play by employees in which he participates, such injury does not originate in any risk connected with, and caused by, his employment; and that such injury does not arise out of the employment within the meaning of the Workmen's Compensation Act (Laws 1911, chap. 751, amended by Laws 1912, chap. 571). *Moore's Case*, 225 Mass. 258, 114 N. E. 204. The precise question presented by this record is whether an injury received by an employee in the course of his employment, as the result of fooling or play by other employees in which he takes no part, can be said to have

arisen out of the employment. While this issue has been decided in other jurisdictions, it has not been directly adjudicated by this court. It is clear that there was no causal connection between the employment and the injury. The injury did not arise because the employee was exposed, by the nature of his employment, to some peculiar danger; it did not follow as a natural incident of his work; and it does not appear "to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *McNicol's Case*, 215 Mass. 497, 499, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 552. The interpretation of the Workmen's Compensation Act enunciated in the case last cited, when applied to the facts in the present case, makes it plain that the injury to the claimant cannot be said to have arisen

out of his employment. The pushing of Wallet out of the doorway by other employees and

**Workmen's compensation—
injury by play of fellow employees—
arising out of employment.**

against the claimant, assuming it was a wrongful act, was not within the scope of his employment. Such acts, whether done in a spirit of play or from a malicious motive, have no relation whatever to the employment; and they are wholly outside the scope of the employment of those who caused the injury.

The weight of authority in England and in this country is in harmony with the result we have reached. *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Fitzgerald v. Clarke & Son*, 1 B. W. C. C. 197, [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101; *Craske v. Wigan*, 2 B. W. C. C. 35, [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo.

560; *Wilson v. Laing*, 2 B. W. C. C. 118, [1909] S. C. 1230, 46 Scot. L. R. 843; *Blake v. Head*, 5 B. W. C. C. 303, 106 L. T. N. S. 822, 28 Times L. R. 321; *Hulley v. Moosbrugger*, 88 N. J. L. 161, L.R.A. 1916C, 1203, 95 Atl. 1007; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, L.R.A.1916D, 968, 156 N. W. 143; *Chicago v. Industrial Commission*, 292 Ill. 406, 15 A.L.R. 586, 127 N. E. 49; *Tarpper v. Weston-Mott Co.* 200 Mich. 275, L.R.A.1918E, 507, 166 N. W. 857; *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, L.R.A.1916F, 1164, 158 Pac. 212, 12 N. C. C. A. 789; *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 99 Neb. 321, L.R.A. 1916D, 970, 156 N. W. 509. See *Rayner v. Sligh Furniture Co.* 180 Mich. 168, L.R.A.1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851.

The cases of *Craske v. Wigan*, 2 B. W. C. C. 35, [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560; *Plumb v. Cobden Flour Mills Co.* 7 B. W. C. C. 1, [1914] A. C. 62, 7 B. R. C. 128, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, Ann. Cas. 1914B, 495; *Simpson v. Sinclair*, 10 B. W. C. C. 220, [1917] A. C. 127, 86 L. J. P. C. N. S. 102, 116 L. T. N. S. 609, 33 Times L. R. 247, 61 Sol. Jo. 350, Ann. Cas. 1917D, 188, cited in the majority decision of the industrial accident board, are not at variance with the conclusion which we have reached. *Willis v. State In-*

dustrial Commission, 78 Okla. 216, 190 Pac. 92, and other cases cited in the decision, so far as they are contrary to the result arrived at in the case at bar, we cannot follow.

Cases which hold that an injury resulting from acts of a fellow employee who was known by the employer as a man of dangerous disposition, or who was known to be given to play or fooling, have no application to the present case. *McNicol's Case*, *supra*. See also, *Reithel's Case*, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; *Cranney's Case*, 232 Mass. 149, 15 A.L.R. 584, 122 N. E. 266; *Marshall v. Baker-Vawter Co.* 206 Mich. 466, 173 N. W. 191; *William Baird & Co. v. M'Graw*, 13 B. W. C. C. 233, 89 L. J. P. C. N. S. 188, 64 Sol. Jo. 650, 57 Scot. L. R. 491, 150 L. T. Jo. 4.

As the evidence did not warrant a finding that the claimant's injuries arose out of his employment, the decree must be reversed and a decree entered in favor of the insurer.

So ordered.

NOTE.

The right to compensation under the Workmen's Compensation Act for injuries sustained through horseplay or fooling is the subject of the annotation in 13 A.L.R. 540, which is supplemented by the annotation following *TWIN PEAKS CANNING CO. v. INDUSTRIAL COMMISSION*, post, 882.

TWIN PEAKS CANNING COMPANY et al. v. INDUSTRIAL COMMISSION OF UTAH.

Utah Supreme Court — March 10, 1921.

(— Utah, —, 196 Pac. 853.)

Workmen's compensation. — horseplay — course of employment.

1. That a boy went to another floor of the factory where he was employed

to visit for a purpose of his own and in no way connected with his duties, upon the temporary stopping of the machinery, and while there cut the power off the elevator upon which a coemployee was riding for a practical joke, does not prevent his death by being caught in the machinery when attempting to restore the power, from arising in the course of his employment, and compensation may therefore be awarded for his death under a statute permitting such award for injuries in course of employment.

[See note on this question beginning on page 882.]

Appeal — from Industrial Commission — examination of evidence.

2. The court will, in a proceeding to review the decision of the Industrial Commission, examine the evidence only to ascertain whether or not there is any substantial evidence to support the findings of the commission and whether it has acted either without or in excess of its jurisdiction.

[See 28 R. C. L. 828, 829.]

Workmen's compensation — effect of disregard of rule.

3. The mere disregard by an employee of a rule of the master, which results in his injury, does not deprive him of the right to compensation under the Workmen's Compensation Act if the statute excludes only those injuries which are purposely self-inflicted.

APPLICATION for a writ of review to the Industrial Commission to review its award under the Workmen's Compensation Act in favor of applicant for the death of her son. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Booth, Lee, Badger, & Rich, for plaintiffs:

There was nothing to show that the deceased was doing anything whatsoever desirable or convenient in connection with his employment at the time he sustained his injuries. What the deceased did was wholly unconnected with his employment and has no causal relation to his employment.

Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 7 B. R. C. 128, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, 7 B. W. C. C. 6, Ann. Cas. 1914B, 495; Whitehead v. Reader [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387, 3 W. C. C. 40; Reimers v. Proctor Pub. Co. 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738; Gonzales v. Lee Moor Contracting Co. 2 Cal. Ind. Acc. Com. Dec. 302; Weighill v. South Heaton Coal Co. 4 B. W. C. C. 141; Parker v. Hambrook [1912] W. N. 205, 107 L. T. N. S. 249, 56 Sol. Jo. 750, [1912] W. C. Rep. 369, 5 B. W. C. C. 608, Ann. Cas. 1913C, 1; Koza's Case. 236 Mass. 342, 128 N. E. 400; Rochford's Case, 234 Mass. 93, 124 N. E. 891; Moyer v. Packard Motor Car Co. 205 Mich. 503, 171 N. W. 403; Di Salvo v. Menihan Co. 225 N. Y. 123, 121 N. E. 766; Kuca v. Lehigh Valley Coal

Co. 268 Pa. 163, 110 Atl. 731; Yodakis v. Alexander Smith & Sons Carpet Co. 193 App. Div. 150, 183 N. Y. Supp. 768; Andractan v. Cobb, Mass. Workm. Comp. Cas. No. 1582; McHenry v. American Mut. Liability Ins. Co. 2 Mass. Workm. Comp. Cas. 789; Pacific Coast Casualty Co. v. Pillsbury, 31 Cal. App. 701, 162 Pac. 1040; Kowalek v. New York Consol. R. Co. 229 N. Y. 489, 128 N. E. 888; Ross v. John Hancock Mut. L. Ins. Co. 222 Mass. 560, 111 N. E. 390; Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N. E. 162.

Messrs. Harvey Cluff, Attorney General, and J. Robert Robinson, Assistant Attorney General, for defendant:

The Workmen's Compensation Act should be liberally construed, and doubts respecting the right to compensation should be resolved in favor of the employee or his dependents.

Ogden City v. Industrial Commission, — *Utah*, —, 193 *Pac.* 857; State Road Commission v. Industrial Commission, 56 *Utah*, 252, 190 *Pac.* 544, 20 N. C. C. A. 65.

The supreme court will not weigh the evidence, but will examine the same for the purpose, only, of determining whether there is any substantial competent evidence to sustain the finding or to support the award made by the Commission, and where it does not clearly and indubitably appear

that the discretion of the Industrial Commission has been abused, its decision is final and unassailable.

Globe Grain & Mill. Co. v. Industrial Commission, — Utah, —, 193 Pac. 642; *Geo. A. Lowe Co. v. Industrial Commission*, 56 Utah, 519, 190 Pac. 934; *McVicar v. Industrial Commission*, 56 Utah, 342, 191 Pac. 1089.

Where an employee is performing an act while on the premises where he is employed to work, which is customary among the employees, and the employer has acquiesced in such custom for a considerable length of time, an injury received by such employee when so engaged is held to arise within the course of employment, although the act causing the injury is only incidental thereto.

Re Loper, 64 Ind. App. 571, 116 N. E. 324; *Phil. Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 13 A.L.R. 524, 204 S. W. 152; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Gurski v. Susquehanna Coal Co.* 262 Pa. 1, 104 Atl. 801; *Re Ayers*, 66 Ind. App. 458, 118 N. E. 386; *Robinson v. State*, 93 Conn. 49, 104 Atl. 491; *Baltimore Car Foundry Co. v. Ruzicka*, 132 Md. 491, 4 A.L.R. 113, 104 Atl. 167; *Rish v. Iowa Portland Cement Co.* 186 Iowa, 443, 170 N. W. 532; *Holt Lumber Co. v. Industrial Commission*, 168 Wis. 381, 170 N. W. 366; *Thomas v. Proctor & G. Mfg. Co.* 104 Kan. 432, 6 A.L.R. 1145, 179 Pac. 372; *Barber v. Jones Shoe Co.* — N. H. —, 108 Atl. 690.

An accident arises in the course of employment if it occurs while the employee is doing what a man so employed may reasonably do in the time during which he is employed, and at a place where he may reasonably be during that time.

Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458; *Barber v. Jones Shoe Co.* — N. H. —, 108 Atl. 690; *White v. Kansas City Stock Yards Co.* 104 Kan. 90, 177 Pac. 522; *Thomas v. Proctor & G. Mfg. Co.* 104 Kan. 432, 6 A.L.R. 1145, 179 Pac. 372.

The employment of an employee is not broken by mere intervals of leisure.

Honnold, Workmen's Comp. p. 379; *State Road Commission v. Industrial Commission*, 56 Utah, 252, 190 Pac. 544, 20 N. C. C. A. 65; *Northwestern Iron Co. v. Industrial Commission*, 160 Wis. 633, 152 N. W. 416; *Humphrey v. Industrial Commission*, 285 Ill. 372, 120 N. E. 816; *Sundine's Case*,

218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616.

There is nothing in the evidence to indicate that the brief visit of the deceased to the second floor was at all out of the ordinary, or was inconsistent with the duty to his employer. He was still "on duty," notwithstanding his temporary absence from his place of employment, and under such circumstances accidents are held to arise within the course of employment.

North Carolina R. Co. v. Zachary, 232 U. S. 260, 58 L. ed. 596, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 119, 58 L. ed. 146, 34 Sup. Ct. Rep. 26.

Frick, J., delivered the opinion of the court:

This is an original application to this court for a writ of review. The application is made pursuant to the provisions of chapter 100, Utah Laws 1917, as the same is carried into Utah Comp. Laws 1917, §§ 3061 to 3165, inclusive, and as amended by chapter 63, Utah Laws 1919.

One Edith Bohling made application in due time and form to the Industrial Commission of Utah, hereinafter called Commission, to obtain compensation for the death of her son, one Charles Brandley, who was fourteen years and ten months of age at the time of his death. The Commission awarded the mother compensation as a partial dependent in the sum of \$7.71 per week for a period of 312 weeks, and, in addition thereto, the sum of \$150 for funeral expenses. The award was based upon the decision and findings of the Commission. The decision reads as follows: "It appears that Charles Brandley was killed in an accident on the 11th day of August, 1920, at Murray, Utah. Decedent had been employed by the defendant Twin Peaks Canning Company for several weeks, his work consisting of caring for the cans in the capping department on the main floor. About the hour of 11:30 A. M. the machine had stopped, and for some purpose the deceased left his place of work, and,

using the freight elevator, ascended to the next floor, and, in watching another boy descend in a like manner, playfully shut off the power of the elevator, causing the elevator to stop between the first and second floors. The decedent climbed to the second floor and turned the power on. The elevator ascended at once and crushed the decedent. It is alleged by the applicant, Edith Bohling, that she is the mother of the decedent by a former marriage; that subsequently she was married to Joseph Bohling and maintained a home in which the decedent had lived for the past seven years; that all earnings of the decedent, both in the past and at the time of said accident, were given to the applicant, and used for herself and family's support."

While the findings of fact in substance follow the decision, yet the findings are very general, merely indicating when and where the accident occurred, the average weekly wage earned by the deceased, and that the applicant was "partially dependent upon the deceased." In the so-called conclusions of law, after fixing the amount to be paid, etc., the Commission further says: "It appears that the employees were cautioned against using the elevator except under conditions which the work demanded, and then only by boys whose work required it. However, this rule does not appear to have been enforced; also, that not only the decedent, but other boys, used the elevator to go to the second floor; also, that they left their post when the machines were stopped during working hours. This practice was indulged in to such an extent as to suggest common practice. The Commission concludes that the decedent was within the course of his employment at the time of the accident, although he may not have been doing that which his employment required, but that which his employment permitted and allowed. The question of whether or not the decedent had business in going to the second floor is not now a matter

that can be definitely determined. It does appear, however, that he had made the trip before for the purpose of talking to a friend; also, that he sometimes ate his lunch on said floor."

It is not easy to understand why the foregoing statements are incorporated into the so-called "conclusions" of the Commission. It is, however, immaterial what the statements or findings of the Commission are called, and we have inserted them here only for the purpose of showing what induced the Commission to make the award in this case.

The facts, in substance, are as follows:

Charles Brandley, hereinafter called the deceased, entered the employ of the Twin Peaks Canning Company, hereinafter called Canning Company, on the 21st day of July, 1920. The Canning Company operated a canning establishment composed of a two-story building, and the deceased and his "chum," Alvin Mitchell, were working on the first floor while several other boys were working on the second floor of the establishment. There were perhaps a dozen or fifteen boys engaged in the establishment. It was the duty of the deceased and Mitchell to "catch" the cans after they were filled with vegetables in the canning room on the second floor, when the same were passed down to them by gravity by means of what is called a "chute," and to place the cans at a place indicated for them on the first floor. There was an electric elevator connecting the two floors which was used to take the empty cans as they arrived at the canning establishment to the second floor. Neither the deceased nor Mitchell was required to perform any duties whatever on the second floor, nor was either required to go there for any purpose. It seems that the cans went through some sort of a machine on the second floor, and that was also the case when they reached the first floor, and the duties of the deceased and Mitchell were confined to the ma-

chine on the first floor. The cans, however, would not be placed in the chute in a continuous stream; so that there were intervals of rest, or intermissions, at which times the machines were not in operation. The deceased and Mitchell were, however, supposed to remain at their posts so that they would be prepared to take up their work at any time, and as soon as the machines commenced operating after the intermissions, which might occur at any moment. The evidence is to the effect that when the machines were at rest both the deceased and Mitchell, and especially the deceased, would frequently, by means of the elevator, ascend from the first to the second floor. The deceased sometimes, during the noon hour, would go to the second floor by means of the elevator to eat his lunch, which he brought from home. One of the boys testified that the deceased went up to the second floor on the elevator "almost daily" between the 21st day of July, 1920, the day the deceased commenced work, and the 11th day of August following, when he was killed. On the 11th day of August aforesaid the deceased and Mitchell were working on the first floor as before stated, when, at about 11:30 A. M., the machines stopped, and the deceased, by means of the elevator, went from the first to the second floor, operating the elevator himself. After the deceased had reached the second floor, and after the elevator had been returned in a manner the testimony does not make very clear to the first floor, Mitchell also went into the elevator and adjusted the switch so as to start the elevator upwards. It seems there was one switch on the elevator by means of which the power could be turned on to operate the elevator, and that there was also another switch on the second floor by means of which the power could be turned either on or off at that place. When Mitchell thus attempted to go from the first to the second floor, and when he had reached a point "a little more than

halfway up" between the two floors the deceased, in attempting a practical joke or prank, disengaged the switch on the second floor and shut off the power from the elevator, leaving Mitchell in it midway between the two floors. Mitchell, it seems, did not disengage the switch on the elevator, but left it so that if the power were turned on the elevator would continue upwards. He, however, climbed up from the elevator where it was stopped by the deceased to the second floor. While the deceased and Mitchell were on the second floor, they were "joking, talking, and laughing" with the other boys who were working on that floor. There was an elevator gate on the second floor which worked automatically, so that when the elevator came up the gate would lift upwards out of the way of those using the elevator, and when the elevator went down the gate would slip into place to prevent anyone from walking or falling into the elevator shaft. When the deceased had thus stopped the elevator midway between the two floors the gate was in place. The visit of the boys on the second floor had continued only for a short time on the day in question when there was some indication that the machines would go into action, and both Mitchell and the deceased were anxious to get back to their machines on the first floor. The deceased thus went to the elevator and leaned over or climbed on to the gate aforesaid and adjusted the switch on the second floor so as to let on the power. He, it seems, did this without knowing or realizing that Mitchell had left the switch in the elevator connected when he climbed out of it to the second floor. As soon, therefore, as the deceased connected the switch on the second floor, and as he was leaning over or was on top of the gate, the elevator commenced to ascend, and the deceased was carried up on the gate against the beam, which dislocated his neck, causing almost instant death. The accident thus occurred as the result of what

in the books is ordinarily denominated as practical joking, horseplay, or pranks.

There is evidence in the record that the boys on the first floor were forbidden to use the elevator, and that only a few days preceding the accident the manager had again specially instructed them not to use the elevator to pass from one floor to the other. Mitchell, the chum of the deceased, was positive in his statement that he knew nothing about such an order, and that he had received no instruction or caution, although the elevator had been used frequently by him, and the deceased, and others as hereinbefore stated. Another boy, however, testified that he heard the manager tell a large number of the boys not to use the elevator, and that he felt quite positive, but not absolutely certain, that the deceased was present among the number. The manager also testified that he was of the impression that the deceased was present when he cautioned the boys, but he could not state positively that such was the case. There is no direct evidence, however, that the Canning Company knew that the boys were using the elevator for the purpose aforesaid, or the extent thereof. In view, however, that the manager testified that only a short time before the accident he had cautioned the boys against using the elevator, he, therefore, must have heard that they were using it, or else he personally must have known that they, or some of them, were doing so.

While the case is not one, therefore, that it can be said that the Canning Company encouraged or authorized the use of the elevator for the purpose for which the boys were using it, yet the nature and frequency of the use were such that the Commission was authorized to infer from the evidence that the Canning Company either knew or should have known that the boys were using the elevator to pass from the first to the second floor, although they could have passed between the

two floors by means of a stairway which was intended for that purpose.

We remark that, in view of the many leading questions that were propounded to the witnesses both by the referee and by counsel representing the several parties, it has been somewhat difficult to make a statement within the limits of an ordinary opinion which would thoroughly reflect all of the peculiar shades respecting the facts and circumstances. From a careful reading of the statements of all of the witnesses, however, we are satisfied that the foregoing statement covers all the essential elements.

Counsel for plaintiffs insist that, in view of the evidence, the accident did not arise "in the course of the employment," and that the evidence does not support the findings of facts of the Commission, or justify its conclusions of law.

This court is now firmly committed to the doctrine that it will examine into the evidence only to ascertain whether

there is any substantial evidence in support of the findings of the Commission, and whether it has either acted without or in excess of its jurisdiction. We refer to the following cases: *Geo. A. Lowe & Co. v. Industrial Commission*, 56 *Utah*, 519, 190 Pac. 934; *McVicar v. Industrial Commission*, 56 *Utah*, 342, 191 Pac. 1089; *Littsos v. Industrial Commission*, — *Utah*, —, 194 Pac. 338; *Utah Fuel Co. v. Industrial Commission*, — *Utah*, —, 194 Pac. 122; *Ogden City v. Industrial Commission*, — *Utah*, —, 193 Pac. 857; and *Globe Grain & Mill. Co. v. Industrial Commission*, — *Utah*, —, 193 Pac. 642. We have cited the foregoing cases for the reason that they present a great variety of circumstances under which that doctrine was applied. In the last case cited the findings of the Commission were held not to be supported by any substantial evidence, and hence the award was set aside.

Appeal—from
Industrial
Commission—
examination of
evidence.

The question to be determined is: Are counsel's contentions tenable? In considering that question, it must not be overlooked that our statute materially differs from most of the statutes in force upon the subject of employers' liability in the several states of the Union. In most of the states the statutes cover accidents "arising out of *and* in the course of the employment," while our statute (Utah Laws 1919, chap. 63, § 3113) covers all accidents "arising out of *or* in the course of the employment." (*Italics ours.*) In order to obtain compensation under our statute, it is only necessary to show that the accident occurred "in the course of the employment," and not that it arose "out of the employment." It is important to keep the distinction in mind when the compensation cases from the various jurisdictions are considered. The attorney general, who represents the Commission in this proceeding, earnestly contends that the award of the Commission is not only supported by the undisputed facts, but that it is fully justified under our statutes and the decisions. He cites and relies upon the following among other cases: *Re Loper*, 64 Ind. App. 571, 116 N. E. 324; *Phil Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 13 A.L.R. 524, 204 S. W. 152; *Gurski v. Susquehanna Coal Co.* 262 Pa. 1, 104 Atl. 801; *Re Ayers*, 66 Ind. App. 458, 118 N. E. 386; *Thomas v. Proctor & G. Co.* 104 Kan. 432, 6 A.L.R. 1145, 179 Pac. 372; *Barber v. Jones Shoe Co.* 79 N. H. 311, 108 Atl. 690; *Rish v. Iowa Portland Cement Co.* 186 Iowa, 443, 170 N. W. 532. To the foregoing might be added *Humphery v. Industrial Commission*, 285 Ill. 372, 120 N. E. 816; *White v. Kansas City Stock Yards Co.* 104 Kan. 90, 177 Pac. 522, and *Judson Mfg. Co. v. Industrial Acci. Commission*, 181 Cal. 300, 184 Pac. 1. In some of the foregoing cases the accident and consequent injury resulted from practical jokes, or what is commonly called horseplay, while in others they were caused by some act of the injured workman

which was forbidden by the employer, or while the workman was engaged in play during the noon hour and while he was off duty. It is not practicable to review all of the cases. We shall, however, refer to two for the purpose of showing the theory upon which the courts proceed in such cases.

In *Gurski v. Susquehanna Coal Co.* 262 Pa. 1, 104 Atl. 801, the injured miner was working in a coral mine. Gas in dangerous quantities appeared in that part of the mine where he was working, and he was directed to leave there and work at another place a considerable distance away. That portion of the mine where the gas appeared was "closed off" by posting notices that that portion of the mine was dangerous, and by warning the workmen of the danger. One of the miners, working under contract and who had before mined coal in the "fenced-off" portion of the mine, had left his "mining machine," which he wanted, in the fenced-off portion of the mine. He was again notified on the morning of the accident not to enter that part of the mine, but he did not heed the warning, and, notwithstanding the notice and warning of danger, he, with his "helper," went to get the machine in the fenced-off portion of the mine, where, while in the act of doing so, he was suffocated by gas, and then and there died. Application was made for compensation by his wife under the Pennsylvania Compensation Act, and compensation was allowed by the court of common pleas, on an appeal to that court from the compensation board, which had disallowed the widow's claim. A further appeal was taken to the supreme court of Pennsylvania, and that court affirmed the judgment of the court of common pleas. In that case it was contended, as it is here: (1) That the accident did not arise in the course of the employment; (a) that, even though that were not conceded, yet that no recovery could be had because the deceased workman had

wilfully disregarded the instructions and warnings of the employer. It is important to state here that the Pennsylvania Compensation Act is like ours in that it is only necessary to show that the accident arose in the course of the employment, and not that it arose out of it. The supreme court of Pennsylvania held that the accident arose "in the course of the employment," and that the failure of the deceased to heed and obey the warning of the coal company merely constituted negligence, which, under the act, did not affect the right of the widow to recover compensation. The case, in so far as the failure of the miner to obey the directions and warnings goes, goes farther than, under the evidence in this case, we are asked to go by the attorney general.

The only other case we shall attempt to review is the case of *Thomas v. Proctor & G. Co.* 104 Kan. 432, 6 A.L.R. 1145, 179 Pac. 372. In that case a young girl, about seventeen years of age, was injured while she, with two other girls during the lunch hour, was riding around the room on a small truck which was used by the company in hauling articles from place to place in the factory. The truck was in a room where the girls ate their lunches, and after they had eaten, and with the knowledge and consent of the assistant foreman, they would ride around the room on the truck for amusement. The injured girl, on the date of the accident, just as the whistle had called the workmen to commence work, in some way fell off the truck and was injured. She made application for compensation, and it was contended that the accident did not "arise out of and in the course of the employment." Under the Kansas statute the accident must arise out of and in the course of the employment in order to entitle the employee to recover compensation. The supreme court of Kansas held that, in view that the assistant foreman had permitted and encouraged the girls to use the truck for the purpose afore-

said on that and other occasions, for that reason, when considered in connection with other circumstances, the accident arose out of and in the course of the employment, and affirmed the award. That case, in our judgment, goes very far in upholding the award upon the ground that it arose out of the employment as well as in the course thereof.

About all of the other cases to which we have referred, and in which the accident was the result of some practical joke, prank, or horseplay, are distinguishable from the case at bar in that in those cases the injured employee did not voluntarily join in the horseplay, and at the time he was injured was discharging his usual duties in the course of his employment. Upon the other hand, there are a number of cases which are cited by plaintiff's counsel in which compensation was disallowed because the accident there in question resulted from practical joking, horseplay, or pranks, or because the injured employee had disregarded the positive orders of the employer. The following cases are illustrative of that class of cases: *Reimers v. Proctor Pub. Co.* 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738; *Rochford's Case*, 234 Mass. 93, 124 N. E. 891; *Moyer v. Packard Motor Car Co.* 205 Mich. 503, 171 N. W. 403; *Pacific Coast Casualty Co. v. Pillsbury*, 31 Cal. App. 701, 162 Pac. 1040; *Re Loper*, 64 Ind. App. 571, 116 N. E. 324. In the last case cited, the appellate court of Indiana, in the course of the opinion, states the rule thus: "The books contain many cases involving injuries to workmen caused or occasioned by some sportive act of a fellow workman, done by him independent of or disconnected from the performance of any duty of his employment, and characterized by the courts and law-writers as 'practical joking,' 'skylarking,' or 'horseplay.' With practical uniformity, the courts hold, both under the English act and also under the various American statutes, that an injury so suffered does not arise out

of the employment within the meaning of the governing statute, and consequently that its compensatory provisions are not thereby invoked."

In support of the statement contained in the quotation the court cited the following cases: *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, L.R.A.1916D, 968, 156 N. W. 143; *Hulley v. Moosbrugger*, 88 N. J. L. 162, L.R.A.1916C, 1203, 95 Atl. 1007; *Fishing v. Pillsbury*, 172 Cal. 690, 158 Pac. 215; *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, L.R.A.1916F, 1164, 158 Pac. 212, 12 N. C. C. A. 789; *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 99 Neb. 321, L.R.A.1916D, 970, 156 N. W. 509, and *De Filipis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761. We have carefully examined every one of the foregoing cases, and while it is true that in those cases the accidents were caused as a result of skylarking, horseplay, or pranks, yet it is also true that compensation was denied, upon the ground, however, that the accidents did not arise "out of the employment," or for the reason that the accidents were caused by the "wilful misconduct" of the employee in question, and not because they did not arise "in the course of the employment." Indeed, in almost every one of the cases, it is conceded in the course of the opinions that the accident there in question may have arisen in the course of the employment, yet that it did not arise out of the employment, and the decisions are based upon the latter ground.

What has just been said also applies to the cases first cited in support of plaintiff's contention. Moreover, in all of those cases, the courts specially refer to the statute which limits recovery to accidents "arising out of the employment." The courts in deciding those cases, however, did not hold that an employee, or, in case of his death, his dependents, may not recover compensation merely because the accident was the result of some practical joke, prank, or horseplay. What the courts hold is that, in case

the joke, prank, or horseplay was such that it could not be said that the accident arose out of the employment, then no recovery could be had under the statute. Our statute, as we have pointed out, is, however, broader than were the statutes under consideration in those cases, in that all accidents which arise "in the course of the employment" are protected, as well as those which arise "out of the employment." It is universally conceded, as it must be, that the term "arising in the course of the employment" is broader and of larger scope and effect than is the term "arising out of the employment." It must, however, be obvious to all that an accident which arose out of the employment must necessarily also have arisen in the course of the employment. It is, we think, equally obvious that the converse of the proposition does not follow. The question, however, still remains: Did the accident in this case arise in the course of the employment?

As hereinbefore stated, the case at bar differs from nearly all of the so-called horseplay or practical-joke cases in this, that in most of those cases the victim of the joke or horseplay either did not participate in the joke or horseplay at all, or if he did, it was because he was forced to do so, while in this case the deceased was the instigator and the principal, if not the sole, actor, in the horseplay; that is, it is clearly inferable from the evidence that, if the deceased had not shut off the power from the elevator when Mitchell was coming up to the second floor with it, the accident would not have happened. Again, if he had not leaned over or "climbed" on to the gate, and had not shifted the switch so as to put the power on the elevator, he would not have been hurt. In view of the foregoing, it is not entirely clear to the mind of the writer why it may not be contended with some force that the acts of the deceased were not taken in the course of his employment. Even though it be conceded that he was

doing no wrong in going to the second floor, yet it does not follow, from that, that what he did was in the course of his employment. An act need not necessarily be wrongful to carry it beyond the course of the employment. So far as the evidence disclosed, there was no reason why the deceased should have left the first floor and gone to the second one at the time of the accident. It seems also reasonable to assume that in doing that he was not engaged in any matter or thing which in any way redounded to the good of the service in which he was engaged. Nor was it directly connected with that service. There is, therefore, much force to the contention that the accident in question did not arise out of the employment, and there is also some force to the argument that it did not arise in the course of the employment. A careful reading of the decided cases will, however, disclose that the mere fact that the injured employee, at the time of the accident, was not in the discharge of his usual

**Workmen's
compensation—
horseplay—
course of
employment.**

duties, or was not directly engaged in anything connected with those duties,

does not necessarily prevent him from recovering compensation in case of accidental injury. In that connection it must be remembered that, while a human being may do no more than what a machine might do, yet he cannot be classed as a machine merely. If during his working hours there are intervals of leisure, he may, during such intervals, within reasonable limits, move from place to place on the premises of the employer, in case he refrains from exposing himself voluntarily to known or visible hazards or dangers. In moving about, as aforesaid, he may also have social intercourse with his coemployees, and within reasonable limits may "visit" with them. In doing these things within the bounds of reason, the employee does not go outside of the course of his employment. Every employer understands that, in case

20 A.L.R.—56.

boys of immature years are employed, he is charged with notice of their natural propensities to congregate, to communicate, and to play with one another. If, therefore, the employer employs any boys and girls, and gives them work which is not continuous, so that there are intervals of leisure, he must assume that during such intervals they may seek communion with their fellow workmen, and he, therefore, must govern himself accordingly. In thus communicating with their fellow workmen—ordinarily, at least—they do not pass beyond the sphere of their employment. Nor is it necessarily detrimental to the service to permit workmen to communicate with each other, and neither the general law nor the industrial act prohibits such intercourse. The movements of the employees and their associations with one another may therefore, within reasonable limits, be well said to be in the course of the employment. While, therefore, in view of all the circumstances of this case, there may be some reason for reasonable minds to differ with respect to whether the accident in question arose in the course of the employment, yet, in view that we are required to construe the act liberally and with the view of effectuating its purpose, and so as to protect the unfortunate employee, and, in case of his death, those who are dependent on him for support, we feel constrained to hold that the accident in question arose in the course of the employment.

It is, however, contended that the deceased violated the orders of the Canning Company in using the elevator, and that he used it for an illegitimate purpose, and that for that reason the applicant may not recover compensation. It is true that in *Pacific Coast Casualty Co. v. Pillsbury*, 31 Cal. App. 701, 162 *Pac.* 1040, the compensation was denied because the accident there in question was caused by the "wilful misconduct" of the boy that was killed. The boy there in question was sent upon an errand, and after

returning he, in violation of the express instruction of the employer, used an elevator to go to the upper story in the building and was killed. Here, again, it becomes important to have recourse to the terms of the statute. Our statute only excludes those injuries which are "purposely self-inflicted." As we read the statute, therefore, it is not enough that the employee merely disregards some rule, regulation, or order of the master, since such conduct may constitute nothing more than ordinary negligence on the part of the employee, and mere negligence does not destroy the right to compensation. Nor does the fact that the employee may have violated some rule or order necessarily prevent him from obtaining compensation in case of accidental injury. That doctrine is illustrated and applied in a number of the cases hereinbefore cited. But we are here not dealing with an adult, with a man of mature years and experience, but with a mere boy, without experience, and with an abundance of life and vigor. Here we meet a situation where the injured lad had outgrown his childish fears, but had not yet reached the age when, by

—effect of
disregard of
rule.

reason of his experience and judgment he would exercise a very great degree of care or caution for his own safety and protection. While, therefore, the acts of the deceased which resulted in his death, in view of all of the circumstances, are not to be commended, yet, in view of his age and immaturity of mind, they were not unnatural or without the bounds of reason. At all events, they were not of that character which would authorize us to hold that the injuries which he suffered were "purposely self-inflicted" within the purview of the statute.

It is true that in some of its aspects this may be a border-line case, and if the deceased had been a man of mature years and experience we might have reached a different conclusion. It is, however, also true that in view of all the circumstances, and for the reasons stated, and in accordance with the great weight of authority, the Commission was justified in awarding compensation to the mother of the deceased, and therefore the award should be, and it accordingly is, affirmed; costs to be taxed against plaintiffs.

Corfman, Ch. J., and Weber, Gideon, and Thurman, JJ., concur.

ANNOTATION.

Workmen's compensation: right to compensation in case of injuries sustained through horseplay or fooling.

This annotation is supplementary to that in 13 A.L.R. 540.

As to right to compensation under Workmen's Compensation Acts for injury from assault, see annotation to *Chicago v. Industrial Commission*, 15 A.L.R. 588.

It will be observed that in *LEE'S CASE* (reported herewith) ante, 870, an injury received by an employee in the course of his employment as a result of horseplay by other employees, in which he took no part, was held not to have arisen out of his employment.

It will be noted that the decision in *TWIN PEAKS CANNING CO. v. INDUSTRIAL COMMISSION* (reported here-

with) ante, 872, holding that the death of the victim of his own practical joke is compensable was under a statute which only requires that the accident arise in the course of the employment, "or" out of the employment, using "or" instead of "and" used in most of the acts.

The decision in *Leonbrun v. Champion Silk Mills* (1920) 229 N. Y. 470, 13 A.L.R. 522, 128 N. E. 711, set out at page 543 of earlier annotation, was relied upon in *Janschewsky v. E. W. Bliss Co.* (1921) 198 App. Div. 8, 189 N. Y. Supp. 154, where an injury, sustained when an employee, who was looking for his tools among those of another employee, was pushed by the

latter and a struggle ensued, was held to have arisen out of and in the course of the employment.

And in *Verschleiser v. Stern* (1920) 229 N. Y. 192, 128 N. E. 126, the injury was held to have arisen out of and in the course of the employment, where someone dropped a piece of flesh about the neck of an employee in an abattoir, and he struck another employee whom he believed responsible, and was injured by the latter.

In *Stark v. State Industrial Acci. Commission* (1922) — Or. —, 204 Pac. 151, it was held that the injury was caused by an accident which arose out of and in the course of the employment where two employees of a shipbuilding company participated in a scuffle with an air hose used in the work, and one of them stumbled and fell in such a position that air from the hose entered his rectum and caused peritonitis. The court said: "The injury in question was caused by an industrial accident. It was a peril of the service. Under the usual conditions there prevailing the employees were more or less subject to such peril. It was an unexpected accident, but nevertheless may reasonably be said to have arisen out of and in the course of the employment. It was an incident of such employment by reason of the appliance used in the work, and the custom which prevailed of the employees, without the infraction of any enforced rule of the establishment, diverting the use of the air hose to sport. The play which had been going on between Stark and Cooper was entirely mutual. The question as to who started the sport can become material only for the purpose of fixing the fault; and, as we have already pointed out, fault of the injured employee under certain conditions, such as prevailed in this case, does not constitute a reason for not allowing compensation."

But in *Stein v. Williams Printing Co.* (1921) 195 App. Div. 336, 186 N. Y. Supp. 705, where a fellow employee pushed the claimant in a playful manner, and caused the latter to assault the employee, who then injured the claimant, it was held that no com-

pensation could be had under the New York Workmen's Compensation Act. The court said: "While it is probably true that technically Schults made the initial assault in this particular instance, it appears that these men had been in the habit of going through more or less of horseplay, and there is no claim that Schults had any intention of doing anything more than had been customary. There was no such insulting conduct as in *Verschleiser v. Stern* (N. Y.) *supra*, nor any apparent latent ill will, and no reason, so far as appears, why Schults should have anticipated any trouble on account of his playful grabbing of the claimant's blouse. The claimant, on his part, appears not only to have made a vicious assault upon Schults by the throwing of the milk bottle, but to have followed it with an effort to get hold of a cobblestone, after trying to bite Schults. It was while he was in this last act, and when the safety of Schults was fairly menaced, that the claimant received the blow which resulted in his injuries. The Workmen's Compensation Law (Consol. Laws, chap. 67) provides for compensating injuries 'arising out of and in the course of his employment, without regard to fault, on the part of the claimant, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another' (§ 10), and the statute is to be read in connection with this exception. There can be no doubt that the claimant's injury resulted from his efforts to injure Schults. He was not in any danger from Schults; no one suggests that the claimant had anything to fear from the horse play of Schults, and it is not contended that this playful act was interfering with the discharge of any duty which the claimant owed to the employer. He appears to have suddenly changed his attitude of playfulness, and to have left the service of the employer for the purpose of injuring Schults, and he received his injuries while

following out that purpose, rather than any purpose of the master."

In *Federal Mut. Liability Ins. Co. v. Industrial Acci. Commission* (1921) — *Oal.* —, 201 Pac. 920, where an employee engaged in sweeping a floor was struck in the eye and injured by a grape which another employee, engaged in putting grapes into a machine, threw at a third employee, the injury was held not to have arisen out of and in the course of the employment, the court stating that there was nothing in the nature of the employment in which any of the workmen were engaged which required any of them to throw grapes at another; that the act was a playful or malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

In *Great Western Power Co. v. Industrial Acci. Commission* (1921) — *Cal.* —, 201 Pac. 931, the court refused to adopt the view allowing compensation in case an employee was injured through another's prank to which the one injured was not a party, and held that an injury to an employee did not arise out of his employment where he was passing over a platform on his way from a tool house to the place where he was working, when two employees, who were engaged in a friendly wrestling match, fell on him and broke his leg, and it was not claimed that the scuffling was habitual, or that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment. J. T. W.

OWNERS OF STEAMSHIP CELIA, Appts.,
v.
OWNERS OF STEAMSHIP VOLTURNO, Respts.

House of Lords—July 28, 1921.

([1921] 2 A. C. 544.)

Damages — loss proved in foreign currency — rate of exchange — proper date for conversion into English currency.

In an action arising out of a collision between an English ship and an Italian ship both ships were held to blame, and the cross claims for damages were agreed, subject to a question raised by the owners of the Italian ship as to the rate of exchange in respect of a claim calculated in Italian lire for detention during the period that the ship was undergoing repairs. Held, by Lord Buckmaster, Lord Sumner, Lord Parmoor, and Lord Wrenbury, Lord Carson dissenting, that the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date at which the detention occurred.

[See note on this question beginning on page 899.]

APPEAL from an order of the Court of Appeal in [1920] W. N. 300, 90 L. J. Prob. N. S. 109, 125 L. T. N. S. 191, affirming an order of Hill, J.

The action arose out of a collision which occurred in the Mediterranean between an English steamship, the *Celia*, and an Italian steamship, the *Volturno*. At the trial Hill, J., found both ships equally to blame

and referred the question of damages to the registrar. The cross claims for damages were agreed subject to a question raised by the owners of the *Volturno* as to one item of their claim, which was cal-

culated in lire, as to the rate of exchange.

That question was whether, in calculating the amount which the respondents, the owners of the *Volturmo*, were entitled to recover from the appellants, the owners of the *Celia*, in respect of damages for loss of the use of their vessel, the rate of exchange to be taken should be taken at the time the loss was incurred or at the time of assessment or payment. The facts are stated in the report of the case before Hill, J., and in the judgment of Lord Buckmaster. The registrar held that the date upon which the rate of exchange should be ascertained was the date of payment. Hill, J., held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention, and the Court of Appeal, without delivering any reasoned judgment, affirmed this decision on the ground that the case was covered by a previous decision of the Court in *Di Ferdinando v. Simon, S. & Co.* [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36.

Present: Lord Buckmaster, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Lord Carson.

Raeburn, K. C., and Langton, for the appellants:

The proper date for ascertaining the rate of exchange is the date of the judgment. This was so held in the case of breach of contract by *Roche, J.*, in *Kirsch & Co. v. Allen H. & Co.* [1919] W. N. 301, 36 Times L. R. 59, 148 L. T. Jo. 198, 122 L. T. N. S. 159, 25 Com. Cas. 63. That decision was reversed by the Court of Appeal on the ground that there was no binding or effective contract, but the question as to the rate of exchange was not discussed. 25 Com. Cas. 174, [1920] W. N. 73, 89 L. J. K. B. N. S. 265, 123 L. T. N. S. 105, 36 Times L. R. 245. However, in the later case of *Di Ferdinando v. Simon, S. & Co.* [1920] 2 K. B. 704. *Roche, J.*, relied from his former opinion and held that the proper date was the date of the breach; and this view has been adopted by *Bailhache, J.*, in *Barry v.*

Van den Hurk [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899, 36 Times L. R. 663, 123 L. T. N. S. 719, 64 Sol. Jo. 602, and by *McCardie, J.*, in *Lebeaupin v. Crispin* [1920] 2 K. B. 714, 89 L. J. K. B. N. S. 1024, 36 Times L. R. 739, 64 Sol. Jo. 652, 25 Com. Cas. 335, 150 L. T. Jo. 24. *Di Ferdinando v. Simon, S. & Co.* has since been affirmed by the Court of Appeal in [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36, and this is really an appeal from that decision unless it can be distinguished on the ground that this is a case of tort, and not of breach of contract. The appellants submit, first, that, whether the case be one of breach of contract or tort, the proper date is the date of judgment; secondly, that damages for tort stand on a different footing. The respondents are resident in Italy, and proved their loss in Italian currency, and upon a proper application of the principle of *restitutio in integrum* they should receive such a sum in pounds sterling as would produce the number of lire proved to have been lost, and no more, but the judgments of Hill, J., and of the Court of Appeal, would give them more lire than they have lost. The amount of lire which the respondents should recover ought not to be made dependent upon a fluctuating rate of exchange. Further, in an action in tort, the damages may go on increasing from the day upon which the tort is committed until the day they are ascertained, and they are not ascertained until they are assessed. Until the recent series of cases there does not appear to be any reported case in England where this point has ever been argued, much less decided. [They referred to *Scott v. Bevan*, 2 Barn. & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152, and *Bertram v. Duhamel*, 2 Moore, P. C. C. 212, 12 Eng. Reprint, 984.] *Manners v. Pearson* [1898] 1 Ch. 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times, L. R. 312, 46 Week. Rep. 498, assists the appellant's contention and it shows the extreme inconvenience which may arise from fixing the date of the breach as the proper date for ascertaining the rate of exchange. The view contended for by the appellants is that which prevails in the United States. *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Story, Confl.*

L. 8th ed. §§ 308, 311A; Sedgw. Damages, 9th ed. § 274.

Sir John Simon, K. C. (with him A. D. Bateson, K. C., and Balloch), for the respondents:

In an action for tort the English court is concerned with nothing except with awarding in sterling the amount of the defendant's liability. It ascertains the rights of the parties and awards that which measures the loss at the time when the loss occurs. *Manners v. Pearson* [1898] 1 Ch. 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498, is really an authority against the appellants. All three judges in the Court of Appeal agreed that, if that were an ordinary action for damages for breach of contract, the plaintiff would be entitled as at the date of the breach, and the judgment of the majority proceeded, rightly or wrongly, upon the form of the action. The view of the majority was that, the action being an action for an account, it was an action for the balance found due on the taking of the account, and not for the several items to be included in it, and that, therefore, the rate of exchange was to be fixed as at the date when that balance was ascertained. For the purpose of the present appeal there is no difference between an action for tort and an action for breach of contract.

Raeburn, K. C., replied.

The House took time for consideration.

Lord Buckmaster:

My lords, on December 17, 1917, a collision occurred in the Mediterranean between the steamship *Celia*, which belongs to the appellants, and the Italian steamship *Volturno*, which is the property of the respondents.

The dispute as to liability for the collision was determined in this country in an action before Hill, J., who decided, on July 22, 1919, that both vessels were to blame, and referred the question of damages to the registrar. The cross claims for damages were agreed between the parties. The claims of the owners of the *Volturno* included one for loss due to the fact that the vessel was under hire to the Italian Ministry of Marine at all material dates,

and that in consequence of her detention for the necessary repairs from December 25 to 30, 1917, at Gibraltar, and January 24 to February 18, 1918, at Newport News, deductions from her hire were made amounting to 304,418 lire. That the *Volturno* is entitled to damages under this head is admitted. But the question is, At what date ought the rate of exchange to be fixed, in order that those damages, which were originally assessed in lire, should be converted into sterling? The registrar held that the date at which the damage was assessed was the right date, but Hill, J., decided that the time when the actual loss for each detention was incurred was the correct period, and this view has been confirmed by the Court of Appeal.

It is suggested that special considerations may apply in regard to the particular circumstances in which this matter arises for determination, but I cannot see that any of these circumstances take this case out of the general rule, and it is the nature of that general rule which your lordships are asked to consider and determine. There are only two possible dates put forward as the dates upon which the conversion can be made—the date when the loss was incurred and the date when the liability for the loss was determined. The suggestion that it might be the date of the writ was incapable of being supported, and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred, and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment.

To my mind that is not the true function and purpose of the judgment. A judgment, whether for

breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would, at the time of the hearing, afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the nondelivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach, measured by the difference between the contract price and the market price of the goods at that date.

As was stated by Wright, J., in the case of *Joyner v. Weeks* [1891] 2 Q. B. 31, 33: "Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed."

And, as an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause.

Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then-existing circumstances, and subsequent changes would not affect the result. If these damages be assessed in a foreign currency, the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.

There is little authority upon the actual question until recent times—

a circumstance due, no doubt, to the fact that fluctuations of currency did not formerly occur with the violent oscillations by which they have been marked in recent years. One of the earliest cases in *Scott v. Bevan*, 2 Barn. & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152. In that case judgment had been recovered in Jamaica for the sum of £1,554 16s. 8d., current money of the island of Jamaica, and proceedings were taken here upon the judgment, the only question being whether the judgment should be converted into English currency, £100 sterling being the equivalent of £140 currency of Jamaica, or whether it should be taken at par, and it was decided that it ought to be estimated at the rate of exchange at the time of the judgment in Jamaica. The real question raised here does not appear to have been considered by the court, a significant fact when it is remembered that Lord Tenterden was the presiding judge.

In the case of *Bertram v. Duhamel*, 2 Moore, P. C. C. 212, 12 Eng. Reprint, 984, the point was not elaborately argued, and the quotation in the judgment at p. 217 is from the opinion of Lord Eldon in *Cash v. Kennion*, 11 Ves. Jr. 314, 32 Eng. Reprint, 1109, but this is not sufficiently explicit to afford real assistance.

The next case is of greater importance. It is *Manners v. Pearson* [1898] 1 Ch. 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498. In that case an action was brought claiming an account of moneys due under a contract which provided for payment in Mexican dollars. Judgment in the action, declaring the plaintiff to be entitled to an account, was delivered on November 4, 1897, and the defendant in fact delivered an account on November 13 of the same year, showing that a balance was due to the plaintiff in Mexican dollars on October 31, 1896. The question that arose was the date at which conversion from Mexican dollars into

English sterling should take place. The plaintiff at first suggested that each sum of money should be converted into sterling at the date when it was shown to be due in the account, but he appears to have been willing to accept August 31, 1896, the date when the balance of the amount was shown to be due, while the defendants contended that the proper date was November 13, 1897, when the account was delivered.

It is, at least, remarkable that the actual date of the judgment was not suggested as the critical moment. The court held, Vaughan Williams, L. J., dissenting, that the right date was November 13, 1897. The foundation of the judgment depends entirely upon the fact that the claim was a claim for an account, and it appears to proceed upon the principle that the account was the real cause of action.

Lindley, M. R., says ([1898] 1 Ch. 589): "To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter."

Rigby, L. J., says (*id.* 590) that the plaintiff's argument "proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it;" and he then says that the account "was not delivered until November 13, 1897, and, even if accepted on that date, could not have formed the basis of an order at an earlier period." This judgment clearly does not depend upon the view that the date of the judgment is the correct date for conversion, but rather upon the ground that the judgment is a judgment for something which is found due on taking the account, and that it is at the date when the account has been taken or delivered that the true liability is disclosed. In other

words, the balance of the account is treated as the foundation of the claim for judgment, and it is at that date that the conversion is to be made.

I am not prepared to accept this view, but it is not essential to determine that question in the present case. It is sufficient to say that the judgment certainly did not proceed upon the ground for which the appellants now contend. Vaughan Williams, L. J., on the other hand, states in clear language the principle which the respondents say is correct. [1898] 1 Ch. 592. He says: "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." And he adds: "I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account." He thought, therefore, that conversion should take place in respect of each item as it was shown to be due, but as the plaintiff was willing to accept October 31, 1896, he also accepted that date as correct.

With the principle as he enunciates it I am in entire agreement, and I do not think that there is any expression in the judgment of the other learned lords justices to show that they disagreed. Their judgment rested, as I have shown, on their view as to the proper application of this principle to the circumstances of the action. The final authorities upon this matter are, fortunately, far from ambiguous. Roche, J., in *Kirsch & Co. v. Allen, H. & Co.* [1919] W. N. 301, 36 Times L. R. 59, 148 L. T. Jo. 198, 122 L. T. N. S. 159, 25 Com. Cas. 63, decided that

([1921] 2 A. C. 544.)

the rate of exchange should be taken as at the present time, meaning, no doubt, the date of judgment; but in a later decision of *Di Ferdinando v. Simon, S. & Co.* [1920] 2 K. B. 704, which was an action for breach of contract to carry goods from London to Italy, and for conversion, the learned judge held that the proper measure of damage was the value of the goods at the date when they should have arrived in Italy. He found the value in Italian lire and converted the sum into English currency at the rate of exchange on that date. This judgment was upheld by the Court of Appeal. [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36. *Bailhache, J.*, in *Barry v. Van den Hurk* [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899, 36 Times L. R. 663, 123 L. T. N. S. 719, 64 Sol. Jo. 602, also fixed the date for conversion as the date when the damages were properly measured, and *McCardie, J.*, in *Lebeaupin v. Crispin* [1920] 2 K. B. 714, 89 L. J. K. B. N. S. 1024, 36 Times L. R. 739, 64 Sol. Jo. 652, 25 Com. Cas. 335, 150 L. T. Jo. 24, decided the same thing.

There is, consequently, a very formidable body of opinion in recent decisions against the appellants' contention, and the only authority to which they can refer in their support is the American case of *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84, decided in 1866. There does not appear to have been any consideration of the question in the Supreme Court of the United States, and their lordships are deprived of the assistance which would have been afforded had the matter been the subject of argument before that tribunal. The principle underlying the decision in the Maryland case appears largely to be due to the consideration of textbooks on international law. In one sense the case undoubtedly affects international matters, but it does not necessarily

follow that it involves consideration of international law. The real question must depend upon the true effect of a judgment in one country relating to damages that are measured in terms of a foreign currency, and into this international relations do not necessarily enter. Disputes similar to that in the present case could easily arise between two British subjects out of a purely British contract, where the measure of damage was originally expressed in terms of a foreign currency; in such a case the English court could and ought to measure the damages at the proper date, and then, at that date, convert the foreign exchange into English currency. There can be no difference in the principle when one of the litigants is not a British subject.

For these reasons I think that this appeal should fail, and should be dismissed, with costs.

Lord Sumner:

My lords, a good deal of the effect of the appellants' plausible and ingenious argument is due to two fallacious suggestions, which have crept into and color the whole of it. The first is that this is, in substance, a claim by the owners of the *Volturmo* for a sum contractually due from the owners of the *Celia* in lire, and the other that, as they have elected to recover it here and not in Italy, the judgment recovered here is merely an attempt to put them in the same position as if a contract had been enforced in Italy.

The collision occurred on the high seas, and, subject to proof that the *Celia* was to blame, she became forthwith liable for the consequences. I may pass over the fact that the *Volturmo* was also to blame, as not, for this purpose, affecting the matter. The right to compensation was complete then and there, though it might take time to discover all the consequences and to establish the extent of the mischief. That compensation was not recoverable in any particular currency, and, although for convenience of proof it

Damages—loss proved in foreign currency—rate of exchange—proper date for conversion into English currency.

would be severable into divers heads and items, it would be one gross sum, recoverable once for all. If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected. The currency in which judgment would be given would depend upon the place in which the plaintiffs might find the defendants' ship so as to arrest her in proceedings in rem, or might succeed in serving process on the defendants themselves as the commencement of proceedings in personam. The essential thing to remember, which the appellants somewhat ignored, is that the sum in question here is only an item in a general claim for damages for a wrong done at sea, which was the subject of compensation just as naturally in British as in Italian currency.

The deduction of hire for the *Volturmo*, which the Italian Ministry of Marine made from the sums payable by it to her owners under the charter, is, therefore, for the purposes of this case, mere evidence of damage inflicted on them by the collision. Though proved in a different way from the physical damage to the ship, it is on the same footing, for it measures their loss, suffered by having the ship laid up, just as their repair bills measure their loss, suffered by having her side stove in. If the question of damage had not been simplified by an agreement between the parties, and if all the damages had gone to the registrar and merchants for assessment together, no one would have thought of raising any question of the rate of exchange as at the date of the judgment. The cost of the temporary repairs incurred at Gibraltar would, I suppose, have been proved in sterling; if they had been done at Marseilles or Cadiz, they would have been proved in francs or in pesetas, just as the repairs at Newport News would have been proved in dollars, and in each case these currencies would have been converted into

sterling, as at the date when liability for the several outlays accrued, because, when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the high court deals is simply the process of completing that proof. When the owners of the *Volturmo* came to their next item—namely, the money value of the use of the ship, of which the damage suffered in collision deprived them—why should any different rule as to exchange be applied? The charter furnished very precise evidence of the then value of the ship in use day by day, but it was evidence only and was not conclusive. See *The Argentino*, per Bowen, L. J. (1888) L. R. 13 Prob. Div. 191, 202, 203. The owners of the *Celia* would have been at liberty to challenge it, if they could, and, if there had been no charter, the Italian owners might have shown what employment in Greece or in Norway could have been got, and so have measured their loss in drachmas or in kroner, instead of in lire. If the damages were such as need not be repaired at all, the whole loss might have been measured by the immediate depreciation of the ship in consequence of the collision, for the *Volturmo*'s owners would not be bound to repair her merely for the benefit of the owners of the *Celia*. In that case there would either be no question of exchange, if the evidence of sound and damage values could be given in sterling, or, if there was any conversion into sterling, it would have been calculated at the rate current at the time of the collision.

My lords, I am quite unable to understand why the owners of the *Volturmo* should be subjected to any different rule merely because they have had the good sense to eliminate all questions that could be agreed, and to present in the most naked form the one question as to which the parties were in difference. All that was agreed was the number of lire actually deducted by the Italian Ministry of Marine during the pe-

riods when the Volturmo was off hire, with the dates of the commencement and ending of those periods. Whether any adjustment was made for the expenses of running the ship while earning hire, which would be saved while she was off hire, does not appear. I do not gather that anything in the agreement was meant to vary any of the rights of the parties.

The appellants, however, completed their argument by saying that the court, having ascertained how many lire the collision cost the owners of the Volturmo in respect of detention, terminated its judicial functions at that point, and thereafter, in bringing into the judgment a certain amount of sterling to correspond with that finding, was merely making its decision available to the judgment creditors, as the best way in which they could be assisted by an English court to get the lire to which they were really entitled. I think this, again, is a fallacy. For the purposes of a collision action it is the judgment that is the final judicial act, and it is the judgment that is the decision of the court. The agreed numbers of lire are only part of the foreign language in which the court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe.

The matter may be tested in this way. Suppose that, as an incident of the collision, some seamen belonging to the Celia had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the Volturmo, and that the former had received and kept it. The owners of the Volturmo could have claimed damages for conversion of the notes, or their return with damages for their detention, as they chose. In the first case the value of the notes

would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken. Why should damage to the ship and her owners by collision be measured otherwise?

No authority was forthcoming which really supported the appellants' propositions. There have been, during the past 100 years, several English cases, in which these propositions might, and indeed ought to, have been applied, if they are sound; yet very learned judges proved to be unconscious of their existence. The best example is *Scott v. Bevan*, 2 Barn & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152. The case in the Court of Appeal in 1898 (*Manners v. Pearson* [1898] 1 Ch. 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498) really negatives them.

On the other hand, considerable support for the view which I have ventured to express above is to be found in the judgment of the privy council in *Pilkington v. Commissioners for Claims on France*, 2 Knapp, P. C. C. 7, 19, 12 Eng. Reprint, 381, which was pronounced by Sir William Grant, M. R. Referring to acts of the French revolutionary government, whereby, between 1793 and 1796, debts due by French subjects to British subjects and payable in France had been sequestrated, and to subsequent arrangements by treaty between England and France, under which compensation was to be made by France in respect of these acts, as for unjustifiable confiscation, and funds were deposited with commissioners for that purpose, he is reported as having said: "We think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. . . . The Republic themselves, in effect, confess that no

such decree ought to have been made. . . . Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrongdoer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50d., he does not make compensation by returning an assignat which is only worth 20d.; he must make up the difference between the value of the assignat at different periods." It is true that these observations are stated to be not strictly necessary to the decision (2 Knapp, P. C. C. 21), and that Dr. Knapp prints his report from notes by another hand, but I think these circumstances detract but little from the authority of the passage quoted.

As to *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84, it is a case of a breach of contract to pay abroad a sum of money, which was the price of goods sold and delivered. It purports to follow *Scott v. Bevan*, 2 Barn. & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152, and has no reference to damages for a wrong not arising out of a contract. Even so, there has been at different times much discussion in the United States as to the true rules governing such actions (*Story Conf. L.* 8th ed. §§ 308-315; *Sedgw. Damages*, 9th ed. § 274); but I think the question need not be pursued, as all such cases turn upon contractual obligations for payment of fixed or calculable sums in a foreign place and in the local currency, which have been put in suit in the courts of the United States. For the same reason, while not intending to intimate any criticism upon it, I have not troubled your lordships with any examination of the judgment in *Di Ferdinando v. Simon, S. & Co.* [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36, in the Court of Appeal. The case of *Delegal v. Naylor*, 7 Bing. 460, 131 Eng. Reprint, 178, 5 Moore & P. 443, 9 L. J. C. P. 167, might seem at first sight to be in point for

the appellants, for it began with a claim in trover for a parcel of local currency notes seized in Lima, but subsequently an agreement was made with the wrongdoers to give up the notes, or pay their value as found by the officer of the court, and, the notes having been lost at sea, the question came before the court in the form of an application for directions as to the course he was to take under this agreement. I think that in substance the direction given was to find what it would cost to get notes of an equal face value in Lima, where they must be presumed to be worth what they appeared to be worth, and in any case it appears not to advance the present appellants' argument.

Finally it was urged that exchanging lire with sterling at the date of the judgment was the best way of eliminating speculative elements, and had the advantage of insuring that in no case would a judgment creditor get more than the exact sum to which he was entitled. Fluctuations in foreign exchanges inevitably introduce a speculative element into all transactions and affairs, and, unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable. Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays. The result may favor one side or the other, and there is no answer to this except that already discussed—namely, that the claimant's right is exclusively a right to lire, and would result in a judgment for lire, if only an English court was, so to speak, competent to express itself in Italian. This is a mere assumption. After all, the court is an English court, and in theory decides the right as at the time when it arises, and does so in plain English. I therefore think that this argument also fails, and that the appeal should be dismissed.

Lord Parmoor:

My lords, the relevant facts may be shortly stated. On December 17, 1917, there was a collision in the Mediterranean between the steamship *Celia* and the steamship *Volturno*. Both vessels have been held equally to blame for the collision. The *Volturno* was temporarily repaired at Gibraltar, causing a detention of the ship from December 25 to December 30, 1915, and permanently repaired at Newport, causing a detention of the ship from January 24 to February 18, 1918. The *Volturno* was on charter to the Italian government, and the vessel was off hire during each period of repair. The loss to the respondents from loss of hire during temporary repairs was agreed at lire 47,372.32, and during permanent repairs at lire 257,046.40; but a difference arose as to the date at which the rate of exchange for Italian lire should be taken, in order to ascertain the amount to be paid in English currency. The question for decision is whether, in calculating the amount which the respondents are entitled to recover from the appellants in respect of damages for the loss of hire of their vessel, the rate of exchange should be taken as that ruling when the loss was incurred, or as that ruling when the assessment of damage was ascertained.

The answer to this question depends not on any technical rule of English procedure, but on the principle of insuring to the injured party, as far as possible, the full measure of compensation to which he is entitled. The argument on behalf of the appellants is that, in an action of tort, damages are not ascertained until they have been assessed, and that, if, in the interval between the tortious act which has occasioned the damage and the ascertainment of its amount, there has been an alteration in the rate of exchange, the party injured will, instead of receiving the amount due to him as compensation, receive a greater or less amount, dependent on whether the rate of exchange has fluctuated

favorably or adversely to his interest. I think that there would be no answer to this argument if the probable fluctuations in the rate of exchange between the date at which the loss is suffered and that at which the amount of damage is ascertained can be regarded as a relevant factor in determining what the amount of damages should be. For reasons hereinafter stated, there appears to me to be a fallacy in this contention. The argument for the respondents is that the amount of loss consequent on a tortious act, such as a collision at sea, falls to be determined at the date when it is suffered, and that the probability of subsequent alterations in the rate of exchange is immaterial, and that the risk of alteration in the rate of exchange is one which affects generally the financial transactions between the two countries, and is in no way connected, either with the tortious act, or with the ascertainment of the amount payable to the injured party.

In my opinion, this contention is correct. The probability of the alteration in the rate of exchange is not an admissible factor in the ascertainment of the amount of damage, both on the ground of remoteness, and on the ground that it is a matter which affects generally all financial transactions, and is in no way connected with the tortious act for which the respondents are liable. To prevent misunderstanding, I desire to add that if the probability of alterations in the rate of exchange could be regarded as a relevant factor in ascertaining the amount of damage, it would be within the discretion of a registrar to fix that rate as at the date of the assessment, or at such other time as, in his opinion, might be reasonably adopted to obtain a fair figure.

The necessity for transferring into English money damages ascertained in a foreign currency arises in the fact that the courts of this country have no jurisdiction to order payment of money except in English currency. Considerations

which are irrelevant in the ascertainment of the amount of damage are irrelevant in fixing a rate of transfer, and I agree in the judgment of Hill, J., as confirmed by the Court of Appeal. In truth the risk of a subsequent fluctuation in the rate of exchange is a risk which the parties themselves respectively incur. In its incidence it may, in any particular case, either mitigate or enhance the amount which, under a stable condition of exchange, would be payable to the injured party; but in itself it cannot affect the ascertainment of damages.

Of the many cases to which your lordships were referred, the judgment of the privy council in *Pilking-ton v. Commissioners for Claims on France*, 2 Knapp, P. C. C. 7, 12 Eng. Reprint, 381, is most analogous to the present case. The judgment of Sir William Grant is based on the finding that a wrong act had been done by the French government, and that restoration in a debased currency is not restoration for the wrong done, and that, if the wrongdoer received the assignats at the value of 50d. he does not make compensation by returning an assignat which is only worth 20d., but that he must make up the difference of the assignat at the different periods. If the assignat at the later date had been worth more than the value of 50d., I think it would logically follow, on the judgment of Sir William Grant, that the wrongdoer would have made full compensation by returning such a number of assignats as would have replaced the numbers received, assessed at the value of 50d.

The other cases cited refer to damages on breach of contract, and not on tort. In the case of contract, no doubt, the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract. In the case of *Di Ferdinando v. Si-*

mon, S. & Co. [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36, in the Court of Appeal, it was pointed out that fluctuations in value subsequent to the date of the breach were irrelevant considerations on the ground of remoteness, and that, where there is a market, the damages are the market value of goods at the time and place where they should have been delivered. I agree with the judgment of Scrutton, L. J., and for the reasons given by him. The same view is expressed by Vaughan Williams, L. J., in *Manners v. Pearson* [1898] 1 Ch. 581, 592, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498: "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." In the same case Lindley, M. R., says that no claim by the plaintiff to damages can be supported, and that the judgment and trial of the action limited the right of the plaintiff to an account of what is due to him from the defendants. He held that the plaintiff was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained. It is not necessary in this appeal to consider the principles applicable to the taking of an account where no damages are claimed, but I do not think that this case supports an argument in favor of the contention of the appellants. In his judgment Lindley, M. R., adopts the principle expressed by Lord Eldon in *Cash v. Kennion*, 11 Ves. Jr. 314, 316, 32 Eng. Reprint, 1109: "I cannot bring myself to doubt that, where a man agrees to pay £100 in London upon

the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." I will not detain your lordships by reference to cases which have already been fully dealt with.

My lords, in my opinion the appeal should be dismissed.

Lord Wrenbury:

My lords, in my opinion this appeal fails. The action is for damages for tort. It is not a continuing tort. On December 30, 1917, and February 18, 1918, the defendants, the owners of the Volturmo, were, by the plaintiffs' wrong, damaged to the amount of 47,372.32 lire in the one case, and 257,046.40 in the other case, making together 304,418.72 lire. On June 8, 1920, the defendants' claim was agreed, subject to the question of the rate of exchange to be taken in assessing the loss. On December 30, 1917, the rate of exchange was 39.90. On February 18, 1918, it was 41.30. On June 20, 1920, it was 66.25. The order under appeal has taken 39.90 and 41.30 as the proper rates of exchange to be taken in measuring in English currency the agreed loss of 304,418.72 lire. The appellants say that this is wrong.

Your lordships who have preceded me have already reviewed the authorities; it is unnecessary for me to do so again; more usefully can I state in my own words what I think is the true principle. Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding January 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on January 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on January 1 the equivalent sum in British currency was (say) £7,500. Adjudge that the plaintiff recover against the de-

fendant £7,500. There is no difference of principle arising from the fact that the loss is of lire as distinguished from (say) cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows, the judgment would be: Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows, and charge the defendant with the price. Declare that the cost would have been £150. Adjudge that the plaintiff recover from the defendant £150. It would be nihil ad rem to say that in July similar cows would have cost in the market £300. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows, and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages—that is to say, money to some amount for the loss of the cows; the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in, had there been no tort. If the date taken be that, not of the tort, but of the judgment, it is giving the plaintiff, not dam-

ages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages, not for the original tort, but for another and a subsequent wrongful act.

All the authorities are in favor of this view except the decision of Roche, J., in *Kirsch & Co. v. Allen, H. & Co.* [1919] W. N. 301, 122 L. T. N. S. 159, 36 Times L. R. 59, 148 L. T. Jo. 198, 25 Com. Cas. 63, and the American decision in *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84. In *Di Ferdinando v. Simon, S. & Co.* [1920] 2 K. B. 704, Roche, J., himself, decided in favor of this view, preferring it (unless the cases could be distinguished) to his decision in *Kirsch & Co. v. Allen, H. & Co.* supra. His decision in *Di Ferdinando v. Simon, S. & Co.* was affirmed on appeal. [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36. The present case is, in substance, an appeal from *Di Ferdinando v. Simon S. & Co.* In my opinion that case was well decided. No difference arises by reason of the fact that this is an action of tort, while that was an action for breach of contract. There is here no continuing tort.

I think this appeal should be dismissed.

Lord Carson:

My lords, a collision occurred on December 17, 1917, between the *Celia* and the *Volturno*. At the trial of the action on July 22, 1919, Hill, J., held both vessels equally to blame for the collision, and referred the question of damages to the Admiralty registrar. The damages, however, were agreed on June 8, 1920, and the reference was, therefore, not held. The damages were agreed in lire, and the question this

House has to decide is as to the proper date upon which to calculate the rate of exchange in order to fix in English currency, for the purpose of entering an English judgment, the damages payable by the wrongdoer to a foreign claimant.

The registrar decided that the date of payment—by which I understand him to mean the date at which the judgment is entered—is the time at which the rate of exchange should be taken. He did so on the authority of a decision of Roche, J., in *Kirsch & Co. v. Allen, H. & Co.* ([1919] W. N. 301, 36 Times L. R. 59, 148 L. T. Jo. 198, 122 L. T. N. S. 159, 1 Lloyd's List R. 223; 25 Com. Cas. 63), and he did so treating a decision of Bailhache, J., as distinguishable on the ground that such decision arose in a case of breach of contract.

Hill, J., reversed the decision of the registrar, holding, on the authority of *Di Ferdinando v. Simon S. & Co.* [1920] 2 K. B. 704, [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36, and other cases, that where the damages are assessed in a foreign currency they must, in entering an English judgment, be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed. The Court of Appeal simply affirmed this judgment, feeling itself bound by the decision in the case of *Di Ferdinando v. Simon S. & Co.* [1920] 2 K. B. 704, [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36.

The *Volturno* was an Italian ship, and was under requisition to the Italian government under a charter party. By the terms of this charter party hire was payable in Italian lire. By reason of the collision temporary repairs to the *Volturno* were made at Gibraltar, causing a detention of the ship from December 25 to December 30, 1917. Permanent

repairs were made at Newport News, causing a detention of the ship from January 24 to February 18, 1918. The loss of the owners of the *Volturno* by reason of such detention was, in respect of the first period, 47,372.32 lire; and, in respect of the second period, 257,046.40 lire; and these two sums, amounting to 304,418.72 lire, were claimed as damages, and were apparently included in the damages agreed.

It was contended by the owners of the *Volturno* that the rate of exchange should be taken, either at the date of the writ, or at the respective dates when the loss by detention was suffered, and Hill, J., adopted this latter view.

It is to be observed, as I will try and show later, that there is very little authority, until we come to recent decisions, which can be held to lay down any rule on this subject, and the fact that the respondents put forward alternative dates shows how uncertain the law is upon this subject. I would also add that all the cases, so far as I know, relied upon in the judgment of Hill, J., were cases of breaches of contract, and no different rule for damages in contract or tort was suggested in the argument before this House. If I am right in the view I have taken of the matter, the reasons which impel me to that view will apply, a fortiori, to breaches of contract. The argument for the appellants, in support of their contention that the date of the entry of the judgment is the proper date to fix the rate of exchange, is shortly as follows: The foreign litigant has suffered, as is agreed, damages to the extent of 300,000 lire. On the principle of *restitutio ad integrum*, he is paid 300,000 lire; he gets all the damage he has suffered, and it is all he would get if the claim was in Italy instead of in England, and although those damages have referred to and are answered on the basis of a loss at antecedent date, that affords no reason for awarding him either more or less, owing to the fluctua-

20 A.L.R.—57.

tions of the exchange one way or the other between Italy and England, which only means that the lira will buy more or less English money. The learned counsel for the appellants say, further, that the object, and the sole object, of translating the lire agreed upon into English currency is to comply with the requirements of English law—that an English judgment for damages must be for a sum of English money in order to make the damages accessible by execution to the foreign litigant. This principle, they say, would satisfy the dictum of Lord Eldon in *Cash v. Kennion*, 11 Ves. Jr. 314, 316, 32 Eng. Reprint, 1109, where he lays down: "If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

I will deal shortly with the authorities later. On what principle are we asked to enter judgment for the owners of the *Volturno* for a sum of English money which will to-day produce a much larger sum of lire than that which they themselves have agreed upon, or, if the exchange had gone the other way and the value of the lire had appreciated, a sum of English money which would produce less than the agreed amount? It is said that the damages must be assessed with reference to the actual periods of detention. It is at that time that the owner suffers damages by loss of use. With that I entirely agree. But when it is added that it follows that that is also the date at which the exchange must be taken for the purpose of conversion with a view to entering judgment, I do not follow the reasoning. I assume that, in assessing the damages, all the necessary adjustments would be made and elements of damage considered. It may be that, for instance, in the present case, the temporary repairs at Gibraltar had to be paid in sterling, and it would, of course, follow that the amount of lire which the sterling represented

at the rate of exchange at that date should form an item in the damages. Similarly, if goods had to be bought in the market in England to replace English goods not delivered under a contract with a foreigner, the date of such purchase would necessarily fix the rate of exchange in assessing the damages. But I do not think there is any connection between the fixing of the damages and the rate of exchange to be taken in relation to certain items thereof at certain dates, and the rate of exchange to be fixed for the purpose of entering judgment.

I am, therefore, of opinion that the contention of the appellants is well founded, and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of judgment is being made for the purpose of making the judgment available.

It may be said that, where the rate of exchange has gone against the lira, the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply, whether the exchange is adverse or otherwise. But in any event, to assign this as a reason for the rule would be, in reality, to give damages for nonpayment, which, except under special circumstances, are never awarded in our courts. (For instance, see the judgment of Bailhache, J., in *Barry v. Van den Hurk* [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899, 36 Times L. R. 663, 123 L. T. N. S. 719, 64 Sol. Jo. 602.)

In *Manners v. Pearson* [1898] 1 Ch. 581, 589, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498, Lindley, M. R., says: "To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of

it which the plaintiff can prove that the defendants committed, which is a totally different matter."

I have examined the judgments delivered by the court of appeal in *Di Ferdinando v. Simon, S. & Co.* [1920] 3 K. B. 409, 11 A.L.R. 358, 89 L. J. K. B. N. S. 1039, 36 Times L. R. 797, 26 Com. Cas. 37, 150 L. T. Jo. 36, and also the judgments in *Lebeaupin v. Crispin* [1920] 2 K. B. 714, 89 L. J. K. B. N. S. 1024, 36 Times L. R. 739, 64 Sol. Jo. 652, 25 Com. Cas. 335, 150 L. T. Jo. 24, and in *Barry v. Van den Hurk* [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899, 36 Times L. R. 663, 123 L. T. N. S. 719, 64 Sol. Jo. 602, all decided in 1920; but, although they all seem to me to lay down and assert the same rule as that upon which Hill, J., following some of these judgments, acted, and which I have already considered, I do not think the learned judges who decided them rest their judgments on any authorities, but rather assume that such a rule existed, or ought, as a matter of principle, to exist. The only case, apart from the recent authorities to which I have referred, which seems to me to give us any assistance, is the case of *Manners v. Pearson* [1898] 1 Ch. 581, 589, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498, from which I have already quoted.

Vaughan Williams, L. J., no doubt, in that case, laid down the principle which is contended for by the respondents in the present case, but he was a dissenting judge, and his judgment cannot be reconciled with the judgments delivered by the majority of the court—Lindley, M. R., and Rigby, L. J.

Although that action may have, to some extent, turned on the form of the action, it is to be noted that judgment was given for an account on November 4, 1897; the account was delivered on November 13, 1897, showing an amount due to August, 1896, yet, upon an application by the plaintiff claiming that the rate of exchange should be fixed

at the date when the account showed the amount due,—namely, August, 1896,—the court decided that the rate of exchange should be taken, not as of that date, but as of the date of the account under the judgment—namely, November 13, 1897.

We have not been referred to any rule laid down in any English text-writers, but under American law the rule, as I stated it, seems to prevail. Sedgw., *Damages*, 9th ed. § 274, states the rule that, generally speaking, the exchange is to be estimated at time of payment, and in support quotes a number of American authorities, including the case of *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84, to which we were referred, and which Sir John Simon admitted was, for what it was worth, an authority in favor of the

appellants. Of course, such authorities are not binding in any way upon us, but they seem to me to be sound in principle, and I think the discussion of the question in *Story*, Conf. L. 8th ed. §§ 308–315, leans to the same conclusion.

I would refer, also, to *Westlake's Private International Law*, 5th ed. § 226, p. 315, where the learned author supports the view I have already indicated.

I am, therefore, of opinion that the arguments of the counsel for the appellants should prevail, and that the appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Solicitors for the appellants:
Thomas Cooper & Co.

Solicitors for the respondents:
William A. Crump & Son.

ANNOTATION.

Recent variations in rate of foreign exchange as affecting damages for tort.

The question as to the rate of foreign exchange to be taken into account in assessing damages for breach of contract is treated in the annotation following *Di Ferdinando v. Simon Smits & Co.* 11 A.L.R. 363. It is there stated that the English courts appear definitely to have taken the position that, in an action for damages for breach of contract in a foreign country, the damages, which must be adjudged in English money, should be computed by taking the rate of exchange prevailing at the time of the breach of contract. This doctrine is extended in the reported case (*THE CELIA v. THE VOLTURNO*, ante, 884) to an action for damages for a tort, it being held that, in calculating the amount of damages for loss of use of a vessel arising from a collision, the rate of exchange should be taken at the time the loss was incurred, and not at the time of the assessment of damages, or of payment; in other words, that the rate of exchange with respect to the claim for deten-

tion should be fixed as at the period of detention. The same considerations were regarded as applicable, whether the action was based on tort or on contract, and the conclusion reached in the *Di Ferdinando Case* was adhered to.

These decisions are based upon the apparently sound doctrine that, the damages, whether from breach of contract or from tort, being sustained immediately at the time of the breach of the contract or the commission of the tort, subsequent events in no way connected with the tortious act or the contract, but arising out of the financial relations of the countries involved, should not be allowed to affect the matter. In other words, the rights of the parties become fixed as soon as a right of action arises. Certain damages have been sustained as of that time which can be definitely fixed in the currency of the forum and of the place where the injury occurred. And the incidental advantage which one or the other of the parties may subse-

quently derive from a variation in the rate of exchange is not a matter which the court should consider.

In accord with the above decision, in the result reached, is *The Verdi* (1920) 268 Fed. 908, an action for damages for a collision in New York in 1915, between British-owned vessels, part of the repairs and expenses being incurred in New York and a part in England, and January 1, 1916, being assumed as the date upon which all the damages were ascertainable. It was held that the damages were properly determined by taking the rate of exchange existing on that date. The court said: "It is contended that the damages cannot be determined until final decree, because the action sounds in tort, and that the rate of exchange then prevailing should therefore be adopted. This somewhat archaic argument, if pushed to an extreme, would bar interest prior to the date

of the decree. The parties, however, have selected January 1, 1916, as the date to fix the amount of their damages in pounds sterling. The case is not one of transmitting these pounds sterling to New York, but of finding their equivalent in dollars on January 1, 1916. This can only be done by employing the rate of exchange prevalent at that date. The matter is quite different from one of a continuing obligation to pay pounds sterling in England, the failure to perform which would be compensated for by interest. Here the obligation was to pay dollars in New York. Failure to pay them is similarly compensated for by interest, but, as the initial damages were calculated in pounds, they must be converted into dollars at the value the pounds had at the time and place of payment. That is measured by the rate of exchange then prevailing."

R. E. H.

LANCE M. COONS, Appt.,

v.

STATE OF INDIANA.

Indiana Supreme Court — February 21, 1922.

(— Ind. —, 134 N. E. 194.)

Contempt — charging judge with bias.

1. Grand jurors who file a report charging the presiding judge with bias and favoring criminals, and calling for his resignation, are guilty of contempt.

[See note on this question beginning on page 908.]

Venue — change — contempt.

2. One charged with contempt of court is not entitled to a change of venue.

Arrest — warrant — ground for quashing.

3. That a statement charging the contempt was not filed before the issuance of a warrant for arrest of a person in contempt is not ground for quashing the writ.

Contempt — charge against judge — effect of truth.

4. Grand jurors cannot purge them-

selves of contempt in charging the presiding judge with bias and favoring criminals, by attempting to show the truth of the charge.

Grand jury — right to charge judge with bias.

5. Grand jurors are not privileged to file a report charging the presiding judge with bias and favoring criminals, and calling for his resignation, where the duties of such jurors are prescribed by statute, which do not include the making of such a report.

Courts — power to punish for contempt.

6. Courts of record of general jurisdiction have power to punish as for contempt their officers for offending the dignity of the court.

[See 6 R. C. L. 495; 2 R. C. L. Supp. 134.]

Contempt — effect of intent.

7. The act, and not the intent, governs in determining whether or not one has been guilty of contempt of court.

[See 6 R. C. L. 489.]

— duty to proceed for libel.

8. A judge cannot be required to proceed for libel, rather than punish for contempt one who files in the court a libelous charge against the judge.

Indictment — of judge.

9. A grand jury may indict a judge for the commission of a crime which evidence before them tends to support.

[See 22 R. C. L. 488.]

Contempt — direct — filing scandalous paper in court.

10. Presenting in open court a libelous charge on the judge is a direct contempt although the responsible parties are absent from the court when the contents of the paper become known.

— necessity of arraignment.

11. One charged with direct contempt of court is not entitled to arraignment.

— what constitutes.

12. Criminal contempts of court embrace all acts committed against the majesty of the law or the dignity of the court, and the primary purpose of the punishment of such offenders is the vindication of public authority of which the court is the embodiment.

[See 6 R. C. L. 488, 490; 2 R. C. L. Supp. 132.]

APPEAL by defendant from a judgment of the Circuit Court for Delaware County (Thompson, J.) convicting him of contempt. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cromer & Long, Wilbur Ryman, and Leffler, Ball, & Leffler for appellant.

Mr. U. S. Lesh, Attorney General, for the State.

Travis, J., delivered the opinion of the court:

This case is one of alleged contempt of court by appellant, acting at the time of such contempt as a grand juror. He, with the other five grand jurors, appeared in open court, and filed with the court what the grand jury termed to be its final report. The judge of the court did not know the contents of the reports so filed until after the grand jury had separated and gone to their several homes; and on the day following the filing of such report the judge prepared a written statement of such parts of such report which were alleged to constitute contempt of court, which written statement was set forth in the order of the court, and which directed the arrest of appellant. The written statement made by the court, in which was set forth the contemptuous language used by appellant and his co-

grand jurors in their said report, is as follows:

"Be it remembered that heretofore, to wit, December 19, 1920, the following named parties, to wit: Lance M. Coons et al. and the other five grand jurors who were then and there members of and constituted the grand jury of Delaware circuit court for the September term, 1920, — came into open court, and as such jurors and in open court presented to the court for filing and to be filed what was by them denominated the grand jury's final report, which said report so presented was signed by each and all of said parties and by each and all presented to the court as aforesaid; that said report so presented and when presented in open court contained the following scandalous, false, libelous, and contemptuous language and paragraphs, to wit:

"The grand jury also laments the fact that the presiding judge is known by the members of the bar to be biased and prejudiced to such an extent that a large number of attorneys at the bar believe him to be

so unfair in the trial of cases in his court, that they cannot get fair rulings and decisions from the judge, to such an extent that the judge is known to take one side or the other in all cases tried before him, and is known to favor certain lawyers and disfavor certain other lawyers that practise law before him.'

"Also the following: 'The grand jury returned into the court, after a further investigation, an indictment against Court Asher for burglary, who is generally known to be a law violator. Humble, law-abiding citizens wanting homes and citizens protected from thieves and burglars, and innocent women and children perhaps from death at the hands of burglars, we think this man, Asher, who was charged with burglary, should have been punished and sent to prison. There was no doubt, from the evidence, as to the guilt of Court Asher. It was not denied. The presiding judge blocked the efforts of the prosecuting attorney and would not let the case go to the jury for a decision, but deliberately selected one of the petit jurors and requested him to sign a verdict of not guilty, and thereafter refused the prosecuting attorney permission to poll the jury.'

"Also the following: 'We are of the unanimous opinion that, through a connivance and conspiracy on the part of the presiding judge, Court Asher, Tom Miller, and others, the burglary case against Court Asher was fixed and understood between the parties that Court Asher would be assisted in his defense by the presiding judge, and his acquittal had. And in support of this opinion we have the sworn testimony that Court Asher, a short time before the trial of his case, offered to bet and wager money that if he were tried in this court he would be acquitted.'

"Also the following: 'And we, the grand jury, do not believe that the presiding judge of our court should hand out such high-handed decisions. We believe that Court Asher was guilty of the crime

charged against him in the indictment, and that, had the presiding judge been fair and impartial in his rulings and dealings, and permitted the jury to have decided the case, a conviction would have been found.'

"Also the following: 'Members of this grand jury saw the presiding judge talk privately with Tom Miller after he, Tom Miller, had been indicted for burglary by this grand jury, and we are apprised of the fact that the presiding judge, after learning that Tom Miller and Court Asher and Gene Williams had been indicted for burglary in an adjoining county, communicated with an officer of an adjoining county, and requested that officer to be very easy on Court Asher, Tom Miller, and Gene Williams.'

"Also the following: 'For us to say that the good citizens of Delaware county have been outraged by such misconduct on the part of our presiding judge is putting it mild, and in behalf of the decent and respectable citizens of Delaware county who pay their taxes to maintain a courthouse and a court where justice should be meted out to lawless people, we, the grand jury, make this request that the presiding judge, William A. Thompson, forthwith transmit his resignation as the judge of the Delaware circuit court to the Honorable James P. Goodrich, governor of the state of Indiana, and that the same be effective at once. The presiding judge, being declared the protector of criminals, has no right to sit upon the bench and further usurp the office of judge.'

"That all of the above and foregoing paragraphs were contained and set out in said report when the same was so presented to said court for filing in said court.

"That said report was passed to the court at about dusk on Saturday, December 19, 1920, and that the court did not see and know the contents of said report until after the said grand jurors had separated and gone to their several homes, many

of them far distant in the country, and now, on this the 20th day of December, 1920, and at the first opportunity, the court now makes and enters the above and foregoing concerning the conduct of the said parties above named in and about the matters hereinbefore set out, and the court now orders and directs that a warrant issue for the arrest and production in open court in the said Delaware circuit court of the parties above named at 2 o'clock P. M. on the 21st day of December, 1920, to make answer to and be held responsible by said court for and on account of said contemptuous conduct as hereinbefore set out and charged as having been done and performed by said parties. And this matter is now postponed and continued until said date in order to permit the sheriff to produce in court the above-named parties."

At the time fixed in the warrant the sheriff produced the said members of said grand jury in court. Thereupon appellant presented to the court for filing, and offered to file, his verified application and affidavit for change of venue from the judge, and the court refused to note the filing of such verified application and affidavit, and refused to file the same or permit the same to be filed as one of the papers in said cause. Thereupon appellant and his co-grand jurors presented to the court for filing, and offered to file, their separate and several motion to quash and set aside the writ, and the court refused to note on its minutes the filing of such motion, and refused to file such motion, or to permit it to be filed, and thereupon appellant, together with his co-grand jurors, offered to file their separate and several answer to the statement of the court theretofore entered of record, and the court refused to note the filing of said answer, and refused to file it, or permit it to be filed,—to all of which rulings by the court appellant, at the time of such rulings, duly excepted. The court thereupon announced its

finding, opinion, and judgment in writing, that each of said grand jury men was guilty of contempt and punishment by a fine for such contempt, to which finding and judgment appellant duly excepted, and thereupon appellant, with his co-grand jurors, filed their separate and several motion, asking the court to reconsider its opinion and judgment, which motion was by the court overruled, and thereupon sixty days were granted said grand jurors to file any and all bills of exception, and each of said grand jurors prayed an appeal to this court, which appeal was perfected by but one of them, viz., this appellant.

The case comes to this court on appeal based on ten assignments of error, to wit: (1) Refusing to note the filing or to file application for change of venue from the judge; (2) refusing to note the filing of, to file, or allow to be filed a motion to quash and set aside the writ; (3) refusing to note the filing of and to file the verified answer; (4) refusing to have noted upon the docket of the court the filing of the verified answer; (5) in rendering judgment; (6) in the opinion and judgment of the court; (7) overruling the motion to reconsider opinion and judgment; (8) overruling motion for a new trial; (9) for rendering judgment without arraignment, and without requesting appellant, or allowing him to make a statement in explanation, extenuation, or denial of the charge; (10) for refusing to allow appellant to make a statement in writing, which he offered in explanation, extenuation, and denial of the charge.

One charged with contempt of court is not entitled to a change of venue from the judge.

Venue—change
—contempt.

State v. Newton (1878) 62 Ind. 517; Merchants' Stock & Grain Co. v. Board of Trade (1912) 20 C. C. A. 582, 201 Fed. 20; Clyma v. Kennedy (1894) 64 Conn. 310, 42 Am. St. Rep. 194, 29 Atl. 539; 13 C. J. p. 60, § 83; Lamberson v. Superior Ct.

151 Cal. 458, 11 L.R.A. (N.S.) 619, 91 Pac. 100.

The writ sought to be quashed and set aside was not dependent on a statement which charged the contempt; hence it mattered not whether

Arrest—warrant—ground for quashing. such statement was made or filed

prior to the issuing of the writ; not being dependent upon a charge or statement, it was not subject to the attack sought to have been made.

Appellant offered to file with the court his written statement, which he terms to be his answer in explanation, extenuation, and denial of the written charge of contempt. This statement, instead of being an apology, or an expression of regret, or an explanation, extenuation, or denial of the written accusations of the judge of the court made by appellant and his co-grand jurors in their final report, is an argumentative discussion in favor of alleged conclusions of law as to what are the rights of grand jurors in the premises, in which is set forth the whole of said final report, together with the statement that such charges were based by the grand jury upon evidence before the grand jury which they (the grand jury) believed to be true when they presented their said report, and that they still believe the charges made against the judge and the court to be true, and that they had a right to make such charges, and that they were to be considered free from malice and wilful purpose to injure or interfere in any manner with the court in so doing.

The answer sought to have been filed by appellant, having included in it the whole of the report, which contained the contemptuous language, the truth of which was by such answer reiterated, confirmed, and enlarged upon, together with the assertion that the grand jurors

Contempt—charge against judge—effect of truth.

had the legal right to thus attack the judge, was in no sense such a statement that could in any wise purge

the jurors of the contempt charged, but, if anything, it was a statement which made the action of the grand jurors more contemptuous than it otherwise would have been; and therefore the offer to file the same and the filing thereof were properly denied.

Under the fifth and sixth assignments of error, it is maintained that the actions and doings of the grand jury are privileged. The statutes of Indiana which define the duties of a grand jury are: The statute of the oath of grand jurors, in which is the following language: "You will diligently inquire, and true presentment make of all felonies and misdemeanors, committed or triable within this county, of which you shall have or can obtain legal evidence" (Burns's Anno. Stat. 1914, § 1961); the statute which sets forth the order of business of the grand jury (Burns's Anno. Stat. 1914, § 1978); and the statute which requires the grand jury to examine the county jail, workhouses, and other public buildings in the county.

In no place in any of these statutes which define the duties of the grand jury is it contemplated that the grand jury shall charge any public officer with the commission of a felony by a so-called report. The statute requires the grand jurors to take an oath to make true presentment of all felonies and misdemeanors. Section 2041 prescribes the form of such a presentment, and names it an indictment; and it will be noted that the language of the form of an indictment is that the grand jury "upon their oath do present." A presentment, as used, in common law, as a written charge of the commission of a crime or misdemeanor, is unknown in the jurisprudence of the United States. The words "presentment" and "indictment" have been held to be used interchangeably (*People v. Flaherty* (1894) 79 Hun, 48, 29 N. Y. Supp. 641, 642); and such seems to have been the interpretation of the United States Constitution, Amendment 5, according to Mr. Justice Gray

(Ex parte Wilson (1884) 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283). Appellant claims that, while the grand jury acts in aid of the court, it is separable therefrom and is not answerable to it, and that all its doings are privileged. The duties of the grand jury in this state are governed by statute, and it has no rights or privileges based upon the common law. The statutes do not provide that the grand jury make reports, to the court, of crimes and misdemeanors of public officials or of other citizens. It is, according to the oaths of its members, required to examine into all felonies and misdemeanors, and to make a true presentment in each of such cases, if, in the opinion of the grand jury as defined by statute, such felony or misdemeanor has been committed; and this applies as well to a judge of a court as to any other public officer or private individual. That part of the final report of the grand jury as set forth in the written statement made by the judge was not contemplated in law. If the grand jury, in making investigation of crimes and misdemeanors as set forth in the statute governing their order of business, conclude, from the evidence taken, that a presentment in the form of an indictment should not be made against the person or persons under investigation for the commission of a felony or misdemeanor, it is not their duty or privilege to make accusations in the form of a report, based on such evidence. There is no privilege, absolute or qualified, to commit contempt of court. *United States v. Craig* (1920; D. C.) 266 Fed. 230, 233.

Grand jury—
right to charge
judge with bias.

Appellant also maintains under his fifth and sixth assignments of error that it is neither direct nor indirect contempt to criticize the court, either in writing or oral comment, by the use of libelous or false statements which have reference to a matter that is no longer before the court. The truth of this contention

applies only where the contempt charged is constructive. There are many cases of contempt reported in the opinions of the higher courts wherein libelous language was held not to be contemptuous when it had reference solely to a matter that had been fairly determined by the court, and was no longer before it for any purpose. *State ex rel. Atty. Gen. v. Hildreth* (1909) 82 Vt. 382, 24 L.R.A. (N.S.) 551, 137 Am. St. Rep. 1022, 74 Atl. 71, 18 Ann. Cas. 661. But the case is different where an officer of the court, be he attorney, sheriff, clerk, or jurymen, either in writing or orally, files or uses libelous, undignified, and scurrilous language, — anything which brings the court into disrepute and lowers its dignity, whereby the due administration of justice is hindered and prevented. *Ex parte McLeod* (1903; D. C.) 120 Fed. 130, 133. An open insult to the person of the judge while presiding is a direct contempt of court, in support of which statement it may well be said that courts of record of general jurisdiction always have power to punish as for contempt their officers for offending the dignity of the court. *State ex rel. Caldwell v. Cockrell* (1919) 280 Mo. 269, 217 S. W. 524. Appellant, to confess and avoid the alleged contempt by his written answer, which he offered to file, and which offer was refused by the court, did not by such answer purge himself of contempt. As stated in an opinion by this court: "For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no farther proof or examination than what is known to the judges by their senses of seeing, hearing, etc." *Ex parte Wright* (1879) 65 Ind. 504, 508; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *Ex parte Robinson*, 19 Wall. 513, 22 L. ed. 208; *Lindsey v. People* (1919) 66 Colo. 343, 16 A.L.R. 1250, 181 Pac. 531.

Contempt—
charging judge
with bias.

Courts—power to
punish for
contempt.

The answer sought to justify appellant in the charges made by the report of the grand jury, by saying that, by such report and the statements therein, no offense was intended to bring the court into disrepute. The statement as an extenuation might have had some standing according to the holding in the case of *Fishback v. State* (1892) 131 Ind. 304, 30 N. E. 1088, wherein it was held that in order to constitute a contempt of court, there must be some act coupled with an intended disrespect or defiance of the court; but it has since been held by this court that, as to whether or not a contempt of court has been committed, it does

Contempt—
effect of intent. not depend upon the alleged intention of the offending party, but on the act which he did. *Dodge v. State* (1895) 140 Ind. 284, 39 N. E. 745; *Re Chartz* (1905) 29 Nev. 110, 5 L.R.A.(N.S.) 916, 124 Am. St. Rep. 915, 85 Pac. 352; *State ex rel. Crow v. Shepherd* (1903) 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; *Levinstein v. E. I. Du Pont de Nemours & Co.* (1919; D. C.) 258 Fed. 662.

Appellant seeks further to purge himself of his contempt by asserting that if any action will lie against him it is libel, and that the judge against whom the report was made ought to descend from the plane of his judicial office to the level of the appellant and attack him by a civil action. In the opinion of this court it would be a still greater humiliation of a court for the judge thereof to pass over the matter of contempt and come under the civil law to justify himself in damages for a libel. Such conduct would be personal. The court is impersonal. *Ex parte McLeod* (1903; D. C.) 120 Fed. 130. To such a point is the judicial status fixed in our jurisprudence that our courts and the judges thereof should be protected from the improper consequences of the discharge of duties, that such judicial officers have al-

—duty to proceed
for libel.

ways been shielded, on the highest consideration of the public good, from being called in question in civil actions for things done in the judicial capacity, even though the judge thereof performs such act corruptly. *Hamilton v. Williams* (1855) 26 Ala. 529; *Busteed v. Parson* (1875) 54 Ala. 393, 25 Am. Rep. 688; *Ex parte McLeod*, supra. This judicial status is better stated by Chief Justice Kent in the memorable case of *Yates v. Lansing* (1810) 5 Johns. 282, as follows: "Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

This grand jury had the authority (five of them concurring), if the evidence taken by them was in their judgment sufficient to support a charge of a commission of a crime, to "present" by "indictment" the judge of the court in question for his alleged conspiracy to thwart the ends of justice; and from the mere fact that they failed to "present" such an "indictment" it is an acknowledgment by them, in the face of their so-called report, that, upon any investigation made by the grand jury, the evidence was insufficient upon which to base a charge for a felony or a misdemeanor against the judge. But instead, through whatever motive it matters not, this appellant, with the other members of the grand jury, filed the report in defamation of the judge, and as well of the court, which was composed of language that scandalized the court. It is therefore a high contempt of court for the appellant to have sought to call to account the judge for his judicial acts elsewhere than before a constituted

Indictment—
of judge.

tribunal for impeachment. It is quite natural that litigants take umbrage at the doings of the courts, for the very reason that one side or the other is always a losing party, not only against their hopes and desires, but even probably against their honest beliefs. Nevertheless such disappointed litigants ought not, and must not, be permitted to lower the dignity of our courts, either by personal violence, or by the use of open, violent, or scandalizing language to the judge in open court. In the early English practice, indignities put upon the persons of judges when off the bench were punished summarily as contempts, for the reason that, as stated by Blackstone, it "demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of their authority (so necessary for the good order of the Kingdom) is entirely lost among the people." Bl. bk. 4, p. 286.

This document having been filed in open court, if contemptuous at all, was a direct contempt, notwithstanding the persons who presented it had gone to their homes and were absent from the court at the time its contents became known.

Appellant claims error for overruling of his motion for a new trial. The record fails to show that any motion for a new trial was offered; neither does appellant make any point in his brief under this alleged error.

Under the ninth error appellant complains that he was not arraigned by the court, and that he did not waive arraignment. It is no part of the procedure in a direct contempt of court that the one who is charged shall have the privilege of an arraignment. *Mahoney v. State* (1904) 33 Ind. App. 655, 104 Am. St. Rep. 276, 72 N. E. 151; *Nebraska Children's Home Soc. v. State* (1899) 57 Neb. 765, 78 N. W. 267.

Criminal contempts of court embrace all acts committed against the majesty of the law or the dignity of the court, and the primary purpose of the punishment of such offenders is the vindication of public authority, of which the court is the embodiment. As was well said by the supreme court of Colorado in the case of *People ex rel. Elliott v. Green* (1883) 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351: "A proper regard for the integrity of our honored profession" of the law and of the courts, and their "judicial authority, requires that indignities . . . to judges, on account of rulings made in court, be summarily dealt with."

Courts have criticized themselves and admonished each other in the careful use of this great power which they have had from time immemorial in the use of this summary proceeding, which admonishment has called to the attention of the courts the discretion of power under actions of this kind, and that such discretion ought to be carefully weighed, to the end that any judge may not, in wrath, pervert the courts' inherent power to preserve their chaste character in the eyes of the people, for whose sole benefit the courts were organized. The exercise of this discretion is most aptly stated by Mr. Chief Justice Marshall in *Ex parte Burr* (1824) 9 Wheat. 529, 6 L. ed. 152, in these words: "This discretion ought to be exercised with great moderation and judgment; but it must be exercised."

According to the published reports, it seems, that there have been fewer cases in the United States of this character wherein corruption and perversion of justice have been imputed to the judge directly and in open court, than for physical blows or chastisement by angered parties and witnesses; and it seems to be the greater weight of authority that to impute corruption and perversion of justice to a judge is attended by

Contempt—direct
—filing scandalous paper in court.

—necessity of
arraignment.

—what constitutes.

more mischievous consequences than a blow. *Rex v. Almon*, *Wilmot's Notes*, 253, 97 *Eng. Reprint*, 94; *Reg. v. Gray* [1900] 2 *Q. B.* 36, 69 *J. Q. B. N. S.* 502, 64 *J. P.* 484, 48 *Week. Rep.* 474, 82 *L. T. N. S.* 534, 16 *Times L. R.* 305; *Re Wallace*, *L. R.* 1 *P. C.* 283, 4 *Moore*, *P. C. C. N. S.* 140, 16 *Eng. Reprint*, 269, 36 *L. J. P. C. N. S.* 9, 15 *Week. Rep.* 533; *Com. v. Dandridge*, 2 *Va. Cas.* 408; *Burdett v. Com.* 103 *Va.* 838,

68 *L.R.A.* 251, 106 *Am. St. Rep.* 916, 48 *S. E.* 878; *State v. Morrill*, 16 *Ark.* 384; *State ex rel. Crow v. Shepherd*, 177 *Mo.* 205, 99 *Am. St. Rep.* 624, 76 *S. W.* 79; *United States ex rel. Guaranty Trust Co. v. Gehr* (*C. C.*) 116 *Fed.* 520; *Re Chadwick*, 109 *Mich.* 588, 67 *N. W.* 1071.

There was no error in overruling the motion to reconsider the opinion and judgment of the court.

Judgment affirmed.

ANNOTATION.

Reflection on judge by grand or petit juror as contempt.

The reported case (*COONS v. STATE*, ante, 900), appears to be the only decision involving the liability of a juror, either grand or petit, for contempt because of a reflection, by him, on the judge. It appeared in that case that the final report of the grand jury was delivered in open court, whereupon the jury were dismissed, and returned to their homes. The following day the judge examined the report and found it to contain scandalous and contemptuous language charging the judge with what amounted to a conspiracy on his part to thwart the

ends of justice. The action of the grand jury is held to be a direct contempt of court. In so holding the court determines that (1) no privilege attaches to a mere report by a grand jury, the official power of that body being confined to the return of indictments; (2) criticism of the action of a judge as to past and completed proceedings may constitute contempt if it is uttered or filed in the presence of the court; (3) for such a reflection the judge may proceed as for contempt, and is not relegated to an action for libel.

A. S. M.

EUGENE SCOTT

v.

VICKSBURG, SHREVEPORT, & PACIFIC RAILWAY COMPANY,
Appt.

Louisiana Supreme Court — January 30, 1922.

(— *La.* —, 90 *So.* 840.)

Carriers — duty with respect to step box.

Where a carrier of passengers furnishes a step box to facilitate them in boarding or alighting from its trains, it is bound to see that such appliance is safe as to strength, is so constructed as not to be readily overturned, is kept in proper condition, and, when set out for the use of the passengers, is placed upon a level and stable surface; but the carrier is not the insurer of the passenger against the consequences of his own negligence, and where the passenger is injured in attempting to use such appliance without looking at it, and stumbles over or against it when he

Headnote by BAKER, J.

should have stepped on it, his injuries are attributable to his misuse of the appliance and not to its inadequacy, and the carrier is not liable for the injuries.

[See note on this question beginning on page 914.]

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Ouachita (Dawkins, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Judgment set aside.*

The facts are stated in the opinion of the court.

Messrs. Stubbs, Theus, Grisham, & Thompson, for appellant:

In order to recover for injury while attempting to board a railroad train, it is not sufficient for plaintiff to merely establish his status as a passenger and the fact of his injury. He must also show affirmatively that the injury was caused by some defect in the appliances, premises, or equipment provided for his use in boarding the train, or by some negligent act of commission or omission on the part of some servant of defendant.

McGinn v. New Orleans R. & Light Co. 118 La. 811, 13 L.R.A.(N.S.) 601, 43 So. 450; Aiken v. Southern P. Co. 104 La. 157, 29 So. 1; Howell v. Union Traction Co. 202 Pa. 338, 51 Atl. 885.

The fact that a passenger may fall and injure himself while attempting to board a train at a station is entirely consistent with the supposition that the carrier may have discharged its full duty in maintaining its premises in such reasonable and suitable condition that passengers and others authorized to use them may, in the exercise of the ordinary care, use them in safety, and that the carrier, through its agents and employees, uses the proper care for the safety and protection of such passenger.

Aiken v. Southern P. Co. 104 La. 157, 29 So. 1; 10 C. J. art. 1348; Poland v. Grand Trunk R. Co. 112 Me. 286, 92 Atl. 38.

The safety of construction and operation is shown by successful use.

Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157; Laffin v. Bufalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599, 5 Am. Neg. Cas. 268; Ryan v. Manhattan R. Co. 121 N. Y. 126, 23 N. E. 1131, 5 Am. Neg. Cas. 329; Fox v. New York, 70 Hun. 181, 24 N. Y. Supp. 43, 5 Am. Neg. Cas. 683; Gabriel v. Long Island R. Co. 54 App. Div. 41, 66 N. Y. Supp. 301, 8 Am. Neg. Rep. 506; MacGilvray v. Boston Elev. R. Co. 4 A.L.R. 296, note.

Negligence of a carrier is not shown by the testimony of a passenger that, as he went to get on the car, the projecting edge of his shoe caught under the lid of the step box and caused him to fall.

Howell v. Union Traction Co. 202 Pa. 338, 51 Atl. 885.

Mr. John M. Munholland for appellee.

Baker, J., delivered the opinion of the court:

An opinion prepared in this case by the late chief justice was not finally passed on, owing to the change in the composition of the court; and the case was reset for argument, and has been reargued and resubmitted. As the said opinion covers the case completely, and appears to be correct, we now adopt it as that of the court. It is as follows: Plaintiff claims \$5,000 as damages for personal injuries alleged to have been sustained through the negligence of defendant and its agents, and, having obtained judgment for \$1,500, defendant has appealed, and he (plaintiff) has answered, praying that the amount of the award be increased to that claimed. The circumstances under which the injuries are said to have been sustained and the particular negligence to which they are attributed are set forth in the petition, as follows: "And that on the 17th day of November, 1914, your petitioner bought one first-class ticket from Delhi . . . to Monroe, . . . and proceeded to the passenger depot . . . in Delhi . . . for the purpose of entering the west-bound train, due about 5 or 6 o'clock P. M.; . . . that it was dark and the depot grounds were insufficiently lighted;

that a lot of empty box cars were standing between the depot and the place where the forward end of the day coach stopped for the purpose of putting off and taking on passengers; that . . . petitioner was present at the time the passenger train . . . came into said station, and took a position within a few feet of the front platform of the day coach, . . . awaiting his time and the invitation . . . to enter; . . . that, after the passenger had gotten off the train the flagman . . . called, 'All aboard,' and . . . petitioner, standing close to said platform, proceeded to step upon the step box and . . . thence to the step of the platform of the said . . . coach, and in so doing put his left foot upon the train box, caught the left hand-hold on the corner of the platform, and, as he threw his weight on his left foot on the aforesaid box, he felt it slip and give way under his foot, and while bringing his right foot up it hung under the cover of the box, at which juncture and while in this predicament he was unlawfully and negligently interfered with by the flagman, and as he reached for the hand-rail on the corner of the coach with his right hand, but before he could grasp it, the flagman forcibly shoved him on his right elbow, at which juncture, and by reason of the insecurity of the step box and the interference of the flagman, your petitioner was forcibly thrown to the ground, by which fall he was rendered unconscious, and did not regain consciousness until carried home."

He then described his sufferings and the results of his injuries, and proceeds as follows: "That all of this is due to the wanton and wilful negligence of the defendant in not providing a safe and suitable means of ingress and egress into (and out of) said passenger coach, and to the wanton, wilful, and negligent interference by the servants and employees of the defendant, particularly the flagman of the train, at the time in question, in interfering with and

preventing him from getting into said train."

Bearing in mind that plaintiff was attempting to enter upon said front platform of the day coach from the south side, and that the rear platform of the "smoker" was coupled thereto on the left, or west, side, the three persons who were in better positions to see how the accident complained of occurred were: (1) The flagman, who stood immediately upon plaintiff's right side, facing him, as he attempted to board the car, and holding a lighted lantern in his hand; (2) M. Kaliski, a passenger on the train, who had come out of the smoker with the expectation of meeting, or seeing, someone with whom he had an appointment, and who (Kaliski) was standing on the bottom step of the rear platform of the smoker, also facing plaintiff; (3) and W. C. Carpenter, a disinterested person, who had never been in the employ of a railroad company, and who, intending to board the train, was immediately behind the plaintiff waiting to move forward as he moved.

At the date of the trial, which was some sixteen months after the accident, the flagman testified that he had been discharged by the railroad company about five months prior to that time (because of a difficulty with a passenger); that he was then engaged in farming; that he was done with railroading; and that he had no interest in the suit.

He further testified, in part, as follows: "When the train stopped at Delhi—after I had discharged all my passengers—got off at Delhi—after all had gotten on that I thought were going to get on, . . . I hollered, 'All aboard,' and Mr. Scott started towards the train, and as he attempted to step up on the train stool he fell backwards in Mr. Carpenter's arms, I would say—and they laid him on the ground and sent for a doctor and I remember hearing the doctor say" (objection).

The witness went on to say that the plaintiff cried out "O Lord," while lying on the ground, and that

he did not know what was the matter with him; that he thought perhaps he had heart failure or was drunk; that plaintiff raised his foot to step on the "step stool," and was attempting to catch the hand hold, but that his foot did not touch the stool and his hand did not touch the hand hold; he simply fell backwards to the ground, against or into the arms of Carpenter, who was behind him; that he (witness), "just like anybody would," caught at him as he fell, but did not reach him.

Carpenter's testimony reads, in part: "We were going on the train, and I was going to get on right behind him. . . . Well, he started to get on it, and the flagman says, 'All aboard,' and started to get on,—and the first thing I knew, Mr. Scott fell back against me, and, of course, I grabbed—both hands—just like anybody else would do, and eased him, behind, the best I could—he got a pretty good fall and I don't remember hurting anything—like that—but his head struck me right there—in the chest—and, of course, I grabbed with both hands—that was to steady him and ease him down. . . . He (the flagman) was on the east side . . . facing the steps. . . . I don't know whether he touched Scott or not."

He testified further that he does not know whether Scott's foot touched the step box or not; it was all so unexpected to him; and he did not know what Scott was doing with his foot. The allegations of the petition that we have quoted were then read to the witness, and he was asked what he knew of the flagman having done what he is there charged with doing, and his reply was, "I never seen any of it;" he never saw Scott take hold of anything; the first thing that he knew was Scott's falling back against him.

Kaliski testified that he was standing on the lower step of the adjoining platform (being the rear platform of the smoker); that he saw Scott come up, and that he made two attempts to get up on the

box, and fell back and someone seemed to catch him; that he never got his foot on the step box; that he (witness) is inspector of watches for the railroad company. Another witness called by defendant (its agent at a near-by station) was about taking the train, and professes to have witnessed the accident. We understand him to say that plaintiff stepped on the box and seemed to give way in the knees, and when he did "he just fell right back."

Plaintiff called in rebuttal the proprietor of the livery stable, who "meets all the trains;" and he testified that he was standing perhaps 10 feet back from the scene of the accident, and that plaintiff walked by him hurriedly and started to get on the train, and that he "fell off backwards;" that, as near as he could tell, plaintiff had one foot on the stool and one foot on the car step, and had hold of the two rods, and that he came off backwards. Witness was looking right at him and did not see the flagman touch him; that the way it struck him was, "There is a man with heart failure," though he had never seen a man inflicted with that complaint.

Plaintiff also called in rebuttal two negroes who profess to have witnessed the accident from a distance of 15 feet. One of them (Perkins) testified that plaintiff "put his foot on the box—left foot; . . . he aimed to stand up;" and the next thing witness saw him fall. The other witness (Johnson) said: "When he aimed to get on the train—stepped on the box there—and as he aimed to make the next step, he fell. . . . He fell from the box."

Witness had no difficulty in seeing the box and also plaintiff's feet, and eventually testified that he saw the box "turned over."

Thus we find the following:

A. It was light enough for me to see the box—it was after dark then, but I saw the box and his foot.

Q. The box never turned over?

A. Yes, sir; I think it must have turned over.

Q. Did you see it turn over?

A. No; but from the cause there—the way it fell, it must have turned over.

Q. Did you see that box turn over?

A. When he made the step there—put his foot on the box—you see, and aimed to catch up there—the box queried over and he fell—why they come around the box, and I couldn't just see whether the box was all turned over there, after he fell.

Q. Say Yes or No, whether the step box turned over.

A. Yes; it turned over.

Q. Did you see it?

A. Yes, sir; I saw it turned over.

Other testimony we find conclusive to the effect that the box was neither turned over nor "querled over." The box that was offered in evidence, and which is shown to be the same type as that to which the testimony relates, measures 12 by 16 inches at the bottom, 10½ by 14½ at the top, and is 10 inches high. Everyone who has ever had occasion to travel on a railroad train knows the type and knows that the boxes are not readily turned over. It is shown, too, that the cinder surface upon which the box in question rested was smooth and hard, that the same arrangement had existed for years, and that no accident had ever happened because of it. The testimony is also conclusive to the effect that the light was quite sufficient for all purposes for which light was there needed. Dr. Barrier, who was the first physician to see plaintiff after the accident, and who was called to the stand by plaintiff, so testifies, saying, however, that a careful examination of plaintiff, which was made within an hour or two, required more light. He also testifies, as do other physicians who participated in that examination, that plaintiff's person showed no visible sign of injury and that no bones were broken, though he complained of great pain in his back, hip, and head, was in a semicon-

scious condition when carried to his home, and was there confined for ten or twelve days after the accident. Dr. Barrier also testified that he weighs 340 pounds; that he had been getting on and off the train at Delhi, with the aid of step boxes such as that here in question, for twenty-four years, and has met with no accident; that he came into Delhi on the train upon which plaintiff was attempting to go in; that he found no change in any of the conditions on the day of the accident; and that, in effect, was the testimony of the plaintiff himself with respect to a period of twenty years or more.

Plaintiff's version of the accident, as it appears in his testimony, is as follows (we quote the testimony as we find it in the record, and have no means of knowing whether its rather jerky appearance is attributable to the witness or the stenographer):

A. After the train came in, I was walking around, ahead of my son—along with him—and I remember—he was a little bit ahead of me—I was telling him what to do (about some of his business) and he followed me to the step box, and I stepped up with my left foot on the box, and it gave, and I caught the rail with my left hand—the rail on the train on the west side of the steps, and when the box kind of gave—as I was going on up—with the weight—why—and jerked, the front foot kind of caught in the floor of the box—extension of the top of the box—and I had on a heavy pair of solid shoes—the sole extended out a little bit—and as I went to reach for it—the other hand bar of the coach was—why—this flagman struck my elbow there and knocked it off, and if it hadn't been for that I would have caught my hold. I can't say that he did this—shoved me, or knocked me, or anything of that kind—but, at the same time, I thought he was doing it to assist me on the train.

Q. At the time the flagman's hand

touched, as you say, your elbow, you had already lost your balance and upon your ability to catch the right handhold depended your escape from the fall, didn't it?

A. My foot hung under the box at the time when I was reaching for the handhold, when he struck my arm.

A little further on in his testimony he says:

I had lost by balance before my right foot had struck the box—had caused me to—with the left foot in trying to catch myself—then my right foot struck under the extension of the top and then it threw me right over.

Q. You had, as I understand, then, already lost your balance before you caught your foot under this extension of the box?

A. I had not lost my balance before the box had given. And in order to get my foot—I caught hold—then my right foot caught under the step.

Q. Is it not a fact, Mr. Scott, that, as a result of the condition which you describe as being due to the fact that the step box gave way under you, you had already lost your balance?

A. To some extent; yes, sir. . . . Not enough, I don't think, but what I could have saved myself by catching with the hand rail.

Further along still plaintiff was questioned about the light around the depot, and seems to have found no fault with it, and then we have the following:

Q. Could you see the step box?

A. I never noticed—when—it I just slipped my foot on it.

Q. How did you know where it was, if you could not see it?

A. I knew about where it was; I knew where it ought to be.

Q. Did you look to see where it was?

A. I really don't know, Mr. Stubbs, whether I looked down at the box; I suppose I did.

Q. You don't remember whether you looked at the box or not?

20 A.L.R.—58.

A. I was bound to have looked at it, or I would not have found it.

Q. If you looked at it, did you see it?

A. I guess so; I felt it though, I know.

Q. Could you see the steps there?

A. Yes, sir.

It will be observed that the petition alleges that plaintiff "was present at the time the passenger train . . . came into said station, and took a position within a few feet of the front platform of the day coach," etc., but that he says in his testimony: "After the train came in, I was walking around, ahead of my son; . . . I remember that he was a little bit behind me,—I was telling him what to do,—and he followed me up to the step box, and I stepped up," etc. His witness Patterson testifies that plaintiff passed him "hurriedly." Plaintiff himself further testifies, in effect, that he attempted to put his foot on the box without looking to see where it was, that he knew about where it was, and that he knew that he felt it.

The evidence leaves no question as to the sufficiency of the light or as to the irrelevancy of the allegations as to the box cars, nor as to the condition of the step box or of the cinder surface upon which it rested. Plaintiff testifies that the flagman touched or knocked his elbow, but admits that impression made upon him at that moment when he had lost, and was trying to recover, his balance. The testimony to the effect that he did get on the step box finds corroboration in the manner in which he fell, to the extent that it seems unlikely that a person merely moving forward upon a level surface will suddenly fall backwards, and, in this instance, not unlikely that plaintiff may have so put his foot upon the box, with his eyes and thoughts directed to his son, who was behind him, as to bring his weight to bear upon it at some angle less than 45 degrees, with the result that the box was pushed forward, with his foot following faster than his body. de-

stroying his equilibrium and throwing him backwards; but, even if that were proved satisfactorily, it would merely establish a misuse by plaintiff of the appliance furnished by defendant, and would not affect the question of the adequacy of the appliance.

As to the law of the case, we are of the opinion that, where a carrier of passengers furnishes a step box or footstool, to facilitate them in boarding or alighting from its train, it is bound to see that such appliance is safe as to strength, is so constructed as not to be readily overturned, is kept in proper condition, and when set out for use of passengers is placed upon a level

Carriers—duty with respect to step box.

and stable surface; but that the carrier is not the insurer of the passenger against the consequences of his own negligence, and where, as here, the passenger is injured in attempting to use such an appliance, without looking at it, and stumbles over or against it when he should have stepped on it, his injuries are attributable to the misuse of the appliances, and not to any defects or inadequacy in the box or in its surroundings, and the carrier is not liable for his injuries.

The judgment appealed from is set aside, and plaintiff's demands are rejected, and this suit is dismissed, at his cost.

Dawkins, J., recused.

ANNOTATION.

Duty and liability of carrier as to "step box" or other device to facilitate entering and leaving car.

- I. Scope of note, 914.
- II. Duty in general, 914.
- III. Particular instances, 916.

I. Scope of note.

As is indicated by the title, this note is devoted to a discussion of those cases determining the duty and liability of a carrier with respect to "step boxes" or other devices to facilitate entering and leaving its cars. It does not include cases dealing with the duty to furnish, and properly to care for, the permanent means or appliances usually provided in aid of entering or leaving cars, such as platforms, permanent hand rails, and the steps of the cars themselves.

II. Duty in general.

The rule which exacts of or imposes on common carriers of passengers the duty of providing suitable and safe means by which passengers may leave and enter the cars is so well settled as to be beyond the field of argument. 4 R. C. L. 1225. That this duty may include the furnishing of a box or footstool or other device to aid passengers in boarding or alighting from cars is equally well settled, but the necessity of furnishing such de-

vice is necessarily governed by the facts and circumstances of the particular case as will be seen by reference to the cases set out infra, III.

The courts are not in entire accord as to the exact degree of care required of the carrier with respect to the duty to furnish a foot box or other device, the definitions of this duty varying from ordinary care to that of furnishing the safest means and devices that are known. In many instances where the duty of the carrier to furnish such a device has been at issue, the court has contented itself with declaring generally that a carrier must provide a safe means of entry and exit to its cars. See *Atlantic Coast Line R. Co. v. Farmer* (1918) 201 Ala. 603, 79 So. 35; *Illinois C. R. Co. v. Cheek* (1899) 152 Ind. 663, 53 N. E. 641; *Cincinnati, N. O. & T. P. R. Co. v. Bell* (1903) 25 Ky. L. Rep. 10, 74 S. W. 700; *Chalker v. Detroit, G. H. & M. R. Co.* (1919) 207 Mich. 138, 173 N. W. 532; *Nelson v. United R. Co.* (1917) 85 Or. 427, 166 Pac. 763.

In *Yazoo & M. Valley R. Co. v. Hill* (1919) 141 Ark. 378, 216 S. W. 1054, the rule was stated as follows: "It is

the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress from its cars, and the company is liable for damages by reason of the neglect of such duty to its passengers in descending from a car at a station."

On the other hand it has been said that a carrier owes the duty to a passenger of providing not only a reasonably safe appliance for enabling him to alight, but the safest appliance that has been known and tested. *Missouri P. R. Co. v. Wortham* (1889) 73 Tex. 25, 3 L.R.A. 368, 10 S. W. 741, 6 Am. Neg. Cas. 576; *Missouri, K. & T. R. Co. v. Dunbar* (1908) 49 Tex. Civ. App. 12, 108 S. W. 500, on subsequent appeal in (1909) 57 Tex. Civ. App. 411, 122 S. W. 574.

In *St. Louis Southwestern R. Co. v. Tittle* (1908) — Tex. Civ. App. —, 115 S. W. 640, the court stated the rule as to the care required of a carrier with respect to furnishing devices to aid passengers in boarding or alighting from its cars as follows: "The carrier is not absolutely liable, and in all events, for failure to provide safe means or conveniences for exit or alighting from the cars. The carrier's duty towards its passenger obviously extends to providing the passenger with reasonably safe means or conveniences for exit or alighting from the cars as against means that are not reasonably safe. This does not mean that the carrier is an insurer, but is liable for reasonable care only. *Thomp. Neg. § 2679*. A duty is but a performance of some act. The rule applicable in the performance of the duty in this particular is that the carrier is charged with the obligation of exercising the same high degree of care which the law imposes upon it in other relations towards its passengers." The court in that case distinguished *Missouri P. R. Co. v. Wortham* (Tex.) *supra*, as follows: "We think [such case] recognizes the rule that a carrier would not be liable for failure to provide reasonably safe means or conveniences to alight from the train

if it 'exercised that high degree of care which their duty to the appellee required;' but that it would be liable if it 'had not exercised the degree of care required of them.' "

So, in *Texas Pacific R. Co. v. Beezley* (1909) 56 Tex. Civ. App. 245, 120 S. W. 1136, wherein it was sought to recover damages for an injury alleged to be due to the failure of a railroad company to furnish a footstool to aid in alighting from its cars, the court held to be erroneous an instruction which charges that it was the railroad's duty to provide "the safest means practicable, the safest means known and used by the railroad companies, to assist passengers in alighting from trains." The court said: "It imposed upon appellant the absolute duty of providing for its passengers the safest practicable means known and used by railroad companies to assist passengers in alighting from its trains, whereas the law only imposes the duty of exercising that high degree of care to furnish such means as a very cautious and prudent person would have exercised under the same circumstances."

However, in the absence of peculiar circumstances calling for such assistance, the failure of a railroad company to furnish a portable step or stool to shorten the distance between the car step and the platform is not of itself such negligence as will render the company liable for an injury resulting from a fall which might not have happened if the step had been shorter, as it is not the duty of a carrier to assist its passengers in getting on and off its cars by providing extra appliances or devices, if ingress or egress is otherwise easy, and no knowledge of the peculiar need of a passenger for such assistance is brought home to the carrier. Such a duty is not enjoined by law. *Young v. Missouri P. R. Co.* (1902) 93 Mo. App. 267; *Cincinnati, N. O. & T. P. R. Co. v. Bell* (1903) 25 Ky. L. Rep. 10, 74 S. W. 700; *Texas Midland R. Co. v. Frey* (1901) 25 Tex. Civ. App. 386, 61 S. W. 442. See also *Traphagen v. Erie R. Co.* (1906) 73 N. J. L. 759, 64 Atl. 1072, 67 Atl. 753, 9 Ann. Cas. 964.

Thus it has been said that an instruction which made it the duty of the carrier to furnish a box, stool, or some other means of assisting the descent of passengers only when it was necessary to do so in order to secure the safety of the passengers, properly stated the law. *Missouri, K. & T. R. Co. v. Sherrill* (1903) 32 Tex. Civ. App. 116, 72 S. W. 429.

The mere fact that other passengers may board or alight safely from trains stopped at the same place does not lessen the duty of the carrier to provide a step or stool, if the platform is so much below the level of the lower steps as to make it unsafe for passengers to alight without such aid. *Merryman v. Chicago G. W. R. Co.* (1907) 135 Iowa, 591, 113 N. W. 357.

III. Particular instances.

Where the lowest step of a car is not higher above the ground than is usual in the case of other vehicles from which people safely alight without such assistance, it has been said that a portable box or footstool need not be provided. See *Atlantic Coast Line R. Co. v. Farmer* (1918) 201 Ala. 603, 79 So. 35. So, in *Young v. Missouri P. R. Co.* (1902) 93 Mo. App. 267, wherein it appeared that the lowest car step was from 18 to 20 inches above the station platform, it was held that the carrier was not guilty of negligence in failing to furnish a portable step, in the absence of any circumstances showing such assistance to be necessary. The court said: "It is not claimed the construction of the step of the car was faulty in not dropping to a nearer level with that of the platform of the station, or that it was of unusual construction in any way, but it is claimed that since the height of the last step was some 18 or 20 inches above the platform, it was the duty of the defendant to have furnished a portable step for the use of the plaintiff and its other passengers while leaving its car. It appears that the defendant had been in the habit of furnishing a portable step to its other cars, but that none had been used in connection with the 'smoker' for at

least a year past. It further appears that the height of the last step of the 'smoker' above the platform was not greater than that between the ground and the last step of the carriages, spring wagons, and buggies in general use. And it still further appeared that thousands of persons had made their exit from said smoker during the preceding year, unassisted and without the happening of a single accident to them. We know of no law, nor has our attention been called to any, which required the defendant to furnish portable steps for the use of its passengers in entering or leaving any of its cars. If it did furnish such steps, it was but a self-imposed duty for the violation of which there could, of course, be no liability. . . . It is well settled that negligence cannot be presumed when nothing has been done out of the usual course of business, unless the course is improper; and that there must be some special circumstance calling for more particular care and caution to make liability. And where something unusual occurs which injures plaintiff, but such unusual occurrence is not even inferentially the result of an unusual act of the defendant, and the defendant has, as far as he is concerned, been pursuing his usual course, which has heretofore been done in safety, then the unusual occurrence is what is called an accident. . . . By the application of this rule to the facts of this case, as we have just stated them to be, it becomes at once apparent that the occurrence which resulted in plaintiff's injury was no more than an accident for which there was no liability."

Similarly, in a case wherein it appeared that the lower step of a car was not more than 18 inches from the platform, and that the injured passenger was assisted by the employees of the carrier in alighting, it was held that the carrier could not be charged with negligence for failing to furnish a box or stool to aid passengers in reaching the ground, the court saying that where none of the attending circumstances tended to establish negligence, it could not be

presumed from the mere happening of the event. *Texas Midland R. Co. v. Frey* (1901) 25 Tex. Civ. App. 386, 61 S. W. 442.

In *Truesdell v. Erie R. Co.* (1906) 114 App. Div. 34, 99 N. Y. Supp. 694, wherein it appeared that the step of the car was only 14 inches above the rail, it was held that the carrier was not negligent in failing to provide a stool or box to aid passengers in alighting. The court, however, admitted that the rule would be different where the steps were inconveniently high, saying on this point: "If the railroad company furnished a car with a step so high that a passenger could not conveniently alight by stepping down, the jury would have been warranted in finding that it was guilty of negligence in not furnishing a platform or stepping box, or assisting passengers in alighting or warning them of the danger and assuring them that they would be afforded ample time to alight."

In *Nelson v. United R. Co.* (1917) 85 Or. 427, 166 Pac. 763, which was an action for damages alleged to have been caused by the failure of the carrier to furnish a stool or box to aid passengers in alighting from its cars, the evidence was in conflict as to the height of the car steps from the ground, there being testimony that it was between 2 and 3 feet, and on the part of the company that it was 22 inches. The court held that whether the carrier was guilty of negligence in failing to furnish a stool under the circumstances was a question for the jury, and sustained a verdict denying liability on the part of the carrier. It was said: "It may be stated as a general rule that it is the duty of a common carrier to provide safe and convenient means of entering and leaving its vehicle. This includes the exercise of due care in the construction and keeping, in at least a reasonably safe condition, the steps of cars and other appliances for enabling passengers to board and alight from its cars. It is not, however, bound to exercise an infallible judgment in such matters, and is generally considered to be guilty of no breach of

duty if the method of construction adopted is in common use and approved by experience; but it has been held that it cannot excuse itself unless the appliances used by it were reasonably safe, though they were such as had been adopted and used by others. It may be the carrier's duty, under certain circumstances, to provide a stool or box for the use of a passenger entering or leaving its car; for instance, where the steps of such car are inconveniently high, or where the car has been stopped at a point where there is no platform. Whether or not the carrier has been negligent in the construction of its steps or in furnishing other appliances for enabling the passenger to board and alight from its vehicle is usually a question for the jury under the facts of the particular case."

But in *Merryman v. Chicago G. W. R. Co.* (1907) 135 Iowa, 591, 113 N. W. 357, it was said generally that, "when the station platform is so much below the level of the lower steps of the car as to make it unsafe for passengers to alight without an intermediate stool or step, it is the duty of the carrier to provide such step."

Where it appeared that a passenger fell while alighting in the dark at a station where she had been accustomed to find a stool placed so as to shorten the distance from the steps to the ground, which distance was 23 inches, it was held that the failure of the carrier to have the stool in place rendered it liable for the injury caused to the passenger by the fall. *Cincinnati, N. O. & T. P. R. Co. v. Bell* (1903) 25 Ky. L. Rep. 10, 74 S. W. 700.

Likewise in a case where the distance from the step to the ground was 3 feet or thereabouts, it was held that the carrier was negligent in failing to provide a step or stool to aid a passenger in entering its car. *Illinois C. R. Co. v. Cheek* (1899) 152 Ind. 663, 53 N. E. 641. It appeared, from the evidence in that case, that, on the occasion of the accident, the train was stopped at a point where there was no platform, and where the distance from the ground to the lowest step of the car was 3 feet; and that it had

been the custom, previously, of the carrier at this station, before inviting passengers to enter its cars, to furnish a stool to facilitate their reaching the steps leading to the platform of the car, but on the occasion of the accident it failed to make this provision, although the injured passenger requested that a stool should be furnished, and demurred at attempting to enter the car until assured by the servants of the carrier that she would be properly assisted. It was held that a verdict against the carrier was properly rendered, and that the passenger was not guilty of contributory negligence in attempting to board the train without the aid of a stool under the circumstances. See to similar effect *Atlantic Coast Line R. Co. v. Farmer* (1918) 201 Ala. 603, 79 So. 35.

Similarly, where a train was stopped at a place where there was no station platform and the distance from the last step of the car to the ground was 20 inches, it was held that it was the duty of the railroad company to furnish a stool to aid passengers in alighting; and that if the stool customarily used was thrown aside because the ground was so slippery that it could not be kept in place, the company should have warned the passengers and given them assistance in alighting. *Chalker v. Detroit, G. H. & M. R. Co.* (1919) 207 Mich. 138, 173 N. W. 532.

Where the car in which a passenger was riding was stopped some distance from the platform, and on attempting to re-enter the car, after going to procure a meal at one of the company's eating rooms, the passenger fell and was injured, it was held that the company was guilty of negligence in that it failed to provide a box or footstool to aid passengers in boarding and alighting from the train, the court saying that it was quite probable, if not almost certain, that the passenger would not have fallen if there had been a platform or stool next the car. *Sellers v. Southern P. Co.* (1917) 33 Cal. App. 701, 166 Pac. 599. The distance from the lower step

to the ground, however, did not appear from the opinion.

In *Missouri K. & T. R. Co. v. Corse* (1907) 46 Tex. Civ. App. 60, 101 S. W. 522, it was held that a railroad company was negligent in failing to provide a stool or box for the use of passengers in alighting. It does not appear from the opinion, however, how far from the ground or platform the steps of the car were.

So, where a train was stopped just before reaching a station, at a place where the distance from the lowest car step to the ground was so great as to make it unsafe to alight without the aid of a stool or other appliance, it was held that the jury were warranted in finding the railroad company negligent in failing to provide such stool or appliance. *Lancaster v. Southern R. Co.* (1912) 92 S. C. 177, 75 S. E. 398, wherein the court said: "In view of the positive and undisputed evidence on the part of the plaintiff as to the call, 'All out for the junction,' and the positive and direct evidence on the part of the defendant, as well as the plaintiff, that the train was stopped before it reached the station, that the step was very high, and that the landing was very narrow and on the verge of a steep incline, opposed only by the recollection of the flagman, who could not swear positively, it seems to the court that the jury could not have reached, with reason, any other conclusion than that due care required that the defendant should furnish a light and stool for women alighting from the train. While it is not true that due care always requires the carrier to furnish stools or other appliances for passengers to alight, conditions shown here by the evidence, beyond reasonable doubt, did require such precautions."

In *Appel v. Alton, G. & St. L. Traction Co.* (1917) 207 Ill. App. 562, it appeared that a street car passenger was injured by being struck by the rear end of the car, on falling after alighting from the left or wrong side of the front vestibule, owing to the fact that no step was lowered or other appliance provided by the

motorman. A verdict for the plaintiff was sustained, the court saying in an official syllabus: "Where a street car motorman states to a passenger in the front vestibule desiring to alight on the left side, instead of on the proper side, of the car, that he will open the wire gate for him, it becomes the duty of the company to provide a step or other appliance by which the passenger can alight in safety."

Where a carrier provides a stool or other device to aid passengers in boarding or alighting from its cars, it must be adequate for the purpose, and the fact that other carriers used similar devices will not relieve it from liability if it is not. *Missouri P. R. Co. v. Wortham* (1889) 73 Tex. 25, 3 L.R.A. 368, 10 S. W. 741, 6 Am. Neg. Cas. 576, wherein it was held that a stool in the shape of a box about 11 inches square on the top, and somewhat larger at the bottom, which overturned when stepped on, was not such an appliance as would relieve the carrier of its duty, the court saying: Notwithstanding the testimony on the part of appellants that boxes of this character were in general use upon railroads to assist passengers in alighting, and that several passengers used the same box upon this occasion, and that none of them were injured, we do not think that the jury were bound to conclude that the appellants, in using it, exercised that high degree of care which their duty to the appellant required. She was a passenger alighting from the car which she had been traveling, to take another, and to complete her trip under her contract with appellants. They owed her the duty of providing not only a reasonably safe appliance for enabling her to alight in order to make the transfer, but the safest that has been known and tested. It would be unreasonable to say that a small box or stool which presented the surface of about 1 square foot and rested upon a base but a little more extensive, and which was shown to be capable of being overturned at least by an incautious step, could be safe

as a platform, such as in ordinary use among railroads. If it were not, the jury were authorized to find that the companies had not exercised the degree of care required of them. It is apparent from the testimony in the case that if a platform had been provided, or even a safe substitute, such as could not have been overturned by a step upon the edge, the injury in this case would not have resulted, and it follows that no amount of testimony as to the length of time it had been used, and the number of persons who had passed over it securely, or of expert opinion as to its safety, ought to be permitted to overcome the undoubted physical facts in evidence."

Likewise, it has been held that a carrier is guilty of negligence in providing a small box or footstool which is badly worn and which, when placed on the uneven platform provided at the station, will tilt or turn over when stepped on by a passenger in alighting. *Missouri, K. & T. R. Co. v. Dunbar* (1909) 57 Tex. Civ. App. 411, 122 S. W. 574.

Similarly, where it appeared that a train was stopped at a place where there was no platform, and the carrier furnished a stool to aid passengers in alighting, but placed it on a rough and uneven ground in such a manner as to be insecure and unsteady when stepped on, it was held that the carrier was liable for injuries to a passenger resulting from the overturning of the stool when she stepped on it, the court saying that so placing the stool would not be the exercise of an adequate degree of care in furnishing passengers a reasonably safe means of alighting. *Migge v. Northern P. R. Co.* (1913) 75 Wash. 197, 134 Pac. 815.

Likewise it has been held that there was no platform at the place where a train stopped to discharge passengers, and that, although a stool was placed by the servants of the carrier to aid passengers in alighting, it was a long distance from the lowest step of the car platform to the stool, and the stool was placed on soft and uneven ground, the carrier was liable for an

injury sustained by a passenger by the overturning of the stool when she stepped on it. *Southern R. Co. v. Reeves* (1902) 116 Ga. 743, 42 S. E. 1015.

In *Missouri, K. & T. R. Co. v. White* (1900) 22 Tex. Civ. App. 424, 55 S. W. 593, it was held that a verdict against a railroad company was warranted by evidence that the stool furnished by the company to aid passengers in alighting was improperly placed, being partly under the step, and that the servants of the company took hold of the injured passenger in such a way as not to be able to help her properly.

In *Davis v. Kelly* (1922) — Ark. —, 237 S. W. 698, where the train had overrun the station platform and a woman passenger was injured as she attempted to alight on a footstool which had been placed on ground that was not level, the submission of the question of negligence to the jury was upheld apparently because of the failure of the carrier to afford the passenger an opportunity to alight on the platform, and not because of the failure to properly place the footstool, or prevent it from tilting as the passenger stepped upon it.

In *Plummer v. Boston Elev. R. Co.* (1908) 198 Mass. 499, 84 N. E. 849, it appeared that, owing to the nature of the construction of a subway, there were places where the permanent platform could be brought no nearer to the cars than 21 inches. In order to bridge this gap the company had provided a movable extension platform, which was pulled out by a servant of the company when the car stopped with the door opposite such a gap. On the occasion of the accident the car had stopped in such a position that the movable platform covered only a part of the door space, and, in attempting to enter the car, a passenger fell through the uncovered space and was injured. It was held that the company was liable, and the fact that the movable platform was the best device known for the purpose, and that no contrivance to serve the same purpose was in use elsewhere, did not lessen the liability of the company for its negligent use of the device.

In *Gulf, C. & S. F. R. Co. v. Southwick* (1895) — Tex. Civ. App. —, 30 S. W. 592, wherein it appeared that a passenger, in alighting from a car, either missed the footstool provided by the carrier, or if she put her foot on it, the stool tilted or capsized, it was said that, if the use of the stool was negligence, without contributory negligence on the part of the injured passenger, and injury was the proximate result of that negligence, the carrier would be liable. The court, however, did not decide the question whether the use of the stool in question was negligence, the decision turning on other points.

In the reported case (*SCOTT v. VICKSBURG, S. & P. R. Co.* ante, 908), it is held that while it is the duty of a carrier who furnishes a step box or footstool for the use of passengers in boarding and leaving its cars, to see that the box is adequate for the purpose, and properly and safely placed, it is not liable for injuries to a passenger resulting from his careless and negligent use of the box furnished.

So, where a passenger suffering from a weak ankle failed to notify the carrier of her infirmity, and stepped from a car step to the platform without looking to see if a portable step had been placed there, it was held that, even assuming that the carrier was negligent in failing to furnish the step, it could not be held liable for the resultant injury, as the contributory negligence of the passenger, in failing to look to see if a step was there, was the direct and proximate cause of her injury. *Young v. Missouri P. R. Co.* (1902) 93 Mo. App. 267.

Likewise, a carrier is not responsible for injuries to a passenger from the use, in alighting, of a stool plainly not intended by the carrier to be used for such a purpose. Thus it has been held that a carrier was not required to furnish means and appliances for alighting from the baggage compartment of a car, where adequate means were provided at the passenger exit of the car, and a passen-

ger who attempted to alight from the door of the baggage compartment, using the motorman's stool as an aid, could not recover for injuries sustained, where it did not appear that the stool was placed in that position by the carrier, or that its use was

so authorized. Nor, in such a case, was it the duty of the carrier to warn the passenger of the unusually long step from the top of the stool to the ground. *Davidson v. Washington & O. D. R.* (1921) 129 Va. 99, 105 S. E. 669. M. B.

STATE OF KANSAS

v.

EARL A. NOSSAMAN, Appt.

Kansas Supreme Court — November 6, 1920.

(107 Kan. 715, 193 Pac. 347.)

Constitutional law — prohibiting sale of cigarettes.

1. The act (Laws 1917, chap. 166) prohibiting and prescribing penalties for bartering, selling, or the giving away of cigarettes or cigarette papers and the keeping of them for barter, sale, or free distribution, is within the police power of the state, and does not violate any of the principles of the 14th Amendment to the Constitution of the United States.

[See note on this question beginning on page 926.]

Evidence — prima facie — possession of cigarettes.

2. The provision making the possession of cigarettes and cigarette papers prima facie evidence of the selling and keeping for sale of the prohibited articles is not a denial of due process of law.

[See 6 R. C. L. 465; 2 R. C. L. Supp. 125.]

Appeal — election — denial — error.

3. Held, further, that under the evidence there was no error in refusing to require the county attorney to elect upon which sales made by the defendant he would rely for a conviction.

[See 14 R. C. L. 199.]

Evidence — sufficiency.

4. The evidence is held to be sufficient to support the verdict of the jury.

Headnotes by JOHNSTON, Ch. J.

APPEAL by defendant from a judgment of the District Court for Harper County (Hay, J.) convicting him of violating a statute prohibiting the barter, sale, or giving away of cigarettes. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. E. C. Wilcox for appellant.

Messrs. Richard J. Hopkins, Attorney General, and Vernon Day, for the State:

The Kansas Anti-cigarette Law is not unconstitutional.

State v. Olson, L.R.A.1918B, 975, and note, 26 N. D. 304, 144 N. W. 661; Austin v. State, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44,

affirmed in 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; 12 C. J. 925.

Johnston, Ch. J., delivered the opinion of the court:

The defendant appeals from a decision adjudging him to be guilty of violating certain provisions of chapter 166 of the Laws of 1917, prohibiting the barter, sale, or giving away of cigarettes or cigarette papers, and also of keeping and having them for barter, sale, and free distribution.

The information charged the making of twelve separate sales to a number of persons, and in the thirteenth count he was charged with keeping cigarettes and cigarette papers for barter, sale, and free distribution. The jury found him guilty of separate sales under seven of the counts, and also guilty under the thirteenth count for the keeping of the prohibited articles, but found him not guilty under three of the counts charging sales.

The defendant contends that the act under which he was convicted denies to him the equal protection of the laws, and deprived him of liberty and property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

In substance the first section of the act makes it unlawful to barter, sell, or give away cigarettes or cigarette papers, and also to keep them in a store or other place for barter, sale, or free distribution. It provides that, upon proper complaint, there may be a search for and a seizure and confiscation of such articles if found. It contains the added provision that the possession of the prohibited article shall be considered *prima facie* evidence of a violation of the act.

The second section declares it to be unlawful to advertise cigarettes or cigarette papers offered for sale in any newspaper, periodical, or circular, or upon any street, sign, placard, billboard, or in any package, store, window, show case, or any other public place.

The third section makes it unlawful to sell or give away cigarettes or cigarette papers or tobacco to any one under twenty-one years of age, and likewise makes it unlawful for the proprietor of any place of business to permit minors to frequent such place while in the act of using tobacco in any form.

The fourth section provides that a violation of the preceding section shall be a misdemeanor punishable by a fine of not less than \$25 nor more than \$100 for each offense.

The defendant bases his claim of invalidity upon the ground that the act prohibited the sale of tobacco in one form and permits its sale in other forms, and that the classification so made is arbitrary and unreasonable. For a number of years there has been a well-settled opinion that the use of cigarettes, especially by persons of immature years, was harmful, and the courts have recognized that they were deleterious in their effects. Their sale and use have been regulated and prohibited by legislative bodies, and these measures have been upheld as a proper exercise of the police power.

Constitutional law—prohibiting sale of cigarettes.

An ordinance of the city of Chicago provided that only licensed persons of good character and reputation could sell cigarettes, and that none could be sold within a prescribed distance of a schoolhouse. A license fee of considerable amount was required to be paid, and besides the licensee was required to give a bond that he would obey the laws. A person convicted of violating the ordinance challenged the validity of the regulation, insisting that the ordinance and judgment operated to deprive him of liberty and property, thereby violating the Federal Constitution. Among other claims it was urged that the singling out of one form of manufactured tobacco for regulation, without applying the same regulation to other forms in which tobacco may be used, was an invalid exercise of power. The court overruled the objection, and held that the measure did not violate any principle of the Federal Constitution. In deciding the case it was said: "It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sale of that particular

form of tobacco. Paragraph 66, before quoted, expressly authorizes the adoption of ordinances necessary to police power; and ¶ 78 is an express authorization of the city council, to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions, express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort, and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations." *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44.

The case was taken on appeal to the United States Supreme Court, where the judgment was affirmed, that court holding that the regulation of the sale of cigarettes was a question for the state to determine for itself, and was not a violation of any provision of the United States Constitution. *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

A statute of Tennessee provided that the sale of cigarettes, cigarette papers, or substitutes for the same, or the bringing of these articles into the state for the purpose of selling or giving them away, was a misdemeanor punishable by a fine of \$50. *W. B. Austin*, who purchased packages of cigarettes from a dealer in another state and sold a package to a customer in his place of business in Tennessee, was convicted. He contended that the act was beyond the power of the state legislature and violated the Federal Constitution. In treating the question whether cigarettes as shipped

in packages were articles of commerce, subject to state control and prohibition, the supreme court of Tennessee said: "Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes; yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which, by human observation and experience, have become well and generally known to be true (*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; 1 *Greenl. Ev.* § 6; 1 *Whart. Ev.* § 282; 1 *Jones, Ev.* §§ 129, 134; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, and note 693; *State v. Goyette*, 11 R. I. 592, 3 Am. Crim. Rep. 282; *Watson v. State*, 55 Ala. 158); nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them (*Boullemet v. State*, 28 Ala. 83; 12 Am. & Eng. Enc. Law, 199). It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that, among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason. It is also a part of the unwritten history

of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone for the protection of the people of the state from an unmitigated evil." *Austin v. State*, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305.

This case, too, was appealed to the Supreme Court of the United States, and, while it declined to take judicial notice that special injury resulted from the use of cigarettes, or to approve the opinion of the Tennessee court that they are "inherently bad, and bad only," it did hold that a restriction or prohibition of the sale of cigarettes enacted by a state for the protection of the public health and welfare is within the police power. In upholding this statute and affirming the judgment, that court said: "Cigarettes do not seem, until recently, to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use, or to indorse the opinion of the supreme court of Tennessee that 'they are inherently bad, and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as

against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health." *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

While the decision dealt mainly with the question of whether the prohibition of the sale of cigarettes shipped in packages from another state was an infringement of the power of Congress over commerce, it did hold that it was within the province of the legislature of the state to declare how far cigarettes may be sold, or to prohibit their sale entirely after they have been taken from original packages and from a part of the mass of property within the state. It was held that it was not unreasonable for the state to declare under penalties that cigarettes are injurious to public health and welfare, and that such an act did not trench upon the liberty of a citizen by preventing him from carrying on a lawful business, nor infringe any principle in the 14th Amendment of the Federal Constitution. These decisions practically determine adversely the contention of the defendant.

The claim that the classification or distinction made between cigarettes and other forms in which tobacco is prepared and wrapped is without substantial merit. It is competent for the state to determine for itself the extent to which it will go in the restriction or prohibition of the sale or use of that which is deleterious to public health or morals. It determined that the sale of cigarettes was a greater menace to the health and welfare of the people than would be the sale or use of tobacco in other forms, and further that the sale of tobacco to minors endangered the public health and safety more than would a sale to adults. It was within the province of the legislature to determine what kinds of tobacco lead to the most hurtful results, and further that the use of tobacco was more hurtful to minors than to

adults. We think there was sufficient ground for the classification that was made. The legislature is not required to cover all evils of a like character in a single act. The fact that it has placed one of them under the ban of the law without condemning others does not impair the validity of the act. In *Cotting v. Kansas City Stockyards Co.* (Cotting v. Godard) 183 U. S. 111, 46 L. ed. 109, 22 Sup. Ct. Rep. 43, the Supreme Court, in speaking of the classifications, said: "It may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations, which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed upon certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another,—certain burdens imposed on one which do not rest upon another."

In the exercise of the police power the legislature may proceed step by step, condemning that which it deems to be the greatest menace to the health and welfare of the people, leaving further regulation and prohibition for future consideration. One who has violated such a prohibition has no ground for objecting that others escape punishment who have done acts which might have been prohibited and punished. The legislature has drawn the line in good faith between the different forms of tobacco and the classes to whom sales may be made, and this, we think, has been done without violating the constitutional rights of the defendant. *State v. Olson*, 26 N. D. 304, L.R.A. 1918B, 975, 144 N. W. 661. While

the statute prohibits the sale or keeping for sale of tobacco to minors, or of tobacco and materials connected with the smoking of tobacco, that part of the act is not within the charges made against the defendant, and is therefore not involved in the case.

There is a further contention that the provision making the possession of cigarette materials prima facie evidence of a violation of the act is a denial of due process of law. It is competent for the legislature to make proof of one fact prima facie evidence of another fact essential to the guilt of the accused, where the fact presumed has a fair relation to, or some natural connection with, the fact to be proven. *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870; 12 C. J. 1205. The term "prima facie evidence" carries the inference that such evidence may be rebutted and overcome, and, notwithstanding the rule, an accused has the opportunity to submit his evidence and make a full defense. The verdict must rest upon all the evidence which must establish his guilt beyond a reasonable doubt. There is a natural connection between the possession of the prohibited articles and the sale of them, and also of the keeping of them for sale or free distribution. The direct evidence abundantly sustained the charges upon which the defendant was convicted, and the instructions calling the attention of the jury to the statutory rule of evidence did not trench upon his constitutional rights.

There is nothing substantial in the objection that the court refused to require the county attorney to elect upon which sales he would rely for a conviction. The information charged specific sales to particular persons, and there was nothing in the evidence to hamper or mislead the defendant, or to make an election necessary.

Neither is there any ground for

Evidence—
prima facie—
possession of
cigarettes.

—sufficiency.

Appeal—election
—denial—error.

the contention that the evidence does not sustain the conviction under the thirteenth count.

Judgment affirmed.

All the Justices concur.

Writ of error dismissed by the Supreme Court of the United States, March 20, 1922 (U. S. Adv. Ops. 1921-22, p. 366) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 314.

ANNOTATION.

Constitutionality of anti-cigarette legislation.

- I. In general; commerce clause; original package, 926.
- II. Cigarette advertisements, 930.
- III. Cigarette smoking, 931.

I. In general; commerce clause; original package.

As to anti-cigarette legislation constituting interference with interstate commerce, see also II. *infra*; and *State v. Sbragia* (Wis.) under IV. *infra*.

That the police power of a state or municipality extends to the regulation or prohibition of the manufacture or sale and, under some circumstances, the use of cigarettes, is well settled, and statutes or ordinances designed for these purposes have generally been held valid. *Austin v. Tennessee* (1900) 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, affirming (1898) 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; *Gundling v. Chicago* (1900) 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, affirming (1898) 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44; *Cook v. Marshall County* (1905) 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, affirming (1903) 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372; *Hodge v. Muscatine County* (1905) 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237, affirming (1903) 121 Iowa, 482, 67 L.R.A. 624, 104 Am. St. Rep. 304, 96 N. W. 968; *Re May* (1897) 82 Fed. 422; *People ex rel. Berlzheimer v. Busse* (1907) 231 Ill. 251, 83 N. E. 175; *Kappes v. Chicago* (1905) 119 Ill. App. 436; *McGregor v. Cone* (1898) 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; *STATE v. NOSSAMAN* (reported herewith) ante, 921; *Alperson v. Whalen* (1905) 74 Neb. 680, 105 N. W. 474.

See also, among other cases, appar-

- IV. Coupons or other extraneous articles in cigarette packages, 932.

- V. Place or method of manufacture, 933.
- VI. Miscellaneous; title of statute, 935.

ently assuming the validity of anti-cigarette legislation: *People v. Duke* (1897) 19 Misc. 292, 44 N. Y. Supp. 336; *Allen v. State* (1913) 10 Okla. Crim. Rep. 75, 133 Pac. 1138; *State v. Sbragia* (1909) 138 Wis. 579, 23 L.R.A.(N.S.) 697, 119 N. W. 290.

A leading case on the present question is *Austin v. Tennessee* (U. S.) *supra*, from which the court quotes in the reported case (*STATE v. NOSSAMAN*, ante, 921). The United States Supreme Court, in this case, sustained the constitutionality of the Tennessee statute making it a misdemeanor, punishable by a fine of not less than \$50, for any person, firm, or corporation, to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same. In the state court the decision was based on the grounds that cigarettes were not legitimate articles of commerce, and that the sale in question was not the sale of an original package, so as to bring the statute in conflict with the power of Congress over interstate commerce. The United States Supreme Court decision is based on the second of these grounds, the view being taken that tobacco, even in the form of cigarettes, is a legitimate article of commerce, although the power of the state to regulate or prohibit the sale of cigarettes, as inimical to the health and welfare of its citizens, is recognized. In this case it appears that the cigarettes were transported by an express company in an open basket, in ordinary cigarette packages

of the size of 3 by 1½ inches, each package containing ten cigarettes; and in the majority opinion it was held that, under these circumstances, the doctrine protecting original packages from interference by the police power of the state was inapplicable. Mr. Justice Brewer, with whom three of the justices concurred, dissented, on the ground that the size of the package was immaterial, that the matter of importation was one for regulation exclusively by Congress, and that the effect of sustaining the statute would be to uphold the power of the state to prohibit the importation of such articles as cigarettes into the state for purposes of sale.

The Tennessee court in *Austin v. Tennessee*, supra, held that it would take judicial notice of the harmful character of cigarettes. The view on this point, of the Federal Supreme Court as stated in the majority opinion, is set out in the quotation from the case in the NOSSAMAN CASE.

The following cases, in so far as they hold or assume that the ordinary package containing ten cigarettes is an "original package," for purposes of interstate commerce, may be regarded as in conflict with *Austin v. Tennessee* (U. S.) supra, and to that extent overruled: *Re Minor* (1895) 5 Inters. Com. Rep. 329, 69 Fed. 233; *Iowa v. McGregor* (1896) 76 Fed. 956; *Sawrie v. Tennessee* (1897) 82 Fed. 615; *Re May* (1897) 82 Fed. 422; *State v. Goetze* (1897) 43 W. Va. 495, 64 Am. St. Rep. 871, 27 S. E. 225. In *Re Minor* (Fed.) supra, it was assumed apparently that the ordinary cigarette package, containing ten cigarettes, was an original package; and the court held, therefore, that a state statute requiring payment of a license fee of \$500 for selling at retail cigarettes, as applied to a sale of such packages imported from another state, was a burden upon interstate commerce in violation of the commerce clause of the Federal Constitution.

The holding in *Blaufield v. State* (1899) 103 Tenn. 593, 53 S. W. 1090, that cigarettes are not legitimate articles of commerce, so that a sale even

of an original package of cigarettes would not be protected by the commerce clause of the Federal Constitution, seems clearly overruled by the decision of the Federal Supreme Court in *Austin v. Tennessee* (1900) 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, supra. Although the question of construction and effect of the statute, rather than its validity, was involved, attention is called also to the holding in the *Blaufield Case* to the effect that the fact that a dealer procured a license to sell cigarettes under a revenue statute did not give him a right to sell in violation of a statute making a sale of cigarettes a misdemeanor; that the revenue act did not repeal the statute making the sale of cigarettes a misdemeanor; that the two fields of legislation were entirely separate and distinct, the latter being a police regulation, passed in the exercise of the state's power to protect the health of its citizens, and the former act being purely a revenue statute, passed only to raise money for the support of the state government.

The Montana statute requiring payment of a license fee of \$10 per month, in addition to any other license, from every person engaged in the business of selling cigarettes, which was applicable to a sale of cigarettes whether manufactured within the state or in another state, was held in *Re May* (1897) 82 Fed. 422, supra, not unconstitutionally to interfere with interstate commerce, the court taking the view that a box holding ten cigarettes, sealed with an internal revenue stamp, was an original package; that after such packages had reached their destination and were exposed for sale in the state they became a part of the mass of the property of the state, and that the business of selling the same was, therefore, subject to the regulations of the state as to licenses the same as other property within the state.

Austin v. Tennessee (U. S.) supra, was adhered to in *Cook v. Marshall County* (1905) 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, affirming (1903) 119 Iowa, 384, 104 Am. St.

Rep. 283, 93 N. W. 372, which was a somewhat similar case arising under the Iowa statute imposing an annual tax of \$300 on the business of selling cigarettes, and on the premises and the owner thereof on which they were sold. The only difference between the two cases, as respects the question whether the statute unconstitutionally interfered with interstate commerce, was that in the Cook Case, it did not even appear that the packages of cigarettes, each of which contained ten cigarettes, were placed in any receptacle for transportation by the express company, the Federal Supreme Court saying that nothing appeared in the record to indicate the means used in transporting the cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and that it was left to infer that they were shoveled into and out of the car and delivered to the retailer in that condition. The baskets which were used in the Austin Case, it was argued, might have been regarded as the original packages. This difference was held immaterial, it being held that the box of ten cigarettes could not, in any event, be justly considered an original package. The court said that while it might be impossible to define the size or shape of an original package, the principle upon which the doctrine was founded would not justify it in holding that any package which could not be commercially transported from one state to another as a separate importation could be considered as an original package.

It was held, also, by the Federal Court in *Cook v. Marshall County* (U. S.) *supra*, that the equal protection of the laws was not denied a retail dealer, by the tax imposed on cigarette selling by the Iowa statute, because sales by jobbers and wholesalers, in doing an interstate business with customers outside of the state, were excepted from its provisions.

In *McGregor v. Cone* (1898) 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041, it was held that the original package of commerce when cigarettes were shipped

in a wooden box containing packages of cigarettes, each of which was sealed with an internal revenue stamp and contained ten cigarettes, was the wooden box, and not the stamped package. So that, where one who purchased such packages of cigarettes outside the state and had them so shipped into the state, and on arrival opened the box and removed one of the packages, which he sold, with the result that he was convicted and committed for violation of the statute, he could not obtain his release on the ground that the sale was in the original package in which the cigarettes were imported, and that the law under which he was convicted was unconstitutional in so far as it applied to such sales. It was held that the determination of the Internal Revenue Department, that the package of ten cigarettes was a proper and original package for purposes of taxation, did not show that it was an original package of commerce for other purposes.

The court took the view in *State v. Lowry* (1906) 166 Ind. 372, 4 L.R.A. (N.S.) 528, 77 N. E. 728, 9 Ann. Cas. 350, that a state cannot deny to a proper person the right to hold in the original packages cigarettes which he has imported from another state. The case involved the construction of the Indiana statute entitled "An Act to Regulate and in Certain Cases to Prohibit the Manufacture, Sale, Keeping, Keeping for Sale, Owning, Giving Away, of Cigarettes, Cigarette Papers," etc., and provided that it should be unlawful for any person, by himself, clerk, servant, or agent, directly or indirectly, to "manufacture, sell, exchange . . . or keep for sale any cigarettes, cigarette papers, . . . or keep or own, or be in any way concerned, engaged, or employed in owning or keeping," any such cigarettes, cigarette papers, etc. It was held that the statute did not apply to the act of smoking cigarettes or of having them in possession for the sole purpose of smoking them; and thus the court avoided the necessity of deciding the question as to the right of a state, under its police

power, to regulate or prohibit the use of articles imported from another state for personal use only, after the original package was broken.

The validity of an ordinance prohibiting the sale of cigarettes without a license, for which a fee of \$100 was required, providing that no license should be granted to sell cigarettes within 200 feet of a schoolhouse, and giving to the mayor a certain discretion as to the issuance of a license, was sustained in *Gundling v. Chicago* (1898) 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44, it being held that the ordinance did not violate constitutional provisions as to due process of law, and that it was within the authority given by statutes providing for the enforcement of "all necessary police ordinances," and authorizing all acts and regulations "which may be necessary or expedient for the promotion of health or the suppression of disease." The decision is affirmed in (1899) 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, where it was held that arbitrary power to grant or refuse a license, in violation of the provisions of the Federal Constitution as to due process of law or equal protection of the laws, was not vested in the mayor by the fact that the ordinance gave him power to determine whether a person applying for a license to sell cigarettes was of good character and reputation, and a suitable person to be intrusted with their sale, where he was required to grant a license to every person fulfilling these conditions. It was held also that the fact that the license fee was high enough to make it partake of the character of an excise or privileged tax, as well as to provide a means for the regulation of the business, did not for that reason render it a violation of any provision of the Federal Constitution as an improper and illegal interference with the rights of the citizens. See quotation from this case in the reported case (*STATE v. NOSSAMAN*, ante, 921).

The ordinance, the validity of which was sustained in *Gundling v. Chicago* (Ill.) supra, was subsequently amended, so that whereas the 20 A.L.R.—59.

original ordinance prohibited the sale, without a license, of cigarettes, the ordinance as amended prohibited the sale or giving away of cigarettes or cigarette papers or cigarette wrappers of any kind, without a license; and the validity of the ordinance as amended was sustained in *Kappes v. Chicago* (1905) 119 Ill. App. 436. It was said: "The purpose of the original ordinance was to regulate and restrict and partially prohibit the use of tobacco in the form of cigarettes. It was upheld as a police regulation on the ground that weak and immature persons injured their health by such use. It would be a halting jurisprudence which could find that such an ordinance was legal and valid, but that the body enacting it had no power to prevent retail dealers of tobacco who had and needed no license for their business, from selling freely to minors as well as to all others the tobacco prepared for cigarettes, and giving away to the purchasers the prepared cigarette papers in which to envelop it. But if the council has power to prevent this, it had necessarily the power to pass the amendment to § 9 complained of, the purpose and effect of which is simply to subject to the same regulations and license fee those who sell the finished cigarette and those who sell the two materials which a twirl of the fingers can combine and make a finished cigarette. It would certainly be strange to hold that a restrictive regulation for the sale of tobacco pipes was valid, but that an amendment to it forbidding, except on the same conditions, the sale of pipe bowls with the gift of amber pipe stems, was beyond the power of the legislative body enacting the original restriction. But it would be no more strange than to sustain the contention of appellants in the present case."

That a statute imposing a specific tax upon the business of selling cigarettes did not provide for notice of the assessment or levy to the one engaged in the business was held in *Hodge v. Muscatine County* (1903) 121 Iowa, 482, 67 L.R.A. 624, 104 Am. St. Rep. 304, 96 N. W. 968, not to

render it unconstitutional, as depriving him of property without due process of law. The decision is affirmed in (1905) 196 U. S. 276, 49 L. ed. 477, 25 Sup. Ct. Rep. 237, where the Federal Supreme Court held that due process of law does not require notice of the assessment or levy to a person carrying on the business of selling cigarettes, there being no discretion as to the amount of the tax. The statute provided for an annual tax of \$300 assessed "against every person . . . and upon the real property, and the owner thereof," whereon cigarettes were sold or kept for sale, in addition to all other taxes and penalties, and that the payment of the tax should not bar criminal prosecution for the sale. And the Federal Supreme Court held, also, that the construction of the statute by the Iowa supreme court, that the annual charge imposed was a tax on the traffic, and not a penalty, was not so clearly erroneous as to justify it in adopting a different construction on a writ of error to the state court, in which it was asserted that the statute denied due process of law. It was held, also, that the owner was not denied due process of law by the fact that the statute made the tax imposed on the business of cigarette selling a lien upon the property where the business was carried on.

It was held, also, by the Federal Supreme Court in *Hodge v. Muscatine County* (U. S.) *supra*, that sufficient provision for notice and hearing to constitute due process of law was afforded the owner of real property who was made personally liable, and his property impressed with a lien, under the Iowa statute above referred to, for the tax imposed thereby on cigarette selling on the premises, by those provisions of the statute which permitted him to make application to the board of supervisors to remit the tax, and, in case of a denial of the petition, to appeal to the district court for a judicial determination of his liability.

And whether the Iowa Constitution was violated by a statute of that state imposing a tax on cigarette selling,

because the statute did not distinctly state the tax and the object to which it was applied, was held by the United States Supreme Court in *Hodge v. Muscatine County* (U. S.) *supra*, to be a purely local question, which it could not consider on writ of error to the state court.

It was said in *People ex rel. Berlizheimer v. Busse* (1907) 231 Ill. 251, 83 N. E. 175, that the legislature has the right, in the exercise of its police power, to pass an act prohibiting the sale of cigarettes. For holding in the case, see VI. *infra*.

The validity of a statute prohibiting the sale of cigarettes to children under sixteen years of age is assumed apparently in *People v. Duke* (1897) 19 Misc. 292, 44 N. Y. Supp. 336, in considering the effect of the statute on the question of conspiracy to monopolize the business of making and selling cigarettes.

And the validity of anti-cigarette legislation seems to be assumed in such cases as *Allen v. State* (1913) 10 Okla. Crim. Rep. 75, 133 Pac. 1138, where the court said it was a violation of the law to sell or give away cigarette papers in that state, and that, so long as such a law was in the statutes, it should be observed, and violation thereof punished.

II. Cigarette advertisements.

The power of a state to prohibit the circulation therein of a newspaper published in another state, containing advertisements of cigarettes, is denied in *Post Printing & Pub. Co. v. Brewster* (1917) 246 Fed. 321. This case involved the same Kansas statute as that considered in the reported case (*STATE v. NOSSAMAN*, ante, 921), the provision of the statute involved being that which made it unlawful for any person, company, or corporation to advertise cigarettes or cigarette papers in any circular, newspaper, or other periodicals, published, offered for sale, or free distribution within the state. The court took the view that the business of printing and publishing a newspaper in another state, and causing the copies thereof to be carried into the

state, and there delivered to subscribers and customers, to agents and representatives, constituted the pursuing of interstate business within the protection of the Federal Constitution. It was said: "The sale of cigarettes in the state of Missouri, where the newspapers of plaintiff are published, is a lawful business; and the transmission by plaintiff of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. Further, it must be regarded as settled the sale of cigarettes in a foreign state to a citizen of this state, and their carriage from said foreign state into this state and here delivered in original packages in consummation of such sale made in a foreign state, is legitimate interstate commerce, which is beyond the power of the legislature of this state to prohibit or unduly restrict or burden. . . . In other words, while the business of bartering, selling, or in any other manner disposing of cigarettes in this state, or the business of advertising in any manner by anyone within this state, of the business of selling or disposing of cigarettes, is by the act in question properly prohibited, yet by reason of the exclusive control of Congress over interstate commerce it must, I think, be held, as the conduct of interstate commerce in cigarettes may not by a state be prohibited or unreasonably burdened, it follows, of necessity, the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the state to prohibit or make criminal and punish, and this for the reason it cannot be thought possible to make the advertisement of a lawful business unlawful and punishable as a crime."

On the point involved in the preceding case, attention is called to several cases among possibly others of a similar nature, not on facts within the scope of the note, because not

involving cigarettes, but of value in this connection because the same principle is involved. Thus, in *State ex rel. Black v. Delaye* (1915) 193 Ala. 500, L.R.A.1915E, 640, 68 So. 993, the court sustained the validity of the statute forbidding the circulation within the state of newspapers and magazines containing advertisements of intoxicating liquors, holding that the same did not, even with respect to papers and magazines published in other states and shipped into the state, infringe the commerce clause of the Federal Constitution so far as it applies to sales from broken packages, on the news stands. But this decision was in view of the Wilson Act enlarging the powers of the states over interstate commerce in intoxicating liquor, and on this ground was distinguished in the *Brewster Case* (Fed.) *supra*, where a publication of cigarette advertisements was involved. The power of the state to forbid the publication within its limits, of advertisements of the keeping for sale of intoxicating liquors at places in other states, is sustained in *State v. J. P. Bass Pub. Co.* (1908) 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894, and *State ex rel. West v. State Capital Co.* (1909) 24 Okla. 252, 103 Pac. 1021.

III. *Cigarette smoking.*

An ordinance prohibiting the smoking of cigarettes anywhere within the corporate limits of a municipality was held void for unreasonableness, in *Hershberg v. Barbourville* (1911) 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189. The court said: "We concur in the conclusion that it is not a reasonable ordinance, and that the circuit court properly so held. . . . The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen's own home or on other private premises is an invasion of his right to control his own personal indulgences. The city council is authorized by statute to enact and enforce all such local po-

lice, sanitary, and other regulations as do not conflict with general laws.

. . . But under this power it may not reasonably interfere with the right of the citizen to determine for himself such personal matters. If the council may prohibit cigarette smoking in the city, it may prohibit pipe smoking or cigar smoking, or any other use of tobacco. The legislature did not contemplate conferring such power upon the council. If the ordinance had provided a penalty for smoking cigarettes on the streets of the city, a different question would be presented; but whether such an ordinance would be valid is a question not now presented or decided."

The question of the power of a municipality or state to prohibit cigarette smoking has been involved in some instances in cases presenting the broader question of the power to prohibit or restrict the use of tobacco, the statute or ordinance in question applying to the use of other kinds of tobacco as well as cigarettes. Thus, in *Zion v. Behrens* (1914) 262 Ill. 510, 51 L.R.A.(N.S.) 562, 104 N.E. 836, Ann. Cas. 1915A, 1057, the statute made it unlawful to smoke tobacco in any form, whether in a pipe, or by the use of a cigarette, cigar, or otherwise, in public places, specifically designating streets, parks, etc., and made it unlawful for a person to have in his possession in such public places a lighted cigarette, lighted cigar, etc. The court held that the police power of a city does not extend to the prohibition of smoking or carrying lighted tobacco in its streets and parks, which are spacious enough so that the use of tobacco in such places cannot be harmful to others or tend to cause danger to property from fire.

Among possibly other cases involving statutes or ordinances prohibiting smoking, attention is called to the following: *State v. Heidenhain* (1890) 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621, holding that a charter provision granting a city power to provide for public health is sufficient authority for an ordinance prohibiting smoking in street cars;

Com. v. Thompson (1847) 12 Met. (Mass.) 231, holding that a statute prohibiting smoking "in any street, lane, or passageway" applied to all open ways, whether legally established public ways or not, the court apparently assuming the validity of the statute.

In *Dempsey v. Stout* (1906) 76 Neb. 152, 107 N. W. 235, the court avoided the decision of the question whether the legislature could forbid the using of cigarettes by an adult, by ruling in effect that the act of "rolling cigarettes" of one's own materials and for one's own use was not the "manufacture" of cigarettes within the meaning of the anti-cigarette law.

See also *State v. Lowry* (Ind.) *supra*, I. where the statute was held not to apply to the act of smoking cigarettes.

IV. Coupons or other extraneous articles in cigarette packages.

The Federal statute of 1897 prohibiting the packing in, attaching to, or connecting with, packages, of tobacco and cigarettes, of "any article or thing whatsoever," other than certain specified labels and stamps, was held in *United States v. 288 Packages of Merry World Tobacco* (1900) 103 Fed. 453, to be within the taxing powers of Congress, and constitutional. In this case the statute was violated by placing in packages of tobacco coupons entitling the holder, on return of a certain number to the manufacturer, to a premium. The court took the view that the means employed by Congress in this instance were reasonably adapted to the end of collecting revenues, in obtaining a tax based on the weight of the package, and in protecting purchasers from fraud. Apparently the same case was before the Federal Supreme Court under the title *Felsenheld v. United States* (1902) 186 U. S. 126, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740, where the same conclusion was reached, it being held that no unconstitutional regulation was made by the statute, although it was construed to prohibit the insertion in packages of tobacco of a coupon printed on thin

paper of inappreciable weight and without extrinsic value, which did not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax. The Federal Supreme Court said: "It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be, either expressly or by implication, an exception of those articles or things which, by virtue of their minute size or weight, do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute, and the courts may not draw a line between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable, and invalid if it is not. Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. . . . We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax."

In *State v. Sbragia* (1909) 138 Wis. 579, 23 L.R.A. (N.S.) 697, 119 N. W. 290, in which the validity of a statute prohibiting the selling or giving away of cigarettes or cigarette paper is apparently assumed, it was held that the sale by a retailer of a sealed package of tobacco put up by the manufacturer, which contains a coupon entitling the purchaser to cigarette papers when presented by him to the manufacturer, will support a conviction

of the retailer under a statute forbidding the sale or giving away, directly or indirectly, of such paper; that the sale of a package of tobacco which contains a coupon entitling the purchaser to cigarette papers if sent to the manufacturer in another state does not, by reason of the fact that it must be so sent, become interstate commerce, so as not to be subject to the operation of a state statute forbidding the sale of such paper directly or indirectly, or upon any pretense or by any device.

And although not dealing with a statute aimed especially at cigarettes, but at tobacco generally, attention is called to *United Cigar Stores Co. v. Stewart* (1916) 144 Ga. 724, 87 S. E. 1034, holding void, because in violation of a constitutional provision requiring uniformity of taxes upon the same class of subjects, a statute which imposed a tax of \$200 "upon every manufacturer of tobacco, and upon every wholesale and retail dealer in tobacco, who redeems, or offers to redeem, any tags or labels sold or distributed or given with tobacco sales," for each place of business in the state where such tags or labels were redeemed.

V. Place or method of manufacture.

Although not limited to cigarettes, attention is called to *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, where the New York statute forbidding the manufacture of cigars or preparation of tobacco in any form in tenement houses under certain conditions was held unconstitutional, as arbitrarily interfering with personal liberty and private property without due process of law. The statute applied to cities having a population of over 500,000; it prohibited the manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement house, if such floor, or any part of such floor, was by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein; any house, building, or portion thereof occupied as a home or

residence of more than three families living independently of one another, and doing their cooking, upon the premises, was a tenement house within the meaning of the statute, which, however, did not apply if, on the first floor of the tenement house, there was a store for the sale of cigars and tobacco. The court said: "What does this act attempt to do? In form, it makes it a crime for a cigar maker in New York and Brooklyn, the only cities in the state having a population exceeding 500,000, to carry on a perfectly lawful trade in his own home. Whether he owns the tenement house, or has hired a room therein for the purpose of prosecuting his trade, he cannot manufacture therein his own tobacco into cigars for his own use or for sale, and he will become a criminal for doing that which is perfectly lawful outside of the two cities named,—everywhere else, so far as we are able to learn, in the whole world. He must either abandon the trade by which he earns a livelihood for himself and family, or, if able, procure a room elsewhere, or hire himself out to one who has a room, upon such terms, as under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer. He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice. He may desire the advantage of cheap production in consequence of his cheap rent and family help, and of this he is deprived. In the unceasing struggle for success and existence which pervades all societies of men, he may be deprived of that which will enable him to maintain his hold, and to survive. He may go to a tenement house, and finding no one living, sleeping, cooking, or doing any household work upon one of the floors, hire a room upon such floor to carry on his trade, and afterward someone may commence to sleep or to do some household work upon such floor, even without his knowledge, and

he at once becomes a criminal in consequence of another's act. He may go to a tenement house, and, finding but two families living therein independently, hire a room, and afterward by subdivision of the families, or a change in their mode of life, or in some other way, a fourth family begins to live therein independently, and thus he may become a criminal without the knowledge, or possibly the means of knowledge, that he was violating any law. It is therefore plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house who is a cigar maker, and trammels him in the application of his industry and the disposition of his labor, and thus in a strictly legitimate sense it arbitrarily deprives him of his property and of some portion of his personal liberty." It was said further: "We are not aware, and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house. It was proved in this case that the odor of the tobacco did not extend to any of the other rooms of the tenement house. . . . This law was not intended to protect the health of those engaged in cigar making, as they are allowed to manufacture cigars everywhere except in the forbidden tenement houses. . . . What possible relation to the health of the occupants of a large tenement house could cigar making in one of its remote rooms have? If the legislature had in mind the protection of the occupants of tenement houses, why was the act confined in its operation to the two cities only? It is plain that this is not a health law, and that it has no relation whatever to the public health. . . . When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without

due process of law, the courts must be able to see that it has, at least in fact, some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must therefore pronounce it unconstitutional and void."

As holding an earlier statute intended to prohibit the manufacture of cigars, or preparation of tobacco in any form, in rooms or apartments, unconstitutional because of a defective title, see *Re Paul* (1884) 94 N. Y. 497.

VI. *Miscellaneous; title of statute.*

The title of the Iowa statute imposing an annual tax of \$300 on the business of selling cigarettes, and on the premises and the owner thereof on which they were sold, "An act to Revise, Amend, and Codify the Statute in Relation to Crimes and Their Punishment," was held in *Cook v. Marshall County* (1903) 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372, sufficiently to comply with the constitutional provision that every act should embrace but one subject and matters properly connected therewith, which subject should be expressed in the title. It appeared that a statute prohibiting the sale of cigarettes, under penalty, was amended by the additional section providing for the assessment of the tax above referred to, which tax was to be assessed and collected after the manner of the mulct liquor tax, and was not to be a bar to a prosecution for the penalty for the sale of cigarettes.

Under a constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, it was held in *Alperson v. Whalen* (1905) 74 Neb. 680, 105 N. W. 474, that the legislature might properly prohibit the giving away of cigarettes under a statute entitled "An Act to Prohibit the Manufacture and Sale of Cigarettes." It was said: "The nature and use of these articles is well understood. If the legislature was justifiable in assuming that the character of these articles is such as to justify the pro-

hibition of their manufacture and sale, the court will also take notice of the nature and use of the prohibited articles. With this in mind, can it be said that the subject of this legislation as derived from the act itself is so disguised in the title that the legislators would not be sufficiently notified by the language used in the title, that it was intended to discourage the use of the articles referred to, and to that end, to prevent all traffic therein? We think that it is manifest from the title to this act, and therefore sufficiently expressed therein, that it was the purpose of the proposed legislation to protect the people of the state against results arising from furnishing these articles to the public. . . . If the barter and gift of cigarettes and cigarette paper are not prohibited by the act, it is manifest that the purpose and intent of the legislature is thwarted, and we think that purpose and intent is plainly to be derived from the title of the act itself."

But under a similar constitutional provision, a statutory provision subjecting to a fine any person who sold, gave to, or in any way furnished cigarettes to any person under twenty-one years of age, was held unconstitutional, in *People v. Blumerich* (1914) 183 Mich. 133, 149 N. W. 1040, because broader than the title of the act, and not sufficiently expressed therein, the title being "An Act to Prohibit the Manufacture, Sale, or Use of Adulterated Cigarettes, and Prohibiting the Use of Cigarettes by Minors." The statute prohibited the use of cigarettes by minors only in public places, and provided that it should not be construed to interfere with the rights of parents and guardians in the management of their heirs or wards on their own private premises. The court said the only prohibition of sale expressly indicated in the title related to adulterated cigarettes; that it was clear it was not within the legislative intent to provide anything more than a modified prohibition of the use of cigarettes by minors; so that, fairly stated, it was the legislative intent

to prohibit absolutely the manufacture, sale, or use of adulterated cigarettes, and to prohibit, to a certain extent, the use of all cigarettes by minors. Under these circumstances the court took the view that the words in the title, "prohibiting the use of cigarettes by minors," could not be construed as broad enough to include a provision of the act prohibiting the sale of cigarettes to them.

And the position was taken in *People ex rel. Berlzheimer v. Busse* (1907) 281 Ill. 251, 83 N. E. 175, that a state legislature does not have power to prohibit the sale of cigarettes under the title of an act which only provides for the "regulation" of the sale of cigarettes. It was said that if the act in question was intended absolutely to prohibit the sale of cigarettes, the court would have no hesitation in holding that it was broader than its title, "An Act to Regulate the Manufacture, Use, and Sale of Cigarettes," and therefore unconstitutional and void. The statute was held valid in this instance, however, on the ground that in providing a punishment by fine and imprisonment for "every person who shall manufacture, sell, or give away any cigarettes containing any substance deleterious to health, including tobacco," the legislature intended not to prohibit, absolutely, the sale of cigarettes, but only the sale of cigarettes which contained substances deleterious to health, including cigarettes made of tobacco injurious to health by reason of being impregnated with drugs or otherwise, and did not intend to prohibit the sale

of cigarettes which contained only pure tobacco.

Although not on facts within the scope of the note, attention is called to *State v. Olson* (1913) 26 N. D. 304, L.R.A.1918B, 975, 144 N. W. 661, which, in sustaining the constitutionality of the North Dakota "Anti-Snuff Act," considered matters related to the present subject. The court held that it would take judicial notice of the use of tobacco in any form as uncleanly, and that its excessive use is injurious; also that the use of tobacco in any form by the young is injurious, and that the use of snuff is especially so. It was held, also, that the statute, which made it unlawful for any person, firm, or corporation, to import, manufacture, distribute, or give away any snuff or substitute therefor, and which defined "snuff" as "any tobacco that has been fermented or dried, or flavored or pulverized or cut or scented or otherwise treated," intended to be taken by the mouth or nose, with exceptions as to certain kinds of chewing tobacco, was constitutional, and could not be assailed on the ground that it deprived any person of life, liberty, or property without due process of law, or denied to any person the equal protection of the laws. The fact that the statute made the exception above referred to was held also not to render it invalid and subject to a charge of class legislation. Petition for a writ of error was dismissed by the United States Supreme Court in (1917) 245 U. S. 676, 62 L. ed. 542, 38 Sup. Ct. Rep. 13.
R. E. H.

ERNEST R. POLLARD, Appt.,

v.

WILLIAM N. WARD, Respt.

Missouri Supreme Court (Division No. 2) — June 23, 1921.

(— Mo. —, 233 S. W. 14.)

Judgment — divorce — bar to action for criminal conversation.

1. A decree of divorce does not bar an action for previous alienation of

affections or criminal conversation or seduction, and it is immaterial that the fact might have been, but was not, set up as a defense to the divorce action.

[See note on this question beginning on page 943.]

— effect upon strangers.

2. A judgment of divorce is conclusive upon strangers as determining the status of the parties to it, but not as to the facts litigated.

[See 9 R. C. L. 461.]

Estoppel — failure to set up defense to action.

3. Failure of a man to set up in a proceeding against him by his wife for divorce, known facts of her misconduct with another man, does not estop him from maintaining an action against such man for criminal conversation with her.

[See 9 R. C. L. 462, 496.]

— what constitutes.

4. Three things must occur to constitute estoppel in pais to the maintenance of an action, an admission, statement, or act inconsistent with the claim afterwards asserted and sued on; action by the other party on the

faith of such admission, statement, or act; and injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

[See 10 R. C. L. 689; 2 R. C. L. Supp. 1039.]

Election — right to profit by.

5. A defendant in an action for criminal conversation with a woman who subsequently secured a divorce from her husband cannot set up in defense an alleged election by the husband in settling property rights with his wife in which he obtained an advantage.

Appeal — erroneous admission of evidence — failure to object.

6. Advantage cannot be taken on appeal of the erroneous admission of evidence to which no objection was made when it was offered.

[See 2 R. C. L. 77; 1 R. C. L. Supp. 385.]

APPEAL by plaintiff from an order of the Circuit Court for Linn County (Lamb, J.) granting a new trial after judgment in his favor in an action brought to recover damages for alleged criminal conversation of defendant with plaintiff's wife. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Pross T. Cross, H. J. West, and Scott J. Miller, for appellant:

The husband in this state has a right and a cause of action against a defendant who has had criminal conversation with his wife and who has debauched his wife, and this cause of action still exists, notwithstanding plaintiff's wife has secured a divorce by default in a divorce suit against him.

Wales v. Miner, 89 Ind. 118; Wood v. Mathews, 47 Iowa, 411; Dickerman v. Graves, 6 Cush. 308, 53 Am. Dec. 41; Ratcliff v. Wales, 1 Hill, 63; Berney v. Adriance, 157 App. Div. 628, 142 N. Y. Supp. 748; Purdy v. Robinson, 133 App. Div. 155, 117 N. Y. Supp. 295.

The debauching of plaintiff's wife in the suit for criminal conversation, while she was his wife, has no connection with, and is no bar to, plaintiff's suit for damages against the debaucher of his wife.

De Ford v. Johnson, 251 Mo. 253, 46 L.R.A.(N.S.) 1083, 158 S. W. 29, Ann.

Cas. 1915A, 344; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731.

A judgment for divorce, even at the husband's fault, is not a bar to an action of this kind.

Michael v. Dunkle, 84 Ind. 545, 43 Am. Rep. 100; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Nolin v. Pearson, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658; Modisett v. McPike, 74 Mo. 636; Clow v. Chapman, 125 Mo. 105, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; De Ford v. Johnson, 251 Mo. 253, 46 L.R.A.(N.S.) 1083, 158 S. W. 29, Ann. Cas. 1915A, 344; Hamilton v. McNeill, 150 Iowa, 470, 129 N. W. 480, Ann. Cas. 1912D, 604; Kroessin v. Keller, 60 Minn. 372, 27 L.R.A. 685, 51 Am. St. Rep. 533, 62 N. W. 438; Houghton v. Rice, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843; Crocker v. Crocker, 98 Fed. 702.

Defendant is not in a position to in-

voke the equitable principle of estoppel.

Pom. Eq. Jur. 4th ed. § 802; Ewart, Estoppel, pp. 6 & 7.

Messrs. Bailey & Hart, James L. Farris' Sons, and Lavelock & Kirkpatrick, for respondent:

The doctrine of estoppel applies, and defendant is permitted to avail himself of the divorce judgment, to which he was neither a party nor privy.

Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Atkinson v. White, 60 Me. 396.

An election is in the nature of an estoppel, and, when made to appear from a final judgment, it concludes the party against whom it is invoked.

Trimble v. Wollman, 71 Mo. App. 467.

When plaintiff's wife sued him for divorce, and charged in her petition that he had wrongfully accused her of improper relations with defendant, she thereby put plaintiff to an election between one of two inconsistent courses of action, namely, he must answer the divorce suit, prove her guilt, and thereby establish the right to maintain suit, or he might refuse to answer, withhold his evidence, if any, allow her to judicially establish her innocence, obtain a decree for divorce, and defeat suit by estoppel.

Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 325; Kansas Moline Plow Co. v. Wayland, 81 Mo. App. 305.

Plaintiff received, at least, a part of the fruits of the judgment for divorce, namely, a deed from his former wife for her interest in all of his real estate, and where a party has taken the fruits of a judicial proceeding, he should not afterwards be heard to question it.

Cape Girardeau & T. Bridge Terminal R. Co. v. Southern Illinois & M. Bridge Co. 215 Mo. 286, 114 S. W. 1084; Hector v. Mann, 225 Mo. 228, 124 S. W. 1109.

If plaintiff had information to the effect that he had wrongfully accused his wife of having improper relations with defendant at the date of the institution of the divorce suit, and failed to set it up by way of answer, he is now estopped from averring that she was guilty of criminal conversation with defendant.

2 Bishop, Marr. Div. & Sep. § 1589; Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865.

The rule that, to be binding, estoppels must be mutual, is not absolute or without rational exceptions.

Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A. (N.S.) 677, 85 C. C. A. 393, 158 Fed. 63; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Atkinson v. White, 60 Me. 396.

Plaintiff having assented, at least, to that part of the judgment settling property rights, received the benefits therefrom, and, in so doing, elected to adopt the theory that his wife was innocent, and that he was guilty of the allegations contained in her petition.

Stone v. Cook, 179 Mo. 534, 64 L.R.A. 287, 78 S. W. 801; Bensieck v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642; Austin's Estate, 73 Mo. App. 61; Welch v. Dameron, 47 Mo. App. 221; Boyd v. Redd, 118 N. C. 680, 24 S. E. 429; Countryman's Estate, 151 Pa. 577, 25 Atl. 146; Bigelow, Estoppel, 2d ed. 503.

Plaintiff having made his election and received certain benefits from said election, he is bound thereby.

Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246.

White, C., filed the following opinion:

The plaintiff recovered judgment in the circuit court of Linn county, Missouri. A motion for new trial filed by defendant was sustained by the trial court, and from that order the plaintiff has appealed.

The petition charges that the plaintiff has been damaged because of criminal conversation of the defendant with the plaintiff's wife, and alienation of her affections. The answer of defendant, after a general denial, pleads estoppel. It alleges that the wife of the plaintiff, Hope Pollard, on February 24, 1917, instituted a divorce proceeding in Ray county, Missouri, against the plaintiff herein; that in June, 1917, a decree of divorce was granted to said Hope Pollard, the finding of the judgment being that the defendant therein, Ernest Pollard, was the guilty party and the said Hope Pollard was the innocent party; that the alleged facts recited in plaintiff's petition, as to the unfaithful acts and conduct of Hope Pollard toward her husband, were reported

to plaintiff, and within his knowledge, long before the 24th day of February, 1917, and by reason of plaintiff's acts and conduct his failure to answer the petition of the said Hope Pollard, and by the judgment in the divorce proceeding, plaintiff is estopped from maintaining his action herein. The suit was brought in Caldwell county; change of venue was granted to Linn county, where the trial was had, beginning on the 3d day of June, 1919."

At the time of the occurrences complained of, the plaintiff, Pollard, thirty-eight years old, lived on his farm in Caldwell county with his wife and four children. He separated from his wife January 29, 1917. Another child was born to his wife two or three months afterward. The defendant, William Ward, then a single man, lived with his parents about a quarter of a mile from the Pollard home.

A volume of evidence was introduced by the plaintiff tending to prove improper intimacy between the defendant and the plaintiff's wife, which ran over a period of two or three years before the separation January 29, 1917. A number of witnesses, including neighbors and others, testified that they saw the defendant visit plaintiff's home during plaintiff's absence and apparent secret meetings between Hope Pollard and the defendant. Some of the witnesses swore to seeing acts of a criminal nature between them.

On January 28, 1917, plaintiff became convinced that a clandestine meeting had taken place between his wife and Ward, and procured bloodhounds, which traced the tracks of someone to Ward's house. Plaintiff separated from his wife the next day. It is unnecessary to state the evidence any further than to say it is sufficiently clear and substantial to support the allegations of the petition.

The defendant denied all charges, and introduced evidence to show his good character. He introduced the pleadings and judgment in the divorce proceeding begun by Hope

Pollard a short time after the separation from her husband. Other facts necessary in consideration of the points to be determined will be noted later in the opinion.

The jury in their verdict assessed the plaintiff's actual damages at \$5,000, and his punitive damages at \$7,000. The motion for new trial was sustained on the ground that the matters charged and put in issue by the petition in the divorce proceeding "were largely, if not entirely, matters involved in the present trial." The trial judge clearly stated his reason for sustaining the motion thus: "Under these facts the court is of the opinion that, having failed to deny the allegations of the said divorce petition, and having made a money settlement upon the charges confessed in it, and having confessed the truth by having failed to answer, plaintiff in this case is estopped from further asserting the infidelity of said wife, and ought not, in good conscience, be permitted to maintain this action."

The petition in the divorce proceeding alleged that the defendant in that suit, Ernest R. Pollard, had offered his wife, Hope Pollard, such indignities as to make her condition intolerable. The indignities enumerated consisted of several specifications of cruel and barbarous treatment, abuse, and villification. The petition then alleged that on the evening of January 28th, the plaintiff, Hope Pollard, left the house for a few minutes, and when the defendant saw his wife coming back he charged her with meeting a man "out there," and ". . . repeatedly said and accused plaintiff of having met the son of Mr. Ward that night, . . . and plaintiff says that the defendant has repeatedly since then accused the plaintiff of improper relations with other men, and has ordered her to leave him."

The judgment in the divorce proceeding recites a finding that during all the time plaintiff faithfully demeaned herself, and discharged all of her duties to the defendant

as his wife, "but that the defendant cursed and abused her at divers times, and did such other and improper conduct towards her as his wife as to render her condition intolerable, as set forth in plaintiff's petition." Alimony to the plaintiff was allowed in the sum of \$4,000, and she was required to execute a quitclaim deed to defendant for all the land of defendant. The acknowledgment of the receipt of such deed is recited in the decree.

I. The general rule is, that a decree of divorce does not bar an action for previous alienation of affections, or criminal conversation or seduction. 21 Cyc. p.

1626. *De Ford v. Johnson*, 251 Mo. 244, loc. cit. 253 to 256, 46 L.R.A. (N.S.) 1083, 158 S. W. 29, Ann. Cas. 1915A, 344, and cases there cited. This court, in the opinion by Judge Graves in that case, said, 251 Mo. loc. cit. 255, speaking of cases cited: "They declare the general doctrine that although the jury may believe that plaintiff's wife obtained a divorce from him, and that she made plaintiff's misconduct ground for obtaining said divorce, yet if the jury believe that, notwithstanding such misconduct on the part of the plaintiff, his wife would not have separated or remained apart from him, or sued him for a divorce if it had not been for the acts, conduct, and influence of defendant toward her; and that defendant purposely and intentionally, by such acts, conduct, and influence, induced her to so separate or remain apart from plaintiff, or sue him for a divorce,—then the fact that plaintiff's wife obtained such a divorce on account of plaintiff's misconduct does not, of itself, constitute any defense to this suit."

This is quoted from *Modisett v. McPike*, 74 Mo. loc. cit. 646. The *De Ford* Case is reported in 46 L.R.A. (N.S.) at page 1083, with copious notes, citing numerous cases where the subject is illustrated. There is no direct allegation in the

petition for divorce which puts in issue the criminal conversation of Ward with the plaintiff's wife alleged in this case so that it could be said to have been adjudicated in that case.

The point made by the defendant, and the point in the mind of the court in sustaining the motion for new trial, is that the plaintiff could have defeated his wife's suit for divorce by proving the facts as to her relations with the defendant; that the very issues presented for determination in this case must have been determined there, because plaintiff failed to present a defense to that divorce proceeding which was complete if true. The judgment, therefore, is conclusive that his wife was not guilty of misconduct.

In taking that position the respondent assumes that a judgment in a divorce proceeding is different from other judgments, in that it is binding upon others than parties to it. There was such a holding in the case of *Gleason v. Knapp*, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865, a case followed in some jurisdictions. That case, however, has been modified and deprived of much of its force by subsequent adjudications by the supreme court of Michigan. *Knickerbocker v. Worthing*, 138 Mich. 224, loc. cit. 228, 101 N. W. 540; *Philpott v. Kirkpatrick*, 171 Mich. 495, 137 N. W. 232.

The precise point has never been determined in this state, but it was approached in the *De Ford* Case, *supra*. A number of decisions in other jurisdictions take a position contrary to that assumed by the trial court. In *Luke v. Hill*, 137 Ga. 159-161, 38 L.R.A. (N.S.) 563, 73 S. E. 346; it is held that a decree of divorce is a judgment quasi in rem.

"So far as the adjudications fixes the status of the parties, the judgment concludes both parties and strangers; but, beyond the adjudication of the status, the decree does not conclude strangers."

"A divorce decree will not estop a party thereto from contesting

with a stranger the truth of the grounds as affecting his liability in another suit upon a cause of action arising pending the divorce suit, but before the decree."

Leading cases are cited in support of the proposition. The case of Coney v. Harney, 53 N. J. L. 53, 20 Atl. 736, was a suit brought by the plaintiff's wife, and it was held that a decree of divorce in favor of plaintiff's wife was not a bar to his suit for damages for criminal conversation, although he had filed in the divorce proceeding a cross bill, afterwards dismissed, in which he charged his wife with the very criminal acts alleged as a cause of action in the suit on trial. The court said (53 N. J. L. loc. cit. 54, 55): "An estoppel, even by the judgment of a court, must be mutual to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality, for had it been adjudicated that defendant had committed the adultery charged in the cross petition, such adjudication manifestly could not have been set up against him,"—a statement of the law particularly applicable to this case.

The case of Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100, was an action for criminal conversation brought by the husband against the seducer of his wife. The defendant set up a decree of divorce granted to her on account of her husband's cruelty. The husband knew of the criminal conduct before the divorce decree was granted. The court held that, because the acts complained of occurred while she was still his wife, he had a cause of action, and then used this language (84 Ind. loc. cit. 545): "After this discovery, it is not strange that the appellee permitted his wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the pub-

lic morals to permit the seducer of a wife to set up a disagreement, or even a separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

From these authorities and the others reviewed in the notes in 46 L.R.A. (N.S.), to the De Ford Case and the Luke Case, *supra*, the general rule appears that a judgment of divorce is conclusive upon strangers as determining the status of the parties ^{—effect upon strangers.} to it, but not conclusive upon strangers as to the facts litigated. The position taken in the Gleason Case, cited from the 56th Michigan, is not supported by reason nor by the weight of authority. There was no mutuality, as said in the New Jersey case, *supra*. Had the court in the divorce proceeding found the wife guilty of adultery with Ward, Ward would not be bound by it in this suit.

The pleadings and judgment in the divorce proceeding were probably admissible in evidence in this case as showing an admission on the part of the plaintiff. If Pollard, in his wife's divorce proceeding, had filed a pleading which admitted any fact, or if, by his silence, he had failed to controvert the facts alleged there, it would be proper to show it as an admission against him. Such admission would not be conclusive against him here, but, like any other admission, it could go to the jury for what it was worth. See Sickler v. Mannix, 68 Neb. 21, loc. cit. 23, 93 N. W. 1018. Logically it must follow that the plaintiff is not concluded by the judgment in the divorce proceeding.

II. Next, the question arises as to whether the plaintiff is estopped by his conduct. It is true that he permitted a decree of divorce to be rendered against him upon the allegations of his wife's petition. While that petition did not, in direct terms, allege that he had falsely charged her with illicit relations with Ward, it may be conceded that he was put upon his notice that such

charge was intended. As said in the Indiana case cited above, after he discovered the nature of her conduct, he might very well desire a divorce, and make it as easy as possible for his wife to obtain one. But the proceeding lacks every element of estoppel by conduct, or estoppel in pais.

To constitute estoppel in pais three things must occur: First, an admission, statement, or act inconsistent with the claim afterwards asserted and sued on; second, action by the other party on the faith of such admission, statement, or act; and third, injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *First Nat. Bank v. Ragsdale*, 171 Mo. loc. cit. 185, 71 S. W. 178; *Wyatt v. Wilhite*, 192 Mo. App. loc. cit. 560, 183 S. W. 1107; *De Lashmutt v. Teetor*, 261 Mo. loc. cit. 441, 169 S. W. 34; *Thompson v. Lindsay*, 242 Mo. loc. cit. 76, 145 S. W. 472.

It may be conceded that in the divorce proceeding Pollard's conduct was inconsistent with the claim he puts forth here, but it cannot be said that the defendant in this case acted upon the faith of any such conduct. His criminality with the plaintiff's wife occurred before the divorce suit was brought, and before the separation. Likewise, the third requisite does not appear here. The defendant is not injured in any manner by the failure of the plaintiff to contradict or controvert the allegations of his wife's petition. If the plaintiff had asserted and maintained in the divorce proceeding the facts which he alleges in this suit, the defendant here would have been in no better position than he is. *Thompson v. Lindsay*, supra; *De Lashmutt v. Teetor*, 261 Mo. loc. cit. 441, 169 S. W. 34. Ward did not in any manner nor to any degree rely upon anything plaintiff

did in his wife's divorce suit, and is not injuriously affected in any manner by the plaintiff's position maintained here because it happens to be different from what he assumed there. The defendant is in no position to invoke the principle of estoppel in pais.

III. It is further claimed by the respondent that the plaintiff herein has obtained the benefit of a transaction, and seeks to repudiate it in this case, in that he obtained the divorce from his wife, a deed from her, and paid her \$4,000 alimony, and, having obtained that advantage and assumed that position, he has elected so that he cannot assume a different position here. This is another way of attempting to state an estoppel. It is impossible to see how that transaction affects the defendant. The business settlement which the plaintiff made with his wife at the time of the decree consisted simply of the purchase by him of her interest in property, which she had acquired from her father. It may have been worth more than he paid her, but he is not retaining the fruits of another transaction which affects the defendant or bears any relation whatever to the issues to be determined in this case.

IV. Another ground is urged by the respondent in support of the propriety of the ruling. It is claimed that improper evidence was offered, on behalf of the appellant, showing the incident in relation to the bloodhounds. We cannot find that the evidence, in the way it arose, was incompetent, and, if it was, the point was not raised in time. When the plaintiff, in his direct examination, related the facts about calling the bloodhounds, no objection was made to his evidence.

The judgment is reversed, and the cause remanded, with directions to the trial court to set aside the order granting a new trial, and to render

Estoppel—failure to set up defense to action.

—what constitutes.

Election—right to profit by.

Appeal—erroneous admission of evidence—failure to object.

judgment for the plaintiff upon the verdict as returned by the jury. C., is adopted as the opinion of the court.

Railey and Mozley, CC., concur.

All concur.

Per Curiam:

Petition for rehearing denied

The foregoing opinion by White, July 19, 1921.

ANNOTATION.

Decree of divorce or separation as *res judicata* or basis of estoppel or evidence in action for alienation of affections or criminal conversation.

I. General rules, 943.

II. Application of rules:

a. Generally:

1. Action for alienation of affections, 946.
2. Action for criminal conversation, 950.

b. Admissibility of decree in evidence:

II. b—continued.

1. Divorce obtained by plaintiff, 951.

2. Divorce obtained against plaintiff, 951.

c. Extraterritorial effect of decree, 953.

III. Rule in Iowa, 954.

I. General rules.

It is generally held that a spouse against whom a divorce has been granted may maintain an action for alienation of affections or for criminal conversation occurring prior to the divorce, the decree not being *res judicata* with respect to the plaintiff's cause of action, and not operating as an estoppel by judgment.

Delaware. — *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731 (alienation of affections and criminal conversation).

Georgia.—See *Luke v. Hill* (1911) 137 Ga. 159, 38 L.R.A.(N.S.) 559, 73 S. E. 345 (alienation of affections).

Illinois. — See *Sackheim v. Miller* (1907) 136 Ill. App. 132 (alienation of affections).

Indiana.—*Michael v. Dunkle* (1882) 84 Ind. 544, 43 Am. Rep. 100 (criminal conversation).

Kentucky. — *Hostetter v. Green* (1914) 159 Ky. 611, L.R.A.1915C, 870, 167 S. W. 919 (alienation of affections). See also *Bergman v. Solomon* (1911) 143 Ky. 581, 136 S. W. 1010 (alienation of affections).

Michigan. — *Knickerbocker v. Worthing* (1904) 138 Mich. 224, 101 N. W. 540 (alienation of affections and criminal conversation). See also *Derham v. Derham* (1900) 125 Mich. 109, 83 N. W. 1005 (alienation of affections). Compare *Gleason v. Knapp*

(1885) 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865.

Missouri. — *De Ford v. Johnson* (1913) 251 Mo. 244, 46 L.R.A.(N.S.) 1083, 158 S. W. 29, Ann. Cas. 1915A, 344, s. c. subsequent appeal in (1915) — Mo. —, 177 S. W. 577 (alienation of affections). And see the reported case (*POLLARD v. WARD*, ante, 936). See also *Modisett v. McPike* (1881) 74 Mo. 636 (alienation of affections).

New Jersey. — *Coney v. Harney* (1890) 53 N. J. L. 53, 20 Atl. 736 (criminal conversation).

New York. — *Purdy v. Robinson* (1909) 133 App. Div. 155, 117 N. Y. Supp. 295 (alienation of affections and criminal conversation).

Likewise, the fact that a spouse secures a divorce or judicial separation does not preclude him from suing on a cause of action for alienation of affections or criminal conversation previously accruing.

United States.—*Waldron v. Waldron* (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383, reversing on other grounds (1890) 45 Fed. 315 (alienation of affections); *Woldson v. Larson* (1908) 90 C. C. A. 422, 164 Fed. 548 (alienation of affections).

Indiana. — *Wales v. Miner* (1883) 89 Ind. 118 (criminal conversation).

Michigan.—*Philpott v. Kirkpatrick* (1912) 171 Mich. 495, 137 N. W. 232 (alienation of affections). See also

Mead v. Randall (1896) 111 Mich. 268, 69 N. W. 506 (alienation of affections).

Nebraska. — **Sickler v. Mannix** (1903) 68 Neb. 21, 93 N. W. 1018 (alienation of affections).

New York. — **Wilson v. Coulter** (1898) 29 App. Div. 85, 51 N. Y. Supp. 804 (alienation of affections); **Hendrick v. Biggar** (1910) 66 Misc. 576, 122 N. Y. Supp. 162 (alienation of affections) affirmed on condition of remission of damages in (1912) 151 App. Div. 522, 136 N. Y. Supp. 306, and reversed on other grounds in (1913) 209 N. Y. 440, 103 N. E. 763.

North Dakota. — **Luick v. Arends** (1911) 21 N. D. 614, 132 N. W. 353 (alienation of affections).

Oregon.—**Keen v. Keen** (1907) 49 Or. 362, 10 L.R.A.(N.S.) 504, 90 Pac. 147, 14 Ann. Cas. 45 (alienation of affections).

Washington. — **Beach v. Brown** (1898) 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46 (alienation of affections).

Wisconsin. — **Lee v. Hammond** (1902) 114 Wis. 550, 90 N. W. 1073 (criminal conversation).

In **Wales v. Miner** (Ind.) *supra*, the court said: "The fact that a divorce may have been granted to the plaintiff a few days before the bringing of the suit would not destroy the appellee's right of action; that might be the means of perfecting it. . . . The action is brought for the injury and destruction of plaintiff's marital relations, and is not based upon their then existence."

So, it was said in **Michael v. Dunkle** (1882) 84 Ind. 544, 43 Am. Rep. 100: "It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement, or even a separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

In **Hendrick v. Biggar** (1910) 66 Misc. 576, 122 N. Y. Supp. 162, affirmed on condition of remission of damages in (1912) 151 App. Div. 522, 136 N. Y. Supp. 306, and reversed on other grounds in (1913) 209 N. Y. 440, 103 N. E. 763, the court said:

"It would be strange, indeed, if the defendant, having broken up the plaintiff's home and forced her to a judgment for support which the court was powerless to finance, could plead such judgment as a bar to an action for her wrongdoing. Such is not the law."

But, it has been held, the failure of the husband to set up the adultery of the wife in a divorce suit against him is a complete bar to a subsequent action by him for criminal conversation. **Gleason v. Knapp** (1885) 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865, wherein the court said: "The wife's divorce proceedings, which began in January, 1881, being followed by a decree which established that she had a sufficient cause of grievance at the earliest date when plaintiff attempted to show any grievance, must be regarded as a bar to any cause of action for that grievance, if it existed. If plaintiff had such a cause of action as he now asserts, it would not only have been admissible in evidence in that divorce suit, but it would have been an absolute and perfect defense to it. The suggestion of the circuit judge that the jury might, if they saw fit, infer that that very divorce suit was the outcome of defendant's misconduct, cannot be allowed any force, since defendant's (plaintiff's here) failure to defend on that ground, when that defense was open to him, and, according to his claim now, was known to him, left it as completely cut off as any other; and the decree is legally conclusive against him that no such facts exist. The facts sworn to by himself in this case are entirely contradictory to his sworn bill concerning the important allegation that he never cohabited with his wife after January 1, 1881, and his claim that he persisted in desiring her return after both bills were filed is somewhat extraordinary in view of this action. . . . There is nothing on plaintiff's own showing which, in our view, left him anything to go to the jury upon, as the divorce proceedings were introduced by himself, and, without showing them, he could not have been offered as a witness at all."

. . . The defense made by his own silence in the divorce suit is as full a bar as could be made, and, in view of it, the case is a very singular one to be brought in a court of justice after the divorce had become absolute and not appealed from."

The foregoing case was reviewed in *Purdy v. Robinson* (1909) 133 App. Div. 155, 117 N. Y. Supp. 295, set out *infra*, II. a, 2, the court saying: "*Gleason v. Knapp* (Mich.) *supra*, cited by the learned counsel for the appellant is not for him. In that case the wife had obtained a divorce, without defense, and the former husband afterwards sued the defendant for criminal conversation, alleging an act known to the former husband before the divorce suit. The court decided that, if the husband had such a cause of action, it would not only have been admissible in evidence in the divorce suit, but would have been an absolute defense; that the husband's failure to defend the divorce suit upon that ground left it completely cut off; and that the decree of divorce was legally conclusive that the facts now relied upon by him in his action for criminal conversation did not exist. Cited, also, in 2 Bishop, Marr. Div. & Sep. § 1589. I think that this doctrine is sound. But, of course, that rule depends upon the fact that the husband had knowledge, so as to make the plea."

Gleason v. Knapp (Mich.) *supra*, was also reviewed in *Luick v. Arends* (1911) 21 N. D. 614, 132 N. W. 353, set out *infra*, II. a, 1, wherein the court said: "The case of *Gleason v. Knapp* is further distinguishable from the case on trial inasmuch as in that case the doctrine really applied was that of estoppel by pleadings, whereby *Gleason* was not permitted to take a position in his alienation of affections case diametrically opposed to his verified complaint in his divorce case. This plaintiff is now alleging practically the same facts as he alleged in defense of his wife's action for divorce. As the divorce judgment is not mutual under the above authorities, it does not bar him from alleging the same facts in

his complaint in this action. There is no estoppel because of his pleadings, his claims in each case being consistent, consequently the case cited (*Gleason v. Knapp*) does not apply."

However, the failure of the husband to charge adultery in defense of a suit for divorce on the ground of cruelty has been held not to bar a subsequent action by him for the alienation of his wife's affections. *Knickerbocker v. Worthing* (1904) 138 Mich. 224, 101 N. W. 540, wherein the court said: "Counsel says plaintiff failed to set up this charge in his amended answer in the divorce case, and is now debarred from charging the defendant with said offense. It is true, the defendant in that case did not say in so many words that his wife and Mr. *Worthing* had committed adultery, but he, in effect, so charged them. This court so regarded the allegations of his answer, and passed upon that question in disposing of the case. Counsel also says that, because the court passed upon that phase of the case, and found the charge of adultery was not made out in the divorce case, the decree in that case is conclusive upon that question; citing as to both of these claims *Gleason v. Knapp* (1885) 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865. There is language in the opinion in that case which tends to justify the claim of counsel, but when the case is considered carefully it will be found to be distinguishable from this one. In the case of *Gleason's* wife against him no answer was put in. In the case of *Gleason* against his wife nothing was done by him except to file his bill of complaint. In the case brought by him against *Knapp* the court found the facts sworn to by him were entirely contradictory to his sworn bill against his wife. The question involved in the case of *Knickerbocker v. Knickerbocker* (1903) 135 Mich. 102, 97 N. W. 1117, was whether the wife was entitled to a divorce upon the ground of cruelty. We held that she was. The question involved here is whether the affections of Mrs.

Knickerbocker were alienated by the unlawful acts of the defendant."

In a concurring opinion in *Knickerbocker Case* (Mich.) *supra*, it was said: "The facts are sufficiently stated in the opinion of the chief justice. . . . I also agree that the plaintiff's action is not barred by the failure to charge adultery in terms in the answer interposed in the chancery case. There is no doubt that a bona fide defense was made in that case. It would be going beyond anything held in *Gleason v. Knapp* (Mich.) *supra*, relied upon by defendant's counsel, and going beyond the requirements of public policy, to hold that because the husband (if such were the fact) chose to make his defense without introducing that element he is barred from maintaining this action against another. Much less can it be said that the decision of this court in the divorce case, rendered long after the trial of the present case at the circuit, such decision being upon a question of fact, can or should have the slightest effect upon the verdict of the jury in the present case."

II. Application of rules.

a. Generally.

1. Action for alienation of affections.

In *Luick v. Arends* (1911) 21 N. D. 614, 132 N. W. 353, an action for alienation of affections brought by a husband from whom the wife had obtained a divorce in another state, it was held that the decree was no bar to the action, the court saying: "At the outset . . . we are confronted with the question whether the decree of divorce granted the wife from her husband, the plaintiff, upon the court's findings of cruel and inhuman treatment of her by the plaintiff, endangering her life, covering the identical period of time embraced within the pleadings and evidence in this action between the plaintiff and a third person, is *res judicata* or an estoppel, by judgment, on those questions and plaintiff's treatment of his wife, under investigation in this case against *Arends*, who was a stranger

to the divorce action. The result of the divorce action was a judgment against this plaintiff, finding him at fault in the disrupting of his family relations, and adjudging the dissolution of the marriage because thereof, and justifying her action in leaving him. If the findings and judgment in the divorce proceedings are binding upon the plaintiff in this case, they absolutely preclude his recovery, and further discussion of the case and errors alleged would be needless. The authorities are practically unanimous in their holdings that the decree is admissible, and is *res judicata* as against the world, only to the extent of judicially establishing the prior existence of the marriage, and its dissolution, and the status of the parties thereafter under the decree. To this extent only is the divorce judgment a judgment in *rem* and *res judicata* in this action; the divorce decree establishes its own existence only, and thereafter the status of the former husband and wife as between themselves and the world; but the judgment of divorce does not carry into this case, under the rules of former adjudication or estoppel by judgment, the issues involved in the divorce trial, nor the grounds upon which the decree of divorce was granted. For reasons of public policy only does the law treat the divorce action as a proceeding in *rem*, and this only to the above extent. It is a well-known rule of law that in a proceeding strictly in *rem* not only the parties named in the action, but the world, is concluded by the judgment, not only to the extent of the judgment itself, but as to all matters in issue and necessarily determined in the findings of fact and decision of matters of law upon which the judgment is based; but a divorce decree is in all things a judgment in *personam*, and as such the rules of evidence applicable to judgments in *personam* apply, except so far as the same is to be treated as a judgment in *rem* as above stated. Hence, the Iowa divorce decree is not admissible in evidence except to establish its own existence, the marriage of the parties being admitted, and as bear-

ing upon the admissibility of testimony relating to the statute as to privileged communications between husband and wife. It is not *res judicata* to plaintiff's cause of action; it does not estop, by judgment, plaintiff from asserting his cause of action against defendant, Arends. Arends was a stranger to the record in the Iowa divorce proceedings; the judgment in that case did not bind him, except as it operated as against the world in certain particulars only as a judgment in rem."

The case of *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731, was an action by a husband for alienation of affections in one count and for criminal conversation in another. After the commencement of the action the legislature granted the wife a divorce, and the court held that the divorce was not a bar to the action, saying: "Although it is true, as Mr. Bishop has said in his valuable work on *Marriage & Divorce*, vol. 1, § 1465, 'that a legislative divorce, equally with a judicial one, snaps the vinculum of the marriage, and that whatever hangs upon it falls,' yet the learned author, in laying down that proposition, illustrates its meaning by referring to the next section, which is as follows: 'If the man dies, the woman will not be his widow, entitled to dower and a portion of his personal property. He will not, on her death, be authorized to hold her lands as tenant by the courtesy; but, on the contrary, his interest and that of his grantees and representatives, in them and in her choses of action, cease. This is not a divesting of vested rights.' The learned writer did not mean, and it cannot be the law, that the divorce would be a bar to an action like the present, brought for an injury to the marital relations prior to the divorce, and which action is not based upon the existence of such relations at the time of the commencement of the suit."

In *Hostetter v. Green* (1914) 159 Ky. 611, L.R.A.1915C, 870, 167 S. W. 919, the court said: "The argument for appellant is that a judgment in a divorce case is a judgment in rem and

therefore binding not only upon the parties thereto, but upon the whole world, and that inasmuch as the evidence in that case and this was substantially the same that issue is *res judicata* as to appellee, and he is precluded from again litigating it. But this contention is not sound; the appellants in this action were not parties to the divorce suit, and in the nature of things could not have been, nor is the wife a party to this suit; the judgment in the divorce suit is binding upon the appellants in this suit only in so far as it fixed the status of the parties to the divorce suit. While the evidence in the two actions may be substantially the same, the pleadings presented essentially different causes of action; in the divorce suit the issue was which party had abandoned the other, while in this suit is involved the issue whether the parents of the wife, prior to the abandonment, were guilty of such conduct and of exercising such influence over their daughter as alienated her affections from the appellee and thereby brought about the abandonment. It does not follow that if Green did abandon his wife, that the abandonment might not have been forced upon him by reason of the hostility of the Hostetters to him, and their influence over their daughter, coupled with mistreatment of him, might have driven him to abandoning his wife when such abandonment would not have been necessary and would never have taken place except for their mistreatment of him and their conduct in prejudicing their daughter against him. Abandonment of a wife by the husband does not necessarily mean that her affections have not theretofore been alienated from him by other persons. The issue of abandonment in a divorce case between husband and wife, and the issue of alienation of affections between either of them and third parties in another and distinct case, are in no sense akin to each other; and because the evidence in the two cases may be substantially the same is no reason why a judgment in one should be a bar to the other. It is not inconceivable that, even if the

evidence in the two cases were exactly the same, it might not uphold a charge of abandonment in the one case, and the charge of alienation in the other. In the divorce case the appellee was barred by law from testifying, while in this case, for the first time, he was permitted by his own evidence to give his version of the differences between him and his wife and what brought them about. It would be unjust to appellee to deny him the right to be heard on the issues raised in this suit, where he may, under the law, testify, because in a previous action between him and another upon different issues, where he was barred from testifying, the same facts were held against him upon the issues there pending. He has not had his day in court as between him and appellants upon the issues between them, and, for the first time in this case, was permitted to testify about these facts."

In *Modisett v. McPike* (1881) 74 Mo. 636, it was held that the fact that a wife obtained a divorce from her husband, based on his misconduct, did not of itself constitute a defense to an action by him for the alienation of her affections, if, notwithstanding the misconduct on the part of the plaintiff, his wife would not have sued him for divorce if it had not been for the acts, conduct, and influence of the defendant in the alienation action.

In *Beach v. Brown* (1898) 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46, the court said: "The action in this case was brought by the respondent after she had obtained a divorce from her husband, and it is therefore urged by the appellant that, if she ever had the right to bring this action, it was lost when she sought and obtained a divorce; that all rights were settled by the decree of divorce; and cases from this court are cited to sustain that contention. But we do not think that the cases cited or the law bear upon this character of rights. It could not, in the very nature of things, have been contemplated in the divorce decree. It is a damage which is peculiar to the wife,

which the husband, under no rule of right, could have any interest in; and it would be a harsh rule of law that, conceding that the wife had this right during coverture, would deprive her of the right when the wrongful acts of which she complains created the necessity for and caused the action for divorce. Of course, the damages could not be calculated after the time when the decree of divorce was obtained."

So, in *Philpott v. Kirkpatrick* (1912) 171 Mich. 495, 137 N. W. 232, it was held that a husband was not estopped from maintaining a suit for the alienation of his wife's affections by reason of having previously brought a divorce suit in which he complained of the present defendant's interference with his domestic relations, and in which he obtained a decree of divorce on the ground of extreme cruelty, it being said that the respective positions of the plaintiff in the two suits were not so inconsistent as to work an estoppel. The court added, however: "It should be borne in mind that the decree in favor of the complainant in the divorce case was because of the wife's extreme cruelty. The decree places it upon no other grounds. As we have shown, the decree was signed on the very day the divorce was granted by the circuit judge, who also heard the instant case, and there was nothing in the record to show that there was any mistake in the decree. It does appear in the record that the plaintiff desired his counsel to make the defendant a corespondent in the divorce case. This, however, was not done."

In *Wilson v. Coulter* (1898) 29 App. Div. 85, 51 N. Y. Supp. 804, an action for alienation of affections, the defendants requested the court to charge that the plaintiff could not recover damages subsequent to August 10, 1895, when she began her action for a separation on the ground of desertion, and also that she could not recover damages after April 1, 1896, when the judgment in that action was entered. The court replied: "On that subject, gentlemen, I will charge you that if it was the plaintiff's desire

and wish to become separated from her husband at the time, and end her relations with him, rather than to live with him as her husband, then you will not take into consideration her loss of his conjugal society after that period. But if, on the other hand, you find that she desired to live with her husband, but was unable to find him,—to locate him,—and that this action of separation was instituted under the circumstances, and as the necessary result of the action of these defendants in inducing her husband to leave her and remain away from her, and as a necessary course for her, in order to obtain some provisions for her maintenance and support, then you are entitled to still take into consideration, as charged by the court before, all the loss of the conjugal society resulting from the wrongful act of the defendants." The defendants excepted to the refusal to instruct as requested and to the instruction given. On appeal it was said: "In actions of this character the plaintiff is entitled to recover damages, not only for the loss of her husband's society, but for the loss of his support and maintenance, which the marriage relation entitles her from the husband and his estate. In case the jury found that the plaintiff did not prosecute her action for a separation because of her desire to live apart from her husband, but because she was unable, by the action of the defendants, to learn of his whereabouts and induce him to return, then the permanent loss of his society and support could be taken into account by the jury on the question of damages."

Under a statute permitting a corespondent to appear in the divorce action and defend the action so far as the issues affect him, the corespondent may become bound by the judgment in the divorce proceeding. But the corespondent is not so bound where the judgment roll does not, in any manner, disclose that he became a party to the divorce action. *Hendrick v. Biggar* (1913) 209 N. Y. 440, 103 N. E. 763, reversing (1912) 151 App. Div. 522, 136 N. Y. Supp. 306, which affirmed on this point (1910)

66 Misc. 576, 122 N. Y. Supp. 162, wherein the court said: "This appeal presents for consideration one of the . . . class of cases where the corespondent had not been originally served with a copy of the summons and complaint, but voluntarily appeared and demanded service of the latter, and, in the first instance, we shall consider an assumed case where the judgment roll in the divorce action duly discloses that a corespondent has thus appeared, and joined issue, and contested the allegations of adultery made against him, or, after service of the complaint and appearing to defend, has been duly placed in default on the trial of such issues. In such a case we see no reason why judgment based upon the trial of such issues should not be an adjudication as to and binding upon such corespondent. It is true that this section provides for a somewhat anomalous practice, and that a corespondent acting under it does not, in the ordinary manner, become a party to the action and to the judgment rendered therein. Nevertheless, he does become a party to it in a manner which, although qualified, gives him a full opportunity to defend against and contest the particular allegations which affect him. Thus there is afforded that opportunity for a full and complete trial of these issues which calls for the application of the fundamental principle governing the general doctrine of res judicata, that a party shall not be heard a second time on a issue which he has once been called upon and permitted to try and contest. We do not think, however, that the evidence presented in this action of appellant's alleged participation in the divorce action so brings her within the principle which we have just stated as to make said judgment binding on her. The judgment roll does not, in any manner, disclose that she became a party to said divorce action. Evidence was offered outside of said judgment roll, to the effect that she appeared in the action and demanded a copy of the complaint, and that a copy of said complaint was served upon the attorney who served this no-

tice of appearance. It appears, however, that said attorney also represented the defendant in said action, and it is not made at all clear that a copy of the complaint was served on him by reason of his appearance for this appellant rather than as attorney for the defendant in the divorce action. But in addition to this, there is no further evidence disclosing appellant's relations to said action. The judgment roll would seem to make it reasonably plain that she did not appear on the trial of the action and contest the allegations of adultery with her, and there is no evidence to show that she ever answered in the action, or that she was properly placed in default in not appearing upon the trial. Under these circumstances, and with such absence of proof, we are not willing to hold that she is bound by the judgment."

The decision in the foregoing case was approved in *Raymond v. Williston* (1914) 213 Fed. 525.

2. Action for criminal conversation.

In *Michael v. Dunkle* (1882) 84 Ind. 544, 43 Am. Rep. 100, an action for criminal conversation, it appeared that before the criminal intercourse occurred, the plaintiff and his wife had separated and did not afterwards live together, and that before the commencement of the action she had obtained a divorce from him. The court, in affirming a judgment for the plaintiff, said: "The woman was still the appellee's wife, and notwithstanding the differences which had led to the separation, which it seems was caused by his cruelty, there might have been a reconciliation between them; and indeed there is evidence that the appellee was seeking to bring this about at the time when the offenses of the appellant were committed and discovered. After this discovery, it is not strange that the appellee permitted his wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done."

Likewise, in *Coney v. Harney* (1890) 53 N. J. L. 53, 20 Atl. 736, an action by a husband for criminal con-

versation, the defendant filed a plea alleging that in an action for divorce brought by the wife, the husband had filed a cross petition charging her with having committed adultery with the defendant, and, that issue having been joined and evidence taken, the cross petition of the husband was dismissed, and a decree granted to the wife on her petition. The court, holding that the plea was bad, said: "It has been contended, in support of the plea, that the decree therein set up is conclusive against the plaintiff as *res judicata*, and affords defendant a bar to this action. It was argued with ingenuity and no little force, that the law ought not to permit one who has made an issue of this character, and, having presumably produced all the evidence in his power, has encountered a defeat thereon, to again vex the courts by a retrial of the same issue. Such considerations have elsewhere induced legislation providing for making the alleged adulterer a party to the divorce proceeding as co-respondent. But no such legislation has changed our law. We are therefore left to enforce the well-settled and indisputable rule on this matter. An estoppel, even by the judgment of a court, must be mutual to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality, for had it been adjudicated that defendant had committed the adultery charged in the cross petition, such adjudication manifestly could not have been set up against him. Under the rule referred to, he cannot set up the adjudication in his favor."

It appeared in *Purdy v. Robinson* (1909) 133 App. Div. 155, 117 N. Y. Supp. 295, an action by a husband for both alienation and criminal conversation, that the wife had obtained a divorce on the ground of the husband's adultery, and that the criminal conversation took place in the time intervening between the commencement of the wife's action for divorce and the final decree therein. The court, in sustaining the husband's

right to bring the suit, said: "A husband's cause of action for criminal conversation should not be barred by the plea of the adulterer that, after the act of criminal conversation, the husband had forfeited or destroyed his conjugal rights. . . . The proposition of the defendant, applied to this case, is that after a wife begins an action for absolute divorce, if she have a leman thereafter, he is secure from an action by her husband for criminal conversation. But the beginning of an action for absolute divorce does not sever the relation of husband and wife. The wife cannot thereafter cohabit with the husband and succeed in her action; but cohabitation is not the full measure of his conjugal rights. . . . The fact that the husband committed adultery is not available as a bar to the adulterer with the wife, when sued for criminal conversation."

b. Admissibility of decree in evidence.

1. Divorce obtained by plaintiff.

It is generally conceded that the spouse who is suing for alienation of affections or for criminal conversation, and who has already obtained a divorce, may introduce the decree of divorce for the purpose of showing that the other spouse, whom he claims has been debauched or whose affections have been alienated, no longer sustains the relation of husband or wife. *Waldron v. Waldron* (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383, reversing (1890) 45 Fed. 315, on other grounds; *Woldson v. Larson* (1908) 90 C. C. A. 422, 164 Fed. 548; *Mead v. Randall* (1896) 111 Mich. 268, 69 N. W. 506; *Lee v. Hammond* (1902) 114 Wis. 550, 90 N. W. 1073.

In *Woldson v. Larson* (1908) 90 C. C. A. 422, 164 Fed. 548, supra, the court said: "A copy of the decree of divorce between the defendant in error and his wife was admitted in evidence. It is contended that this was error for the reason that a judgment in a suit is not evidence in another suit against one who was not a party to it. We think there can be no question of the competency and material-

ity of proof that the plaintiff in such action as this has, since the occurrence of the tort complained of, obtained a divorce from his wife. It is proper for him to show that the wife, whom he claims has been debauched, no longer sustains that relation to him, and the best proof of that fact is the decree of divorce."

In *Lee v. Hammond* (Wis.) supra, both the fact that a divorce had been granted and the ground on which it was obtained were held to be competent evidence.

But in the United States cases, supra, it was held that the party procuring the divorce may not use the decree in a suit for alienation of affections or for criminal conversation, for the purpose of showing the ground on which the divorce was obtained, or as proof of the act with which the defendant, as corespondent in the divorce action, was charged.

Thus, in *Waldron v. Waldron* (U. S.) supra, it was held that where the fact of divorce was confessed by the pleadings, and was admitted by counsel for the defendant, in open court, the divorce record was inadmissible.

It was said in *Mead v. Randall* (1896) 111 Mich. 268, 69 N. W. 506: "It was competent for the plaintiff to show the fact of divorce, for the purpose of negating any claim that there had been, up to that time, a reconciliation between the parties, plaintiff and his wife. But the bill of complaint, which was an ex parte statement of the plaintiff, not himself a competent witness, should not have been read in evidence. Much less should the jury have been permitted to consider it as substantive proof of the facts stated."

2. Divorce obtained against plaintiff.

Where the plaintiff in an action for alienation of affections or criminal conversation is the guilty person against whom a divorce has been obtained, it is held in some jurisdictions that the decree is admissible against him in mitigation of damages. *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731 (alienation of affections); *Sackheim v. Mil-*

ler (1907) 136 Ill. App. 132 (alienation of affections). See also *Luke v. Hill* (1911) 137 Ga. 159, 38 L.R.A. (N.S.) 559, 73 S. E. 345 (alienation of affections); *Simmons v. Simmons* (1888) 21 Abb. N. C. 469, 4 N. Y. Supp. 221 (alienation of affections).

In *Prettyman v. Williamson* (Del.) supra, it was said: "The divorce granted by the legislature to Mrs. Prettyman, . . . may be and should be considered by you in mitigation of damages, if you should think the plaintiff entitled to recover damages, because the plaintiff would not be entitled to any compensation for the loss of the affection, society, and services of his wife after she ceased to be his wife."

Likewise, it was said in *Sackheim v. Miller* (1907) 136 Ill. App. 132: "The statements made to the court by defendant's counsel informed the court that the bill was by Mrs. Miller for a divorce, and that a divorce was granted to her, and plaintiff's cross bill was dismissed for want of equity. It was not stated what the bill charged, but inasmuch as a decree was granted on it in her favor, it must be presumed to have been for a statutory cause for divorce. The issue was, whether or not the defendant alienated the love and affection of plaintiff's wife. Evidence of any one of the statutory causes for divorce would tend to prove that the love and affection of plaintiff's wife were alienated by the cause for divorce averred in the bill and found as a fact by the decree. We are of opinion that the offered evidence should have been admitted."

But the spouse who is suing, and against whom a divorce has been granted, is not estopped from contesting, in an action against a stranger, to that decree the truth of the grounds on which the decree was prayed. *Luke v. Hill* (1911) 137 Ga. 159, 38 L.R.A. (N.S.) 559, 73 S. E. 345 (alienation of affections), wherein the court said: "It is a general universal rule that estoppels must be mutual. Strangers can neither take advantage of, nor be bound by, an estoppel. . . . A decree in a matri-

monial suit, fixing the status of the parties, in distinction from the specific findings therein, is to be regarded as a judgment quasi in rem. So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers; but, beyond the adjudication of the status, the decree does not conclude strangers. . . . The adjudication of the status is conclusive upon strangers, but does not bind them upon causes of action springing from the marital relation prior to the decree. A divorce decree will not estop a party thereto from contesting with a stranger the truth of the grounds as affecting his liability in another suit upon a cause of action arising, pending the divorce suit but before the decree. . . . Beyond the legal effect of determining the status of the parties, the law applies, as in other judicial proceedings, that a judgment is not conclusive in another suit, except in cases in which the same parties or their privies are litigating in regard to the same subject of controversy. The plaintiff in error is estopped by the decree of annulment from denying his matrimonial status; but in a cause of action against strangers, arising before the decree of annulment, based on the legality of his marriage, he is not estopped by the decree from contesting with them the truth of the grounds upon which the decree was prayed."

In other jurisdictions, however, the record in the divorce proceeding is admissible only to the extent of judicially establishing the prior existence of the marriage, and its dissolution, and the status of the parties thereafter under the decree. *Hostetter v. Green* (1914) 159 Ky. 611, L.R.A. 1915C, 870, 167 S. W. 919 (alienation of affections); *Sickler v. Mannix* (1903) 68 Neb. 21, 93 N. W. 1018 (alienation of affections); *Luick v. Arends* (1911) 21 N. D. 614, 132 N. W. 353.

It appeared in *Sickler v. Mannix* (1903) 68 Neb. 21, 93 N. W. 1018, supra, an action by a wife for alienation of affections, that the husband had been granted a divorce on the ground

of extreme cruelty. The court, in refusing to admit the divorce decree in evidence, said: "Mrs. Sickler [the defendant] was not a party to that suit, and it is only where a judicial record contains an admission of one or the other of the parties to it that it is admissible as such in favor of a stranger. . . . Mrs. Mannix [the plaintiff] did not admit in her pleadings in the divorce case that she had been guilty of extreme cruelty to her husband. On the contrary, she denied and contested the charge, and the fact that the court found against her on the trial does not make such finding admissible against her in favor of a stranger, on the trial of another action."

A divorce decree was held to be admissible in *Luick v. Arends* (N. D.) *supra* (an action for alienation of affections), only for the purpose of establishing its own existence,—the marriage of the parties being admitted,—and as bearing on the admissibility of testimony relating to the statute as to privileged communications between husband and wife. The court said: "The rule is general that a judgment or decree is not admissible in evidence as *res judicata* on the facts involved, or to operate as an estoppel by judgment in other than actions strictly in rem, except as between parties or privies. There must be a mutuality between the parties to the action in which the decree is rendered and in the action in which it is offered, and it is only admissible in favor of a party when it would be admissible against him if the decree had been the other way. Applying this test, it is plain that the trial court's ruling in excluding the grounds upon which the decree was entered is correct. Suppose the plaintiff in this action had prevailed in the divorce suit under his claim of desertion by the wife, and in this action plaintiff had offered in evidence the decree of divorce granted him, and entered against his wife's claim of cruelty, as proof that he had not been guilty of the acts of cruelty charged in defendant's answer in this case, and had not by cruelty alienated her affections.

It is clearly apparent that such testimony would be inadmissible as against the defendant in this action; he was not a party to the divorce action, nor could he be, nor could he have privity with any party to that action for divorce. . . . Wigmore, on Evidence, § 1348, subd. 2a, recognizes the fact that apparently contrary judgments may be rendered by different courts on the same facts, as counsel contends has resulted in this action, between different parties, under this rule, by the following comment upon it: 'A judicial judgment binds only the parties to the specific litigation, and therefore the same question of fact must be investigated anew, even innumerable times, between parties not affected by prior judgments. There may, therefore, be an analogous situation in which innumerable parties will be affected by a fact common to the rights or duties of all; and this fact, in the absence of a judicial proceeding binding on all, may be from time to time differently determined by different juries and judgments in successive litigations.' "

Where, however, the record in the divorce proceedings discloses admissions by the spouse against whom the divorce was obtained, and who later became the plaintiff in an action for alienation of affections or for criminal conversation, it may be received in evidence to the extent of showing those admissions. *Bergman v. Solomon* (1911) 143 Ky. 581, 136 S. W. 1010, wherein it appeared that the plaintiff in the alienation action admitted the charges of cruelty made in the complaint in the divorce action, the court saying that such course tended to show that he was willing to get rid of his wife.

c. Extraterritorial effect of decree.

A divorce decree obtained by one spouse in a foreign jurisdiction under such circumstances as not to be recognized by the law of the forum has been held not to bar an action by the other spouse for criminal conversation taking place after the rendition of the decree. *Berney v. Adriance*

(1913) 157 App. Div. 628, 142 N. Y. Supp. 748; C. v. D. (1904) 8 Ont. L. Rep. 308, appeal dismissed in (1906) 12 Ont. L. Rep. 24.

A foreign statute imposing a penalty on the guilty party to a divorce proceeding, whereby he forfeits all rights acquired by the marriage (see Iowa cases cited *infra*, in the following subdivision), will not be given extraterritorial force so as to bar a cause of action for alienation of affections which arose in the forum prior to the obtaining, by the other spouse in such foreign jurisdiction, of a divorce against the plaintiff in the alienation action. *Luick v. Arends* (1911) 21 N. D. 614, 132 N. W. 353.

But in *Bledsoe v. Seaman* (1908) 77 Kan. 679, 95 Pac. 576, a spouse who had obtained a divorce in a foreign jurisdiction was held to be estopped to set up the invalidity thereof in an action for criminal conversation occurring after the decree.

III. Rule in Iowa.

In Iowa a statute providing that "when a divorce is decreed, the guilty party forfeits all rights acquired by the marriage," is held to be a complete bar to the right of one spouse against whom a divorce has been granted, to recover for the alienation of the affections or for criminal conversation with the other spouse. *Hamilton v. McNeill* (1911) 150 Iowa, 470, 129 N. W. 480, Ann. Cas. 1912D, 604 (alienation of affections); *McNamara v. McAllister* (1911) 150 Iowa, 243, 34 L.R.A.(N.S.) 436, 130 N. W. 26, Ann. Cas. 1912D, 463 (alienation of affections); *Duff v. Henderson* (1921) — Iowa, —, 183 N. W. 475 (alienation of affections and criminal conversation), overruling *Wood v. Mathews* (1877) 47 Iowa, 409.

In *Duff v. Henderson* (1921) — Iowa, —, 183 N. W. 475, the court said: "The appellant's petition is in two counts. In one count he seeks to recover damages from appellee for alienation of the affections of appellant's wife. In a separate count of his petition, the appellant seeks to recover for damages for criminal conversation between the appellee and

appellant's wife. The appellee answered the said counts of the petition by alleging that the appellant was barred and estopped under § 3181 of the Code from maintaining either of said alleged causes of action, for the reason that, after the alleged causes of action arose, the appellant's then wife obtained a divorce from the appellant. A demurrer to the allegations of the answer was overruled. Section 3181 of the Code provides: 'When a divorce is decreed the guilty party forfeits all rights acquired by the marriage.' In *Hamilton v. McNeill* (1911) 150 Iowa, 470, 129 N. W. 480, Ann. Cas. 1912D, 604, we held that § 3181 of the Code was a full and complete bar to the right of a husband to recover for alienation of his wife's affection, where the wife subsequently obtained a divorce from her husband. In *Wood v. Mathews* (1877) 47 Iowa, 409, we held, in an action for criminal conversation, where the plaintiff's wife had procured a divorce from him, that this constituted no defense to an action for damages for the injuries sustained prior to the time of procuring the divorce. *Wood v. Mathews* was considered by the court in *Hamilton v. McNeill*, and, in the majority opinion, it was said: 'We think, however, that we are not called upon at the present time to say whether the *Wood Case* should be overruled. As before indicated, the present action is not an action for criminal conversation. The case presented by the petition is one of simple alienation by alleged acts and arts not in themselves criminal. Such an action is essentially different in its nature from an action for criminal conversation, although both contain some elements in common.' We are squarely confronted with the proposition that we are compelled in the instant case to overrule either *Hamilton v. McNeill* or *Wood v. Mathews*. If *Hamilton v. McNeill* is followed, then the procuring of a divorce by the appellant's wife was a complete bar to appellant's right to recover against the appellee for alienation of his wife's affections. If *Wood v. Mathews* is to be followed, then the ap-

pellant is not barred, by reason of the wife procuring a divorce from him, from maintaining a cause of action against the appellee for criminal conversation with his wife. A majority of the court are of the opinion that the majority opinion in the case of *Hamilton v. McNeill* should be adhered to, and that the obtaining of a divorce by the appellant's wife is a complete bar to his right to maintain an action for the alienation of the affections of his wife, under the provisions of § 3181 of the Code. The argument pro and con is so fully set forth in the majority opinion, and in the dissenting opinion in said case, that it is deemed unnecessary to further discuss the proposition. The views expressed by the present Chief Justice Evans in the majority opinion in said case are in accord with the views of the majority of the court as now constituted. We now hold that the obtaining of a divorce by the appellant's wife from the appellant is a complete bar to the appellant's right to maintain a cause of action against the appellee for the alienation of his wife's affections, and it therefore follows that the demurrer of the appellant to the answer of the appellee, pleading the obtaining of such divorce as a bar to the appellant's right of action on the count charging alienation of affections, was properly overruled. The majority of the court are of the opinion that *Wood v. Mathews* should be overruled, and that the obtaining of a divorce is a bar to the right of a husband to maintain an action for criminal conversation. It therefore follows that the demurrer of the appellant to the answer of the appellee, pleading the obtaining of a divorce by appellant's wife as a bar to the appellant's right to maintain an action for criminal conversation, was properly overruled. The court now holds that the appellant cannot maintain an action against the appellee for either alienation of the wife's affections or for criminal conversation, and the fact that appellant's wife obtained a divorce from him subsequent to the acts complained of is a complete bar to the right of the appellant to maintain either of said

causes of action. The writer of this opinion dissents from the conclusion of the majority as expressed herein. I think *Hamilton v. McNeill* is wrong, and should be overruled, and that the dissenting opinion of Mr. Justice Deemer in that case is correct. I also think that *Wood v. Mathews* should be followed, instead of being overruled. Mr. Justice Stevens joins in this dissent, both as to the overruling of *Hamilton v. McNeill* and the following of *Wood v. Mathews*. The majority holding to the contrary, it necessarily follows that the judgment of the district court must be affirmed."

In *Hamilton v. McNeill* (1911) 150 Iowa, 470, 129 N. W. 480, Ann. Cas. 1912D, 604, which was followed in the foregoing case, the court summed up its conclusions as follows: "The right of action for damages for alienation of affection is a 'right acquired by the marriage' within the meaning of § 3181 of the Code. That by the terms of this statute the 'guilty party' forfeits such right. (2) That the forfeiture declared by the statute must be recognized by the court regardless of any advantage resulting thereby to any defendant. This is so, not because of any affirmative right conferred on the defendant, but because of the absence of right in the plaintiff. And the forfeiture is properly pleadable as such by a defendant. (3) That the decree of divorce shown in this record fixed the status of the plaintiff herein as the 'guilty party' therein within the meaning of said § 3181. The question at this point is not so much whether the decree is conclusive as between plaintiff herein and third parties, and as affecting alleged affirmative rights of such third parties, but whether the decree is conclusive upon the plaintiff himself as bringing him within the operation of the statute in question. We hold it to be conclusive upon plaintiff in the latter respect, that he became thereby subject instanter to the forfeiture declared by the statute. (4) That plaintiff's plea that the divorce was obtained by his own collusion will not avail to relieve him from its conclusiveness while it remains in force."

A. S. M.

MODERN WOODMEN OF AMERICA

v.

CLARA S. ALLIN et al.

FLORENCE A. INGALLS et al., Appts.,

v.

CLARA S. ALLIN.

Illinois Supreme Court — December 22, 1921.

(301 Ill. 119, 133 N. E. 677.)

Insurance — mutual benefit — payable to wife — when person ascertained.

1. Under a mutual benefit certificate payable to the holder's wife and children, the person described as wife is to be ascertained at the time of his death, so that, if the wife living when the certificate was issued dies and the member marries again, the second wife is entitled to the benefit.

[See note on this question beginning on page 959.]

— lien for advances to keep certificate alive.

2. One of several beneficiaries in a mutual benefit certificate who pays

dues from his own money to keep the certificate in force is entitled to a lien on the fund realized from the certificate for the amount so paid.

APPEAL by the defendant children from a decree of the Appellate Court, First District, reversing a decree of the Circuit Court for Cook County (Scanlan, J.) in their favor in a suit to determine conflicting claims to a benefit fund arising under a certificate issued to their deceased father. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Elliott R. Goldsmith, for appellants:

The certificate does not include the second wife.

Day v. Case, 43 Hun, 179.

The widow is not one of the "legal heirs," and is not entitled to participate in the \$3,000 fund as a beneficiary.

Gauch v. St. Louis Mut. L. Ins. Co. 88 Ill. 251, 30 Am. Rep. 554; Phillips v. Carpenter, 79 Iowa, 600, 44 N. W. 898.

Payment by the widow of \$320 for dues to keep the certificate in force did not entitle her to an equitable lien.

Grand Lodge, A. O. U. W. v. Ehlman, 246 Ill. 555, 92 N. E. 962.

Messrs. Lewis F. Baker and Samuel Grossman, for appellee:

A benefit certificate in a society of this character differs from an ordinary policy of life insurance in that it speaks with reference to the conditions existing at the time of the death of the member whose life has been insured by it.

Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; Ptacek v. Pisa, 134 Ill. App. 155.

From a consideration of the object for which benefit societies are formed, which is to afford protection to the family and dependents of the members of such societies after the death of the members, a person cannot take as beneficiary unless he falls within one of the designated classes at the time of the death of the member.

Murphy v. Nowak, 223 Ill. 301, 7 L.R.A.(N.S.) 393, 79 N. E. 112; Tyler v. Odd Fellows Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360.

When the status of a beneficiary is the main, if not the sole, inducement for the insurance, the name becomes a mere descriptive designation, and the object of the benefit is, and always remains, in the person filling the particular status.

Order of R. Conductors v. Koster, 55 Mo. App. 186.

While at law a certificate is not assignable, in equity, a beneficial inter-

est may be transferred therein, which will be protected by a court of chancery.

Supreme Council, R. A. v. Tracy, 169 Ill. 123, 48 N. E. 401; McGrew v. McGrew, 190 Ill. 607, 60 N. E. 861; Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582.

Farmer, J., delivered the opinion of the court:

The Modern Woodmen of America filed its bill of interpleader in the circuit court of Cook county to have determined conflicting claims to a benefit fund of \$3,000 under a benefit certificate issued to Richard H. Allin in 1887, whereby the society agreed to pay to the wife and children of the member, at his death, \$3,000. The benefit certificate read, a benefit fund not to exceed \$3,000 should "be paid at his [the member's] death to wife and children." At the time the certificate was issued, in 1887, Allin was married and had four children. His wife's name was Arabella M. Allin. Twenty years afterwards, in 1907, Arabella M. died, leaving her husband and their four children surviving. Allin married again, his second wife's name being Clara S. Allin. No children were born of this marriage. Allin died in December, 1918, leaving surviving him his widow, Clara S., and the four children of his first wife, and a dispute arose as to who was entitled to the fund. No change in the name of the beneficiaries had ever been made, and the widow claimed an equal interest in the fund with the children of deceased, and also reimbursement of the amount of \$320 she had paid of her own money in dues on the certificate to keep it in force. The children disputed the validity of her claim, which caused the society to file its bill of interpleader. The widow and children filed answers, setting up their claims to the fund. The society paid the money into court and was dismissed out of the suit. The issues made by the widow and children were referred to a master in chancery to take testimony and report his conclusions. The master reported recommending

a decree awarding the entire fund to the children of the deceased member. The court entered a decree as recommended by the master, awarding the entire fund to the four children after deducting the costs of the litigation. The widow prosecuted an appeal to the appellate court, and that court reversed the decree of the circuit court. The appellate court held the widow was entitled to \$320 dues paid by her to keep the certificate in force, and the remainder of the fund was divided in five equal shares among her and the children. That court reversed the decree and remanded the case, with directions to enter a decree accordingly. A certificate of importance was granted, and the children have prosecuted an appeal to this court.

The first and principal question involved is whether the word "wife," as employed in the benefit certificate means only the person who sustained that relation to the member when the certificate was issued, in 1887, or whether it means the person who sustained that relation at the time of his death. The benefit certificate reads that Richard H. Allin has become a member of the order, and while in good standing is entitled to participate in the benefit fund to an amount not exceeding \$3,000, "which shall be paid at his death to wife and children," subject to the conditions named on the back of the certificate and the society's fundamental laws. At the time the certificate was issued the laws of the society provided they might be amended at a regular or special meeting by a two-thirds vote. The laws in force at the time of the death of Arabella M. Allin, the first wife, provided that, if a beneficiary died before the death of the member, upon a failure to designate another beneficiary the benefits "shall be payable to the other surviving beneficiaries, if any there be, or if no beneficiaries survive him, then to the wife of such member if she survive him, and in case he has no surviving wife, to

his legal heirs." Subsequently, and before Allin's death, the by-laws were amended, but the provision to meet the contingency of the death of a beneficiary before the death of the member and no other beneficiary being named was not essentially changed. Allin made no change in the beneficiaries designated when the certificate was issued in 1887, when Arabella M. was his wife.

Appellants, who are the children of Richard H. Allin, contend that the words in the certificate "to be paid at his death to wife and children" mean that payment was to be made to his then wife and children upon the death of the member; that Arabella M. being then his wife, she was designated as one of the beneficiaries, and upon her death, no other beneficiary having been named in her place, the entire fund became payable to the children as surviving beneficiaries. On the other hand the appellee contends that no specific person was designated to take the fund; that the designation of beneficiaries was of classes, and as the certificate speaks at the death of the member, the beneficiaries answering the description in the certificate are entitled to the fund.

Our attention has not been called to a decision of this or a similar question by any court of last resort. A few intermediate courts of appeal have passed on the question, but their decisions are not in harmony. We are then left to decide the question from a consideration of the language of the certificate and of the object of benefit societies to afford protection to the families and dependents of members of such societies after the member's death. We know of no valid objection to a member designating beneficiaries by classes, such as children, or wife and children, as was done in this case. If, instead of designation by classes, they had been designated by their individual names, they would take by that description if living at the death of the member. Here one

of the classes designated was the member's wife. The person answering that description at the time the certificate was issued died before the death of the member, and at his death another woman answered that description. One of the objects of Allin in securing the certificate was to secure a fund for the benefit of the members of his family at his death. He designated as beneficiaries classes bearing a certain relationship to him,—i. e., wife and children. He knew no payment could be made until his death, and then only to persons answering the description of the beneficiaries. His four children were born before the date of the certificate and all of them are still living. More than ten years elapsed after Allin's second marriage before his death, but no change was made by him in the designation of his beneficiaries. At the time of his death appellee answered the description of one of his beneficiaries. We think the language of the certificate must be construed to mean that when he died he wanted his wife to share in the benefits, without regard to whether she was the same person who was his wife when the certificate issued. The construction that the designation of wife meant Arabella M. Allin as much as if she had been specifically named as a beneficiary is, in our opinion, unwarranted. It was the person who at his death answered the description of the class designated that he desired to protect. We have said appellants, who are the four children of Allin, were born before the benefit certificate was issued. He designated them as beneficiaries by the description of "children." If another child or children had subsequently been born and survived the father, such child or children would certainly have been entitled to share in the fund, but, if the certificate is to be construed as appellants contend,

Insurance—
mutual benefit—
payable to wife
—when person
ascertained.

they would not have been protected. The four children were not designated by name, but it clearly was the intention of Allin to provide a fund for the benefit of all of his children who survived him, and it does not seem reasonable to construe the certificate to protect only such as were born before it issued. The same rule of construction would apply to a beneficiary designated as "wife." The person answering that description at the death of the member, when the certificate speaks for the first time, is within its protection.

The proof shows that appellee paid out of her own funds, for dues

on the certificate to keep it in force, \$320. She is entitled to an equitable lien on the fund for that amount, and to be paid that amount before the remainder of the fund is distributed among the beneficiaries. Supreme Council, *R. A. v. Tracy*, 169 Ill. 123, 48 N. E. 401; *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861.

It was no abuse of the discretion of the court to order the costs of the litigation paid out of the fund.

The judgment of the Appellate Court is affirmed.

Petition for rehearing denied February 10, 1922.

ANNOTATION.

Right of second wife to take under policy designating "wife" or "widow" as beneficiary, issued during life of first wife.

As indicated by the title, this note does not cover cases where the beneficiary was designated by name, although a few border-line cases have been included. Neither does it consider the rights of one who never occupied the legal relation of wife to the insured.

Designation of "wife."

It is generally held that the designation of the insured's "wife" as beneficiary relates to the person occupying that relationship to him at the time of his death. *Pike County Mut. Life Asso. v. Berry* (1919) 214 Ill. App. 316; *MODERN WOODMEN v. ALLIN* (reported herewith) ante, 956; *Sherry v. Locomotive Engineer's Mut. Life & Acci. Asso.* (1916) 6 Ohio App. 228; *Re Browne* [1903] 1 Ch. (Eng.) 188, 72 L. J. Ch. N. S. 85, 51 Week. Rep. 364, 87 L. T. N. S. 588, 19 Times L. R. 98; *Bottomley v. Ancient Order United Workmen* (1913) 25 Ont. Week. Rep. 26, 5 Ont. Week. N. 83.

Thus it will be observed that in the reported case (*MODERN WOODMEN v. ALLIN*, ante, 956), it was decided, under a mutual benefit certificate payable at insured's death "to wife and children," that the person described

as "wife" was to be ascertained at the time of his death, so that if the wife living when the certificate was issued died and the insured remarried, the second wife was entitled to the benefit.

And in *Re Browne* [1903] 1 Ch. (Eng.) 188, 72 L. J. Ch. N. S. 85, 51 Week. Rep. 364, 87 L. T. N. S. 588, 19 Times L. R. 98, where a man having a wife and children took out a policy on his life, expressed to be "for the benefit of his wife and children;" it was held that the presumption that a married man speaking of his wife intends the person who is his wife at that time, and does not contemplate one whom he may marry after her death, loses weight in construing an instrument intended to make provision for a wife after the husband's death, and is countervailed by the presumption that he, in all probability, intended to provide for her who survived him, and for that reason stood in need of the provision; and that a similar line of reasoning pointed to the conclusion that he intended to benefit all of the children, which was strengthened by the reflection that he could not reasonably be supposed to have intended to benefit only the children living at

the date of the policy, to the exclusion of afterborn children by the then existing wife, and therefore that a second wife and her child were entitled to participate jointly with the children of the first marriage.

And in *Pike County Mut. Life Asso. v. Berry* (1919) 214 Ill. App. 316, where an unmarried man took a benefit certificate designating his "wife and children" as beneficiaries and, after being married and divorced, married a second time and died, his second wife and children were held entitled to the benefit in equal parts. The court said: "In the benefit certificate under consideration, the beneficiaries are not named, but described. At the time of its issuance they did not exist. The intended beneficiaries are described as those who at the time of the death of the insured sustain the relation to him of wife and children. If none such were living, then to his legal heirs. Who are the beneficiaries is determined at the death of the insured. *De Benio v. Catholic Order of Foresters* (1915) 194 Ill. App. 616; *Burr v. Royal League* (1914) 193 Ill. App. 238. The insured died leaving appellant Cloa Berry, his wife, Thomas R. Berry and Marjorie M. Berry, his children, who are described in the benefit certificate as beneficiaries, and are therefore entitled to the fund the same as if they had been specifically named therein."

And in *Bottomley v. Ancient Order United Workmen* (1913) 25 Ont. Week. Rep. 26, 5 Ont. Week. N. 83, where the policy directed the money to be paid to the insured's wife, and she died and he married again, the second wife was held entitled to the fund.

And in *Sherry v. Locomotive Engineers' Mut. Life & Acci. Asso.* (1916) 6 Ohio App. 228, where a policy was taken payable to "Mrs. Patrick Sherry, wife," and after the death of the insured's first wife he remarried, and thereafter the first policy was taken up and two new ones issued in place thereof, but no change as to the beneficiary was made, the second wife was held entitled to the entire proceeds of the policies as

against the children of the first marriage. The court said: "In determining the rights of these parties under these policies we must rely wholly and entirely upon the language used in the clause hereinbefore referred to. At the time of the death of Patrick Sherry he had but one wife living, to wit, the plaintiff in this case. At the time of the execution and delivery of the policies in question he had but one wife living, the plaintiff herein. If he had intended to make any other person than his then wife, Mary A. Sherry, the sole beneficiary of said insurance policies, he certainly would have done so. It seems to us, being governed in the distribution of the fund in question by the surroundings of the parties, taken in connection with the plain meaning of the beneficiary clause in the policies, that, in the light of all these facts, there can be but one conclusion reached, and that is that Mary A. Sherry is entitled to all of the fund, and is the sole beneficiary of the two policies in question. It is contended by counsel for defendants that at the time the policy was taken out, in 1869, being the original policy, Patrick Sherry by his choice made provision for and designated the beneficiary thereunder, and must naturally, if not necessarily, have had in mind the person who was then his wife. If this line of reasoning be the correct one, then why is it not proper to claim that at the time when the two policies here in question were issued, and the plaintiff in this case was his wife, Patrick Sherry made his choice and designated the beneficiary, and of necessity had in mind the person who was then his wife? It seems to us if we apply to the two policies in question this same reasoning that is applied by counsel for defendants to the original policy, we can arrive at but one conclusion, and that is that the plaintiff is entitled to the proceeds of the policies in question."

And in *Speegle v. Sovereign Camp, W. W.* (1907) 77 S. C. 517, 58 S. E. 435, where the by-laws of a benefit association provided for the payment of a certain sum to the person named in

the member's certificate, and that the beneficiaries should be his "wife, children," etc., and that in case the beneficiary predeceased the member, and no new designation of a beneficiary was made, the benefit should be payable to the member's next living relation in order named, it was held that the second wife (Hattie K.) of a member who had designated "his wife, Susan," as beneficiary, was entitled to the benefit as against the children of the first wife, Susan, who had died, the court holding that the second wife was the member's next living relation, and that the children took no vested interest, since the member might, during his life, have designated a new beneficiary, which he practically did by his second marriage.

And upon like facts and provisions the same result was reached in *Harris v. Harris* (1906) 44 Tex. Civ. App. 152, 97 S. W. 504.

The *Browne Case*, supra, was distinguished in *Re Griffiths* [1903] 1 Ch. (Eng.) 739, 72 L. J. Ch. N. S. 380, 88 L. T. N. S. 547, where a man having a wife and children effected insurance expressed to be "for the benefit of his wife, or, if she be dead, between his children in equal proportions," upon the ground that the policy in the *Browne Case* was expressed to be for the benefit of wife "and" children, and not as in the case under consideration, for the benefit of wife "or" children; and it was held that the presumption that a married man speaking of his wife intends his wife at that time was strengthened by the words "if she be dead," which seems to point to the wife who was living when the policy was effected; and consequently that a subsequent wife was not entitled to take.

And in *Day v. Case* (1887) 43 Hun, 179, 5 N. Y. S. R. 397, the designation of the beneficiary in a certificate of benefit insurance obtained by one H. M. Case, providing that "all payments or benefits that may accrue or become due to the heirs of the persons insured, by virtue of his policy, will be payable to Mrs. H. M. Case, or lawful heirs," was held to refer to the wife of the insured at the time the certificate

was issued, and not to the person who was his wife at the time of his death.

And the *Day Case* (N. Y.) supra, was relied upon in *Re Shanley* (1916) 95 Misc. 427, 160 N. Y. Supp. 733, where the policy provided for payment "to either the executor or administrator, husband or wife," and in the application the name of the beneficiary was given as "Kate Shanley, wife," and it was held that a second wife (Bertha), whom the insured married after the death of his first wife, Kate Shanley, was not entitled to the benefit. The court said: "There was no new designation of the beneficiary, after the issuance of the policy and the death of the decedent's first wife, Kate Shanley. At the time the application was made and the policy issued, the accountant was not the wife of the deceased; and while he used the term 'wife' in the application, and the application formed a part of the contract of insurance (*Wachtel v. Harrison* (1914) 84 Misc. 76, 145 N. Y. Supp. 982), it clearly appears, from the fact that he inserted the name of the person who was his wife when the application was made, that he intended the beneficiary to be the latter, and not the accountant, who occupied that relationship at the time of his death (*Day v. Case* (N. Y.) supra)."

And in *Bickel v. Bickel* (1904) 25 Ky. L. Rep. 1945, 79 S. W. 215, where a husband obtained a life policy payable to his "wife, Caroline, and his children," and his wife died, and his second wife (Louise) was held not entitled to any part of the proceeds of the policy, the court holding that when the first wife died her interest in the policy survived to the children, and calling attention to the fact that the policy was not issued by a benevolent society, and distinguishing cases dealing with contracts of such societies from the case at bar.

Designation of "widow."

The term "widow" as used in the designation of a beneficiary, or in by-laws relating thereto, is held to refer to the person who sustains that

relation upon the death of the insured. *Masonic Mut. Relief Asso. v. McAuley* (1882) 2 Mackey (D. C.) 70; *Phelan v. Phelan* (1892) 21 Ins. L. J. (La.) 93; *Small v. Jose* (1893) 86 Me. 120, 29 Atl. 976; *Peacock v. Joyce* (1920) 142 Tenn. 335, 219 S. W. 350; *Given v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* (1888) 71 Wis. 547, 37 N. W. 817; *Riley v. Riley* (1890) 75 Wis. 464, 44 N. W. 112; *Re Parker* [1906] 1 Ch. (Eng.) 526, 75 L. J. Ch. N. S. 297, 54 Week. Rep. 329, 94 L. T. N. S. 477, 22 Times L. R. 259.

Thus in *Phelan v. Phelan* (1892) 21 Ins. L. J. (La.) 93, where a policy was payable to the insured's personal representative "for the benefit of his widow," and the wife who was living when the policy issued died and he remarried, his second wife, who survived him, was held his "widow," and entitled to the benefit as against the heirs of his first wife. The court said: "The widow claims the fund upon the strength of the express clause in the policy. The heirs of the first wife maintain that as the present widow, at the date of the issuance of the policy, could not have been in Phelan's contemplation as to be some day his widow, she could not have been the beneficiary he had then in view; and that as the first wife was the only one at the moment likely to become his widow, it must be held that she it was whom the insurer had in his mind at the time of taking out the policy. It is a rule of interpretation applicable to all contracts, and from which policies of insurance are not excepted, that the intentions of parties must be drawn from the words or language, oral or written, which parties have themselves employed in order to convey their meaning. It is only in case that the language itself is doubtful, that courts may go outside for light or guidance as to intention. In this case, Phelan has very clearly made this policy for the benefit of his widow; and as there is a difference between widow and wife, the courts are not at liberty to use one expression for the other. There is nothing in such a provision, in any view to be taken of it, which would

demand of the courts to ignore or distort it, from motives of public policy, the law permits second marriages, and a man may consider the contingency of his marrying again, and provide in all events for the necessities of the wife, first or second, from whom he may be called away by death. So it may have been his design, not considering at all the question of second marriage, that his wife shall be beneficiary only in the event of her surviving him. In this case, interpreting this provision of the policy according to its precise and clear expression, we must hold that Phelan had in view the wife, whether by first or second marriage, who would survive him, and as in this case it happened to be the defendant, Maria Geheeb Phelan, she is entitled to the proceeds of the policy. It is contended that one must have, at the time of the taking out of the policy, an insurable interest in order that the policy shall hold. The insurance company is not contesting the paying because the beneficiary was without insurable interest at the date of the issuance of the policy, on the contrary, it is willing and anxious to pay the one adjudged entitled to receive. We know of no law which prevents a person from contracting with another, and paying that other a consideration, stipulating that a third person shall receive the advantage for which the first party contracts and pays; it is, on the contrary, well settled that one may contract for the benefit of another, and that such other may enforce the obligation. There is no earthly reason why this principle should not apply in the case of life policies; and in fact it does apply in same. Hence in *Hearing's Succession* (1874) 26 La. Ann. 327, the supreme court of this state declares: 'A man may take out a policy of insurance on his life in the name of anyone, or having taken it out in his name, he may, with the consent of the assurers, transfer it to whom he pleases.' It would not make a particle of difference in any other contract that the third party, beneficiary, was not determined at the date of execution of

the contract, but was expected to be in existence or be known by the time fixed for final execution. A might lend money to B, secured by mortgage, payable in one or more years to the one, if any, who at that time would be his, A's, wife. If at the time of date for payment, A was married, the wife could collect; if not, then A would receive the payment. In a contract of this nature, there is no reason why a man insuring his own life, and having, as all recognize, an insurable interest, may not pay the insurer the premium demanded, and stipulate that some person, not yet determined, by chance or circumstances, shall be the beneficiary. There is nothing here against public policy, and where law or public policy does not forbid, men may contract entirely as they will. As a fact the very contrary is the case; for it is eminently in accord with the dictates of public policy that a man should provide in this way for the needs of one who may at some future date be dependent or have claims on him."

And in *Re Parker* (Eng.) *supra*, it was held that the word "widow" as used in a policy designating as the beneficiaries the "widow, or widow and children, or some one or more of them" as the insured should appoint, did not refer to the then wife of the insured, should she survive him, but to the person who at his death should become his widow.

And in *Riley v. Riley* (1890) 75 Wis. 464, 44 N. W. 112, it was held that the word "widow" in the by-laws of a mutual benefit association, by which it was provided that the business and object of the association should be to afford financial aid and benefit to the widows, orphans, and heirs of deceased members, or such other persons as might be designated by the insured member, and that at the death of a member his widow or designated heirs should receive the specified sum,—does not refer to the wife of the member at the time he obtained his certificate of insurance, if she survived him, but means the person who was his widow at the time of his death. The court said: "In this case

Riley made no change as to the beneficiary named in the certificate, but died leaving the money to go according to the terms of the by-laws. The by-laws clearly gave it to the widow. It is so expressly stated, but the counsel for the appellants contends that the word "widow" in the by-laws was intended to refer to, and does actually mean, the first wife, if she survived her husband, where no other person as beneficiary was designated. We can perceive no valid reason for giving such a construction to the by-laws. Undeniably the plaintiff is Riley's widow, and it is the widow who is to have the avails of the policy, where the insured has given no other direction as to the person to whom it is to be paid. The declared object of the association is to afford financial aid to the widows and orphans; and the second wife, having lost her husband, may be, quite likely would be, as meritorious a person for assistance as the first wife, left a widow. Suppose the husband had survived both wives, having no children by the first wife, but leaving children by the second. Could it be claimed with any reason that these children would not be entitled to the insurance money? It might be argued with as much consistency that it was not intended the insurance should be paid to them, as it is now insisted that it should not be paid to the widow by a second marriage. Such a refinement upon language is not to be indulged in in the construction of these policies, which are usually drawn up by business men who use language in its common meaning. The by-laws certainly designate the widow as the person who is to have the benefit of the insurance, where no other direction is made by the insured, and the term certainly includes the widow by a second marriage. It is said that it is hardly to be conceived that the husband, having the power of changing the beneficiary, did not exercise that power and change the beneficiary named in the certificate. But we must presume that he was familiar with the rules and by-laws of the association, and knew that, according to them, the in-

surance would go to his widow, and that this was what he desired. The inference is that he wished to make no other disposition of the fund, but that his widow should take it. This is the legitimate inference from his neglect to make a change as to the beneficiary."

And in *Small v. Jose* (1893) 86 Me. 120, 29 Atl. 976, where the insured's wife, who was living when a policy issued payable "for the benefit of his widow, if any, and his then surviving children," the right of a second wife, who survived the insured, to some share, was not seriously contested, the question at issue being whether a daughter of a deceased child of the insured was entitled to a part of the amount of the policy.

And in *Masonic Mut. Relief Asso. v. McAuley* (1882) 2 Mackey (D. C.) 70, where the person who was the widow of a member of a benefit association, the by-laws of which provided that on the death of the member "his widow, orphan, heir, assignees, or legatee, shall be entitled to receive as many dollars as there are members in the association at the time of death," was held entitled to the benefit as against the administrators of the first wife, who was designated by name as the original beneficiary, and the husband's estate. The court construed the designation of the first wife to mean that she should receive the benefit only if she survived her husband, and held that the classes named in the by-laws should take in the or-

der in which they appeared, beginning with the member's widow.

And in *Peacock v. Joyce* (1920) 142 Tenn. 335, 219 S. W. 350, where the by-laws of a benefit association, which were incorporated in the certificate, provided that if the beneficiary should die prior to the death of the member, and he failed to have another beneficiary named, the amount should be paid to "the widow," it was held that the member's second wife, whom he married after the death of his first, who was designated by name as beneficiary, was entitled to the benefit as against the children by his first wife, since, under the express terms of the certificate, the member's widow was entitled to take.

And in *Given v. Wisconsin Odd Fellows Mut. L. Ins. Co.* (1888) 71 Wis. 547, 37 N. W. 817, it was held that insurance in a mutual benefit association the by-laws of which provided that on the death of a member "the person designated before death, or his widow, child, or children, mother, sister, or sisters," etc., "as the case may be and in the order named," should receive the insurance, was payable to the widow of the insured, although when the certificate was issued, in the lifetime of a former wife, the insured had directed that the insurance be paid to her, her appointment as beneficiary being held to have been revoked by her death and the benefit being payable by the by-law to his widow.

J. T. W.

G. W. HANSON, Appt.,

v,

LEMARS MUTUAL INSURANCE ASSOCIATION.

Iowa Supreme Court — February 14, 1922.

(— Iowa, —, 186 N. W. 468.)

Insurance — fire — injury from smoke and soot.

A policy of fire insurance on household goods does not cover loss due to their injury by smoke and soot from the flame of an oil stove turned too high.

[See note on this question beginning on page 967.]

(— Iowa, —, 186 N. W. 468.)

APPEAL by plaintiff from a judgment of the District Court for Sioux County (Hutchinson, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

Statement by Evans, J.:

Action upon a policy of fire insurance to recover thereunder damages caused by smoke and soot. At the close of plaintiff's evidence there was a directed verdict for the defendant. The plaintiff appeals.

Mr. Clarence A. Plank, for appellant:

There was a fire within the meaning of the policy, and defendant is liable for the loss sustained by plaintiff.

Way v. Abington Mut. F. Ins. Co. 166 Mass. 67, 32 L.R.A. 608, 55 Am. St. Rep. 379, 43 N. E. 1032; Balestracci v. Firemen's Ins. Co. 34 La. Ann. 844; O'Connor v. Queen Ins. Co. 140 Wis. 388, 25 L.R.A. (N.S.) 501, 133 Am. St. Rep. 1081, 122 N. W. 1038, 1122, 17 Ann. Cas. 1118; White v. Republic F. Ins. Co. 57 Me. 91, 2 Am. Rep. 22; John Davis & Co. v. Insurance Co. of N. A. 115 Mich. 382, 73 N. W. 393; Russell v. German F. Ins. Co. 100 Minn. 528, 10 L.R.A. (N.S.) 326, 111 N. W. 400; Collins v. Delaware Ins. Co. 9 Pa. Super. Ct. 576; American Towing Co. v. German F. Ins. Co. 74 Md. 25, 21 Atl. 553.

Messrs. J. T. Keenan and Van Oosterhout & Kelyn, for appellee:

The policy did not cover loss for injury to plaintiff's goods by smoke and soot.

Collins v. Delaware Insurance Co. 9 Pa. Super. Ct. 576; Fitzgerald v. German American Ins. Co. 30 Misc. 72, 62 N. Y. Supp. 824; Samuels v. Continental Ins. Co. 2 Pa. Dist. R. 397.

The court did not err in directing the jury to return a verdict for the defendant.

Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235; Hurd v. Neilson, 100 Iowa, 555, 69 N. W. 867.

Evans, J., delivered the opinion of the court:

The plaintiff was a holder of an insurance policy of the defendant company which covered his household goods. He averred in his petition that he suffered a loss from fire to such household goods to the amount of \$428, in that damages had been caused to his household goods by smoke and soot which es-

caped from his oil stove and filled his house to such an extent as to cause the damage complained of. The story of the fire in brief is that plaintiff arose at 5 o'clock in the morning and lit the burners of his oil stove in the kitchen for the purpose of heating a boiler full of water which had been set thereon the night before. The ultimate purpose was to heat the water for use in the family washing to be done that morning. Having lit the burners with a match, the plaintiff went back to bed and fell asleep. One hour later he was awakened by the smoke and soot which filled his house. He immediately repaired to the kitchen and found that the flames from his burners extended nearly to the top of the boiler, and were emitting in great quantities the smoke and soot complained of. He removed the cause of the smoke and soot by turning out the wicks in the burners. He testified, "I went over there and turned them out." The following statement by the trial court is a fair summary of the record: "There was no fire except that under the boiler, as he tells it. The only thing that was necessary to extinguish the fire was to turn down the burner. The burner was turned down, and the fire under the stove went out; smoke disappeared. There is no evidence here that there was any leak, that there was any fire in the pan, or that that tank had ignited. The only evidence here is that the burner that was started was turned up too high, or became overloaded, which caused more fire and flame than was reasonably and necessarily intended when it was lighted. It is a matter of common knowledge with those who use the oil stoves that they will smoke if they are not particularly watched and cared for, and I cannot see any theory upon which the plaintiff can recover in this case. There was no leaking oil; no ignition of the tank; nothing necessary to put

it out but to turn down the burner, and it went out."

Nothing is claimed for any damage done by flame or heat except as the same produced the smoke and soot. The defendant denied all liability for the loss on the ground that there was no fire within the contemplation of the policy. It is not essential to the plaintiff's right of recovery that he should show that he had suffered loss by the actual burning of any part of his property, but it is essential that it should appear that the smoke and soot from which he suffered resulted from a "hostile" fire rather than from a "friendly" one. Ordinarily a fire in a stove or furnace and subject to control in such place is a "friendly" fire, and damage for smoke and soot therefrom is not within the contemplation of an insurance policy. The rule in such cases is stated in Wood on Insurance, § 103, as follows: "Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limit of the agencies employed, as from the effects of smoke or heat evolved thereby or escaping therefrom from any cause, whether intentional or accidental. In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not purposely caused by the assured, and these, as a consequence of such ignition, de hors the agencies."

In *Cannon v. Phoenix Ins. Co.* 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775, it is stated as follows: "It does not appear from the proofs of loss that there was any fire in or about the building, except in the stove where it was intended to be built. This fire did not spread from where it was built and intended to remain. It was, therefore, all the time during the alleged injury and damage to the goods, what is termed in the books a 'friendly,' and not a

'hostile,' fire. It is true there is sound authority for the proposition that an insured can recover loss occasioned by smoke, soot, etc., thrown out by a fire; but we think in these cases it will be found that such matter causing injury was the product of a hostile fire. If a fire should break out from where it was intended to be and become a hostile element by igniting property, although it might not actually burn the property insured, yet if it caused injury thereto by smoke or heat, or other direct means, damages would be recoverable."

The plaintiff relies upon the Wisconsin case of *O'Connor v. Queen Ins. Co.* 140 Wis. 388, 25 L.R.A. (N.S.) 501, 133 Am. St. Rep. 1081, 122 N. W. 1038, 17 Ann. Cas. 1118, wherein recovery was allowed. The fire in that case was described by the court as follows: "The heat was so intense as to char and injure furniture, and the great volumes of smoke and soot greatly injured the furnishings and personal property of the plaintiff. It does not appear from the evidence that there was any ignition outside of the furnace, although the fire was so intense as to overheat the chimney and flues, and char furniture in the rooms. The evidence shows that the chimney was so hot it seemed as though it was on fire, that the fire was burning fiercely in the furnace, around the mopboards was burned, and the mopboards blistered, the wall paper charred and burned, and the chimney cracked from the excessive heat. . . . The fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used."

Reliance is also had upon the case of *Collins v. Delaware Ins. Co.* 9 Pa. Super. Ct. 576. The fire was described by the court as follows: "The plaintiff's goods were not burned, but were damaged by smoke and soot; but it is well settled that a policy against 'direct loss or damage by fire' may cover loss other

than by actual burning, such as by water used to extinguish the fire, and by smoke from the fire. If, however, the fire itself be not insured against, as it ordinarily is not when it is kept within the place that is fitted and intended for it, there is no liability for such consequences as the escaping of smoke or gas. We cannot do better than to adopt the illustrations used in a well-considered Massachusetts case. If a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or scorch valuable furniture left too near it, or injure property by its smoke which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, it may be conceded, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it, the insurance company would not be liable."

It appears also in that case that

the fire had melted off a cap of the container and was burning from the inside thereof.

From the foregoing it will be seen that close questions may arise over the dividing line between a "hostile" and a "friendly" fire. In the case before us we think it cannot be said that the evidence was sufficient to justify a finding of a "hostile" fire within the contemplation of ~~Insurance—fire—injury~~ the policy. It was ~~from smoke and soot.~~ manifestly a case where the wick had been turned too high, from which cause smoke and soot were inevitable from the beginning, and which was at all times subject to control by merely turning back the wick. The only burning or charring of any kind done by the flame was upon the wick. So far as appears, all the smoke and soot came from the wick.

We feel compelled to hold, therefore, that the trial court properly sustained the motion for a directed verdict.

Affirmed.

Stevens, Ch. J., and Arthur and Faville, JJ., concur.

ANNOTATION.

Loss by heat, smoke, or soot without external ignition as within fire insurance policy.

For liability of property insurer as affected by explosion (including the question of what constitutes a fire preceding an explosion), see annotation in 13 A.L.R. 883.

Of some interest, perhaps, by way of analogy, is the annotation in 1 A.L.R. 1163, on "Burning as element of offense of arson."

Where premises are insured against loss by fire, and fire is employed on the premises for economic or scientific purposes, and it is confined to the agencies intended, and damage ensues from smoke, soot, excessive heat, etc., without any actual ignition of the insured property, the loss is generally held not to be within the protection of the policy, which extends only to

"hostile" fires, and does not include so-called "friendly" fires.

Georgia. — Cannon v. Phoenix Ins. Co. (1900) 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775.

Iowa. — HANSON v. LEMARS MUT. INS. ASSO. (reported herewith) ante, 964.

Kansas. — McGraw v. Home Ins. Co. (1914) 93 Kan. 482, 144 Pac. 821, Ann. Cas. 1916D, 227.

Maryland. — American Towing Co. v. German F. Ins. Co. (1891) 74 Md. 25, 21 Atl. 553.

New York. — Fitzgerald v. German American Ins. Co. (1899) 30 Misc. 72, 62 N. Y. Supp. 824.

Pennsylvania. — Samuels v. Continental Ins. Co. (1892) 2 Pa. Dist. R. 397.

England.—Austin v. Drewe (1816) 6 Taunt. 436, 128 Eng. Reprint, 1104, 2 Marsh. 130, Holt, 126, 16 Revised Rep. 647, 4 Campb. 360.

It will be observed that in the reported case (*HANSON v. LEMARS MUT. INS. ASSO.* ante, 964) a policy insuring against loss by fire is held not to cover injury or damage to household goods by smoke and soot from the flame of an oil stove turned too high. The court states that it is not essential to a recovery that a loss has been suffered by the actual burning of any part of insured's property, but that it must appear that the smoke and soot resulted from a "hostile" fire, rather than from a "friendly" one.

The earliest case upon the question appears to be *Austin v. Drewe* (Eng.) supra, in which it was held that no recovery could be had under a policy insuring against damage by fire to stock and utensils in a sugar house, where sugar was damaged by the heat and smoke from the usual fires, which got into the room by reason of the mismanagement of a register at the top of the chimney.

And in *Fitzgerald v. German American Ins. Co.* (1899) 30 Misc. 72, 62 N. Y. Supp. 824, where the court followed *Austin v. Drewe* (Eng.) supra, it was held under a policy insuring against loss or damage by fire, that there could be no recovery for damage to the insured property resulting from smoke emitted by a lighted lamp which did not cause any fire exterior to itself.

And in *Samuels v. Continental Ins. Co.* (Pa.) supra, the court, without rendering an opinion, denied recovery under a policy insuring against all direct loss or damage by fire, for damage caused by the smoke and soot of a lamp, the flame of which, from some unknown cause, flared up to a height of 2 or 3 feet above the chimney.

And in *Cannon v. Phoenix Ins. Co.* (Ga.) supra, under a policy insuring "against all direct loss or damage by fire," it was held that the insured was not liable for damage to the insured property caused by smoke and soot escaping through a defec-

tive or disarranged stovepipe, from a fire intentionally built in the stove and kept therein; or for damage caused by the water used in cooling a portion of the ceiling heated by such pipe, if there was no actual ignition by the heat, and it did not appear that the use of the water was necessary to prevent ignition. The court said: "It was, therefore, all the time during the alleged injury and damage to the goods, what is termed in the books a "friendly," and not a "hostile" fire. It is true there is sound authority for the proposition that an insured can recover loss occasioned by smoke, soot, etc., thrown out by a fire; but we think, in these cases, it will be found that such matter causing injury was the product of a hostile fire. If a fire should break out from where it was intended to be, and become a hostile element by igniting property, although it might not actually burn the property insured, yet if it caused injury thereto by smoke or heat, or other direct means, damages would be recoverable. But this is not this case."

And in *Gibbons v. German Ins. & Sav. Inst.* (1888) 30 Ill. App. 263, a fire insurance policy was held not to cover damage from steam escaping from the heating apparatus, which produced such a degree of heat that the furniture and books were charred. The court referred to *Austin v. Drewe* (Eng.) supra, as sustaining their conclusion, and said: "In each case there was excessive heat, but no fire where it ought not to have been. Fire and heat are not one, but cause and effect; and damage by heat is not insured against in terms, and is covered by the policy only where the misplaced fire causes it. If the fire were a moral agent, no blame could be imputed to it. It was doing its duty, and no more. The damage was caused by another agent who, undertaking to transmit the beneficial influence of the fire, broke down in the task."

And in *American Towing Co. v. German F. Ins. Co.* (Md.) supra, recovery was denied under a policy insuring a tug, including the boiler, against loss by fire, for damage to the

interior of the boiler caused by its being overheated, when empty, by the furnace fires, and not by a fire outside the furnace. The court said: "The burning or warping the bars of the grate in the furnace, though produced by the action of fire, could hardly be supposed to be within the scope of the risk insured against, however general the terms of the policy. And if that be true of the furnace, it is difficult to perceive why it is not equally true of such parts of the boiler as are brought in contact with the fire in the furnace, or the heat evolved therefrom. The fire, while in the furnace, was in its proper place, and where it was intended to be; and it was placed there to act upon the boiler, which, in course of time, would be burned out or warped, as the grate in the furnace would be, by the continued action of fire thereon. And if such results of the action of fire upon these materials, while in ordinary use, are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of fire while confined to the furnace, and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace, of such intense heat as to crack his chimney, or to warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured."

And in *McGraw v. Home Ins. Co.* (1914) 93 Kan. 482, 144 Pac. 821, Ann. Cas. 1916D, 227, there was held to be no liability under a fire insurance policy for damage to a boiler, due to a want of care or skill on the part of the person in charge of it, or to interference with its management by some

other employee, as such a fire would be a "friendly," rather than a "hostile," one; but it was held that if someone who desired to injure the plaintiff's property gained unlawful entrance to the building, and drained the water from the boiler and lighted a fire under it, which the person extinguished after damaging the boiler, and withdrew, without leaving any trace, the fire would be regarded as a "hostile" one, such as would render the insurer liable.

And in *Western Woolen Mill Co. v. Northern Assur. Co.* (1905) 72 C. C. A. 1, 139 Fed. 637, certiorari denied in (1905) 199 U. S. 608, 50 L. ed. 331, 26 Sup. Ct. Rep. 750, recovery was denied on a policy insuring against loss by fire for damage to wool, caused by spontaneous combustion with smoke and great heat, while the wool was submerged in water for several days during a flood. The court said: "That the wool, submerged for the time mentioned, became smoking hot, may be conceded; that spontaneous combustion, caused by the wool being submerged in water, existed, may also be conceded; and still the plaintiff has not shown any direct loss by 'fire' as that word is used and known to the public generally. Fire is always caused by combustion, but combustion does not always cause fire. The word 'spontaneous' refers to the origin of the combustion. It means the internal development of heat without the action of an external agent. Combustion, or spontaneous combustion, may become so rapid as to produce fire; but, until it does so, combustion cannot be said to be fire. 'Fire' is defined in the *Century Dictionary* as 'the visible heat or light evolved by the action of a high temperature on certain bodies, which are in consequence styled "inflammable or combustible."' In *Webster's Dictionary* 'fire' is defined as 'the evolution of light and heat in the combustion of bodies.' No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air

is caused by combustion. Combustion keeps up the animal heat of the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years, to decay and molder away, until it becomes again a part of mother earth. Still we never speak of these processes as 'fire.' And why? Because the process of oxidation is so slow that it does not, in the language of the witness at the trial, produce a 'flame or glow.' It appears, without contradiction, from the evidence, that there was not at any time any visible heat or light in or about this wool."

And in *Babcock v. Montgomery County Mut. Ins. Co.* (1849) 6 Barb. (N. Y.) 637, a policy insuring against loss by fire was held not to cover damage to the insured house from lightning where there was no ignition or burning. The court said: "Unless, therefore, there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed, or even ignited, but there must be a fire or burning which is the proximate cause of the loss. It is immaterial how intense the heat may be; unless it be the effect of ignition, it is not within the terms of the policy. The heat of the sun often contracts timber, from which losses occur; but they would not be considered losses by fire."

And to the same effect is *Kenniston v. Merrimack County Mut. Ins. Co.* (1843) 14 N. H. 341, 40 Am. Dec. 193.

And in *Sleet v. Farmers' Mut. F. Ins. Co.* (1908) — Ky. —, 19 L.R.A. (N.S.) 421, 113 S. W. 515, it was held that there could be no recovery under a policy insuring against loss by fire, for the loss of a barn by being knocked down by lightning, but not burned.

But in *O'Connor v. Queen Ins. Co.* (1909) 140 Wis. 388, 25 L.R.A. (N.S.) 501, 133 Am. St. Rep. 1081, 122 N. W. 1038, 17 Ann. Cas. 1118, a policy insuring against all direct loss and

damage by fire included loss by smoke, soot, and excessive heat due to a fire kindled, with unusually inflammable materials, in the furnace designed to heat the building, although the fire did not escape from the furnace and was not communicated to the property injured. The court said: "The plaintiff lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not for use therein, or intended so to be used, and of such a highly inflammable character as to cause intense heat and great volumes of smoke to escape through the registers leading into the rooms, and greatly damaged plaintiff's property. The heat was so intense as to char and injure furniture, and the great volumes of smoke and soot greatly injured the furnishings and personal property of the plaintiff. It does not appear from the evidence that there was any ignition outside of the furnace, although the fire was so intense as to overheat the chimney and flues, and char furniture in the rooms. The evidence shows that the chimney was so hot it seemed as though it was on fire, that the fire was burning fiercely in the furnace, around the mopboards was burned, and the mopboards blistered, the wall paper charred and burned, and the chimney cracked from the excessive heat. It is the contention of appellant that the damage occasioned by heat, smoke, and soot is not covered by the policy, where the fire is confined within the furnace. This position involves the construction of the words of the policy 'direct loss or damage by fire,' and leads to a consideration of what fires are within the contemplation of the policy. No limitation is placed upon the word 'fire' by the language of the policy itself, but it is said that 'contracts of insurance are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and proper sense.' No doubt this is the general rule, but it must also be remembered, in applying the rule, that this and other courts

have construed contracts of insurance favorably to the insured. *Karow v. Continental Ins. Co.* (1883) 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27; *Brady v. Northwestern Ins. Co.* (1863) 11 Mich. 425; May, Ins. 3d ed. 402; *Peters v. Warren Ins. Co.* (1840) 14 Pet. (U. S.) 99, 10 L. ed. 371. Appellant insists that a fire confined within the limits of a furnace, although producing damage by smoke and heat, is not a fire within the meaning of the policy in question, and relies mainly upon the case of *Austin v. Drewe* (1816) 4 Campb. 361, 6 Taunt. 436, 128 Eng. Reprint, 1104, 2 Marsh. 130, Holt, 126, 16 Revised Rep. 647. In that case the plaintiff was the owner of a sugar factory several stories high, with pans on the ground floor for boiling sugar, and a stove for heating. A flue extended to the top of the building, with registers on each floor connecting with the flue to introduce heat. Because of the negligence of a servant in not opening a register at the top of the flue, or chimney, used to shut in the heat during the night, the smoke, sparks, and heat from the stove were intercepted, and, instead of escaping through the top of the flue, were forced into the rooms, in consequence of which the sugar was damaged. The flames were confined within the stove and flue, and no actual ignition took place outside thereof, and it was held that the loss was not covered by the policy. The lord chief justice said that there was no more fire than always existed when the manufacture was going on, and which continued to burn without any excess. The case seems to turn upon the point that the fire was the usual and ordinary fire, never excessive, and always confined within its proper limits. We shall briefly refer to other cases cited by appellant on this point." After examining the cases, the court concluded: "The foregoing cases, we think, fully show that *Austin v. Drewe* is not authority against plaintiff here. There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was, in the language of the books, a 'friendly,' and not a 'hos-

tile,' fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was, we think, a 'hostile' fire, and within the contemplation of the policy. Ordinarily, the question in such cases is for the jury. *New York & B. Despatch Exp. Co. v. Traders' & M. Ins. Co.* (1882) 132 Mass. 377, 42 Am. Rep. 440, s. c. on subsequent appeal (1883) 135 Mass. 221; *Richards, Ins.* § 221. But in this case, the evidence being practically undisputed, we think no error was committed in directing a verdict for the plaintiff."

And in *Way v. Abington Mut. F. Ins. Co.* (1896) 166 Miss. 67, 32 L.R.A. 608, 55 Am. St. Rep. 379, 43 N. E. 1032, it was held that damage to insured property by smoke arising from the burning of soot in a chimney, accidentally ignited by the burning of waste paper in a stove, was covered by a policy insuring against all loss or damage by fire, especially where there was an accidental obstruction of the flue contributing to the damage. In reply to the contention of the defendant (who relied upon *Austin v. Drewe* (Eng.) supra) that the policy was not intended to apply to a fire which was lighted and maintained for ordinary purposes for which fires are used in buildings, and which was confined within the place fitted for such fires, the court stated that, while it was not disposed to question the soundness of the general principle upon which the contention was founded, it deemed it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney, incidental to the ordinary use of a stove, or whether such a fire be held to be one for whose unexpected injurious consequences an insurance company should be liable, and further said: "We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the

occupation of a building, and fire which starts from such a fire, without human agency, in a place where fires are never lighted or maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

The Way Case was referred to with approval in *Collins v. Delaware Ins. Co.* (1899) 9 Pa. Super. Ct. 576, in which a recovery was upheld for damage to the insured property caused by heavy smoke and soot from an oil stove used for heating, due to the oil therein catching fire. Here the trial court left to the jury to determine whether the smoke and soot which caused the damage proceeded from fire outside the place where, under the contract of insurance, it was intended to burn, and it would appear that the jury found that the fire was out of its proper place. Whether or not the insurance company would have been lia-

ble had it been in its proper place, the court did not say.

And a recovery may be had under a policy insuring against loss happening by fire, for damage resulting from heat from an adjoining burning house, although there was no actual ignition of the property insured. *Case v. Hartford F. Ins. Co.* (1852) 13 Ill. 676. The court here distinguished *Austin v. Drewe* (Eng.) *supra*, on the ground that the damage there resulted from a fire in the stove and flue, and which was confined within its proper limits.

In *New Orleans R. & Light Co. v. Aetna F. Ins. Co.* (1919) 145 La. 82, 81 So. 764, where a recovery was sought upon a fire insurance policy, for damage to an electrical generator, the insurer conceded that it was liable for such damage as might have resulted from fire, even though it might have been ignited by an electrical current, but contended that a large part of the damage resulted from a short circuit which produced a high-powered current, accompanied by extreme heat, and this contention was held to be sustained by the evidence, and a recovery for such damage was denied.

J. T. W.

AUGUSTUS S. PEABODY

v.

ANDREW RUSSEL, Auditor of Public Accounts, et al., Appts.

Illinois Supreme Court — February 22, 1922.

(302 Ill. 111, 134 N. E. 150.)

Appropriation — of reserve funds — validity.

1. An appropriation of a specified sum for reserve to be apportioned between certain departments of government as emergencies arise, by the director of finance with approval of the governor, is not valid under a constitutional provision that bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections.

[See note on this question beginning on page 981.]

Constitutional law — effect of legislative construction.

2. Legislative construction of a constitutional provision is of no weight

when there is no doubt as to its proper construction.

[See 6 R. C. L. 63; 2 R. C. L. Supp. 13.]

(Cartwright, J., and Stone, Ch. J., dissent.)

APPEAL by defendants from a decree of the Circuit Court for Sangamon County (Smith, J.) in favor of complainant in an action brought to enjoin defendants from granting, issuing, or signing any warrants pursuant to an appropriation to the Department of Finance of a reserve fund. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edward J. Brundage, Attorney General, and Clarence N. Boord for appellants.

Mr. Walter F. Dodd, for appellee:

The requirement of a specified object and purpose makes necessary the establishment of definite limits within which the money is to be used.

People ex rel. State Bd. v. Brady, 277 Ill. 124, 115 N. E. 204; People ex rel. Hopkins v. Kings County, 52 N. Y. 556; State ex rel. Broadwater v. Siebert, 99 Mo. 122, 12 S. W. 348; Menefee v. Askew, 25 Okla. 623, 27 L.R.A. (N.S.) 537, 107 Pac. 159; Dickinson v. Clibourn, 125 Ark. 101, 187 S. W. 909; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; Martens v. Brady, 264 Ill. 178, 106 N. E. 266; Mitchell v. Lowden, 288 Ill. 327, 123 N. E. 566; Fergus v. Russel, 270 Ill. 304, 110 N. E. 130.

The appropriation here is not a distinct item for a specified object and purpose, but a total to be allotted into items for purposes to be determined in the future.

Martens v. Brady, 264 Ill. 178, 106 N. E. 266; Mitchell v. Lowden, 288 Ill. 327, 123 N. E. 566.

An allotment to an office from the reserve fund destroys the definite amounts appropriated to that office by legislative action.

People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; People v. Kane, 288 Ill. 235, 123 N. E. 265.

There is no legislative construction in favor of this appropriation except that involved in the creation of the "reserve" fund itself.

Phoebe v. Jay, Beecher's Breese (Ill.) 268; Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

Mr. Werner W. Schroeder, amicus curiæ:

There is nothing in the Constitution to indicate the minuteness to which

the items must be reduced. An item is valid even though the legislature could actually have split it into a great many more parts and could have detailed the objects far more minutely.

Mitchell v. Lowden, 288 Ill. 327, 123 N. E. 566; Martens v. Brady, 264 Ill. 178, 106 N. E. 266.

The making of an appropriation such as the one in question is a practical necessity, because emergencies do arise in the conduct of government, which cannot be foreseen, and which require immediate action.

People ex rel. Holmquist v. Illinois C. R. Co. 237 Ill. 324, 86 N. E. 724; People ex rel. Moneyham v. Cairo, V. & C. R. Co. 247 Ill. 360, 93 N. E. 405; People ex rel. Williamson v. Chicago, B. & Q. R. Co. 253 Ill. 100, 97 N. E. 245.

Legislative construction placed upon a doubtful constitutional provision is entitled to great weight and consideration, and where an act has been recognized, sanctioned, and acquiesced in by the different departments of the government and the people for many years, such practical construction raises a strong presumption of its correctness.

People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157; Nye v. Foreman, 215 Ill. 285, 74 N. E. 140; Boehm v. Hertz, 182 Ill. 154, 48 L.R.A. 575, 54 N. E. 973; People ex rel. Neil v. Knopf, 171 Ill. 191, 49 N. E. 424.

Carter, J., delivered the opinion of the court:

This action was commenced by the presentation of a petition in the circuit court of Sangamon county for leave to file a bill for injunction in accordance with the provisions of §§ 16 to 22 of chapter 102 (Hurd's Stat. 1919, pp. 2055-2056). That court granted such leave, and this bill was thereafter filed. The defendants, who are appellants here,

filed a general demurrer, which was overruled, and, they having elected to abide by the demurrer, the court entered a decree for injunction as prayed in the bill, and from that decree the case has been brought by appeal to this court.

Appellee, Peabody, alleged in his bill that he is a resident, citizen, and taxpayer of Cook county, having filed the bill for injunction in his own behalf and on behalf of all taxpayers who may desire to join therein. He alleged that the fifty-second general assembly, at its regular session in 1921, passed an act entitled "An Act to Provide for the Ordinary and Contingent Expenses of the State Government until the Expiration of the First Fiscal Quarter after the Adjournment of the Next Regular Session of the General Assembly," and that said act, except certain items vetoed by the governor, was duly approved June 30 and went into effect July 1, 1921. Laws 1921, p. 83. The bill further alleges that by the terms of that act an appropriation was made in the following language:

(25) To the Department of Finance:

For reserve.....\$500,000.

To be apportioned between the executive, judicial and military departments of the state government and allotted as emergencies arise by the director of finance with the approval in writing of the governor.

The bill sets forth that § 16 of article 5 of the Illinois Constitution provides that "bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections," and alleges that said appropriation to the department of finance "for reserve" is unconstitutional and void as in violation of the Constitution, and particularly the section just quoted, and prays that said appropriation be held unconstitutional and void,

and that a perpetual injunction issue enjoining Andrew Russel, auditor of public accounts, from granting, issuing, or signing any warrants pursuant to such appropriation, and that Edward E. Miller, state treasurer, be perpetually enjoined from countersigning, honoring, or paying any such warrants.

In the brief filed by the attorney general it is stated that after the passage of the omnibus bill the attorney general advised the auditor of public accounts that payment should not be made from said appropriation until the constitutionality thereof should be determined by the courts, and that opinion practically states that the appropriation is unconstitutional. On this question, when the bill in this case was filed for an injunction in the circuit court of Sangamon county, counsel for the governor of the state and the director of finance appeared in the circuit court and asked leave to intervene and to file a brief for appellants, the state auditor and the state treasurer. This leave was granted, and, on the appeal to this court, counsel for the governor and director of finance also asked leave to file a brief in behalf of the appellants, and that leave was granted and briefs have been submitted by counsel for the governor and director of finance.

The question has been argued in the briefs by both counsel for appellants and for appellee as to whether the appropriation here in controversy specifies an "object" or "purpose" and appropriates thereto the \$500,000 in a "distinct item," as provided by § 16 of article 5 of the Constitution. The language just referred to, relied on by counsel for appellee in his brief as making this appropriation unconstitutional and void, was placed in the Constitution by an Amendment adopted by the people in 1884, conferring what is generally known as the "item veto power of the governor." As stated by this court in *Martens v. Brady*, 264 Ill. 178, on page 190, 106 N. E. 271: "The purpose of the consti-

tutional provision here invoked is to enable the governor, when passing on appropriation bills, to consider and act on the items of the appropriation separately."

Even before this provision was inserted by the Amendment of 1884, the Constitution of 1870 contemplated that the purpose of appropriations should be specified, and provided in § 17 of article 4 that "no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution."

The framers of the amendment to § 16 of article 5 in 1884 undoubtedly had before them the broad language of § 13 of article 4 that "no act hereafter passed shall embrace more than one subject," and it would appear that they intended to use language clearly indicating that appropriations should specify both the object and purpose and the amount. It will be noted that § 25 of the Appropriation Act here in question states that the \$500,000 is "to be apportioned between the executive, judicial and military departments of the state government and allotted as emergencies arise by the director of finance with the approval in writing of the governor."

Manifestly, such an appropriation has neither certainty as to the department by which the appropriation is to be used, nor as to the purpose for which it is to be expended. Section 24 of the State Finance Act (Laws 1919, p. 951) says: "The item 'reserve,' when used in an appropriation act, shall include expenditures for public purposes which were unforeseen by the general assembly."

It would appear from this definition that the statute would permit the director of finance, with the approval of the governor, to employ this money for any public purpose within the general constitutional or statutory powers of the executive, judicial, and military departments of the state government. There is no specification of the object and

purpose in § 25 of the Appropriation Act as to this \$500,000, as required by the Constitution.

It would appear to be argued by counsel for appellants that the appropriation here involved is one to be allotted and used by the several departments of the state government "as emergencies arise," and that "emergencies" constitute a specified "object and purpose" to which a distinct item has been appropriated, and that the word "emergency," properly construed, can only mean when a real emergency arises—when an occurrence takes place in the operation of government, which could not reasonably be anticipated by the legislature and was not provided for by the legislature, and which requires speedy action. This court said in *People ex rel. State v. Brady*, 277 Ill. 124, on page 129, 115 N. E. page 206: "That an appropriation can only be paid out of the treasury in payment of obligations incurred for the particular purposes specified in the appropriation was decided in *People ex rel. Brinkerhoff v. Swigert*, 107 Ill. 494, where it was sought to compel the auditor and treasurer to pay over to the captain of a company, in a lump sum, the share of an appropriation allotted to that company, and there was no showing that any obligation of the state had been incurred, and no bill of particulars or specification was presented. The law on that subject was repeated in *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120, where it was held that an appropriation for a particular purpose can only be paid on the presentation of itemized vouchers, showing that obligations have been incurred."

In the same case the court, in referring to the statutory provision as to the state board of agriculture, said (277 Ill. 130): "This provision, if it were valid, does not apply to this case, because the appropriations were made for specific purposes, and not to be expended for such purposes as in the opinion

of the board would best advance the interests of agriculture, horticulture, manufactures, and domestic arts. If the act did apply it would be in violation of the Constitution, which provides that bills making appropriations shall specify their objects and purposes, and appropriate to them, respectively, the several sums in distinct items and sections. The general assembly must determine to what objects and purposes money of the state shall be appropriated, and cannot bestow that power upon any person or board for the exercise of discretion of the donee as to the objects for which the money shall be expended."

In *Fergus v. Russel*, supra, heretofore cited in *People ex rel. State Bd. v. Brady*, supra, the court said (270 Ill. 332): "Paragraph 26 of § 1 of the Omnibus Bill is as follows: 'To the state treasurer, such sums as may be necessary to refund the taxes on real estate sold or paid on error and for overpaying of collectors' accounts under laws governing such cases, to be paid out of proper funds.' The objection to this item is that no definite sum is appropriated. Paragraph 3 of § 16 of article 5 of the Constitution is, in part, as follows: [Here giving the portion above quoted.] It will thus be seen that to make a valid appropriation a definite sum of money must be appropriated for the purpose specified."

It is manifest that the appropriation of \$500,000 is not an item in the constitutional sense, but is a sum for general distribution. The constitutional provision requires a definite amount for a definite object and purpose. In this appropriation there is no definite amount for a definite object and purpose, but a general amount, to be apportioned into items among a number of possible objects which are in no way specified, and this allotment or specification is necessary before the appropriation is effected.

We do not think anything said in *Mitchell v. Lowden*, 288 Ill. 327, 123 N. E. 566, relied on by counsel for

amici curiæ, as to large appropriations for a specified amount to a given object, justifies the appropriation of \$500,000 as set forth in the Appropriation Act. It is clear from the reasoning in *Mitchell v. Lowden*, and *People ex rel. State Bd. v. Brady*, supra, that the size of the appropriation as to a specified amount is not material, if the item is otherwise proper. In our judgment a fair reading of the opinion in *Mitchell v. Lowden* tends to support the decision of the trial court with reference to this appropriation being contrary to the constitutional provisions. It is clear, from the items of the Appropriation Act objected to, that the appropriation itself is not a complete act of legislation, but seeks to delegate to an administrative officer the specification of objects and purposes, and the determination of distinct items therefor. The Constitution expressly requires these acts to be performed by the general assembly itself. *People ex rel. Breckon v. Election Comrs.* 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109; *Sheldon v. Hoyne*, 261 Ill. 222, 103 N. E. 1021, and cases cited. The reasoning of this court in *People v. Kane*, 288 Ill. 235, 123 N. E. 265, supports the same conclusion.

It would seem from a plain reading of the provisions of § 16 of article 5 of the Constitution, as well as from the construction already put upon the provisions of the Constitution by this court, that the Appropriation Act in question, in attempting to appropriate, in § 25 thereof, \$500,000 to be expended by the director of finance, on the approval of the governor, is unconstitutional and must be held void.

It is argued at some length by counsel for *amici curiæ* that appropriations similar to the one here in question have been made by the legislature from time to time for many years past, the sums appropriated varying in amount from

Appropriation—
of reserve funds
—validity.

\$3,000 to \$4,000, down to 1919 when a sum was appropriated and expended equal to the one here in question. The legislative construction placed upon a doubtful constitutional provision is entitled to weight, but, when there is no doubt as to the proper construction of the constitutional provision, such legislative construction is entitled to little or no weight. In the first volume of our decisions, *Phoebe v. Jay, Beecher's Breese* (Ill.) 268, in speaking of the authority of the legislature to act, this court said (page 271): "The Constitution is their commission, and they must act within the pale of their authority, and all their acts, contrary or in violation of the constitutional charter, are void. If they have no power to pass an act, any number of repetitions of unconstitutional acts, or acts beyond the pale of their authority, can never make the original act valid."

This same doctrine was quoted with approval by this court on this subject in *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327. Of course, it is unnecessary for us to discuss or decide whether the former appropriations that have been expended under the authority of the various departments of the state government were constitutional or not. It is clear that, if these moneys in former years were expended contrary to the Constitution, under the authorities just cited, it would furnish no justifiable reason for again violating the plain provisions of the Constitution.

Counsel for amici curiæ also argue at length that under the decisions of this court similar general funds for emergency or contingent expenses have in effect been held constitutional under the provisions of the statute in such cases as *People ex rel. Holmquist v. Illinois C. R. Co.* 237 Ill. 324, 86 N. E. 724; *People ex rel. Moneyham v. Cairo, V. & C. R. Co.* 247 Ill. 360, 93 N. E. 405, and *People ex rel. Williamson v.* 20 A.L.R.—62.

Chicago, B. & Q. R. Co. 253 Ill. 100, 97 N. E. 245. It is obvious from an examination of the respective statutes construed that the language under construction in those cases is not as specific as the constitutional provision here in question. See *Hurd's Stat.* 1917, chap. 24, § 111, chap. 120, § 121, and chap. 139, § 125. In this case the court has under construction a constitutional provision, and not the provisions of a statute such as govern appropriations for villages, cities, towns, and counties, and what is said in those cases, in our judgment, does not in any way tend to support the arguments of counsel for amici curiæ that the appropriation here in question should on the reasoning of those cases be held valid.

Neither do we think the argument of counsel for amici curiæ should control here because it seems absolutely necessary for the proper administration of the state government that a large latitude in regard to appropriations should be permitted in order to care for the emergencies that necessarily arise from time to time. The answer of this court to this argument is found in *Knickerbocker v. People*, 102 Ill. 218, where this court said (page 220): "Counsel for appellant have pressed upon the attention of the court, with much earnestness and in strong terms, the supposed inconveniences and great hardships that will probably result from holding the act in question unconstitutional, as a reason why such a construction should not be given to it. The argument of ab inconvenienti should have but little weight, if any, in solving the question before us. Considerations of this character address themselves to the official duty and conduct of the court, rather than to the question in hand. While they afford the strongest reasons why the court should act with great caution and mature deliberation in the consideration of the case, yet they do not throw a particle of light upon the vital question upon which it depends. It is not claimed that

considerations of this character can have any controlling influence in a case where the act of the legislature is clearly unconstitutional, but it is urged they may be looked to in doubtful cases. This view has the sanction of authority, yet it is rather plausible than forcible, for, where an act of the legislature is manifestly unconstitutional, it is the duty of courts to so hold, however disastrous the consequences may be. On the other hand, if there is a reasonable doubt as to its unconstitutionality, the act should be sustained, whether any evil consequences would flow from holding it invalid or not."

This reasoning of the court, rendered in a decision construing the Constitution more than forty years ago, is a complete answer to the argument of counsel as to the inconvenience that may come to the state government from holding this appropriation of \$500,000 invalid. It has been held by the courts of last resort in other states where somewhat similar provisions are in force that the provisions requiring the object of the appropriation to be specified and definite should be enforced. *Dickinson v. Clibourn*, 125 Ark. 101, 187 S. W. 909; *State ex rel. Broadwater v. Seibert*, 99 Mo. 122, 12 S. W. 348; *Menefee v. Askew*, 25 Okla. 623, 27 L.R.A. (N.S.) 537, 107 Pac. 159; *People ex rel. Hopkins v. Kings County*, 52 N. Y. 556. In this last case the court said (page 569): "It is not difficult, and ought not to be regarded as an unreasonable or onerous requirement, to state the 'object' to which an appropriation is to be applied, or the 'single work or object' for which it is proposed to create a state debt, or the 'object' for which a tax is deemed necessary, and to which it is to be applied."

In our judgment, if this appropriation for the benefit of either one, two, or three departments of the state government, without specifying the definite purpose or object of the appropriation, can be sustained, then such appropriations for

every branch of the state government just as indefinite must be sustained, and we see no legal reason why, if \$500,000 could be thus appropriated, even larger sums might not be appropriated to various state departments in the same indefinite and uncertain manner. We deem the argument of no force that similar appropriations have been heretofore made and wisely expanded by the governor and other state officials, without any serious harm to the public, and therefore the present and future governors of the state and state officials can be rightly trusted to continue to protect the interests of the public. Assuming that all this may be accepted as true, yet it furnishes no justification for disregarding the plain mandates of the written Constitution. If the provisions of the Constitution as to appropriations require them to be too definite and specific to make the conduct of the state government practical and efficient, it is not for the courts to change these specific provisions because of the impracticability and inconvenience of enforcing the Constitution. The courts must enforce the Constitution as adopted by the people, and if the Constitution requires a change it should be done in the regular manner. It may well be said that there are worse conditions than not having public officials able to carry out conveniently and satisfactorily the emergency work that may be required from time to time, without a specific appropriation. In a constitutional government no injury can come to a state greater than the destruction of the safeguards provided in its Constitution.

The decree of the Circuit Court will be affirmed.

Cartwright, J., dissenting:

The opinion adopted in this case holds the appropriation to the department of finance to be allotted as emergencies arise by the director of finance, with the approval in writing of the governor, to be a violation of § 16 of article 5 of the Constitution, giving to the governor

power to veto any one or more of the items or sections contained in any bill making appropriations for money out of the treasury. This appears to be contrary to the purpose and intent of the Amendment of 1884, by which the provision was incorporated in the Constitution, and also contrary to the rule that courts must presume the words of the Constitution to have been employed in their natural and ordinary meaning.

In construing a constitutional provision it is important to consider the object intended to be accomplished and the mischief designed to be remedied. Cooley, Const. Lim. 7th ed. 100. The Constitution, when adopted in 1870, by § 17 of article 4, vesting the legislative power in a general assembly and declaring limitations upon the exercise of the power, provided that no money should be drawn from the treasury except in pursuance of an appropriation made by law. There was no provision that appropriations should be in distinct items or sections, and appropriations were frequently not made so as to enable the governor to exercise the veto power. Governor Cullom, in his message in January, 1883, recommended that § 16 of article 5 should be amended so that the veto power of the governor should be enlarged so as to give the governor the power of partial veto by items or sections. The governor called attention to the fact that governors of many states possessed that power, and that mayors had been given the power in 1875. In compliance with the recommendation of the governor, a resolution for the Amendment to the Constitution giving the governor power to veto distinct items or sections was submitted to the people and adopted. It was not in article 4, pertaining to the legislative department, which remained unchanged, but in article 5, concerning the executive department, and in that section which related to the veto power. The only purpose of the Amendment was that appropri-

ations should be made in such separate items as would enable the governor to exercise his veto power, and it seems to me clear that the appropriation in question was of such a character as to meet the purpose of the Amendment. It specifies that the reserve is to be apportioned between the executive, judicial, and military departments of the government, and allotted, as emergencies arise, by the director of finance, with the approval in writing of the governor; and this is surely sufficiently specific to enable the governor to determine whether he would approve of the appropriation or exercise his power to disapprove of it.

Disregarding, however, the history of the Amendment, its evident purpose, and the article amended, it seems to me that the appropriation did specify the object and purpose for which it was made, and appropriated the amount in a distinct item and section. It has been the constant practice of the legislature to make appropriations for contingencies which may arise between sessions of the legislature, and the power has not only never been questioned, but is not now questioned. Such appropriations are made to meet expenses that may or may not occur within the scope of the department to which the appropriation is made. This appropriation is more specific in limiting the expenditure to emergencies which may arise. An emergency is:

"A sudden or unexpected occurrence or condition calling for immediate action." Standard Dict.

It is "an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." Webster's Dict.

It is "any event or occasional combination of circumstances which calls for immediate action or remedy; an unforeseen occurrence; a combination of circumstances which calls for immediate action or remedy; a sudden or unexpected occasion for action; a sudden or unex-

pected happening; any case of casualty or unavoidable accident." 20 C. J. 499.

It is "some unforeseen occasion, condition, or pressing necessity that requires immediate action; a sudden or unexpected happening or occasion calling for immediate action." Century Dict.

It is not only more specific than an appropriation for contingencies, but there are practical considerations which cannot be overlooked in interpreting the Constitution. The state owns and operates twenty-seven different establishments in different parts of the state, including state hospitals for the insane, feeble-minded, and blind, the penitentiaries, reformatory, and other similar institutions, and the state government is charged with the maintenance of peace and order within its bounds. Emergencies may arise at any time calling for immediate action, which will be the only effective remedy. In 1920 landslides were endangering the state buildings at the Chester State Hospital, and money was taken from such an appropriation as this to build retaining walls and preserve and protect the state buildings. It would be nothing less than a calamity if no appropriation could be made for that specific purpose until the legislature should be called in special session. Riots are liable to occur, and have occurred, calling for immediate action in suppressing the same, and on two occasions property of the state has been destroyed by windstorms, where there was a necessity for immediate restoration to such an extent as to answer the purpose of the institution. Making an appropriation for such purposes is only the exercise of ordinary prudence and foresight.

As has been stated, there has never been, and is not now, any claim that appropriations for contingencies may not be made without specifying the particular purpose of the appropriation. In the same appropriation bill in which this appropriation was made there was an appro-

priation to the department of public welfare for contingencies of \$100,000, to the governor, \$40,000, to the department of public works and buildings, \$20,000, to the secretary of state, \$15,000, to the division of poultry husbandry, \$5,000, and numerous other like appropriations to the various departments of the state government, which were approved by the governor, besides appropriations vetoed, not because they violated any constitutional provision, but because they did not meet with the approval of the governor. To recognize the validity of these appropriations, more indefinite than the one in question, which appropriated a definite sum of money for a specific purpose, with no discretion as to the purpose, does not appear to me to be justified or founded in reason.

It is true that the Amendment must be construed as it appears to have been understood by the people who adopted it. It was not only adopted to meet the objection of a want of veto power, but I do not see how it can be said that the people understood the Amendment as prohibiting such an appropriation as this. There are provisions in the statutes requiring appropriations of counties, cities, villages, and towns to specify the purposes of the appropriations, and it has been the general practice to make appropriations for contingent expenses or other similar designation. The court has sustained such appropriations as in compliance with the statute, where the amount is reasonable. *People v. Cairo, V. & C. R. Co.* 237 Ill. 312, 86 N. E. 721; *People ex rel. Whitlock v. Chicago & E. I. R. Co.* 249 Ill. 549, 94 N. E. 959; *People ex rel. Williamson v. Chicago, B. & Q. R. Co.* 253 Ill. 100, 97 N. E. 245. These local governments cover the entire state, and the people must have understood that such appropriations could be made. As to such local governments it is within the power of the court to determine whether the amount appropriated is reasonable, but the court has

no power to interfere with, regulate, or control the legislative discretion as to the amount of an appropriation. As a matter of fact, the legislature, at the session when this appropriation was made, appropriated about \$170,000,000, of which the appropriation in question was but a small portion, but, if it were large, the court would have no right to set it aside for that reason.

Stone, Ch. J., also dissenting:

I concur in the above dissent. A fund such as is here appropriated cannot be made available for any of the purposes for which specific appropriations have been made. To sanction such use would be, in effect, to increase the appropriations made for the purposes specified. It is impossible, however, to foresee and provide for all emergencies which may arise in the discharge of

the functions of state government, just as such contingencies cannot be foreseen in the administration of the government of municipalities. There appears to be no good reason for a different rule as applied to the wider functions of the state. It was clearly held in *People ex rel. Moneyham v. Cairo, V. & C. R. Co.* 247 Ill. 360, 93 N. E. 405, which holding has been approved in later cases, that such appropriations may be made for the reason that "it is practically impossible to always provide in advance for incidental expenses that will arise during the year." There appears to have been no objection to the amount appropriated in this case. The reason for approving such an appropriation in the case of a municipality applies with equal if not greater force, in the case of the state.

ANNOTATION.

Particularity of specification of purpose required in appropriation bill

The reported case (*PEABODY v. RUSSEL*, ante, 972) involves a provision (§ 16, art. 5) of the Illinois Constitution, as follows: "Bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections." It is held that an appropriation of a definite sum of money "to be apportioned between the executive, judicial, and military departments of the state government, and allotted as emergencies arise by the director of finance with the approval in writing of the governor," is invalid for lack of certainty as to the department by which the appropriation is to be used, and as to the purpose for which it is to be expended.

So, in *People ex rel. State Bd. v. Brady* (1917) 277 Ill. 124, 115 N. E. 204, the court said, obiter, that "the general assembly must determine to what objects and purposes money of the state shall be appropriated, and

cannot bestow that power upon any person or board for the exercise of discretion of the donee as to the objects for which the money shall be expended."

In *Martens v. Brady* (1914) 264 Ill. 178, 106 N. E. 266, however, it was held that an appropriation "for the purpose of building and maintaining state aid roads in the several counties of the state" did not violate the foregoing constitutional provision in not specifying the amount for building roads in one item and the amount for maintaining them in another item. The court said: "The constitutional provision here invoked in one of importance, and must be complied with in all appropriations to which it is applicable. Building roads, and maintaining them when built, are different undertakings, but both are necessary to carry out the general scheme or purpose of the act, which is to provide for better highways throughout the state. The purpose of the constitutional provision here invoked is to enable the governor, when

passing on appropriation bills, to consider and act on the items of the appropriation separately. In order to carry out the general scheme of the act, however, the building and maintenance of roads are so closely connected that it is difficult to say where one ends and the other begins. The act itself clearly contemplates but one fund to carry out its provisions, as is evidenced by § 1, which provides "that the term "state road and bridge fund," when used herein, shall mean all moneys appropriated by the state of Illinois for road and bridge purposes." We do not think the construction and maintenance of state aid roads constitute separate and distinct items which, under the constitutional provision, it is required should be separately itemized in the bill making the appropriation. Their relation to the purpose and scheme of the act, and to each other, is so close that it is not to be supposed the governor would approve of the one and veto the other. Again, the general assembly, at the time of making the appropriations, could not know the amounts needed or required to first construct the roads and afterwards maintain them. The appropriations which constitute the state road and bridge fund are available to the state highway commission, which can make allotments from said fund to each county of the state as provided by the act, and the commission is required, in preparing vouchers for warrants, to designate the amount spent for construction and the amount spent for maintenance, and also show the location, as to county and division of the county, on which the same is to be used. This requirement is practicable and furnishes a record of the amount expended for each purpose, and where used. We do not think the constitutional provision invoked was violated."

So, in *Hett v. Portsmouth* (1905) 73 N. H. 334, 61 Atl. 596, it was held that an appropriation of a definite sum of money for "permanent street improvements" was not so indefinite as to amount to an attempted delegation

of legislative power to the executive officers whose duty it might be to expend the money. The court said: "If it is conceded that the expression, standing alone, and unexplained or unlimited by extraneous evidence, might include a great variety of public highway enterprises, the kind, locality, and extent of which would require the exercise of that degree of deliberation and judgment which is vested in the governing body, the question remains whether the circumstances attending the vote do not sufficiently limit the general scope of the language used. What was the intention of the members of the city council passing the vote, when ascertained from a consideration of all the competent evidence? What did they understand was included in the expression 'permanent street improvements'? The facts that the city had in 1903 adopted a policy of making permanent improvements in the roadbeds of the streets, as contradistinguished from temporary repairs, by using asphalt paving, that after an investigation of the subject the city had appropriated money for asphalt paving, and that a considerable amount of that paving was laid, proving to be satisfactory, constitute evidence showing that work of that character upon the streets was included in the title to the joint resolution of 1904, and in the body thereof. That such was the intention of the city council can admit of little doubt under the circumstances, while such a purpose is not inconsistent with the language used. It is, therefore, unnecessary to inquire whether other highway improvements might not be called 'permanent.'"

In *State ex rel. Broadwater v. Siebert* (1889) 99 Mo. 122, 12 S. W. 348, it was held that a reappropriation of an unexpended balance of a former appropriation is on the same footing as the original appropriation as to the necessity of stating the object for which the reappropriation is made. The court said: "That question must be determined by the terms of the act of reappropriation, and resort cannot be had to the first act

for that purpose. By the terms of the reappropriation in this case, the object stated is 'to pay the balance due under the contract made for the enlargement of the capitol building.' When this reappropriation was made, there was nothing due the relator upon any contract for the enlargement of the capitol building, nor had there been any contract whatever made with him by the commissioners. Conceding that, under the act making the original appropriation, the commissioners had authority to contract for the services for which they approved relator's account, they did not so contract until after the time had elapsed within which he could have been paid, by virtue of such original appropriation. And the terms of the reappropriation limit the payment to such balance as may be due under the contract, i. e., under the contract made before the passage of the act of reappropriation upon which a balance was or might become due. By no proper construction can relator's claim, under an original contract made after the act, be brought within the terms of the reappropriation, and, there being no fund upon which the auditor was authorized by law to draw a warrant, the peremptory writ prayed for will be refused."

While not precisely in point, for the reason that the particularity of the specification related to the amount of money appropriated, and not the purpose for which it was appropriated, the cases of *Fergus v. Russel* (1915) 270 Ill. 332, 110 N. E. 142, Ann. Cas. 1916B, 1120, and *Engstad v. Dinnie* (1898) 8 N. D. 1, 76 N. W. 292, bear collaterally on the subject under annotation. *Fergus v. Russel* (Ill.) supra, arose under the provision of the Illinois Constitution heretofore quoted. It was held that an item which failed to appropriate a definite sum of money was invalid. To the same effect, see *Engstad v. Dinnie* (N. D.) supra, wherein the court stated the facts and its conclusion as follows: "A careful reading of the enactment of December 18th reveals the important

fact that the same nowhere undertakes to appropriate any specific sum or amount as an expenditure for an electric light improvement for the city of Grand Forks. Its terms warrant the expenditure of no sum or amount which is stated or made definite. The law requires not only that an annual appropriation bill shall 'specify' the purposes for which the appropriation is made, but it must go further and specify 'the amount appropriated for each purpose.' Rev. Codes, § 2262. The measure we are considering, adopted December 18th, assumed to appropriate \$50,000 out of the general fund of the city for the purpose of paying salaries and the incidental expenses of the city government, including the payment of city orders; and also, incidentally, for the purpose of 'defraying the expense of erecting and completing and installing an electric light plant for said city, and the operating expenses of the same during said fiscal year.' From this language it appears that, while the city council attempted to appropriate a gross amount (\$50,000) from the general fund of the city for certain purposes mentioned, it does not specify the sum or amount which each or either purpose is to receive. From this language it is impossible to determine how much of this appropriation may be expended for any one purpose named in the enactment. We are far from holding that, in an appropriation out of the general fund of a city to meet the ordinary expenses incident to carrying on the city government, each item of expense must be anticipated, and stated in dollars and cents in the appropriation bill. No such rigid and fanciful requirement as that suggested is made by the law, and we certainly shall not attempt to read into the statute by construction any such embarrassing rule. But a costly improvement such as that contemplated in the contracts in question does not fall within the ordinary operating expenses of a city organized under the Code."

A. S. M.

T. W. MARTIN, Plff. in Err.,
v.
C. W. HEMPHILL.

Texas Commission of Appeals (Section B) — February 15, 1922.

(— Tex. —, 237 S. W. 550.)

Evidence — parol to show status of person signing contract.

1. Parol evidence is admissible in an action to enforce a contract, confirmation of which was signed in a firm name "by" an individual, but which confirmation did not purport to include the whole contract, to show that the individual was the sole member of the firm.

[See note on this question beginning on page 992.]

— parol to vary writing.

2. In the absence of fraud, accident, or mistake oral evidence is not admissible to contradict or vary the terms of a written contract.

[See 10 R. C. L. 1016; 2 R. C. L. Supp. 1139.]

— contract only partly in writing.

3. Where a writing represents only a part of a contract, the other parts being expressed orally, those parts of the contract not reduced to writing which are consistent with the writing may be shown.

[See 10 R. C. L. 1030; 2 R. C. L. Supp. 1142.]

Name — right to adopt business name.

4. An individual may, in the absence of statutory prohibition, adopt any name he chooses under which to carry on business.

[See 19 R. C. L. 1383.]

Contract — signature — firm name by individual.

5. A signature affixed to a contract of a firm name "by" the name of an individual does not show that the individual signed as agent for the firm, rather than as the firm itself.

Partnership — character — status.

6. A partnership at common law is not a legal entity, but only a contractual status, and before a suit can be filed by or against it the membership of the firm must be shown.

[See 20 R. C. L. 805, 920, 936; 3 R. C. L. Supp. 1103, 1111.]

Bank — authority of president — contract for cotton.

7. The president of a state bank has no implied authority to bind it by a contract for the purchase of cotton.

[See notes in 1 A.L.R. 693; 9 A.L.R. 1146.]

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Coleman County (Woodward, J.) in favor of defendant in an action brought to recover damages for breach of certain contracts for the sale of cotton. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Snodgrass, Dibrell, & Snodgrass, for plaintiff in error:

The court erred in holding that to permit plaintiff to prove by oral testimony that he was the sole constituent member of the firm, and the only person doing business under the name of McDonald Brothers, would be to vary and contradict the terms of the written contracts of confirmation offered in evidence.

Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165; Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946; Hunter v. Adoue, 38 Tex. Civ. App. 542, 86 S. W. 622; 29 Cyc. 270, 419, 420.

At common law a partnership is not a legal entity, but only a contractual status.

Glasscock v. Price, 92 Tex. 271, 47 S.

W. 965; Houghton v. Puryear, — Tex. Civ. App. —, 30 S. W. 583.

Mr. W. Marcus Weatherred, for defendant in error:

Parol evidence is inadmissible to vary or contradict the terms of a written instrument.

Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165.

A state bank cannot engage in the buying and selling of cotton.

Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601; First Nat. Bank v. Commercial Nat. Bank, 99 Tex. 118, 87 S. W. 1032; Fidelity & D. Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782; Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

Powell, J., filed the following opinion:

The court of civil appeals gives us the benefit of a clear and accurate statement of this case, as follows:

"Appellant filed this suit against the appellees, C. W. Hemphill and the Central State Bank of Coleman, a state banking corporation, to recover damages for the breach of certain contracts for the sale of cotton by appellees to appellant. The appellees filed separate answers, and the trial court sustained exceptions of the appellee Central State Bank, which eliminated that defendant from the suit.

"The case was tried before a jury, and the court peremptorily instructed a verdict in favor of the remaining defendant, C. W. Hemphill. Judgment was rendered upon the verdict for such defendant, from which this appeal has resulted.

"Appellant's cause of action was based upon certain contracts for the purchase of cotton made at different dates during the month of September, 1917, which contracts were each evidenced by written confirmations. The confirmations were signed with the printed name, McDonald Brothers, by T. W. Martin, the latter name being written. It was alleged that the confirmations were each delivered to C. W. Hemphill and accepted by him; and that,

at the time of the making of the contracts and the issuing of the confirmations, appellant was engaged in the business of buying and selling cotton in the town of Coleman, in Coleman county, Texas, for himself, but was transacting business under the name of McDonald Brothers. It was further alleged that these facts were well known to the defendant C. W. Hemphill. These allegations were denied, both generally and specially.

"Appellant offered to prove the facts as alleged, but, upon objection by the appellee Hemphill that the proof tendered was an attempt to vary and contradict by parol the terms of written contracts, the court excluded such testimony.

"The bill of exceptions upon this point shows that appellant testified, in substance, that he resided in Coleman, Coleman county, Texas, during the cotton season of 1917-18, and had been following the business of buying and selling cotton for fifteen or twenty years, sometimes buying for himself and sometimes for other people. That, during the cotton season of 1916, he was engaged in buying cotton at Sweetwater, Texas, for McDonald Brothers, of that place. That during the season of 1917 and 1918 he was engaged in buying and selling cotton at Coleman.

"When it was attempted to show the manner and name in which he did business during the season of 1917, objection was made, and the jury was retired. During the retirement of the jury, appellant testified that he did business at Coleman during 1917, under the name of McDonald Brothers, and that he was the sole constituent member of such firm. He testified that he made the purchases in question from appellee C. W. Hemphill, and that in each instance he issued a written confirmation, which correctly stated the date, the amount, and the price and terms of the contract. The first confirmation is typical of all, and is as follows:

"Coleman, Sept. 8, 1917.

"C. W. Hemphill, Dear sir:—We beg to confirm herewith purchase from you as follows:

100 B. C. at 19½ B/M.

"Differences as follows:

Good middling ..½.. On

St. middling ..½.. On

Middling

St. low middl'g ..½.. Off

Low middling ..½.. Off

St. good ordin'y Off

Spots Off same grade white

Tinges Off same grade white

"Terms: Oct. 15th. Reimbursement. E. & O. E.

"Yours very truly,

"McDonald Bros.,

"by T. W. Martin.

"It was also testified by appellant that he had previously had a conversation with Hemphill, concerning the use of the name of McDonald Brothers in the contracts. The substance of this testimony was that local merchants had run a garnishment against appellant's bank account, and that he suggested running the cotton account in the name of McDonald Brothers, to avoid the garnishment of his funds, to which Hemphill assented.

"Appellant also testified that Hemphill never delivered the cotton upon any of these contracts, but requested an extension of time, to which he consented, provided Hemphill would pay any overdrafts created by the purchase of other cotton to fill the contracts. It was not claimed that there was any definite period of extension.

"As stated, the court excluded this testimony, and in the bill of exceptions qualified the same as follows:

"This suit was brought by T. W. Martin on written confirmation signed "McDonald Bros., by T. W. Martin," T. W. Martin having testified that during the season of 1916 he bought cotton for and represented McDonald Brothers, which was a cotton firm engaged in buying and selling cotton. When he sought to testify that in the confirmations issued he was not acting for McDonald Brothers, but for himself

under the name of "McDonald Brothers," the defendant objected on the ground that the written confirmation, by the manner of its signature, showed that T. W. Martin was not signing as an individual, but as the agent of McDonald Brothers, and that Martin should not be permitted to vary the legal meaning and effect of the signature and of the written instrument, by parol testimony that he was acting for himself in so signing the instrument, which objections were by the court sustained under the decision of *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165.

"The principal questions upon this appeal are whether the trial court correctly interpreted the contracts as not binding appellant as principal, but as showing that he executed the confirmation as the agent of McDonald Brothers; and whether the court correctly held that appellant should not be permitted to vary the legal meaning and effect of the signature and of the written instruments, by parol testimony that he was acting for himself in signing the same.

"It is in substance the contention of appellees that the contracts were plain and unambiguous, and showed upon their face that appellant did not execute the same for himself and as an individual, but in the capacity as agent for McDonald Brothers, and that, therefore, parol evidence would be inadmissible to vary the meaning and legal effect of the instruments.

"Upon the other hand, it is claimed by appellant that the printed signature of the name McDonald Brothers, not revealing whether it was a corporation or partnership, and, if a partnership, not disclosing the constituent members of the firm, parol evidence was admissible to show who was transacting business in that name; and that such testimony would not be contradictory, but explanatory of the written instrument.

"Both parties rely upon the case

of Heffron v. Pollard, *supra*, upon the authority of which the trial court based his ruling in excluding the proffered testimony, and in peremptorily instructing for appellee Hemphill."

The court of civil appeals, also relying upon the case of Heffron v. Pollard, *supra*, concluded that the trial court properly excluded the testimony in question and affirmed its judgment. See — *Tex. Civ. App.* —, 221 S. W. 333.

The controlling question before us is whether or not the court of civil appeals correctly held that Martin should not have been permitted to prove that he was the sole member of the firm of "McDonald Brothers." We think the court erred in so holding, and that such testimony should have been admitted by the trial court. We do not think that proof would have revised the written confirmations. If not, it was clearly admissible.

It is elementary that, in the absence of fraud, accident, or mistake, oral evidence is not admissible to contradict or vary the terms of a written instrument. Many Texas authorities in this connection are collated in case of Harper v. Lott Town & Improv. Co. — *Tex. Com. App.* —, 228 S. W. 188. That the court in the case of Heffron v. Pollard, *supra*, had this rule of evidence in mind is quite clear. This can be gathered from several sections of that opinion as follows:

(1) "As to the legal effect of this contract upon its face there can be no doubt. It discloses the names and relation of all the parties connected with it. It binds Fry, the principal, and does not bind Heffron, the agent. If it had said in express terms that Fry was bound by the contract, and Heffron not, the meaning in the light of the law would not have been more unmistakable. Can Heffron be held liable upon this written agreement? Is it permissible in order to bind him to show

by parol testimony an intention exactly contrary to that expressed on the face of the writing, namely, that Heffron was bound by it and that Fry was not bound? In our opinion this cannot be done without violating a cardinal rule of evidence."

(2) "In the present case, also, the name is not a fictitious one. It is the name of a real person. But the contract purports to bind him alone, and upon its face is inconsistent with the idea that the defendant, in signing it, may have intended to use it for his own business name."

(3) "The intention of the parties to a written contract must be derived from the writing itself when its meaning is clear. Can it be said that the admission of parol evidence to show that the contract before us was made for the benefit of defendant [Heffron], and was intended to bind him, does not violate this rule? We think not. The contract clearly shows the relation of all the parties to it, who was to be bound and who was not to be bound, and its legal effect cannot be varied by such evidence."

But there is another rule of the law of evidence which is equally elementary. It has been stated for the supreme court of Texas by Justice Williams in the case of Coverdill v. Seymour, 94 Tex. 1, 57 S. W. 37, as follows: "It is sometimes the case that the writing represents only a part of the contract,

the other parts being expressed orally, and, in such cases, these parts not reduced to writing, which are consistent with the writing, may be shown."

We think this is the rule applicable to the case at bar, and under which the proffered testimony was admissible.

In the case of Heffron v. Pollard, *supra*, the written contract in several instances, in its very body, bound one John W. Fry a real person. He was fully and completely identified repeatedly. The contract was complete in itself in every de-

Evidence—parol to show status of person signing contract.

—parol to vary writing.

—contract only partly in writing.

tail. It nowhere mentioned Heffron as being bound. In signing the contract, Heffron executed it for John W. Fry in this language: "John W. Fry, per Heffron." Fry was a legal entity. He could sue and be sued. No explanation as to his identity was required. As said by the court in this case, the contract itself was just as clear as if it had expressly provided that Heffron was not to be bound. So, in the case at bar, if the written confirmation had expressly provided that Martin was not a member of the firm of "McDonald Brothers," then the testimony in question would have varied the contract and would not have been admissible. But, what do we find to be the facts in the instant case upon this point?

The confirmation in suit was essentially an incomplete statement of the contract. It did not even pretend to reflect the entire agreement between the parties. It was not even signed by Hemphill. All the parties to the suit in their pleadings set up many things outside the contents of the confirmations. In so far as they were not inconsistent with the latter they were admissible in evidence. Hemphill said it was understood that he was acting for another man, and was not to be bound personally; that if he accepted the contract at all, it was only in that limited manner. There were many other parts of the contract not covered by the written confirmations.

It will be conceded that Martin had the right to assume the trade-name of "McDonald Brothers," or any other name. In this connection, we quote as follows from 29 Cyc. p. 270: "Without abandoning his real name, a person may adopt any name, style, or signature wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued. Such assumed or fictitious name may be either a purely artificial name, or

a name that is or may be applied to natural persons."

The tradename "McDonald Brothers" does not necessarily imply that two or more persons by the name of McDonald are doing business under that name, or that the firm includes anyone by the name of McDonald. In fact, a tradename used by a partnership firm does not, prima facie, conclusively prove anything as to its constituent members. In this connection, we quote as follows from 30 Cyc. pp. 419, 420: "At common law a partnership may be validly organized, without any provision in the agreement as to the name under which it is to do business. When a firm name is fixed upon it may be the full individual name of any partner; the surnames of all the partners; or the surname of one or more of the members with the addition of '& Co.:' or it may consist of individual names wholly distinct from the names of any of the members; or it may be a name purely fanciful. . . . Partnership contracts are perfectly valid when made in the firm name, even though such name does not contain the names of any of the partners."

Our supreme court has recognized the above rules laid down by Cyc. In the very case of Heffron v. Pollard, supra, the court says: "We understand the law to be that when a party, for the purpose of transacting business, adopts an assumed name, whether it be fictitious or the name of another, he is bound by a contract made in that name."

Upon this very point, the court of civil appeals is in accord, in the instant case, with the principles of law now under discussion. That court in this very case says: "It must be conceded that it is usually permissible for a person to assume a fictitious or artificial business name, or even the real names of other natural persons, in the making of contracts, and, where the contract is not inconsistent with such theory, a recovery may be had by the person really contracting under the assumed name."

Name—right to adopt business name.

name of "McDonald Brothers," or any other name. In this

It is quite clear that Martin had the right to do business under the tradename of "McDonald Brothers." He alleged that he was so doing business; that he and Hemphill agreed it was best to do so, and because of Martin's financial condition. The allegations of the pleadings set up the whole agreement and contract between the parties. The written confirmations were silent on many of these points. One of the incomplete portions of the confirmations is the composition of the firm of McDonald Brothers. The firm name appears but once in any part of the writing, and that is at the very end thereof. It appears thus: "McDonald Brothers, by T. W. Martin." The court of civil appeals says that the confirmation itself clearly shows that Martin signed as agent of the firm. We cannot agree with this holding.

Contract—
signature—
firm name by
individual.

Certainly, no agency is expressly shown. If he had signed it by "T. W. Martin, Agent," then it would have clearly appeared that he was so acting, or if he had signed it by "T. W. Martin, Member of Firm," the intention would have been equally clear. But he did neither of these things. He only signed his name. It is a matter of common knowledge that firm names are frequently signed by members of the firm. When the firm name is printed, the name of someone authorized to sign for the firm is necessary, in order to attest the authenticity of the firm's signature. In our common experience, we know almost daily of instances where firm names are signed and then followed by the name of someone else who was a member of that firm. The signature shows, in such cases, that the firm's name was signed by this member of the firm. Yet it is seldom stated that he is a member of the firm. Martin, as the sole member of the firm, could have signed this instrument just as he did. It was not inconsistent with his con-

tention as pleaded. Certainly there should be no presumption of mere agency, when one does not expressly sign as agent, and especially when the written instrument itself nowhere states anything which, even by implication, shows any such agency.

It is clear to us that the confirmations shed absolutely no light upon the composition of the firm of "McDonald Brothers," but leave the whole matter open as the subject of parol proof. As we view it, proof that Martin was either agent or sole member of the firm would be consistent with the written confirmations.

Really, parol proof would be absolutely necessary in this case before McDonald Brothers could sue or be sued. A partnership, at common law, is not a legal entity, but only a contractual status. See *Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965; *Houghton v. Puryear*, 10 Tex. Civ. App. 383, 30 S. W. 583. Before a suit could have been filed by or against McDonald Brothers, it would have been necessary to allege the membership of said firm. Proof showing its membership would have been explanatory and not contradictory thereof. This was necessarily an open question in the case at bar, and, as we view it, the evidence was clearly admissible. On the other hand, in the case of *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165, John W. Fry was one man, an individual, a legal entity, and no further light was necessary in his identification.

Partnership—
character—
status.

McDonald Brothers is really, in the case at bar, a fictitious tradename. It is true there are McDonalds at Sweetwater. There are perhaps other McDonalds in every county in Texas. But, in the instant case, it was a fictitious name, adopted by Martin and Hemphill under a mutual agreement, according to the pleadings. It is for the jury to pass upon the truthfulness of Martin's allegations. If they

are true, then, if the proffered testimony in support thereof is excluded, this rule of evidence becomes the instrument and vehicle of a grave injustice in defeating contractual obligations honestly assumed. The firm name of "McDonald Brothers" did not reveal who constituted such firm. Therefore parol testimony was admissible to show who was transacting business at that time and place under that name. As already stated, such testimony would not be contradictory of the written confirmation, but merely explanatory thereof.

We think if the supreme court which decided the case of *Heffron v. Pollard*, supra, had had the facts of the instant case under consideration, it would have admitted the proffered testimony in evidence. We feel justified in this assertion in view of the following quotation from the opinion in the above cause last referred to: "If the contract had been signed in the name of Fry only, it would have been proper to have permitted it to be read to the jury upon proof that defendant [Heffron] signed it, that the contract was made for his benefit, and that he assumed the name of Fry as his business name in the transaction."

If the contract had been so signed, the writing, on its face, would certainly have bound no one but Fry. Heffron's name would have appeared nowhere in the written contract. Under those circumstances, the court in that case says that Heffron would have been permitted to explain the contract by stating that he used Fry's name as a business name, and that he (Heffron) was the real party at interest. It seems to us that if such an explanation be permissible, then there could be no serious doubt as to the admissibility of testimony by Martin, explaining that he was the constituent member of the firm of McDonald Brothers. Certainly one would be as much an explanation as the other, and neither apparently any more a variation of a written contract than the

other. In one case, Heffron would be explaining his use of the name of another individual, entirely unlike his own; in the other, Martin would be explaining his use of a partnership, or firm tradename, entirely foreign to his own.

As we construe the decision in *Heffron v. Pollard*, supra, the court there found that John W. Fry's name was used repeatedly in the very body of the contract; that his name was signed to the contract "per Heffron;" that John W. Fry, *prima facie*, means John W. Fry, a definite description of a given individual; that no explanation was necessary to his complete identification; that when Heffron signed "John W. Fry, per Heffron," it showed conclusively that Fry was the principal, whose name was being signed by his agent, Heffron, otherwise Heffron would have either signed his own name only after having also used it in the body of the contract, or would have been consistent all the way, and used only the name of John W. Fry throughout the contract. In other words, the court held in *Heffron v. Pollard* that when the name of one individual is signed by another individual, and the latter's name is also signed to the contract, the latter is, as a matter of law, merely the agent of the former, and proof to the contrary is not admissible.

But the use of an indefinite firm or partnership name is a vastly different proposition, as we view it; "McDonald Brothers" does not identify a soul. It might be used by any man, or set of men. It, *prima facie*, conveys no meaning; when its name, in printed form, is signed to a contract, it is the usual custom for someone to attest the signature; that is done by a member of the firm as often as by a mere agent; the signing of the firm name by a member of the firm cannot be inconsistent with his membership therein; evidence explaining the constituency of the firm and his membership therein is certainly not only admissible, but generally essential. When

a firm name is signed by an individual, with nothing in the contract anywhere to show whether the latter is an agent or member of the firm, the signer is just as likely to be the one as the other; we are inclined to think the law makes no presumptions, and we are certain it carries no conclusive presumption; his status is subject to proof.

We think what we have said sufficiently disposes of the issue as to the admissibility of the testimony in question. But counsel for Martin quote as follows from the case of Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946: "The general rule is that one who contracts as agent cannot maintain an action in his own name and right upon the contract.

To this general rule there are four exceptions generally recognized by the courts and text-writers: First, where the agent contracts in his own name, second, where the agent does not disclose his principal, who is unknown; third, where by the usages of trade the agent is authorized to act as owner of the property; fourth, where the agent has an interest in the subject-matter of the contract, and in this case whether he professed to act as agent or not."

In discussing the above quotation, counsel contend very vigorously that in the case at bar Martin was plaintiff, asserting certain rights in court, and not a defendant, denying liability, as in the case of Heffron v. Pollard, *supra*. Proceeding further in that same connection, they state: "Now, in the case at bar, the plaintiff in error alleged and undertook to prove not only that he had an interest in the subject-matter of the contracts in controversy, but that he had the sole and only interest therein; and, in view of this announcement by our supreme court, we respectfully submit that he was entitled to prove his case by the evidence offered upon said trial and which was excluded by the trial court, and he was entitled to make such proof regardless of whether this court holds, or does

not hold, that by the manner of executing the contracts plaintiff in error professed to act as agent or not."

We do not think it necessary to pass upon the correctness of this contention of counsel, and we do not do so, although it strikes us as having some force. As said before, we think what we have already said disposes of this question, and that the confirmation does not, in itself, show that Martin signed as agent.

We think the bank was properly dismissed from the suit by the trial court. The president of the bank had no authority to bind his principal, a state bank, to any such contract as the

**Bank—authority
of president—
contract for
cotton.**

one pleaded by Martin. We are in complete accord with the decision of the court of civil appeals upon this point, when it says: "We hold that plaintiff's petition wholly fails to state a cause of action against the bank, for the reason that, under the pleading, such transactions were ultra vires the corporation. It was not alleged that the bank had, at the time of the making of the contracts, any cotton to deliver thereunder, or that it would, in due course of business, acquire such cotton as collateral to any loans made. The mere potential ability of the bank to acquire such property in the future would not, in our opinion, suffice to give it authority to make contracts of this character for future delivery. Neither would the bank be bound by custom, upon contracts of its managing officers, for the future delivery of cotton, in such circumstances. Under the pleadings, to hold the bank liable under these contracts would be, in effect, to recognize that a state banking corporation could engage in the business of buying and selling cotton for future delivery, a doctrine which this court cannot sanction."

We do not think it necessary to pass upon other contentions raised in the application, because we believe they have been effectually disposed of by what we have said in

holding admissible the testimony in question. We are of the view that these questions will not now arise in such a way as to give any difficulty upon another trial of the case.

It follows, from what has been said, that we think the District Court and Court of Civil Appeals erred in excluding the proffered testimony tending to show that Martin composed the firm of "McDonald Brothers," and that such error requires a reversal of the judgment. In fact, the whole case turned upon that error.

Therefore, we recommend that

the judgments of the District Court and the Court of Civil Appeals be reversed, and that the cause be remanded to the former for another trial in conformity therewith.

Cureton, Ch. J., delivered the opinion of the court:

The judgment recommended in the report of the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

We approve the holding of the Commission of Appeals on the question discussed in its opinion.

ANNOTATION.

Admissibility of extrinsic evidence, to identify the person or persons intended to be designated by the name in which a contract is made.

It is not intended in the present annotation to discuss the numerous cases dealing with parol evidence to show who is bound by a contract signed by an agent, or cases of like character dealing with partnerships, but to cover cases of the nature of the reported case (*MARTIN v. HEMPHILL*, ante, 984), in which an assumed name is signed to a contract, the question being whether parol evidence is admissible to show who was meant by the assumed name. In addition, there have been included cases somewhat outside the above limitation, dealing with the admissibility of parol evidence to identify, as between two persons of the same name, the one who was intended in a contract.

Cases dealing with parol evidence to show who constituted an association or partnership which is a party to a contract have not, in general, been included. See for a case of this kind *The Golden Rod* (1912) 197 Fed. 837.

A case having some points of similarity to *MARTIN v. HEMPHILL* appears in *Meyer v. Shapton* (1914) 178 Mich. 417, 144 N. W. 887, although, as will subsequently appear, the facts make it perfectly distinct in principle and beyond the scope of this annotation. In that case it was

held competent to show by oral evidence that an order for an automobile, written on a paper headed "Meyer Bros.," and signed by the purchaser, but not by the vendor, was in fact made with an individual named Herman C. Meyer. But in this case the testimony was that the firm of Meyer Brothers had not been in existence for a long period; that the plaintiff happened to have the printed form in question, and that by mistake the name of "Meyer Bros." was not erased; but that it was understood that the individual, the plaintiff, was making the sale.

A name signed to a contract may be shown to be a name adopted by another. In an action of unlawful detainer a lease signed "E. H. Turner," is admissible in evidence against the defendant G. W. Turner, and parol evidence is admissible to show that the said G. W. Turner was the person who signed the lease as E. H. Turner. *Simons v. Marshall* (1852) 3 G. Greene (Iowa) 502. Such evidence makes no change in any term, condition, or obligation in the lease. The proof only identifies one of the parties who signed the lease as being one of the parties in wrongful possession. The fact that he did not sign his true name does not release him from the obligation created

by the fact that he did sign as lessee, and went into possession under the lease. It may be shown by parol evidence that a person referred to in the contract as "Pop Dyer," was the same person as S. H. Dyer, such person being commonly known as "Pop" Dyer. *Haskell v. Tukesbury* (1899) 92 Me. 551, 69 Am. St. Rep. 529, 48 Atl. 500. In an action on a contract in which the party of the second part is named as "Mrs. Isidor Braun," but which is signed "Isidor Braun," oral evidence is competent to show that Mrs. Isidor Braun thus signed the contract. *Wuertz v. Braun* (1906) 113 App. Div. 459, 99 N. Y. Supp. 340.

In *Daugherty v. Heckard* (1901) 189 Ill. 239, 59 N. E. 569, it was held competent in an action upon a contract bearing the name of but one person as party of the first part, to establish by parol proof that the contract was in fact that of a copartnership, and that the firm entered into the contract in the name and style of the individual.

In *Hall v. Tufts* (1836) 18 Pick. (Mass.) 455, where a mortgage was given to "Ebenezer Hall, 3d," to secure a note described as being held by him, and the note appeared to be payable to "Ebenezer Hall," parol evidence was admitted to explain that a partnership existed between Ebenezer Hall and Ebenezer Hall, 3d, and that the debt for which the note and mortgage were given was a partnership debt, the business of the partnership having been carried on, at least for a while, in the firm name of "Ebenezer Hall."

It seems to have been held competent in *Thompson v. Thompson* (1899) 78 Minn. 379, 81 N. W. 204, 543, to explain that an individual was doing business in the name of "Smith & Thompson," in an action upon a contract signed in such partnership name.

In *Walker v. Miller* (1905) 139 N. C. 448, 1 L.R.A.(N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 Ann. Cas. 601, an action involving a deed of real estate to a partnership grantee, the members of which had died, but the name of which had been per-

petuated and the property kept together by consent of all parties interested after a sale of the business to strangers, for the purpose of collecting the accounts and settling up the partnership affairs, it was held competent to identify the true owners of the property granted by the deed, by parol evidence.

A foreign merchant who had established one Edward Higginbotham and conducted business in London in the name of Higginbotham, that name being painted outside the countinghouse and employed in all the contracts, was held liable upon a broker's sold note, naming Edward Higginbotham, although, prior to the transaction evidenced by the note, the merchant had terminated the authority of Higginbotham to represent him, but had not given notice thereof, parol evidence being held competent to show the above facts. *Trueman v. Loder* (1840) 11 Ad. & El. 589, 113 Eng. Reprint, 539, 3 Perry & D. 567, 9 L. J. Q. B. N. S. 165.

Where the name of a party to a contract applies to more than one person, parol evidence is generally held admissible to identify the contracting party. Thus, where the name of the grantee in a deed is equally applicable to more than one person, parol evidence is admissible to show the true grantee. *Wolff v. Elliott* (1900) 68 Ark. 326, 57 S. W. 1111; *Coit v. Starkweather* (1830) 8 Conn. 289; *Peabody v. Brown* (1857) 10 Gray (Mass.) 45; *Simpson v. Dix* (1881) 131 Mass. 179; *Avery v. Stites* (1832) *Wright* (Ohio) 56; *Begg v. Begg* (1883) 56 Wis. 534, 14 N. W. 602.

In application of this rule, in *Wolff v. Elliott* (1900) 68 Ark. 326, 57 N. W. 1111, it was held competent to show that a deed to "John Elliott & Amanda Elliott his wife," was a deed to John Elliott and a woman named Amanda Elliott, whom he had married illegally and was living with as his wife, although he had a lawful wife living, also named Amanda Elliott.

Parol evidence is admissible in a

case of a deed to Elijah Wheedon, where there were two persons, a father and son, by this name, to show which was meant, although the son was commonly designated as Elijah Wheedon, Jr.; this situation amounts to a latent ambiguity which parol evidence is competent to explain. *Coit v. Starkweather* (1830) 8 Conn. 289.

Parol evidence was held competent in *Peabody v. Brown* (1857) 10 Gray (Mass.) 45, to show that a deed to "Hiram Dowling, cordwainer," was intended for the father by that name, and not for his son of the same name, who was only thirteen years of age at the date of the deed. But the situation is held to create a latent ambiguity, opening the case for parol evidence.

Where the name of a grantee in a deed is equally applicable to father or son, parol evidence is admissible to show that the grantee intended was the son, although he was commonly designated with the term "Jr."

added to his name. *Simpson v. Dix* (1881) 131 Mass. 179.

In *Begg v. Begg* (1883) 56 Wis. 534, 14 N. W. 602, parol evidence was held admissible to show whether a father or son was the real grantee of a deed, where it was in evidence that, by usage, at least, the father was designated as "senior" and the son as "junior." The court says that as such affixes are no part of the name so as to render identity absolutely certain on the face of the deed, and as neither was used in this deed, it is immaterial, other than as a fact which might be shown with other evidence in order to prove which of the two was intended.

But where the father resides at one place and the son at another, a deed in which the grantee named might apply to either the father or son, if that alone were given, is not explainable by parol evidence, where the residence of the son is added. *Babcock v. Pettibone* (1874) 12 Blatchf. 354, Fed. Cas. No. 700; *Barton v. Babcock* (1871) 28 Wis. 192.

W. A. E.

**YOSEMITE LUMBER COMPANY et al., Plffs. in Certiorari,
v.
INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.**

California Supreme Court (In Banc)—January 27, 1922.

(— Cal. —, 204 Pac. 226.)

Constitutional law — extent of authority conferred — support of workmen's compensation system.

1. Constitutional power to create and enforce a complete system of workmen's compensation does not authorize the creation of a liability on any person to pay such compensation, or require any person to contribute funds to support the system.

[See note on this question beginning on page 1001.]

— judicial power — determination of liability to workmen.

2. The power to determine whether or not a liability exists to compensate a workman for injury is judicial.

[See 28 R. C. L. 824.]

Workmen's compensation — jurisdiction of commission — extent.

3. Under a constitutional provision

authorizing determination by an industrial accident commission of disputes arising under legislation authorized by it, the jurisdiction of the commission cannot be extended beyond such disputes.

Constitutional law — requiring compensation of workmen.

4. Plenary power conferred by the

Constitution to create and enforce a liability upon persons to compensate their workmen and their dependents for losses caused by injuries and death does not authorize the creation of a liability to compensate workmen of other persons.

— authority to create department of rehabilitation.

5. Constitutional authority to create and enforce a complete system of workmen's compensation, and enforce liability on the part of all persons to compensate their workmen and their dependents for loss by injury or death, does not authorize the creation of a state department for rehabilitation of disabled employees generally, to which an employer must contribute in case of the death of one of his workmen without dependents.

Tax — provision for rehabilitation of injured workmen.

6. A provision that an employer shall, in case of death in the course of his employment of one of his workmen without dependents, pay a certain sum into a state fund to be used for rehabilitation of injured workmen generally, and to pay the expenses of the industrial accident bureau, imposes a tax.

Constitutional law — delegation of judicial power — validity.

7. The legislature cannot confer judicial power upon the Industrial Accident Commission further than is authorized by the Constitution, where that instrument limits the power of the legislature to create new courts or judicial tribunals.

[See 28 R. C. L. 749.]

— authority to confer power on commission — limitation.

8. A provision of a constitutional amendment designed to establish a minimum wage for women and children, to the effect that the legislature may provide for the general welfare of all employees, and that no provision of this Constitution shall be construed as a limitation upon legislative authority to confer upon any commission such power and authority as the legislature may deem requisite to carry out the provisions of this section, does not empower the legislature to create a fund for industrial rehabilitation of injured employees generally, and confer upon the Industrial Accident Commission authority to hear and determine controversies as to distribution of that fund.

CERTIORARI to the Industrial Accident Commission to review its order awarding compensation for the death of an employee of the defendant lumber company to the state, in a proceeding by it under the Workmen's Compensation Insurance and Safety Act, for such payment. *Award annulled.*

The facts are stated in the opinion of the court.

Messrs. A. E. Bolton and Arthur W. Bolton for plaintiffs in certiorari.

Messrs. Adolphus E. Graupner, U. S. Webb, and Warren H. Pillsbury for defendants in certiorari.

Shaw, Ch. J., delivered the opinion of the court:

This is a proceeding in certiorari, under the Workmen's Compensation Insurance and Safety Act (Stat. 1917, p. 831), to review an order of the Industrial Accident Commission requiring the Yosemite Lumber Company to pay to the state of California the sum of \$350 for the death of John Moore, who was killed by an injury arising out of and in the course of said employment, because of the further fact that he left no

dependents surviving him. The order was made under the authority of the Act of 1919, Stat. 1919, p. 273. The sole question for decision, as we view the case, is whether or not the said act gives the commission jurisdiction to adjudicate the liability of the employer to the state.

The act provides that when an employee receives a fatal injury, of a kind that is compensable under the provisions of the Workmen's Compensation Insurance and Safety Act, and "does not leave surviving him any person entitled to a death benefit, the employer . . . shall pay into the treasury of the state of California the sum of \$350 for each such fatal injury in addition to any

other payments under the provisions of said Compensation Act," not exceeding three times the average annual earnings of such employee, and that the moneys so paid "shall be covered into a special fund to be known as the 'industrial rehabilitation fund,' which fund is hereby created and appropriated for the purposes set forth in this act." Section 1.

It further declares that said fund may be used by the Industrial Accident Commission "for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state" (§ 2); that the remainder of the fund which may be left after the commission shall have used so much thereof as they deem best in such promotion shall be placed, "semiannually, to the credit of the accident prevention fund, established by said Compensation Act" (§ 3; also § 51, Compensation Act, Stat. 1917, p. 865). When \$5,000 "shall have been accumulated in said fund," it is to be deposited "with the state compensation insurance fund as a revolving fund." From this "revolving fund" the payments so required by the aforesaid §§ 1, 2, and 3 are to be made, on the order of the Industrial Accident Commission, and the "state treasurer shall from time to time, upon the order of the commission, reimburse said state compensation insurance fund from the industrial rehabilitation fund for expenditures made from said revolving fund." The expenses of administration of the state compensation insurance fund in carrying out the duties imposed by the act are also "to be paid from said state industrial rehabilitation fund," all under the direction of the commission. Section 4. The commission is given jurisdiction to determine the liability of such employer and to require the payment by him of the \$350 to the state in such cases, by proceedings before it in the same manner as provided in the Workmen's Compensation Insurance and Safety Act; "provided further" that at any

time after it is paid into the state treasury, any person claiming to be a dependent of the employee may establish such dependency to the satisfaction of the commission, and thereupon the state may be required to pay to said dependent the said \$350, or whatever thereof is necessary to meet his claim. Sections 5 and 6.

The accident prevention fund referred to is used to support the "department of safety" carried on by the Industrial Accident Commission. Workmen's Compensation Act, §§ 33 to 52. The state compensation insurance fund mentioned is established by the Workmen's Compensation Act for the purpose of enabling the commission to carry on the business of an insurance carrier for employers, with respect to their liability under the act.

It will be seen from these provisions that the act makes no provision for compensation by the employer to the person injured, or to the dependents of such person. The "compensation" contemplated by the act is only to be made when the workman who is killed by the injury leaves no dependents to be compensated, and it goes to other persons not related to the deceased workman or connected with his employer. It goes to the state to enable it to carry on a benevolent enterprise for the benefit of a class of workmen throughout the state, and to provide funds for the insurance bureau of the Industrial Accident Commission. The true intent of the act is to provide for the creation of a general fund for these purposes.

The proceeding in which the order or award in question was made was begun by the state of California after the death of John Moore. In its petition it averred that Moore left surviving him no person dependent on him for support, or any person entitled to a death benefit under the Compensation Act, and that, on account thereof, \$350 was owing by the Yosemite Lumber Company to the state, under and by

virtue of said Act of 1919. The Act of 1919 purports to confer upon the commission the power to make orders determining and enforcing the liability which the act creates. It is contended on behalf of the commission that legislative authority to confer such power upon the commission is found in § 21, article 20, of the Constitution, as amended in 1918. This claim is contested by the petitioner, who asserts that it has no such effect.

Prior to the amendment of 1918, § 21 of article 20 read as follows: "The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

The following is the section as amended in 1918 (see Stat. 1919, p. lxxv.):

"The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the conse-

quences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.

"The legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state. The legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

"Nothing contained herein shall

be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state or the state compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

The power to determine whether or not the liability referred to in the first paragraph of the above section and imposed by this

Constitutional law—judicial power—determination of liability to workmen.

law exists against any person is judicial power. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917E, 390; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 322, 153 Pac. 24; *Carstens v. Pillsbury*, 172 Cal. 579, 158 Pac. 218; *Marin Water & Power Co. v. Railroad Commission*, 171 Cal. 712, 154 Pac. 864, Ann. Cas. 1917C, 114. It is claimed that the new section authorizes the creation of a liability on employers in favor of the state for the benefit of workmen in general, and that it gives the legislature power to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning such liability. The second paragraph of the section is the part which purports to give this power, if it is contained anywhere in the section. It gives no authority to create a tribunal for any other purpose or with any other judicial power than to

Workmen's compensation—jurisdiction of commission—extent.

settle the "disputes arising under such legislation," referring to the legislation provided for in the first paragraph of the section. It is therefore apparent that, when we have ascertained the kind and character of the disputes that may arise under the legislation authorized by the first part of the section, we have found the limits beyond which the judicial power and jurisdiction of the Industrial Accident Commission cannot go.

The first grant to the legislature by the new section is the grant of

power "to create and enforce a complete system of workmen's compensation." This does not authorize the creation of a liability on any person to pay such "compensation," or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.

Constitutional law—extent of authority conferred—support of workmen's compensation system.

The next phrase of the new section empowers the legislature "in that behalf to create and enforce a liability on the part of any or all persons, or the dependents of of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment." This does not authorize the creation of a liability on the part of any person

—requiring compensation of workmen.

to compensate the workmen of other persons, or the dependents of workmen of other persons. The phrase "their workmen" necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his "dependents," thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. Nothing is added to the force of the provision by the use of the word "plenary." If the legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.

The use in this clause of the words "any and all persons," in describing those made liable, and the words "any and all of their workmen," in describing those to be compensated, do not show an intent to empower the legislature to enlarge

the liability against a particular employer for a particular injury so as to include compensation to workmen in general as a class, or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury.

Nor is such enlarged meaning given to the section by the use of the phrase "complete system of workmen's compensation," in the opening clause, or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: The liability of "any or all persons" to compensate "any or all of their workmen." This is in effect a provision for any person to compensate his workmen, which is but another form of saying that any employer shall compensate his employee for an injury arising out of the employment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim, "expressio unius est exclusio alterius," is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the Act of 1919.

That there was no such thought in the minds of those who framed the amendment, or of the legislature that proposed it, is clearly indicated by the argument in favor of the amendment in the pamphlet distributed to the voters with the ballot at the election at which the amendment was adopted. The amendment was proposed by the legislature of 1917. Under § 1195 of the Political Code, when the legislature proposes an amendment to the Constitution, to

—authority to
create depart-
ment of re-
habilitation.

be voted upon by the electors of the state, the author of such amendment and one member of the same house who voted with the majority in submitting the same shall be appointed as a committee to draft an argument giving the reasons for the adoption of such amendment. This argument is to be printed in a pamphlet and distributed to the voters with the sample ballot, to be used by the voter in preparing his vote and in studying the questions upon which he is to act. Pol. Code, § 1195a. It is to be assumed that the arguments prepared by the author of the amendment state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce. The argument printed and distributed with the ballot upon the amendment here under consideration refers to the fact that the Workmen's Compensation Act had been in force for several years; that § 21 of the Constitution, as it was, "failed to express sanction for the requisite scope of the enactment to make a complete and workable plan," which plan embraced, as essential components, compulsory compensation for injury and death irrespective of fault, safety provisions, insurance by the state, and administration of the system, and it then states that the original section contained nothing covering safety or insurance, and only meager authority for administration; that the law in force had apparently exceeded the scope of the amendment authorizing it, and that the amendment was designed to give authority for the legislation already enacted and to sanction the plan then in existence. This obviously refers to the extensive revision of the original Workmen's Compensation Act that was enacted at the same session, as well as to the original act, neither of which attempted to create such a liability as that provided by the Act of 1919. There is no suggestion in the argument that the proposed amended section was intended to authorize the legislature to impose

any liability upon employers of a character different from that already provided by the original section, and nothing to suggest to any voter the idea that it was for carrying on a system for the benefit of disabled workmen in general, or for the levy of contributions to support such system upon employers in whose service men having no dependents were killed by injuries received in the course of their employment. It cannot be supposed that the author of the amendment, or the legislature that proposed it, intended to provide for such a scheme as that contained in the Act of 1919 by language so illy adapted to suggest the idea as that contained in this section, and that the voters should be inveigled into voting for it by an argument presented to them with the ballot which does not even mention it.

In so far as the act purports to exact from employers a sum to be used by the state for disabled workmen in general, it is in reality a taxing law,—a revenue measure. It requires any employer to pay to the state the sum of \$350 whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational re-education of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the state in carrying on the department or bureau administered by the Industrial Accident Commission, all of which are public purposes. This is

Tax—provision for rehabilitation of injured workmen.

purely a tax. "A tax is a charge upon persons or property to raise money for public purposes." *Perry v. Washburn*, 20 Cal. 350. A tax "includes every charge upon persons or property, imposed by or under the authority of the legislature, for public purposes." *Madera v. Black*, 181 Cal. 310, 184 Pac. 400; 1 *Cooley*, Taxn. p. 6. The amended section of the Constitution contains no suggestion of a design to provide

for raising revenue by a tax of such an extraordinary character as this statute proposes. We need not consider the question whether, as a tax, it would not be void because of its unfair discrimination. We are of the opinion that the language of the section gives no warrant for the conclusion that it was intended to provide for taxation of any kind.

Our conclusion is that § 21 of article 20, as amended in 1918, did not authorize the legislature to impose a liability on an employer to pay money to the state for the purposes specified in the Act of 1919. It follows by necessity that said section gives no authority to the legislature to confer on

the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers, sought to be imposed by said Act of 1919. It may be conceded that, under its general powers, the legislature might provide a fund for the benefit of persons disabled in industry in this state, and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund. But any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article 6 of the Constitution, since no section of the Constitution gives the legislature power to confer jurisdiction thereof upon the Industrial Accident Commission. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 322, 153 Pac. 24; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; *Carstens v. Pillsbury*, 172 Cal. 579, 158 Pac. 218; *Employers' Liability Assur. Corp. v. Industrial Acci. Commission*, 177 Cal. 775, 171 Pac. 935.

Counsel for the commission cite the case of *State Industrial Commission v. Newman*, 222 N. Y. 363, 118 N. E. 794, as contrary to our views as aforesaid. The case is not in point. The Constitution of New

Constitutional law—delegation of judicial power—validity.

York contains no provision limiting the power of the legislature of that state to create new courts or tribunals, such as are contained in our article 6. The question which we have discussed—that is, the power of the legislature to confer judicial power of this character upon the Industrial Accident Commission—could not arise in New York, for that state has not the constitutional limitations upon the legislative power to create courts which give rise to the question here and control our decision thereof.

It is further claimed that authority for the imposition of this liability and for the giving of this jurisdiction to the commission is found in § 17½ of article 20, which reads as follows: "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

The arguments printed on the ballot for the election of 1914, at which this section was adopted, indicate that its main purpose was to authorize the establishment of a minimum wage for women and minors. Nothing whatever is said in the arguments upon any other subject except that there is a suggestion that all employers, bad as

well as good, should be compelled to provide proper living and working conditions for their employees. The part of the section authorizing the legislature to "provide for the comfort, health, safety and general welfare of employees" was, as we think, intended to refer to the comfort, health, safety, and welfare of employees during the time of their employment, and to have no reference to general provisions, such as are here involved, for the vocational re-education of those who have been injured and are not able to pursue their former occupation. It certainly furnishes no

authority and has no reference to authority for giving the Industrial Accident Commission power to enforce the levy of contributions upon employers for the purpose of raising revenue with which to carry on a school for the re-education of employees, or for any other state purpose.

—authority to confer power on commission—limitation.

We find no ground upon which the jurisdiction of the commission can be upheld. Many other objections are made to the constitutionality of the act, but, in view of the conclusion above stated, we deem it unnecessary to consider them.

It is ordered that the award of the Industrial Accident Commission aforesaid be annulled.

We concur: Lennon, J.; Sloane, J.; Wilbur, J., Shurtleff, J.

I concur in the judgment: Lallor, J.

Petition for rehearing denied February 23, 1922.

ANNOTATION.

Constitutionality of provision of Workmen's Compensation Act for contribution to general fund in absence of dependents of deceased workman.

It will be observed that in the reported case (YOSEMITE LUMBER CO. v. INDUSTRIAL ACCI. COMMISSION, ante, 994) a provision of the Compensation Act for the payment, in case of the death of an employee leaving no de-

pendents, of a certain amount into the state treasury, in addition to any other payments under the act, for the purpose of establishing an industrial rehabilitation fund for disabled workmen in general, was held not within

the power of the legislature under constitutional amendments giving it power to create "a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment," to create "a complete system of workmen's compensation," and to "create and enforce a liability on the part of any and all persons to compensate any or all of their workmen for injury or disability and their dependents." The court takes the view that the provision of the act in question is in reality a taxing law or revenue measure.

There is little direct authority on the question under consideration.

In *State Industrial Commission v. Newman* (1918) 222 N. Y. 363, 118 N. E. 794, where a division of the Compensation Act provided that if an employee who had previously incurred permanent partial disability through the loss of specified members incurred permanent total disability through the loss of other members, he should be paid, in addition to the compensation provided for partial disability, certain additional compensation out of a special fund created by the payment of a certain sum by the insurance carrier to the state treasurer in every case of injury causing death in which there were no persons entitled to compensation, it was held that this provision was authorized by and did not violate art. 1, § 19, of the New York Constitution, providing that nothing contained in the Constitution should be construed to limit the power of the legislature to enact laws for the payment either by employers, or by employers and employees, or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees, or for death of employees resulting from injuries. The court said: "An historical statement will indicate the approach to a correct determination of the question presented. In 1910, a legislative act entitled, 'An Act to Amend the Labor Law in Relation to Workmen's Compensation in Certain Dangerous Employments,' became a

law. It was the forerunner of, and in general purpose and character similar to, the existing Workmen's Compensation Law. Laws 1910, chap. 674. In March, 1911, we adjudged it invalid, because it infringed certain provisions of the state Constitution, which then did not contain the section (§ 19 of article 1) we have referred to and in part quoted. That section was duly adopted on November 4, 1913, and, of course, became effective January 1, 1914. In March, 1914, the present Workmen's Compensation Law was finally enacted. Laws 1914, chap. 41. It did not then contain the provisions, here involved, of subd. 7 of § 15. In November, 1915, we decided that a claimant who became an employee under the act, having theretofore lost a hand, became entitled, upon the loss of the remaining hand while such employee, to the compensation for permanent total disability, and not to the lesser compensation for permanent partial disability. *Schwab v. Emporium Forestry Co.* 216 N. Y. 712, 111 N. E. 1099. Our decision related to a claim arising in July, 1914, and affirmed the decision of the appellate division, rendered May 5, 1915. *Schwab v. Emporium Forestry Co.* 167 App. Div. 614, 153 N. Y. Supp. 234. Manifestly the law was a hindrance to those who, having lost a hand or other member, sought to become employees under the act, because the loss of the remaining member subjected the employer to the payment of a compensation substantially greater than it would in case the employee had the two members. After the decision of the appellate division, the legislature, by an amendment to subdivision 6 of § 15, enacted 'Aat: 'An employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.' Laws 1915, chap. 615. The provisions of § 15 were supplemented in 1916 by the addition of subd. 7, which we have already quoted. The evident and clear purpose of the subdivision was

to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust, through the creation of a state fund contributed to by the insurance carriers, and, as the permanent total disability arose, accessible to any member of the entire prescribed class of employees so disabled. Its provisions are within the letter and spirit of the Constitution. The act requires each employer within its provisions to secure the prescribed compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation through the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) securing from the State Industrial Commission in the stated manner permission to be a self-insurer. Section 50. The term 'insurance carrier' of subd. 7 of § 15 includes the state fund, the stock corporations or mutual associations, and the self-insurer. Section 3, subd. 12. All employers, therefore, contribute under identical conditions to the special fund of said subd. 7,—those utilizing the state fund or the stock or mutual associations through the insurance premiums contributed to the fund or association, and the self-insurers by payments directly. The special fund is exclusively distributed among the employees of those who contribute. Its creation and use are not different in principle from those of the state fund or the funds of the associations constituted of the premiums received. In the last analysis all compensation to the employees of the employers paying those premiums is not paid by the employer to his employees, but from the aggregated and indiscriminate funds. From those funds the awarded compensation is directly paid to the employees or dependents, or reimbursement for payments by employers is made to them. Sections 53, 54, 25, 26. In *Jensen v. Southern P. Co.* (1915) 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B,

276, 9 N. C. C. A. 286, we expressed the conclusions that the scheme of the act is essentially and fundamentally the creation of a state fund from premiums paid by employers to insure or effect the payment of a prescribed compensation for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments, and that the act was amply sustained by the Constitution. Subdivision 7 is well within the scheme."

In *Watkinson v. Hotel Pennsylvania* (1921) 195 App. Div. 624, 187 N. Y. Supp. 278, affirmed in (1921) 231 N. Y. 562, 132 N. E. 889, a provision of the Workmen's Compensation Act for the payment to the state treasurer in every case of injury to an employee, causing death, in which there are no persons entitled to compensation, of the sum of \$900, to be held by the state treasurer as custodian, and conferring on the Industrial Commission the distribution thereof, was held not to be unconstitutional, as violating the due process of law, just compensation, or equal protection of law clauses, and it was held that the amount fixed was not unfair or unreasonable. It was also stated that a provision for the payment of \$100 to the state treasurer where a deceased employee left no dependents was valid, and the above provisions of the Compensation Act were further held not to be rendered invalid by the Rehabilitation Law, accepting appropriations by the United States for vocational rehabilitation of disabled persons.

And in *Salt Lake City v. Industrial Commission* (1921) — Utah, —, 18 A.L.R. 259, 199 Pac. 152, it was held that a provision requiring an employer carrying his own insurance to pay a certain amount into the state treasury in case of death of an employee without dependents, to provide a fund for compensating employees suffering a second disability, which, when combined with the first, causes injuries greater than the compensation provided for the disability from the second injury alone, does not deprive the employer of the equal protection

of the laws, or deprive him of his property without due process of law, where he is privileged to insure in the state fund if he chooses to do so. (The question of the constitutionality

and construction of provisions directed against noninsuring employers is considered in the annotation appended to this case in 18 A.L.R. 259.)
J. T. W.

STATE OF INDIANA, Appt.,

v.

WILLIAM DAILEY et al.

Indiana Supreme Court — March 17, 1922.

(— Ind. —, 134 N. E. 481.)

Homicide — necessity of death within a year and a day.

1. Death must occur within a year and a day after infliction of the wound to constitute murder, under a statute merely providing for the punishment of that crime.

[See note on this question beginning on page 1006.]

— **punishment of murder — definition.** ment of murder refers to that crime
2. A statute providing for punish- as it existed at common law.

APPEAL by the State from a judgment of the Circuit Court for Clark County (Fortune, J.) sustaining a motion to quash an indictment charging defendants with the crime of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. U. S. Lesh, Attorney General, for the State.

Messrs. Charles D. Kelso and Warren B. Allison, for appellees:

The common law governs in Indiana except in cases where its application is restricted or entirely prohibited by express statutory provisions.

Dunville v. State, 188 Ind. 373, 123 N. E. 689.

When a public offense has been declared by statute, and punishment fixed therefor, without definition, the courts will resort to the common law and the general import of the language used, to determine the sufficiency of the charge within the general terms of the statute.

State v. Patton, 159 Ind. 251, 64 N. E. 850.

The law conclusively presumes that death results from some other cause if the death does not take place within a year and a day after the felonious blow was struck, and neither the court nor the jury can draw a contrary one.

Archer v. State, 106 Ind. 432, 7 N.

E. 225; Gillett, *Crim. Law*, 2d ed. § 510; Clark, *Crim. Law*, p. 130; 21 Cyc. 702, 848; *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; 21 Am. & Eng. Enc. Law, 2d ed. p. 93; *State v. Orrell*, 12 N. C. (1 Dev. L.) 189, 17 Am. Dec. 563; *Thomas v. State*, 67 Ga. 460; *Percer v. State*, 118 Tenn. 765, 103 S. W. 780; *Clark v. Com.* 90 Va. 360, 18 S. E. 440; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *People v. Kelly*, 6 Cal. 210; *State v. Mayfield*, 66 Mo. 125; *Hughes*, *Crim. Law & Proc.* § 15, note 22; 2 *Bishop, Crim. Proc.* § 533; 1 *Whart. Crim. Law*, 11th ed. § 436.

Myers, J., delivered the opinion of the court:

Appellees, by indictment duly returned in the Clark circuit court, were charged with the crime of murder. *Burns's Anno. Stat.* 1914, § 2235. A separate and several motion by each appellee to quash the indictment was sustained, and judgment of release followed. The state

appealed, and has assigned as error the action of the court in quashing the indictment as to each appellee.

The indictment in substance charged that appellee Gaunt, on November 18, 1917, did unlawfully, feloniously, purposely, and with premeditated malice strike Charles Orem with a dangerous and deadly weapon, thereby inflicting a mortal wound, from which mortal wound so inflicted Charles Orem, on January 21, 1919, died, and that appellee William Dailey, before the commission of the felony aforesaid, counseled, encouraged, hired, and commanded Gaunt to commit the felony.

The indictment on its face shows that the death of Orem occurred more than a year and two months after the wound was inflicted. The sole question presented by this appeal is, Must death result within a year and a day from the time the wound was given? On this particular question we have no statute. While a prosecution for murder is not barred by any limitation, yet that is not the question here presented. The legislature has enacted that "crimes and misdemeanors shall be defined, and punishment therefor fixed by statutes of this state and not otherwise." Burns's Anno. Stat. 1914, § 287. This enactment has been in force since 1852, and is an exception ingrafted upon the act adopting the common law. Thus rests the support for the ruling that no common-law crimes, punishable as such, exist in this state (*Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631; *State v. Terre Haute Brewing Co.* 186 Ind. 248, 115 N. E. 772; *McDaniels v. State*, 185 Ind. 245, 113 N. E. 1004; *Woodsmall v. State*, 181 Ind. 613, 105 N. E. 155, 899; *Hinshaw v. State*, 188 Ind. 147, 122 N. E. 418), although by § 236, Burns's Anno. Stat. 1914, "the common law, together with acts passed by the British Parliament in aid thereof, prior to the fourth year of the reign of James I., is, by adoption, in force, and prevails in this state so far as

applicable, and when not inconsistent with our fundamental laws, state or Federal, and not inconsistent with the acts of our own legislature or statutes enacted by Congress" (*Sopher v. State*, 169 Ind. 177, 182, 14 L.R.A. (N.S.) 172, 81 N. E. 914, 14 Ann. Cas. 27).

In the instant case the crime is designated murder, and punishment therefor is fixed. Section 2335, supra. The word "murder" had a definite and well-defined meaning in law long before this statute was enacted.

Homicide—
punishment of
murder—
definition.

Consequently it logically follows that the offense designated as murder at common law is such under our statute. In *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579, the court had under consideration a statute of this state, authorizing the personal representative of one whose death was caused by the wrongful act or omission of another to maintain an action for damages against the one so causing the death, if commenced within two years. Burns's Anno. Stat. 1914, § 285. In that case counsel for plaintiff in error insisted that § 285, supra, should be construed as giving the right of action to such representative in case his decedent died from the effects of the wound so received by him within a year and a day thereafter, for the reason that the "law does not look upon such a wound as the cause of a man's death, 'after which he lives so long.'" The court did not agree with this contention. It held, as did this court, that § 285, supra, created a new cause of action, and was in derogation of the common law, and allowed two years after such death within which to commence it. In that case the court observed: "In cases of murder the rule at common law undoubtedly was that no person should be adjudged, 'by any act whatever, to kill another who does not die by it within a year and a day thereafter; in computation whereof the whole

day on which the hurt was done shall be reckoned first.' 1 Hawk. P. C. chap. 13, id. bk. 2, chap. 23, § 88; 4 Bl. Com. 197, 306. The reason assigned for that rule was that, if the person alleged to have been murdered 'die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain.' 3 Inst. 53. And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute. Whart. Am. Crim. Law, § 1073; State v. Orrell, 12 N. C. (1 Dev. L.) 139, 17 Am. Dec. 563."

In this state we have no statute in contravention of the common-law rule that a party must die within a year and a day after the wound is inflicted in order to make the killing either murder or manslaughter. Therefore if by analogy we may reason from the rule that, where a statute creates a crime by name without defining it, the court may do so by the aid of common-law definitions (State v. Patton, 159 Ind. 248, 251, 64 N. E. 850; Hopewell v. State, 22 Ind. App. 489, 492, 54 N. E. 127), then we might as readily say that the legislature, by its silence on the subject of time between

the giving of the wound and the death, intended that the common-law ^{necessity of death within a year and a day.} rule of a year and a day should govern, and we so hold. *Eppe v. State*, 102 Ind. 539, 553, 1 N. E. 491, 5 Am. Crim. Rep. 517; *Moore's Crim. Law*, § 849; *Gillett, Crim. Law*, § 510.

Other jurisdictions having statutes creating and defining the crime of murder very similar to ours, and no statute on the question now under consideration, have with one accord held that time is as essential now as at common law, because to sustain the charge it is necessary that it appear that the death occurred within a year and a day of the infliction of the alleged mortal wound. *State v. Mayfield*, 66 Mo. 125; *State v. Testerman*, 68 Mo. 408; *State v. Sides*, 64 Mo. 383; *Edmondson v. State*, 41 Tex. 496, 498; *Hardin v. State*, 4 Tex. App. 355, 370; *Com. v. Parker*, 2 Pick. 550, 558; *Com. v. Robertson*, 162 Mass. 90, 97, 38 N. E. 25; *Percer v. State*, 118 Tenn. 765, 777, 103 S. W. 780; *State v. Bantley*, 44 Conn. 537, 26 Am. Rep. 486, 489; *State v. Orrell*, *supra*; *Brassfield v. State*, 55 Ark. 556, 18 S. W. 1040; 21 Cyc. 702; 13 R. C. L. 747, § 52.

Judgment affirmed.

ANNOTATION.

Homicide as affected by time elapsing between wound and death.

The rule that death must ensue within a year and a day from the infliction of a mortal wound, in order to constitute homicide, obtains generally throughout the United States, deriving its support in some jurisdictions from the common law, in some from a statutory enactment which expressly includes this element in the definition of homicide, and in some from the rule announced in the reported case (*STATE v. DAILEY*, ante, 1004), to the effect that, where a statute creates a crime by name without defining it, the courts may do so by the aid of common-law defi-

nitions. Thus, in each of the following cases, the court has declared the rule to be that, in order to constitute criminal homicide by the unlawful taking by one human being of the life of another, it must appear that the death occurred within a year and a day from the time of giving the mortal wound:

Arizona.—*Roberts v. State* (1915) 17 Ariz. 159, 149 Pac. 380.

Arkansas.—*Kee v. State* (1872) 28 Ark. 155, 2 Am. Crim. Rep. 263; *Brassfield v. State* (1892) 55 Ark. 556, 18 S. W. 1040; *Fisher v. State* (1913) 109 Ark. 456, 160 S. W. 210.

See also *Glover v. State* (1915) 116 Ark. 588, 172 S. W. 876.

California. — *People v. Kelly* (1856) 6 Cal. 210; *People v. Wallace* (1858) 9 Cal. 30; *People v. Cox* (1858) 9 Cal. 32; *People v. Steventon* (1858) 9 Cal. 273; *People v. Murphy* (1870) 39 Cal. 52. See also *People v. Aro* (1856) 6 Cal. 207, 65 Am. Dec. 503; *People v. Coleman* (1858) 10 Cal. 334.

Connecticut. — *State v. Bantley* (1877) 44 Conn. 537, 26 Am. Rep. 486.

Indiana.—*Epps v. State* (1885) 102 Ind. 539, 1 N. E. 491, 5 Am. Crim. Rep. 517. And see the reported case (*STATE v. DAILEY*, ante, 1004).

Kentucky.—See *Jane v. Com.* (1860) 3 Met. 18; *Rose v. Com.* (1914) 156 Ky. 817, 162 S. W. 107.

Louisiana. — *State v. Kennedy* (1845) 8 Rob. 590.

Maine.—*State v. Conley* (1854) 39 Me. 78.

Massachusetts.—*Com. v. Parker* (1824) 2 Pick. 550; *Com. v. Macloon* (1869) 101 Mass. 1, 100 Am. Dec. 89; *Com. v. Robertson* (1894) 162 Mass. 90, 38 N. E. 25. See also *Com. v. Snell* (1905) 189 Mass. 12, 3 L.R.A. (N.S.) 1019, 75 N. E. 75.

Michigan.—See *Chapman v. People* (1878) 39 Mich. 357.

Missouri.—*Lester v. State* (1846) 9 Mo. 666; *State v. Sides* (1877) 64 Mo. 383; *State v. Borders* (1917) — Mo. —, 199 S. W. 180; *State v. Reakey* (1876) 1 Mo. App. 3. See also *State v. Mayfield* (1877) 66 Mo. 125; *State v. Testerman* (1878) 68 Mo. 408.

Montana.—*State v. Keerl* (1904) 29 Mont. 508, 101 Am St. Rep. 579, 75 Pac. 362.

Nebraska.—See *Debney v. State* (1895) 45 Neb. 856, 34 L.R.A. 851, 64 N. W. 446.

Nevada.—*State v. Anderson* (1868) 4 Nev. 729; *State v. Huff* (1876) 11 Nev. 17; *State v. Williams* (1909) 31 Nev. 360, 102 Pac. 974.

North Carolina.—*State v. Orrell* (1826) 12 N. C. (1 Dev. L.) 139, 17 Am. Dec. 563; *State v. Shepherd* (1847) 30 N. C. (8 Ired. L.) 195; *State v. Haney* (1872) 67 N. C. 467.

Oregon. — See *Bowen v. State* (1859) 1 Or. 270.

Tennessee.—*Percey v. State* (1907) 118 Tenn. 765, 103 S. W. 780.

Texas. — *Edmondson v. State* (1874) 41 Tex. 496; *Hardin v. State* (1878) 4 Tex. App. 370.

Virginia. — See *Clark v. Com.* (1893) 90 Va. 360, 18 S. E. 440.

Washington.—*State v. Champoux* (1903) 33 Wash. 339, 74 Pac. 557. See also *State v. Phillips* (1910) 59 Wash. 252, 109 Pac. 1047.

"The requirement that it must appear that the party died within a year and a day is a rule of evidence merely. Unless the party dies within that time, the prosecution will not be permitted to show that he died of the injury received." *People v. Murphy* (1870) 39 Cal. 52.

The reason for the rule was stated in *State v. Orrell* (N. C.) supra, as follows: "If such was not the case, that is, if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one." In the same case, in discussing the necessity of alleging the time of death in the indictment, the court said: "Nor is it less important to state the time of death, in order to show that the deceased died of the wound given her by the prisoner, within a year and a day after she received it. For, if the death happened beyond that time, the law would presume that it proceeded from some other cause than the wound."

Similarly, in *State v. Anderson* (Nev.) supra, it was said: "If the shot was fired more than a year and a day before the death, then the law would presume that the party died from some other cause than the wound. No proof of a shooting which took place more than a year and a day before the death of the party would be received, and of course the prisoner could not be in any danger from this source."

In *State v. Shepherd* (1847) 30

N. C. (8 Ired. L.) 195, it was said that in respect to murder the time of the death is material in but one respect, that is, that it occurred within a year and a day from the wounding, as the law attributes death not happening within a year and a day to some cause other than the wounding.

In construing a statute which provided that, "in order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered," the court in *State v. Huff* (1876) 11 Nev. 17, said: "The literal import of this language does lend some countenance to the notion that the law is guilty of the absurdity of saying that a malicious killing shall be deemed a harmless or a guilty act according to the length of time the victim survives after receiving the fatal wound. But knowing what the rule of law which the

statute recognizes and affirms has always been, we are able to acquit it of such absurdity. It is a rule of evidence merely. Knowing that the real cause of death must be more or less doubtful in all cases where a wound has not proved speedily fatal, the law has wisely set a limit to that inquiry, and has determined that when a wounded party has survived the wound a year and a day, there shall be a conclusive presumption that he died from some other cause. It does not say, 'Notwithstanding you killed him with malice aforethought, you are deemed innocent because he lived a year and a day after you stabbed him;' but what it does say is, 'He lived so long after you stabbed him, I therefore conclude you did not kill him;' or, rather, 'It is so doubtful in such cases what was the cause of death that upon grounds of public policy I have determined never to permit the attempt to show that the wound was the cause.' " M. B.

DENNIS O'SHEA, Respt.,

v.

JOHN L. LAVOY, Appt.

Wisconsin Supreme Court — December 13, 1921.

(— Wis. —, 185 N. W. 525.)

Automobile — injury to guest — liability.

The owner of an automobile is not liable for damages to an invited guest riding therein for injuries sustained by the latter, due to the turning over of the machine because of a defective spring, even though it was a secondhand machine and the spring was repaired with old parts.

[See note on this question beginning on page 1014.]

Headnote by OWEN, J.

APPEAL by defendant from a judgment of the Circuit Court for Marinette County (Quinlan, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Owen, J.:

The plaintiff is the father-in-law of the defendant, and is about seventy-two years of age. Both reside at Marinette, Wisconsin. On July 18,

1920, the defendant started in a Chalmers automobile on a trip to Norway, Michigan, for the purpose of bringing home one of his children who had been visiting at that place.

He took with him his wife, two children, his niece, another lady, the plaintiff, and his wife, whom he invited to make the trip with him. The car was a 1915 model. Defendant had purchased it as a second-hand car in 1919. Sometime prior to this date, four leaves of the left front spring broke, and defendant took the car to a garage and had the spring repaired. The broken leaves were the second, third, fourth, and fifth from the bottom; there being seven leaves in the spring. The garage man substituted some old leaves which he had in the shop for the broken ones, and thus repaired the spring. He took some leaves he had in the garage that were a little bit too long, cut off the tapered ends, and fitted them the same length as the ones that were broken. This was regarded as a temporary job, and a new spring was ordered. The garage man told defendant that it would not be good policy to run the car too long with the repaired spring, but that it would be safe as long as he watched himself on the road. The garage man testified that he knew the defendant intended to use the car in an ordinary way, and that he considered it entirely good and adequate, temporarily, for that purpose. He further testified that there was nothing unusual about using a repaired job on a spring temporarily before a new spring arrives. In fact, it was quite common to do that in that vicinity. He further testified that any part of a car that is made of steel is apt to crystallize after four or five years' use. Between the time of the repair of the spring and the trip in question, defendant ran the car a distance of 1,500 miles, making one trip from Marinette to Milwaukee therewith without any mishap.

While on the trip to Norway, they passed over a small bridge near the village of Daggett, Michigan, going at the rate of 15 to 18 miles an hour. Almost immediately thereafter the master (top) leaf of the spring broke very near the front end there-

of, where it had no support from the other leaves. This caused the left side of the car to drop down, the fender coming in contact with the tire, which made it impossible to turn the car, which at that time was turned a little to the left, and the car slid a short distance and toppled over the edge of the road and down an embankment, turning completely over, causing injury to the plaintiff to recover damages for which this action was brought.

The defendant testified that when the leaves broke on the former occasion it did not let the fender of the car down onto the front wheel, and that he did not know that such a result would follow from a breaking of the master leaf.

The material allegations of the complaint were to the effect that plaintiff was riding with the defendant in said car as the defendant's invited guest along a public highway, and that said defendant was then and there driving said automobile at an excessive rate of speed, and the said left front spring of the automobile was defective, which fact was well known to the defendant for a long time prior to said date, and which said fact was entirely unknown to this plaintiff; that while it was so driven the said left front spring of said automobile broke, and by reason thereof the said car was thrown over a high embankment, through said defendant's carelessness and negligence. Upon the trial the complaint was amended by striking out the words "at an excessive rate of speed," and the words "at an ordinary rate of speed" were inserted instead, so that the only negligence on the part of the defendant relied upon at the trial was the using of the automobile with the defective spring, which it was alleged was well known to the defendant for a long time prior to said date.

The jury returned a special verdict in which it was found that the defendant was negligent in using the car at the time in question in the condition it then was; that such

negligence was the proximate cause of plaintiff's injuries; that no want of ordinary care on the part of the plaintiff proximately contributed to his injuries; that plaintiff did not voluntarily assume the risk of any danger arising out of the operation, with ordinary care, of defendant's car in the condition in which it was at the time when the trip was commenced; and that the damages sustained by plaintiff were \$4,800. Upon this verdict judgment was entered in favor of the plaintiff and against the defendant. From the judgment so entered defendant brings this appeal.

Messrs. Richmond, Jackman, Wilkie, & Toebeas, for appellant:

The complaint does not state a cause of action because no gross negligence is alleged.

Astin v. Chicago, M. & St. P. R. Co. 143 Wis. 477, 31 L.R.A.(N.S.) 158, 128 N. W. 265; *Howe v. Corey*, 172 Wis. 537, 179 N. W. 791; *Greenfield v. Miller*, 173 Wis. 184, 12 A.L.R. 982, 180 N. W. 834; *Massaletti v. Fitzroy*, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690; *Jones v. Parish*, 1 Pinney, 495, 1 Am. Neg. Cas. 848; *Willard v. Giles*, 24 Wis. 319; *Burns v. State*, 145 Wis. 375, 140 Am. St. Rep. 1081, 128 N. W. 987; *Childs v. North Hudson Bldg. & L. Asso.* 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600; *Flynn v. Lewis*, 231 Mass. 550, 2 A.L.R. 896, 121 N. E. 493; *Avery v. Thompson*, 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4; *Wellman v. Mead*, 93 Vt. 322, 107 Atl. 396; *Huddy, Automobiles*, p. 890; *Epps v. Parish*, 26 Ga. App. 399, 106 S. E. 297.

There was no allegation bringing the case within the rule of licensor and licensee.

Greenfield v. Miller, 173 Wis. 184, 180 N. W. 834; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800, 15 Am. Neg. Rep. 221; *Taylor v. Northern Coal & Dock Co.* 161 Wis. 223, 152 N. W. 465, Ann. Cas. 1916C, 167; *Brinilson v. Chicago & N. W. R. Co.* 144 Wis. 614, 32 L.R.A.(N.S.) 359, 129 N. W. 664; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Vanderbeck v. Hendry*, 34 N. J. L. 472; *Cahill v. Layton*, 57 Wis. 600, 46 Am. Rep. 46, 16 N. W. 1; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis.

105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24, 10 Am. Neg. Cas. 485; *Hupfer v. National Distilling Co.* 114 Wis. 279, 90 N. W. 191; 29 Cyc. 449; 18 Am. & Eng. Enc. Law, 1136; *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 887, 11 Ann. Cas. 371.

Messrs. George Evans and Martin, Martin, & Martin, for respondent:

The owner of the car is liable for an injury received by his guest due to a defective spring, which condition is unknown to the guest and known to the owner.

Greenfield v. Miller, 173 Wis. 184, 180 N. W. 834; *Reiter v. Grober*, 173 Wis. 493, 18 A.L.R. 362, 181 N. W. 739; *Klein v. Beeten*, 169 Wis. 385, 5 A.L.R. 1237, 172 N. W. 736; *Patnode v. Foot*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Gresh v. Wanamaker*, 221 Pa. 28, 69 Atl. 1123; *Burnham v. Central Auto. Exch.* — R. I. —, 67 Atl. 429; *Beard v. Klusmeier*, 158 Ky. 153, 50 L.R.A.(N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342; *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347; *Perkins v. Galloway*, 194 Ala. 265, L.R.A.1916E, 1190, 69 So. 875; *Galloway v. Perkins*, 198 Ala. 658, 73 So. 956; *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547; *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712; *Kennedy v. R. & L. Co.* 224 Mass. 207, 112 N. E. 872; *Massaletti v. Fitzroy*, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690; *Jacobs v. Jacobs*, 141 La. 272, 74 So. 992, L.R.A.1917F, 253, 74 So. 992; *Avery v. Thompson*, 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4; *Roy v. Kirn*, 208 Mich. 571, 175 N. W. 475; *Barnett v. Levy*, 213 Ill. App. 129.

Mr. Gerald F. Clifford also for respondent.

Owen, J., delivered the opinion of the court:

The automobile is an instrumentality of recent creation, which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributes so much to the comfort and pleasure, the welfare and happiness, of the family. It has given a new idea to distances and materially enlarged the orbit of individual existence. It affords recreation which appeals to every member of the family, and pleasures which may be indulged by

the family unit. It is a minister of health as well as pleasure. It makes the fresh air of the country available to the citizen of the congested city, and brings the pleasures of the city within the reach of the rural inhabitant. There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure, and recreation afforded thereby. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbor for a ride in the country, to join a picnic party, or to enjoy an evening at the theater in the near-by city. This is a species of hospitality which should be encouraged rather than discouraged, and the law should not couple with this friendly act a duty which makes its exercise an unreasonable hazard. On the other hand he who takes his friends and neighbors into his automobile places them in a high-powered, swiftly moving vehicle, attended with great danger unless handled and operated with a requisite degree of care. He must realize that he has voluntarily received into his keeping the lives and safety of his passengers, and he should not be permitted to trifle therewith, or to renounce all responsibility in such respect.

Upon these general observations, we apprehend there is little difference of opinion either in law or in human conscience. The difficulty arises in announcing in concrete form, with some degree of definiteness and workability, the exact extent and nature of this duty. It is a question that has not been discussed or decided by this court. While there are numerous decisions elsewhere, the question is nevertheless of recent origin, and the courts are not in complete accord in their method of its treatment, although there may not be a great practical divergence in the conclusions reached.

It has been held that the owner of a conveyance is liable to an in-

vited guest, who sustains injuries while riding with him, only for gross negligence. *Moffat v. Bateman*, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. N. S. 369; *Coughlin v. Gillison* [1899] 1 Q. B. 145, 68 L. J. Q. B. N. S. 147, 47 Week. Rep. 113, 79 L. T. N. S. 627; *Avery v. Thompson*, 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4, Ann. Cas. 1918E, 1122; *Epps v. Parrish*, 26 Ga. App. 399, 106 S. E. 297. It has also been held that he is liable for ordinary negligence. *Siegrist v. Arnot*, 10 Mo. App. 197; *Perkins v. Galloway*, 194 Ala. 265, L.R.A. 1916E, 1190, 69 So. 875; *Mayberry v. Sivey*, 18 Kan. 291.

There is a line of cases which hold that the situation gives rise to the relation of licensor and licensee; that the owner is not bound to furnish a sound vehicle or a safe horse, but is liable for active negligence which increases the hazard or creates a new one. *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371; *Beard v. Klusmeier*, 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342; *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547.

In Massachusetts it is held that, while the legal relation arising between the owner of the automobile and his invited guest is that of licensor and licensee, it is also that of bailor and bailee, the nature of the bailment being that of a gratuitous mandatum, and that the owner is liable only for his acts of gross negligence. *West v. Poor*, 196 Mass. 183, 11 L.R.A. (N.S.) 936, 124 Am. St. Rep. 541, 81 N. E. 960; *Massaletti v. Fitzroy*, 228 Mass. 487, L. R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690.

A study of the cases, however, reveals a greater consensus of judicial opinion upon the degree of care which should be required of the owner of the automobile under such circumstances than is indicated by the above statement. For instance, in the states holding that the owner

is liable for ordinary negligence, there is but one degree of negligence recognized. In such states the care which an individual is required to exercise under any particular circumstances is ordinary care, and a failure to exercise the care required constitutes negligence.

In the above-cited cases holding that the measure of the duty owing by the owner of the automobile is the same as that which a licensor owes to a licensee, the conduct which brought liability to the owner was rash and reckless, approaching if not constituting "gross negligence," under our definition of that term. It is to be remarked, however, that the practical application of the doctrine of those cases, that the owner is liable for his active negligence which increases the danger or creates a new one, makes him liable for acts which amount to no more than ordinary negligence. For illustration, see *Lowell v. Williams*, 183 App. Div. 701, 170 N. Y. Supp. 596. The doctrine of the Massachusetts cases plainly holds the owner liable only in cases of "gross negligence," as the term is understood in that state. But gross negligence, as understood in Massachusetts, comprehends a lesser degree of negligence than is included within our definition thereof.

Thus, it will be seen that the courts have held the owner liable only for a degree of negligence which approximates, but probably is less than, gross negligence, as defined by this court. This may be a just measure of responsibility to place upon the owner. But the problem which confronts us is to devise a rule which will accomplish that result. Would it be a just rule to hold the owner liable only for gross negligence as known to the jurisprudence of this state? Would this lay upon the owner a just measure of responsibility? Can the status of a gratuitous mandatory logically be imputed to one who transports human beings from place to place? Furthermore, does the rule of liability obtaining between

licensor and licensee, which rule is intended to apply principally with reference to the condition of premises, establish a correct measure of responsibility with reference to the operation of an automobile? Would not that rule lead to liability for acts of ordinary negligence, and, if so, is that a just rule?

But the question of the liability of the owner of an automobile for damages resulting to his invited guest who is riding therein, by reason of his negligent management thereof, is not before us in this action and will not be decided. The foregoing discussion is indulged for the purpose of inviting the attention of the profession to the many aspects of the question which must influence the eventual determination thereof, with a view of directing their discussion into helpful channels when they shall have occasion to present that question to the court.

In this case the damage resulted from a defective spring on the automobile. Negligent operation thereof is not claimed. We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him. It has been held by this court that in the former case the legal relation arising was that of licensor and licensee. *Greenfield v. Miller*, 173 Wis. 184, 12 A.L.R. 982, 180 N. W. 834. It follows that the same relation arises in the latter case, which conclusion is supported by authorities already cited. Whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the "management" of the automobile, they plainly are applicable so far as the "condition" of the automobile is concerned. According to those rules, the guest accepts the premises of his host as he finds them, subject only to the limitation that the licensor must not set a trap, or be guilty of active negligence which contributed to the injury. Here the accident happened, as said before, be-

cause of a broken spring, and the question is: Did that constitute a "trap," within the meaning of the rule? That is the only basis upon which liability can be predicated. A "trap," within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises, which may be avoided if known. Hence it is the duty of the host to advise his guest of its presence, so that the guest may enjoy the premises in a security equal to that enjoyed by the host. The guest has no right to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest upon equal terms of security.

In this case the defendant considered the automobile to be in sufficient condition to make the trip. This is evidenced by the fact that he not only intrusted his own safety thereto, but that of his wife and children as well. There can be no stronger evidence of the belief of the ordinary well-meaning man in the sufficiency of the car to safely make the trip.

So we have a situation where the owner of an automobile, who is about to make a pleasant trip, fully believing in the sufficiency of the car to do so with safety to the occupants, with the best of motives and with a view of promoting his pleasure, invites his father-in-law to ride with him, and by reason of the giving way of some part of the car the father-in-law sustains injuries. Under such circumstances, it is clear to us that the father-in-law, in accepting the invitation, took the car as he found it, was attended by the same measure of security enjoyed by the owner and the other members of his family, and that he was entitled to no more.

Were it material to the decision, we would hold that, upon the record, we find nothing which should have led the defendant to believe that the car was unsafe to make the trip,

nor that he had any reason to anticipate the accident or the resulting injuries. It is true he had a repaired spring, but he had driven the car 1,500 miles after it was repaired without any indication that it was insufficient in its repaired condition for the purposes to which he devoted the car at the time in question. Besides, it was not the repaired part that gave way. It was the master leaf of the spring, which up to that time had fully performed its service. There is no evidence that the leaves supplied by the repairer did not contribute as much strength to the spring as those which were broken. It is common knowledge that the giving way of most any part of a car that has been used for upwards of five years may be expected, and this, we think, is the only knowledge with which the defendant could be charged respecting the deficient condition of the car. But knowledge of this is not sufficient to render him liable to those whom he invites to ride with him, for injuries resulting from the giving way of the various parts of the car. Furthermore, the accident was a most unusual one to result from the breaking of a spring, and, as we understand it, was due to the peculiar construction of this kind of car. The defendant testified that he did not know that the fender would engage the front wheel in case of the breaking of the front spring; and, if it were necessary to a decision of the case, the question of whether he should reasonably have anticipated the instant results from the breaking of the spring would be a serious one. However, we think neither of these latter questions is involved. We place the decision upon the ground that the owner did not fail in the performance of any duty which he owed to those whom he invited to ride with him. The consequence is that the plaintiff has no cause of action, and the complaint should have been dismissed.

Judgment reversed, and cause remanded, with instructions to dismiss the complaint.

Siebecker, Ch. J., took no part.

Automobile—
injury to guest
—liability.

ANNOTATION.

Automobiles: liability of owner or operator for injury to guest.

I. Injury due to negligent operation:

a. Invited guests:

1. General rule as to care in operation, 1014.
2. Minority rule, 1018.
3. Effect of statutes, 1021.

As to liability of parent for injury to child's guest by negligent operation of car, see annotation in 2 A.L.R. 900.

As to liability for injury to guest in car, see 12 A.L.R. 987.

For duty and liability of carrier of passengers for hire by automobile, see annotation in 4 A.L.R. 1499.

Scope.

The question of the liability of one driving the car, to another who is engaged in a joint enterprise with him, is not within the scope of this annotation.

In *Barnett v. Levy* (1919) 213 Ill. App. 129, it was held that where one alleges that he was riding in an automobile as the guest of the defendant, and seeks to recover for an injury claimed to have resulted from the defendant's negligent operation of the automobile, he must prove that he was riding as a guest, and cannot recover if it appears that the parties were engaged at the time in a joint enterprise, and that each had agreed to pay an equal part of the expense of the trip, and a case is not made out merely by proving that the plaintiff was a lawful occupant of the automobile.

In *Wilmes v. Fournier* (1920) 111 Misc. 9, 180 N. Y. Supp. 860, affirmed in (1920) 194 App. Div. 950, 185 N. Y. Supp. 958, the evidence was held to show that the plaintiff, at the time an injury was sustained, was riding as an invited guest in the defendant's automobile, and that the latter was liable for an injury which occurred through his negligence. It was contended that the parties were engaged in a joint enterprise, as they were on a hunting trip, but the court stated that even if this were true the defend-

I. a—continued.

4. *Respondeat superior*, 1021.
5. Application to facts, 1022.
- b. Guests at sufferance, 1025.
- c. Contributory negligence, 1026.

II. Injury due to condition of car, 1029.

ant would not, by reason of this, be immune from liability for his torts which resulted in any injury to the plaintiff.

I. Injury due to negligent operation.

a. Invited guests.

1. General rule as to care in operation.

The rule is established by the weight of authority that the owner or operator of an automobile owes the duty to an invited guest to exercise reasonable care in its operation, and not unreasonably to expose him to danger and injury by increasing the hazard of travel.

Alabama. — *Perkins v. Galloway*, (1915) 194 Ala. 265, L.R.A.1916E, 1190, 69 So. 875, second appeal in (1917) 198 Ala. 658, 73 So. 956; *McGeever v. O'Byrne* (1919) 203 Ala. 266, 82 So. 508.

California. — *Spring v. McCabe* (1921) — Cal. App. —, 200 Pac. 41.

Illinois. — *Barnett v. Levy* (1919) 213 Ill. App. 129; *Masten v. Cousins* (1919) 216 Ill. App. 268.

Kentucky. — *Beard v. Klusmeier* (1914) 158 Ky. 153, 50 L.R.A.(N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342.

Maryland. — *Fitzjarrell v. Boyd* (1914) 123 Md. 497, 91 Atl. 547.

Nebraska. — *Bauer v. Griess* (1920) 105 Neb. 381, 181 N. W. 156.

New Jersey. — *MacKenzie v. Oakley* (1920) 94 N. J. L. 66, 108 Atl. 771.

Tennessee. — *Tennessee C. R. Co. v. Vanhoy* (1920) 143 Tenn. 312, 226 S. W. 225.

The court in *Perkins v. Galloway* (1915) 194 Ala. 265, L.R.A.1916E, 1190, 69 So. 875, said: "The express or implied duty of the owner and driver to the occupant of the car is to exercise reasonable care in its op-

eration not to unreasonably expose to danger and injury the occupant, by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel. *Reaves v. Maybank* (1915) 193 Ala. 614, 69 So. 137. Failing in this duty, he will be liable to the occupant or guest in the car for injuries the result of such carelessness or lack of diligence.”

On the second appeal of the *Perkins Case* in (1917) 198 Ala. 658, 73 So. 956, the court said: “It does seem to be a harsh or hard rule which makes the carrier or host liable to the passenger or guest as for injury or death, in the absence of gross negligence or wantonness, especially when the passenger or guest is treated by the carrier or host just as the latter himself is treated, and when both are injured by the same accident, as in this case. If this be so, the reply is: The law is so written, and cannot and should not be changed to meet hard cases; such instability would make shipwreck of the law. The liability of the owner of an automobile to a guest riding for pleasure only was recognized, but not decided, in the case of *Powers v. Williamson* (1915) 189 Ala. 600, 66 So. 585. That decision, however, went off on the ground that the owner of the machine was not in that case liable for the negligence of his son, who was operating the car; that is, that the doctrine of respondeat superior did not apply in that case. It is, however, a necessary conclusion that the owner would have been held liable in that case had the son been held to be the agent of his father, the defendant, or had the father, who was the owner, been operating the machine and been guilty of negligence proximately contributing to the injury. It is very true that it has been held that a gratuitous carrier of goods, like a gratuitous bailee of goods, is not liable to the owner of the goods in the

absence of gross negligence. This distinction is well pointed out by Mr. Hutchinson (*Carriers*, vol. 2, § 1022, p. 1179), who says: ‘This, it will be observed, is different from the well-settled rule in regard to the gratuitous carriage of goods, which, as has been seen, does not impose upon the common carrier the same degree of responsibility as when the carriage is for compensation; and this illustrates the different light in which the two kinds of business are viewed by the law. The carrier of goods becomes an insurer of their safety only when he is paid to become so; but the carrier of the passenger is bound to the utmost care and caution, whether paid by the passenger or not; and this distinction is based upon wholly different reasons of public policy, being, in the one case, the value which it puts upon human life and personal safety, and, in the other, the necessity of preventing frauds and combinations to the “undoing of all persons” who may have dealings of that kind with the carrier. This distinction between the gratuitous bailment of goods to the carrier and the gratuitous carriage of the passenger is, upon this ground, well established, and in the latter case the carrier’s liability is the same as when he is paid for the carriage.’” In this case, although the guest was not invited to ride by the defendant, but by another person who was in the car, it was held that, as the defendant knew of the guest’s presence in the car, the duty not to injure him was the same as if he had expressly invited him to ride.

And in *Cates v. Hall* (1916) 171 N. C. 360, 88 S. E. 524, where there was conflicting evidence whether the plaintiff was riding in the defendant’s automobile as a passenger for hire, or merely as a guest, it was held that in either event the defendant owed him the duty to exercise that care which a prudent man should use under the circumstances. The court said: “And on the question more directly involved in the appeal, the decided cases here and elsewhere are to the effect that the distinction as to the liability of carriers in cases of

passengers for hire, and those carried gratuitously, does not prevail as in the cases of common carriers of goods, but the same degree of care is exacted in the one case as the other. *McNeill v. Durnham & C. R. Co.* (1904) 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; *Benner Livery & Undertaking Co. v. Busson* (1895) 58 Ill. App. 17; *Indianapolis Traction & Terminal Co. v. Klentschy* (1906) 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869; *Lemon v. Chanslor* (1878) 68 Mo. 340, 30 Am. Rep. 799; *Gillenwater v. Madison & I. R. Co.* (1854) 5 Ind. 339, 61 Am. Dec. 101; *Hale, Bailm.* p. 497; 6 Cyc. 544. In *McNeill's Case* the court cites with approval from *Lemon v. Chanslor* the statement of the position as follows: "This, we think, was sufficient to authorize the instruction. The principle announced in it that, although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact will exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that "if a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, omission of that skill is imputable to him as gross negligence." In *Indianapolis Traction & Terminal Co. v. Klentschy* (1906) 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869, supra, it was held: "Carriers are liable to passengers for negligence resulting in damages, though the carriage is "gratuitous," and further, "When an officer of a street railway company, on behalf of such company, invited a visiting order, composed of women of whom plaintiff was one, to take a free trolley ride in one of such company's cars, the acceptance of such invitation by

taking passage on the car constituted the plaintiff a passenger." In *Hale on Bailments*, p. 497, the author states the position as follows: "In one respect there is a striking difference between the liability of common carriers for goods and the liability of public carriers of passengers for injuries to a passenger. As has been seen, where goods are carried gratuitously the carrier is not regarded as a common carrier, but is simply a private carrier, and liable, as a mandatary, only for gross negligence. But in respect to public carriers of passengers, public policy has imposed an entirely different rule. Even though such passengers are carried gratuitously, if they have been accepted by the carrier as passengers, all the extraordinary liabilities of the relation attach. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service." Applying the principle, we are of opinion that whether plaintiff hired the car from one of the partners, or whether he was riding in a car which was donated by the partnership for free service, and was being operated at the time by one of the partners in pursuance of this arrangement, in either event he was to be considered a passenger, and is entitled to have his rights determined in that view of the case; and, as stated, it constituted reversible error to make the question of a contract for hire conclusive on the subject."

And in *Avery v. Thompson* (1918) 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4, it was held that the operator of an automobile who has voluntarily undertaken to transport a guest is required to exercise that degree of care which would seem reasonable and proper from the character of the thing undertaken. The court said: "In order to determine whether these verdicts are so manifestly contrary to the law and the evidence that they should be set aside by this court, it is necessary to ascertain, in the first instance, the measure of

duty which Mr. Thompson, the inviter and the host, owed to Mrs. Avery, the invitee and guest, under the circumstances of this case; in other words, the degree of care which he was in law bound to exercise for her protection and safety during this gratuitous transportation. We should first inquire what was the legal relation existing between the parties. Ordinarily, in personal actions, the duty which is violated is one of two kinds. Either it is one imposed upon the defendant equally with all the world and independent of any act or violation on his part, as, for instance, the duty of a driver of an automobile toward other travelers on the highway; or it may arise out of contract, either under seal or given for good consideration in consequence of which the defendant has assumed a correlative duty, an illustration of which is the carriage of persons or property for hire. There is, however, a third way in which a legal duty may arise, and that is from a gratuitous undertaking on the part of the defendant—a duty voluntarily assumed without consideration, and a duty owed to the plaintiff alone because of the peculiar relations of the parties. The most common instance of this third classification is a gratuitous bailment. Within this zone, independent of either contract or tort in its larger sense, falls the defendant's duty, and therefore the plaintiff's right in the case at bar. The defendant (using this term for the sake of convenience) had entered into no contract with the plaintiff by the terms of which he had agreed to carry her safely from Friendship to Thomaston and return, nor was he obliged to invite her into his car to become his guest. He voluntarily undertook to transport her on this pleasure trip, and his liability wholly grew out of this voluntary undertaking, and was commensurate with the duty so assumed by him. The next inquiry is this: To what degree of care and exertion should he be held under these circumstances? Was he bound to convey her safely as a common carrier? Clearly not. Was he liable for

injuries resulting from what has often been termed ordinary negligence; that is, a failure to exercise the care of an ordinarily prudent person in the same situation? Or should he be held bound to exercise only a slight degree of care, and be liable only in case of reckless and wilful misconduct—what has been often characterized as gross negligence? There has been much controversy over the use of phrases expressing different degrees of negligence, as 'slight,' 'ordinary,' and 'gross,' but it seems to be largely a matter of terminology, and the later decisions, while for the most part rejecting the arbitrary distinctions, acknowledge the existence of conditions that increase or diminish the degree of care to be exercised. In *Raymond v. Portland R. Co.* (1905) 100 Me. 529, 3 L.R.A.(N.S.) 94, 62 Atl. 602, this court said: 'It will be here observed that the courts, in discussing the above propositions, have used the term "negligence" instead of the word "care," to express the measure of duty. But confusion has arisen from regarding "negligence" as a positive instead of a negative word. For this reason it is usual to express the duty owed in positive terms, by stating what constitutes due care, rather than in negative terms, by stating what constitutes negligence, which is the unintentional failure to perform a duty implied by law. "Negligence" is the opposite of "due care." Where due care is found, there is no negligence. If there is a want of due care then there is negligence. We are inclined to agree with the great weight of judicial opinion that the attempt to divide negligence, or its opposite, due care, into degrees, will often lead to confusion and uncertainty. It seems to us, therefore, that the measure of duty owed by persons in the discharge of their mutual relations would be better expressed by the use of the term "negligence," if one prefers a negative definition, or "due," "reasonable," or "ordinary care," always having reference to the circumstances and conditions with regard to which the terms are used.' On the other hand, the Massachusetts court, in its

latest discussions of the subject, closes an elaborate analysis of the authorities with the words: 'We are of opinion . . . that, in this commonwealth at any rate, degrees of negligence are known to the law.' *Massaletti v. Fitzroy* (1917) 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690. Notwithstanding these antagonistic statements as to definition, we doubt not that the two courts, from a given state of facts, would be apt to reach the same conclusion as to liability. The difference is more verbal than real. . . . The language is different in these two opinions, but the essential elements of the self-implied duty undoubtedly remain the same. Adopting, then, the modern method of statement, we think that the true rule of liability on the part of a voluntary undertaker should be this, that he be required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken." And, after examining the cases on the question before them, it was further said: "The foregoing decisions give expression in varying forms to substantially the same fundamental principle, and lead to the same essential inquiry, viz., Did the defendant exercise toward his invited guest that degree of care and diligence which would seem reasonable and proper from the character of the thing undertaken? The thing undertaken was the transportation of the guest in the defendant's automobile. The act itself involved some danger, because the instrumentality is commonly known to be a machine of tremendous power, high speed, and quick action. All these elements may be supposed to have been within the contemplation of the guest when she accepted the invitation. In a sense she may be said to have assumed risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man, who will not, by his own want of due care, increase their danger or subject the guest to a newly created danger.

In other words, we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest, and shall not unreasonably expose her to additional peril. This would seem to be a sane, sound, and workable rule—one consistent with established legal principles and just to both parties. It leaves the determination of the issue to the jury as a question of fact."

And in *Fitzjarrell v. Boyd* (1914) 123 Md? 497, 91 Atl. 547, it was contended that an invited guest could recover from the owner of an automobile only if the injury resulted from the gross or wilful negligence of the owner, but the court refused to adopt this view, and held that the owner owed his invited guest the duty to use ordinary care not to increase the guest's danger, or to create any new danger, and that a recovery might be had for an injury to the guest, caused by an attempt, against the latter's protest, to pass another vehicle, by reason of which the car skidded and overturned.

And in *Atwell v. Winkler* (1921) 196 App. Div. 946, 188 N. Y. Supp. 158, it was held that one having a friendly, gratuitous ride is entitled to the exercise of proper care by the driver of an automobile, and is entitled to recover from the latter for an injury resulting from a failure to use such care.

And in *Karavias v. Gallinocos* (1917) 143 L. T. Jo. (Eng.) 237, where the defendant had invited the plaintiff to ride in his motor car, and the latter had sustained an injury, it was held that the plaintiff was entitled to recover, the jury having found that the defendant had failed to exercise reasonable care, but that he was not guilty of gross negligence. The court, however, expressed some doubt upon the question involved, and stated that it was a fit question to be taken to the court of appeals, whether in such a case it was necessary for the plaintiff to prove gross negligence in order to recover.

2. *Minority rule.*

In some jurisdictions it is held that

gross negligence must be shown in order to hold the owner or operator of an automobile liable for an injury to an invited guest. (See, however, the remarks by the court in *Avery v. Thompson* (1918) 117 Me. 120, L.R.A. 1918D, 205, 103 Atl. 4, set out *supra*, I. a, 1, where an attempt is made partially, at least, to reconcile the decisions.)

Thus, in *Massaletti v. Fitzroy* (1917) 228 Mass. 487, L.R.A. 1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690, it was decided that one inviting another to ride gratuitously in his automobile is not, in the absence of gross negligence, liable for injury to him by the overturning of the car through the negligence of the chauffeur. The court in this case goes a great length to show that the different degrees of negligence still obtain in Massachusetts, and after reviewing the decisions it was said in conclusion: "Approaching the question apart from authority, we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that, to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury."

And in *Eppe v. Parrish* (1921) 26 Ga. App. 399, 106 S. E. 297, where it was alleged that the plaintiff was riding as an invited guest in an automobile owned and driven by the defendant, and that the latter carelessly and negligently, and because of inexperience and lack of skill in the handling of the automobile, lost control of it and drove it head on into a tree, by reason

of which the plaintiff was injured, it was held that no cause of action was alleged, as it was not alleged that the defendant was guilty of gross negligence. The court said: "It is our opinion that in order for an invited guest in an automobile to recover of the owner and driver of the car for an injury occasioned by the negligence of the driver, it must be pleaded that such negligence was gross negligence. See, in this connection, the reasoning set out in *Self v. Dunn* (1871) 42 Ga. 528, 5 Am. Rep. 544. See also, in this connection, Civil Code 1910, § 3473; Huddy, *Automobiles*, 5th ed. 890; *Massaletti v. Fitzroy* (Mass.) *supra*. We understand that it has been an open question in Georgia as to what degree of negligence is owed by the owner and driver of an automobile to an invited guest. We have reached the conclusion that, in order for the invited guest to recover from the owner and operator of an automobile for an injury received by reason of the negligent driving or handling of the machine, there must be facts pleaded that show gross neglect upon the part of the owner and driver of the machine. We have examined cases from other states, and in all cases where there seems to be a holding to the contrary the cases were dependent upon the particular facts there pleaded, such as the driving of the automobile at a reckless rate of speed over the protest of the invited guest, or the racing of the car with other vehicles over his protest."

And in *Cody v. Venzie* (1919) 263 Pa. 541, 107 Atl. 383, where an invited guest was injured while riding in the defendant's automobile, it was held that the different degrees of negligence are recognized in Pennsylvania, and that when a gratuitous carriage is for the sole benefit of the guest the law requires slight diligence, and holds the carrier responsible only for gross neglect, but an instruction that wanton and wilful negligence was necessary in order to sustain the action was held erroneous. The court said: "As carriers may be properly classified according to the relation which exists between them and their

passengers or guests, so the duty which carriers owe to their passengers or guests may likewise be classified. On grounds of public policy, a carrier for hire owes to his passengers a duty of the greatest care, for he is paid to carry safely. Gratuitous carriers are, however, in an entirely different category. In England and in this country, and in the courts which recognize and in those which do not recognize kinds or degrees of negligence, 'the measure of liability of one who undertakes to carry gratis is the same as that of one who undertakes to keep gratis' (*Massaletti v. Fitzroy* (1917) 228 Mass. 487, L.R.A. 1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690, and cases cited therein); and hence, from the well-settled law on the subject of bailments, we may ascertain and define the duty which the gratuitous carrier owes his guest. In *First Nat. Bank v. Graham* (1875) 79 Pa. 116, 21 Am. Rep. 49, and again in *Woodruff v. Painter* (1892) 150 Pa. 96, 16 L.R.A. 451, 30 Am. St. Rep. 786, 24 Atl. 621, 1 Am. Neg. Cas. 872, we quoted with approval from Story on Bailments: 'When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.' It follows, therefore, that when a gratuitous carriage is for the sole benefit of the guest the law requires slight diligence, and makes the carrier only responsible for gross neglect; if it is for the sole benefit of the carrier the law requires great diligence, and makes the carrier responsible for slight neglect; and where it is for the benefit or pleasure of both parties, as in the instant case, it requires ordinary diligence, and makes the carrier responsible for or-

dinary neglect. We believe, however, for the reasons hereinbefore suggested—though the matter is wholly foreign to the present case—that justice would be better administered, and incidentally a better citizenship result, if juries were specifically told what were the duties and liabilities of the parties, without laying stress on the words, 'great,' 'ordinary,' or 'slight,' at the same time telling them why the law is so. A dogmatic statement as to what the law is, without stating the reason why it is so, receives but little heed from one who does not understand why he should as a man, and should not as a jurymen, give effect to his natural sympathy for those in distress; and his antagonism is not lessened by also dogmatically informing him, without explanation, that it is his duty to take the law from the court, or, almost equally useless unless the reason is given, that sympathy should not be considered in deciding the case. Inasmuch as the reason and spirit of the law are the life of the law, the course suggested would also tend to a better appreciation of the law by the judges themselves, and would aid in producing that uniformity and certainty so much needed in these days, when attacks are made upon the law for no other reason than that it restrains unlawful conduct. It follows from what has been said that the court below was clearly right in treating the case as one different from that of a carrier for hire; but it erred when it held that plaintiffs could not recover except upon proof of 'wanton and wilful' negligence, which is different even from gross negligence (1 Thomp. Neg. § 20); and also when it decided there was not sufficient evidence on the real question in issue to submit it to the jury. We cannot say, as a matter of law, that defendant was exercising ordinary care when he turned his Ford car at right angles while running downhill at a speed of 25 or 30 miles an hour. Some men might believe that it would be safe so to do, while others, equally honest, would believe the contrary. Whether those who so believed would be reckless, or those

who did not would be overcautious, is a matter for the jury to determine. Whether the fact that the Ford automobile is a light vehicle affects the question; whether ordinary care did not require the defendant to run straight ahead, turn around, and afterwards proceed on the crossroad; whether he made the turn because of something said or done by plaintiffs; and whether his wife's suddenly calling attention to the signboard threw him off his guard—are also matters for the jury, and not for the court."

3. *Effect of statutes.*

In some jurisdictions the question under consideration is governed by statutory provisions.

Thus, in *Roy v. Kirn* (1919) 208 Mich. 571, 175 N. W. 475, a statute providing that the owner of an automobile shall be liable for an injury occasioned by the negligent operation of such motor vehicle, whether such negligence consists in violation of the provisions of the statutes of the state, or in the failure to observe such ordinary care in such operation as the rules of the common law require, was held applicable as between the driver of an automobile and an occupant thereof, and not merely between the driver or his principal, and the public.

And in *Jacobs v. Jacobs* (1917) 141 La. 272, L.R.A.1917F, 253, 74 So. 992, it was held that the driver of an automobile who has invited a guest to ride with him is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service, and that although an invited guest, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is nevertheless entitled to the benefit of the provision of the Civil Code that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury; and it was held that the responsibility of the driver of an automobile for the safety of his guest is not limited to his duty to abstain from acts of gross or wilful negligence, but demands that he avoid the ordinary negligence

or imprudence referred to in the Civil Code.

And in *Nichols v. Pacific Electric R. Co.* (1918) 178 Cal. 630, 174 Pac. 319, where the Code provided that a carrier of persons without reward must use ordinary care and diligence for their safety, it was held that the driver of an automobile was liable for an injury to his guest which was proximately caused by the driver's negligence in case the guest was not guilty of contributory negligence.

And in *McKeen v. Iverson* (1921) — N. D. —, 180 N. W. 805, a finding by the jury that the death of plaintiff's husband, who was riding as a guest with the defendant, was due to the reckless driving of the latter, was held supported by the evidence, and the court stated that by statute every person is responsible, not only for his wilful acts, but also for an injury occasioned to another by the want of ordinary care in the management of his property, except where the one injured by the want of ordinary care brought the injury upon himself.

4. *Respondent superior.*

In most of the cases the owner was personally driving the car, but the general rule has been held applicable where his employee was operating the car, and the question of respondent superior was expressly raised.

Thus, in *Lowell v. Williams* (1918) 183 App. Div. 701, 170 N. Y. Supp. 596, affirmed in (1920) 228 N. Y. 592, 127 N. E. 916, in holding that the fact that the plaintiff was riding as a gratuitous guest in defendant's automobile did not prevent the application of the rule of respondent superior as between the latter and her chauffeur operating the car, the court said: "It is said that the doctrine is not applicable, as between master and servant, in relation to a gratuitous guest invited by the master, as in the present case, to ride in a carriage or automobile purely as a courtesy or kindness. The question of appellant's liability, presented by the plaintiff, must be answered from the cold legal standpoint, unaffected by other con-

siderations. That the owner of a vehicle inviting another to ride with him as a favor nevertheless owes some duty to his guest cannot be disputed. He cannot wilfully injure him, or expose him to unnecessary or unusual dangers. Nor can it be disputed that in such case the owner would be responsible for his own personal negligence in caring for his guest. Such was the case of *Patnode v. Foote* (1912) 153 App. Div. 494, 138 N. Y. Supp. 221, where the guest recovered for damages sustained by reason of the reckless driving of the host. The contention that the owner is not responsible seems to be based upon the theory that, the plaintiff accepting defendant's invitation, and placing herself, as did appellant, in the care of the chauffeur, the latter was acting for her as much as for the appellant, and for the time being was the servant of both. The doctrine of *Massaletti v. Fitzroy* (1917) 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690, appears to turn upon degrees of negligence, whether slight, ordinary, or gross, which the court holds still exist in Massachusetts. In that case the court held that the defendant could not be held liable to an invited guest, save for gross negligence. We do not recognize these distinctions or degrees of negligence in this state, referring entirely to the degree of care required in the particular case presented—some relations demanding extraordinary, and others but ordinary, care. If a man fulfils the obligation of care placed upon him, he is not negligent; and if he fails, he may be adjudged negligent. It seems to us that, once it is conceded that the appellant owed to her guest the duty of reasonable care, she cannot escape liability for the negligence of her chauffeur on the facts in this case. It may be that the doctrine of respondeat superior does not apply to every case of a person riding gratuitously, upon a friendly invitation from the owner of a vehicle. There may be cases where the relation of the owner of the vehicle and the person so invited would partake of the nature of a

joint adventure, in which the chauffeur, the general servant of the owner, would, for the time being, become the servant of both, or where the doctrine of assumption of risk might bar recovery. In such cases the doctrine of respondeat superior might not apply. But on the evidence here there is nothing to justify a finding of joint adventure or assumption of risk. Indeed, there is some evidence from appellant's chauffeur tending to show active personal supervision of the operating of the automobile by the appellant. But the mere fact that the plaintiff was a guest, riding free, accepting a courtesy and kindness from appellant, does not prevent the application of the rule."

As to liability of parent for injury to child's guest by negligent operation of car, see annotation in 2 A.L.R. 900.

5. Application to facts.

In driving his automobile while accompanied by a guest the operator is required to use reasonable and ordinary care not to increase the danger to the guest by fast and reckless driving, and he is guilty of negligence rendering him liable to the guest, where he operates his machine in violation of the speed laws, and an injury results to the guest, who was not guilty of contributory negligence. *Spring v. McCabe* (1921) — Cal. App. —, 200 Pac. 41.

And in *Beard v. Klusmeier* (1914) 158 Ky. 153, 50 L.R.A.(N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342, it was held that one who invites another to ride in his automobile must exercise ordinary care not to increase the danger of such undertaking, or create a new danger, and is liable to his guest for injuries caused by such rapid driving of the car, against the protest of the guest, where it results in a collision with an obstruction in the street.

And in *McGeever v. O'Byrne* (1919) 203 Ala. 266, 82 So. 508, the court stated that the evidence showed without dispute that the defendant was guilty of gross negligence in driving his automobile, loaded with passen-

gers who were his invited guests, at a speed of approximately 40 miles an hour, over a crossing of two of the main thoroughfares of a city, and it also appeared, without the possibility of any conflicting evidence, that this reckless misconduct was the proximate cause of a collision with another car, which resulted in plaintiff's injury. The question at issue in this case was the assumption of risk, or contributory negligence on the part of the plaintiff.

In *Borys v. Christowsky* (1916) 9 Sask. L. R. 181, 27 D. L. R. 792, 34 West. L. R. 346, 10 West. Week. Rep. 291, a finding for the plaintiff was sustained where there was evidence that the defendant took his hands off the steering wheel of his automobile while driving at a high rate of speed, and that this caused an accident and injury to the plaintiff, the court stating that defendant's act constituted gross negligence and rendered him liable to the plaintiff for injuries received while riding with him, by his consent. It is not entirely clear in this case whether or not the plaintiff was an invited guest.

In *Masten v. Cousins* (1919) 216 Ill. App. 268, where one count alleged that at the defendant's invitation the plaintiff was riding with him in his automobile, and that defendant so negligently drove the car along the highway that the plaintiff was thrown therefrom and injured, it was held that the question of negligence was for the jury, there being testimony that the defendant, against the plaintiff's repeated protests, was driving the car along the highway at 40 miles an hour, and that it left the highway, collided with a tree, and threw the plaintiff out and injured her, and under the facts the doctrine of *res ipsa loquitur* was held applicable.

And in this case, under another count alleging that the defendant, while the plaintiff was an invited guest in his car, negligently drove and operated it at a speed greater than that prescribed by the Motor Vehicle Act, and that the car left the road, collided with a tree, and injured the plaintiff, it was held that a *prima*

facie case of negligence was made out by evidence supporting the allegations.

In *Pinckard v. Pease* (1921) 115 Wash. 282, 197 Pac. 49, where one was driving a doctor to his house, and was trying to reach the bedside of a patient in the shortest possible time, it was held that he was not guilty of negligence, it appearing that he drove his car without chains over a hard, straight piece of wet road at 30 or 35 miles an hour, and as he approached a curve he applied the brakes, but because of the slippery condition of the road the speed was not lessened as much as he anticipated, and the car skidded, resulting in an accident and injury to the doctor. The court said: "We are not dealing here with the degree of care that Hugh Pease would be held to in case he had injured someone on the highway. The degree of care which he was called upon to exercise should be measured by what a reasonable man would have done in the same circumstances. He had with him a medical man whose purpose was at one with his; that is, to reach the bedside of Mrs. Pease in the shortest possible time. They were engaged on the same errand. In this degree they were actuated by the same feeling, and to hold either one of them liable for negligence under these circumstances, the negligence must have been practically gross or wilful. The exercise of a fine and discriminating judgment in such circumstances is not practical or obligatory. The driver cannot be said to have done differently than a reasonably prudent man would have done under the same circumstances. The curve was not a specially sharp one, and the speed at which he was going was not excessive, in view of the imperative nature of the errand, and an attempt was made to slacken speed at the curve. So far as the appellant's responsibility to the respondent is concerned, we can find no act of negligence, and at most it was, as agreed to by the respondent, the result of a mistake of judgment."

In *Avery v. Thompson* (1918) 117

Me. 120, L.R.A.1918D, 205, 103 Atl. 4, Ann. Cas. 1918E, 1122, it was held that a finding was justified that the defendant did not use the reasonable care required toward his guest, where it appeared from the evidence that he was familiar with the premises, and knew that he was approaching a grade crossing, and that, although the whistle of an approaching train had been blown, and an automatic bell was ringing, and he saw the train approaching a short distance away, he attempted to drive over the crossing and was hit by the train.

And in **Tennessee C. R. Co. v. Vanhoy (1920) 143 Tenn. 312, 226 S. W. 225,** the question of negligence on the part of the driver of an automobile in which plaintiff's deceased was riding as a guest was held for the jury, where there was evidence that he was an experienced driver, familiar with the dangerous character of the railroad crossing where the accident occurred, and that he ran his car upon the track at a crossing, at which his vision was obstructed to the extent that he could not see an approaching train till within a few feet of the track, without stopping, looking, and listening.

In **Barnett v. Levy (1919) 213 Ill. App. 129,** where one, claiming to be a guest, sought recovery for an injury alleged to have been caused by the defendant's negligence in operating an automobile, the question of the defendant's negligence was held properly left to the jury, there being no dispute but that the accident was due to a blow-out of a tire, but no direct evidence as to what caused the blow-out, and the evidence as to the speed of the car being conflicting.

In **Jacobs v. Jacobs (1917) 141 La. 272, L.R.A.1917F, 253, 74 So. 992,** where the provision of the Civil Code that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury was held applicable in the case of an invited guest, it was held that the driver of an automobile was not liable for injuries sustained by his guest, where it appeared that the driver had inquired about the con-

dition of a thoroughfare before entering it, and was informed that it was all right; that the car, while traveling at a moderate rate of speed on a prominent street in a city, ran into an open canal extending across the thoroughfare without any guard rail, barrier, red light, or other warning of danger; that the glare of an electric light between the driver and the canal prevented his seeing the danger until it was too late to stop while going at an ordinary speed; that the driver had never traveled over that route before, and had no knowledge of the dangerous situation; and that the guest had traveled over the route several times, and was acquainted with the situation, but that he did not warn the driver or complain of the speed.

And in **Ortwein v. Droste (1921) 191 Ky. 17, 228 S. W. 1028,** where a recovery was sought for an injury alleged to have resulted to the plaintiff through the negligence of one who had invited her to ride, the evidence was held to support a verdict for the defendant, there being testimony that on a rainy morning he met the plaintiff and invited her to ride, and that when going down a hill the automobile got in the car track while being driven at a moderate speed, and commenced skidding, and turned completely around and ran into a pole.

And in **Connolly v. Ritter (1915) 43 Pa. Co. Ct. 527,** where the deceased was jolted out of a car, it was conceded that the deceased was riding with the defendant as a guest, and that the duty of the defendant was to exercise ordinary care only, and it was held that a nonsuit was properly granted, the testimony of the defendant, who was called as a witness by the plaintiff, showing that he was a competent chauffeur, that he used due care at and before the happening of the accident, and that he was familiar with the road conditions.

In **Powell v. Berry (1916) 145 Ga. 696, L.R.A.1917A, 306, 89 S. E. 753, 13 N. C. C. A. 858,** where recovery was sought against the driver of an automobile, for the death of one riding with him as a guest, it was held that the voluntary drunkenness of the

driver was no excuse for negligence, and that it did not relieve one from exercising the degree of care required of a sober man under the same circumstances, the court holding that ordinary care is not to be measured by what every prudent drunken man would do under like circumstances, but by what every prudent sober man would do under the circumstances.

In *Lochhead v. Jensen* (1912) 42 Utah, 99, 129 Pac. 347, which was an action against the owner of an automobile for an injury sustained by one whom he had invited to ride with him, an instruction that it was the duty of the defendant "to use due diligence in the driving of the same, so as to have it under reasonable control at all times to avoid injury; and it is the duty of the driver . . . to keep a reasonable lookout for any obstruction or dangers that may be in the road upon which he is driving, and if he fails to do so, and through his negligence causes injury to others, then he is liable therefor," was held prejudicial in the case, since it presented questions of negligence beyond those charged in the complaint; there was, however, no intimation that the court considered the general rules laid down unsound.

b. Guests at sufferance.

In some cases involving an injury to a guest at sufferance riding in an automobile, a distinction has been made between the degree of care required in the operation of a car in which one is riding as an invited guest, and one in which the guest was merely one at sufferance.

Thus, a distinction is made in *Lutvin v. Dopkus* (1920) 94 N. J. L. 64, 108 Atl. 862, between a case where the person injured was riding at the owner's invitation, and one where he had himself requested the owner to allow him to ride, the court there holding that where the plaintiffs requested the defendant to convey them in his automobile to a certain place, and their request was allowed, and an injury to them occurred, the plaintiffs were mere licensees, and that the defendant owed them only the duty of

20 A.L.R.—65.

refraining from acts wantonly or wilfully injurious. The court said: "The conceded fact is that they solicited the defendant, as brother members of the organization, for the use of his automobile to take them to the picnic grounds and return. The act of the defendant in acceding to their request possessed none of the elements of a contract, and involved no element of invitation which can bring it within the rule of law applicable to a passenger upon a railway train or a hired bus, or to those cases of express or implied invitation upon which reliance is placed in the appellant's brief, and which involve, as a consequence of the legal relationship thus established, the application of the rule of due care. The legal status of the plaintiffs here exhibited is that of licensees, to whom the only legal obligation imposed is that of refraining from the perpetration of acts wantonly or wilfully injurious."

And in *Crider v. Yolande Coal & Coke Co.* (1921) — Ala. —, 89 So. 285, where one was riding in a motor truck as an accommodation, and without charge, it was held that he was a mere licensee, and assumed all the risks of the carriage, except such as might result from wanton or intentional wrong, or a failure to exercise due care to avert injury after his danger became apparent. And in this case a count which merely alleged negligence, and contained no charge of wanton or intentional injury, was held insufficient to state a cause of action.

And the evidence in the *Crider Case* showing that the one riding on the motor truck for his accommodation was thrown therefrom when the car, which was traveling 20 or 25 miles an hour, in rounding a curve, turned 2 or 3 feet to the right to allow an automobile to pass, and hit a hole, it was held that the driver was not negligent in respect of the immediate and emergent duty presented by the actual conditions obtaining at the time of the accident.

But in *La Rose v. Shaughnessy Ice Co.* (1921) 197 App. Div. 821, 189 N. Y. Supp. 562, where a boy ten years

old climbed on a motor truck and was allowed by the driver to ride for some distance, a part of the time on the seat, it was held that he was not subject to the treatment of a mere trespasser, but that the driver owed him a higher duty than merely to refrain from doing him a wanton injury, and that the duty owed was not discharged, where, in a crowded section, the driver of the truck slowed down and told the boy to get off, and then, without giving him an opportunity to do so, increased the speed, by reason of which the boy was thrown under the truck and injured.

And in *Grabau v. Pudwill* (1920) 45 N. D. 423, 178 N. W. 124, where a boy fourteen years old got upon the running board of the automobile of a neighbor while it was in a town, and remained thereon with the knowledge and implied consent of the driver during a trip into the country, it was held that he was a guest by sufferance, and that the driver owed him the duty to exercise ordinary care for his safety. The court said: "The plaintiff received no invitation to ride upon the car. Yet the defendants knew all the time that he was upon the running board of the car. He was in plain sight. He was a guest of the defendants, by sufferance. It is true that he was a gratuitous guest, but this alone is not sufficient to relieve the defendants from at least the exercise of ordinary care for his safety. In fact, we can see but little difference between defendants' duty toward him as a gratuitous guest, after the acquired full knowledge of his presence on the running board, than if they had, in the first instance, invited him as their guest. The defendants, however, contend that, before there can be any liability on their part, it must appear that they were guilty of active negligence. We do not think that rule should be applicable to a case of this character. If there is any evidence of negligence, such that the minds of reasonable men might draw from it different conclusions, it should have been submitted to the jury. We think there was such evidence." And in this case

the question of the defendant's negligence was held for the jury, where the evidence tended to show that the boy was allowed to stand on the running board during a trip on a country road for a distance of 6 or 7 miles, and that the automobile, at a curve in the road, left the highway and collided with a pole, after running approximately 40 feet, and that the boy's leg was lacerated by contact with a wire fence.

c. Contributory negligence.

The question as to personal care of guest as affecting his right to recover against a third person is treated in the annotation in 18 A.L.R. 309; and, as affecting his liability to a third person, in the annotation in 18 A.L.R. 365.

It has been held that ordinarily a driver is intrusted with caring for the safety of the occupants of his car, and that unless the danger is obvious, or is known to the guest, he may rely upon the assumption that the driver will exercise proper care and caution; but that if an adult guest in an automobile driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and that a failure to do so is negligence. *Tennessee C. R. Co. v. Vanhoy* (1920) 143 Tenn. 312, 226 S. W. 225.

And in *McGeever v. O'Byrne* (1919) 203 Ala. 266, 82 So. 508, *infra*, it was held that a passenger riding with another in an automobile owes the duty to exercise due care, and may be guilty of such negligence as to bar a recovery against the driver of the car for an injury.

And in *Powell v. Berry* (1916) 145 Ga. 696, L.R.A.1917A, 306, 89 S. E. 753, 13 N. C. C. A. 858, where recovery was sought against the driver of an automobile for the death of a guest riding with him, it was held that one riding in a car driven by another, though a mere guest and having no control over the person driving the car, may be guilty of such negligence

as to preclude a recovery for an injury resulting from the negligent operation of the car, and it was held that if a driver, from intoxication, is in a condition which renders him incapable of operating it with proper skill, and this fact is known, or palpably apparent to one entering the car, this is a fact which may be proved for the consideration of the jury to throw light on the question whether such person exercised ordinary care in entering the car, or remaining in it, or in reference to his conduct while in it, and that it might also be shown as bearing on the guest's negligence that he took drinks of liquor with the driver of the car, and furnished some of the liquor, and upon the evidence in the case the question of contributory negligence was held for the jury.

And in *Tennessee C. R. Co. v. Vanhoy* (Tenn.) *supra*, where plaintiff's intestate was killed at a railroad crossing while riding as a guest in defendant's automobile, the question of contributory negligence was held for the jury, there being evidence showing that she had ridden in automobiles but a few times, and was unfamiliar with their operation, that she was on the rear seat so that her view was obstructed by those seated in front of her, and that she did not know they were approaching a railroad track, and had no reason to believe that the driver, who could see the approach of a train before she could, would not exercise due care.

In *Rappaport v. Roberts* (1918) — Mo. App. —, 203 S. W. 676, it was held that an invited guest was not guilty of contributory negligence as a matter of law, where there was evidence that he objected, within a block of the scene of the accident, to the speeding up of the car in order to race with a car which had just passed, although he sat still until the accident occurred, and did not insist that the car be stopped, or that he be allowed to get out. The court said: "He was riding as a guest, and was not in control of the automobile, and unless the danger was obviously very great, and the time elapsing after his claimed remonstrance was long enough for

plaintiff to be deemed to have acquiesced in the race, he ought not to be considered guilty of contributory negligence merely because he did not do more than remonstrate in the manner in which he says he did. He was riding at the invitation and by favor of the man who was driving, and the negligence of the latter cannot be imputed to him. This rule, of course, does not absolve plaintiff from exercising ordinary care for his own safety. He must exercise all the care which ordinary caution required of him under the circumstances. *Burton v. Pryor* (1917) — Mo. App. —, 198 S. W. 1120. But the time was too short to make plaintiff amenable to the charge of contributory negligence, on the ground that, after making objection, he remained quiescent in the car until the collision occurred. In other words, the question of contributory negligence in this case should depend solely upon whether plaintiff instigated the race by suggesting it to the driver, or whether it was against his advice and over his objection, and not upon the fact that he thereafter sat still and made no other, or more effective or insistent, objection, in the short space of time afforded."

In *Lochhead v. Jensen* (1912) 42 Utah, 99, 129 Pac. 347, it was held that the question of contributory negligence should not be left to the jury where there was no evidence to show that the guest did or said, or failed to do or say, anything, or that he had exercised any control or direction over the operation or handling of the machine, or that he in any way consented to or acquiesced in the manner of its operation.

In *Avery v. Thompson* (1918) 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4, it was held that an invited guest who was injured when the driver of an automobile drove in front of an approaching train was not guilty of contributory negligence, where she had neither direction nor control over the operation of the car, and was a stranger in the locality, and it appeared that she was the first to see the approaching train and gave time-

ly warning to the driver. The court said: "The plaintiff cannot be held guilty of contributory negligence, as is earnestly urged by the defendant. The negligence complained of was the act, not of the railroad company, but of the defendant in the management of the machine, and no act, or failure to act, on the part of the plaintiff, can be deemed the proximate cause of the accident. She had neither direction nor control of its operation. That was absolutely within his power. She neither consented to nor acquiesced in the particular management or mismanagement that caused the tragedy. She was a stranger in the locality and was sitting quietly on the back seat, in full and justifiable reliance upon his capacity as a competent driver. She was not inattentive, because she was apparently the first to perceive the train, and at once gave warning. He heard her exclamation. Had he heeded it and stopped, as he might have done, all would have been well. Instead, he hesitated, then put on speed and plunged rashly into obvious peril, into the very jaws of death. She was powerless to prevent it. Clearly, no blame can be attached to the plaintiff."

And in *McKeen v. Iverson* (1921) — N. D. —, 180 N. W. 805, it was held that a finding was justified that the deceased, who was killed while riding in the defendant's automobile, was not guilty of contributory negligence in getting into the defendant's car, although the defendant was more or less intoxicated, it appearing that several others also got into the car, and that the fact that the guests were somewhat intoxicated, and that the deceased participated in the use of liquor by the defendant, would not bar a recovery, it appearing that the accident resulted not from the defendant's incapacity to handle the car, but from his lack of care, and desire to do a stunt to frighten his guests.

And in *Masten v. Cousins* (1919) 216 Ill. App. 268, where the plaintiff sought to recover for an injury sustained while riding as a guest in the defendant's car, when it was being

driven by the latter 40 miles an hour and left the highway and collided with a tree, it was held that the plaintiff was not guilty of contributory negligence, as a matter of law, there being evidence that about ten minutes before the accident she had requested the defendant to slow down, and he had done so, and that just a moment before the injury she had again requested him to drive slower.

In *Crider v. Yolande Coal & Coke Co.* (1921) — Ala. —, 89 So. 285, where one who was riding on a motor truck for his accommodation stood upon the floor of the car, leaning with his back against the cab, or hood, over the driver's seat, with one arm resting on the top of it, and lost his balance and fell from the truck when it struck a hole, it was held, in an action by him against the owner of the truck, that he was guilty of contributory negligence barring a recovery.

In *Rappaport v. Roberts* (1918) — Mo. App. —, 203 S. W. 676, where the evidence was conflicting as to whether the guest requested the driver to speed up the car and pass another, an instruction which did not submit to the jury the question whether or not the plaintiff made such a request, but merely submitted the question whether directing the driver to speed up was negligence, was held erroneous. And in this case another instruction that before the plaintiff, a guest, could recover, it must appear that his injury was caused by the negligence of one or more of the defendants, "without any fault, neglect, or want of ordinary care and prudence on plaintiff's part," was held not properly to submit the question of contributory negligence, in view of the statement that the plaintiff must be without any fault or neglect, and a statement in the first part of the instruction that the plaintiff must exercise the "highest degree of care and caution."

In *McGeevor v. O'Byrne* (1919) 203 Ala. 266, 82 So. 508, an instruction was held erroneous and prejudicial, in an action by a guest to recover for an injury sustained while riding in

defendant's automobile, that plaintiff's mere knowledge that defendant was under the influence of intoxicants, and of his driving across city streets at an excessive speed, would, as a matter of law, bar any recovery for defendant's simple negligence, the court holding that this withdrew from the jury the essential factor of plaintiff's volition in continuing the journey up to the place of the collision, as to which the evidence was in dispute, and also withdrew the question of plaintiff's assumption of the risk of injury, which rested in debatable inference.

In the McGeevor Case it was alleged in one plea that the plaintiff was guilty of contributory negligence which proximately contributed to cause his injuries; that the defendant, for a distance of a quarter of a mile preceding the accident, had been driving along one of the main streets of the city, which intersected one of the thoroughfares constantly used by automobiles; that the plaintiff knew these facts; that defendant, while so doing, was driving at an excessive rate of speed—40 miles an hour; that plaintiff, with knowledge of these facts and the danger, negligently sat in the doorway of the automobile with his feet resting on the running board, which was obviously dangerous to a man of ordinary prudence, and that his injuries followed as a proximate cause of plaintiff's negligence, it was held that such plea was not subject to demurrer on the grounds that it failed to show facts which in law constituted contributory negligence or assumption of risk; that it failed to show that plaintiff had any control over the operation of the car or the one driving; that it showed that the defendant was in control of the machine, and did not show any facts which cast upon the plaintiff the duty of protesting or warning defendant against driving at the alleged high rate of speed. And another plea, averring the same facts as the one above, with an addition that the defendant at the time was under the influence of intoxicating liquor, and that plaintiff, with knowledge that

the car was driven as stated while the defendant was under the influence of intoxicants, knowingly and wilfully rode at the high rate of speed without protest or objection, and which alleged that an ordinarily prudent man would not have done so, was held not subject to any of the grounds of demurrer above stated. And another plea, alleging in substance that the plaintiff and defendant took several drinks of whisky and beer, and joined in a ride for mutual pleasure, and that plaintiff willingly and voluntarily rode in the car for about a quarter of a mile at a speed of approximately 40 miles an hour, knowing that defendant was under the influence of intoxicants, and that the car was loaded above its capacity, and its driving, therefore, dangerous, and that the streets driven over were constantly used by automobiles, was held not subject to a demurrer alleging that no facts were stated which showed that plaintiff's intoxication was a proximate cause of the injury.

II. Injury due to condition of car.

It will be observed that in the reported case (*O'SHEA v. LAVOY*, ante, 1008) it was decided that an owner of an automobile is not liable to his father-in-law, riding with him as an invited guest, for an injury sustained when the machine turned over because of a defective spring breaking, although the car was a secondhand one, and the spring had been repaired with old parts, the court holding that the situation was analogous to a case of one invited to dine; that the legal relation was that of licensor and licensee; that in such cases the guest accepts the premises as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence; and that the broken spring in question did not constitute a trap. The court discusses cases dealing with the question of liability of an owner of an automobile for damages resulting to an invited guest by reason of the negligent management of the car, and points out that the apparent conflict may be accounted for on the ground

that in some states different degrees of care are recognized, while in others there is but one degree of care; it refrains, however, from deciding the

degree of negligence in the management of the car which will render the owner of an automobile liable for damages to an invited guest.

J. T. W.

STATE OF WEST VIRGINIA EX REL. S. P. SMITH

v.

COUNTY COURT OF KANAWHA COUNTY et al.

West Virginia Supreme Court of Appeals — March 31, 1916.

(78 W. Va. 168, 88 S. E. 662.)

Political parties — rules — enforcement by courts.

1. In the absence of a statute conferring the jurisdiction, courts will not undertake to settle and determine substantial controversies between rival political committees, or factions of such a committee, the right in which is dependent upon party rules, usages, and customs, or grant relief to either of such committees or factions, as the representative of the party, in those cases in which the party is entitled to relief, but will refuse the relief asked until the controversy is settled and determined by some supervising board, committee, or other tribunal of the party.

[See note on this question beginning on page 1035.]

Mandamus — what will support.

2. Clear legal right of the relator in mandamus to have performance of the act he seeks to coerce performance of, and plain duty to perform it on the part of the respondent, are essential to the award of the writ.

[See 18 R. C. L. 128; 3 R. C. L. Supp. 787.]

Evidence — judicial notice — rules of political parties.

3. Courts judicially know political parties have rules and regulations for their government and tribunals for the prescription, interpretation, and administration thereof, and that the rights of members and inferior or subordinate bodies of such organizations are determinable by such rules and regulations within the parties and by their tribunals.

[See 9 R. C. L. 1069; 15 R. C. L. 1092, 1126.]

Courts — recognition of rules of societies.

4. In the absence of fraud or violation of positive law, courts will recognize and vindicate rights accorded by

the decisions of such tribunals, in those cases in which a statute makes it their duty to recognize and enforce them.

Political parties — factions — recognition.

5. Neither of two factions of a political committee, dividing on substantial controversies governed by party usages, customs, and rules, can be recognized by the courts as having prima facie right.

[See 9 R. C. L. 1068.]

— remonstrance by faction.

6. A remonstrance or protest by one faction of a political committee made to an officer or court acting in a ministerial capacity, against performance of an act demanded on behalf of the party by another faction claiming to represent it, and based upon allegations of fact raising questions as to the right of such factions to represent the party, determinable by its supervising committees and governing bodies, justifies the refusal of the officer or court to perform the act demanded.

PETITION by relator for a writ of mandamus to compel respondents to appoint certain persons whose names he had certified for appointment to the position of registrars of voters of Kanawha county. *Writ refused.*

The facts are stated in the opinion of the court.

Messrs. Avis & Donnally, for petitioner:

In the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties, in matters involving party government and discipline.

Marcum v. Ballot Comrs. 42 W. Va. 263, 86 L.R.A. 296, 26 S. E. 281; Kump v. McDonald, 64 W. Va. 325, 61 S. E. 908; Boggess v. Buxton, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; Moody v. Trimble, 109 Ky. 139, 50 L.R.A. 810, 58 S. W. 504; Davis v. Hambrick, 109 Ky. 276, 51 L.R.A. 671, 58 S. W. 779; Phelps v. Piper, 48 Neb. 724, 33 L.R.A. 53, 67 N. W. 755; Kearns v. Holley, 188 Pa. 116, 42 L.R.A. 235, 68 Am. St. Rep. 852, 41 Atl. 273.

Members of political committees are not public officers.

Usilton v. Bramble, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743; Atty. Gen. v. Drohan, 169 Mass. 534, 61 Am. St. Rep. 301, 48 N. E. 279.

Messrs. McClintic, Mathews, & Campbell also for petitioner.

Messrs. Frank Lively and W. E. R. Byrne for respondents.

Poffenbarger, J., delivered the opinion of the court:

The relator, chairman of the Republican county executive committee of Kanawha county, seeks a peremptory writ of mandamus commanding the county court of said county to appoint, as registrars of voters therein, certain persons whose names he had certified to that body for appointment to said positions, upon averment of his right to have them appointed under the provisions of § 98a-1 of chapter 3 of the Code (§ 121), as amended by chapter 28 of the Acts of 1915. From the return of the alternative writ, it appears that his presentation of the list of persons designated for appointment was met by a protest against their appointment, on the ground of alleged irregularity and invalidity of their selection. One member of the court was willing to appoint them,

another declined, and the third was absent from the court and the state, on account of illness.

The grounds of the protest were:

(1) That S. P. Smith, the relator, was not, and never had been, chairman of said committee; and (2) that the persons whose names were presented by him had not been by it selected or designated for appointment. These denials of right were based upon several claims or contentions. As elected by the Republican voters of the county in a primary election held June 4, 1912, the committee consisted of ten members, one from each magisterial district. On some date in the year 1914, one of them, W. F. Shirkey, elected for Malden district, resigned, and the remaining members elected John H. Hawes to fill the vacancy. The relator was not one of the ten. On April 4, 1914, a resolution was adopted by the committee, electing him a member thereof from the county at large, and making him its chairman with the right to vote in case of a tie. Since that date, he has acted as chairman, but the return denies authority in the committee to enlarge its membership. On March 4, 1916, he, and five members whose titles to the positions they claim are admitted, met pursuant to a notice of a meeting of the committee, and, on the assumption of a vacancy in the position to which S. A. Fogarty had been chosen for Elk district, elected W. S. McAfee to that position and thereafter recognized him as a member. Claiming, then, to have six of the ten original members and seven of the eleven members composing the committee, as they contend, they adopted a resolution purporting to confer upon Chairman Smith power to name, on behalf of the committee, persons for appointment as registrars. Fogarty, still claiming his membership, and four others, did not attend the meeting. They denied that Fogarty's

place was vacant, that Smith was a member, and that a quorum was present when McAfee was admitted and the resolution adopted, Fogarty's change of residence to a point in another state is the ground of denial of his membership. McAfee was elected to his place on the assumption that his change of residence had ipso facto vacated it. On the other hand it is claimed he is residing out of the state only temporarily; that temporary absence was not cause for his removal; and that, if it were, it did not of itself create a vacancy, so as to reduce the membership of the committee to nine, of which five might have been a quorum. On the issues of fact entering into the controversy considerable evidence was submitted, and numerous political precedents were invoked in support of the regularity and validity of the committee procedure relied upon by the relator. For both him and the respondent, it is claimed § 27 of chapter 26 of the Acts of 1915 vests jurisdiction in the courts to review the acts of all political committees.

Clear legal right in the relator to have the act he seeks to coerce performed, and plain duty to perform it on the part of the respondent, are indispensable bases of an application for the writ of mandamus. Doubt as to his right or the duty of the officer is fatal to him. *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927, 2 Ann. Cas. 74; *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265; *Marcum v. Ballot Comrs.* 42 W. Va. 263, 273, 36 L.R.A. 296, 26 S. E. 281.

The right to the relief sought here depends upon the solution of the numerous questions raised by the protest. Seven members out of eleven, a quorum with one to spare, composed the meeting at which the resolution was adopted purporting to give the chairman authority to name the registrars, if the elected committee had power to enlarge their number by election of a mem-

ber at large, and Fogarty's place had become vacant and had been properly filled. But, if the committee had no power to add to its membership, there could have been only ten members in all; and, if Fogarty had not vacated his place, less than a quorum constituted the meeting at which the resolution was passed. Whether Smith, though a member, having right to vote only in case of a tie, could be counted to make a quorum, and whether Fogarty's change of residence disqualified him, or, disqualifying him, ipso facto vacated his place, are questions. All of these are determinable by rules, regulations, and precedents of the political party of which the committee is a tribunal, and they are made, interpreted, and applied by the party committees and conventions. They are not recognized or treated as constituting any part of the public law administered by the courts, unless made so by statute. Courts judicially know political parties, like other voluntary associations, have rules and regulations for their government and tribunals for the prescription, interpretation, and administration thereof, and that the rights of members and inferior or subordinate bodies of such organizations are determinable by the rules and regulations within the parties and through their tribunals. When political rights are so settled and determined, the courts recognize them and vindicate them. *Boggess v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *Republican Executive Committee v. County Ct.* 68 W. Va. 113, 69 S. E. 522; *Kump v. McDonald*, 64 W. Va. 323, 325, 61 S. E. 909.

But if an inferior committee is divided into opposing factions, and the demand of one of them upon a public officer or tribunal for the performance of a statutory duty toward the party such faction professes to represent meets with

Evidence—
judicial notice—
rules of political
parties.

Courts—
recognition of
rules of
societies.

Mandamus—
what will
support.

resistance by way of a protest or remonstrance based upon facts raising issues determinable by party usages and customs, the right between them must be regarded as uncertain and undetermined. The remonstrance brings to the surface an issue for the determination of which

~~Political parties~~
~~—rules—enforce—~~
~~ment by courts.~~

public law known to the courts makes no provision. Of

course, party usages and customs are susceptible of proof; but courts cannot interpret and apply them without invasion of the province of the party tribunals. Political parties, like fraternal and religious societies and corporations of all kinds, administer, as well as make, their rules and regulations, within the limitations prescribed by law. To assume jurisdiction or exercise power within this sphere of social influence and dominion would be a judicial invasion of right, and an unnecessary one. The right of a voluntary association to interpret and administer its own rules and regulations is as sacred as is the right to make them, and there is no presumption against just and correct action or conduct on the part of its supervising or appellate authorities and tribunals. On the contrary, the presumption is in favor of it. In connecting himself with the organization, a member subjects himself as fully and completely to the power of administration, within legal limits, as to the power of legislation or prescription. To say courts can make rules and regulations for such associations would be absurd and ridiculous. To say they may interpret and apply them, in view of the powers reserved to, and exercised by, the governing bodies of the association, would be as plainly subversive of contractual right.

Nor is it the province or function of courts to do unnecessary things. They afford remedies only to those who are otherwise remediless. They afford redress to the injured, not on considerations of mere convenience, but on the ground of necessity. Therefore, a member of a

society of any kind, and particularly of a voluntary, unincorporated one, has no right to judicial redress or a judicial hearing of a grievance, until he shall have exhausted the remedies afforded him by the society itself. *Deveny v. Hart Coal Co.* 63 W. Va. 650, 60 S. E. 789; *Boyce v. Montauk Gas Coal Co.* 37 W. Va. 73, 16 S. E. 501.

"Where the society makes provision for the settlement of controversies between it and its members, or between its members, concerning its government, its dissolution, or its property, courts will refuse to take cognizance of such controversies until those who have grievances have, in the first instance, resorted to and exhausted the remedies provided by the society; and it is not necessary, in such a case, that the language of such provisions shall make it imperative on the members to exhaust these remedies, but it is sufficient that the society has afforded a means for a settlement within the society itself. The mere provision of such a means abridges the right to appeal to the courts, until the prescribed means have been pursued. This rule also prevails in matters of discipline, in the expulsion and suspension of members, and arises from the fact that in such cases the controversy springs from the contract of membership, and is a matter of internal regulation. With such matters courts are loath to deal and will take jurisdiction only when compelled to do so. But it has been held that, where a member appears in the relation of a creditor of the society, he is not bound to present his claim to the tribunals of the society unless such provisions stipulate expressly that he must first submit his claim to the tribunals of the society, before seeking to enforce it in the courts of the land." *Niblack, Ben. Soc. & Acci. Ins.* p. 215, § 111.

In *Boggess v. Buxton*, and *Republican Executive Committee v. County Ct.*, cited, this principle was applied to political organizations;

and in *Marcum v. Ballot Comrs.* 42 W. Va. 263, 36 L.R.A. 296, 26 S. E. 281, the court declined to recognize either of two contesting candidates as having been regularly nominated, and based the decision partly on that ground, Judge Brannon saying: "Two clashing conventions may be so circumstanced as to warrant the conclusion that neither is authorized to speak for the party. We hold that neither of these conventions was so authorized. The law is that the writ of mandamus 'will not lie unless the relator shows a clear legal right to have the thing done which he asks for. If the right be doubtful, the writ will be refused.' "

In view of the contentions of the opposing parties, based upon party usage, custom, rules, and regulations, and general parliamentary law, the court declined to say either had prima facie right. Like conclusions are recorded in other well-considered cases. *Stephenson v. Election Comrs.* 118 Mich. 396, 42 L.R.A. 214, 74 Am. St. Rep. 402, 76 N. W. 914; *Shields v. Jacob*, 88 Mich. 164, 13 L.R.A. 760, 50 N. W. 105; *People ex rel. Eaton v. District Ct.* 18 Colo. 26, 31 Pac. 339; *Phelps v. Piper*, 48 Neb. 724, 33 L.R.A. 53, 67 N. W. 755; *State ex rel. Gillis v. Johnson*, 18 Mont. 556, 46 Pac. 440. In the later decisions of this court, here referred to, and those of several other jurisdictions, the analogy subsisting between political organizations and other voluntary associations has been recognized; and, that having been done, the rights of contending factions respecting remedies in the courts depend upon the principles upon which judicial relief relating to such associations and rights therein is granted. *State ex rel. Hatch v. Smart*, 24 Mont. 413, 62 Pac. 591; *State ex rel. Gilchrist v. Weston*, 27 Mont. 185, 70 Pac. 519, 1134; *State ex rel. Buttz v. Liudahl*, 11 N. D. 320, 91 N. W. 950; *Moody v. Trimble*, 109 Ky. 139, 50 L.R.A. 810, 58 S. W. 504.

As has been observed, there can be no well-grounded distinction between the prevailing and the losing

faction respecting the application for judicial relief. To recognize the former and entertain it, over the objection of the latter, would necessarily ^{—factions—} ~~recognition.~~ imply judicial adop-

tion of the procedure and conclusion upon which the advantage obtained rests. To do that either brushes aside and ignores the contentions underlying the remonstrance, as being immaterial, or compels the court to take cognizance of the disputes and determine them, under a system of rules, regulations, and party law the interpretation and application of which properly belong to the party tribunals.

Of course, there are limitations upon the powers of the governing bodies of voluntary associations. When property rights of members are involved, the courts will lend assistance for their protection, but, ordinarily, not until the available remedies within the organization have been exhausted. Fraud vitiates everything, and becomes a ground of relief against almost every sort of transaction. Relief from oppressive and unreasonable action will be given. Mere frivolous, unsubstantial, and unmeritorious grounds of resistance would constitute no obstacle to judicial relief.

The statute invoked by the relator does not govern the rights involved here, or empower the courts to determine them. Section 3 of the act provides that "the various executive committees and officers thereof, now in existence, shall exercise the powers and possess the duties herein prescribed until their successors are chosen in accordance with this act."

It prescribes no rule or standard by which the courts can determine who constitute such committees—the very question on which this controversy hinges. When members of committees become elective under the statute prescribing qualifications, there will be such a standard. Eligibility will then depend upon conditions legally prescribed. Now it depends largely upon party usages and customs, and they are

judicially known not to be uniform in any sense. Precedents set by a state committee as to its own organization, membership, or procedure may not obtain in a county or other inferior committee. The practice in one county often differs widely from that in another. What was party law a few years ago may not be now. No legal rule nor any settled party practice enables any court to say whether an elected county committee may increase its membership; whether a member added, made chairman, and given a casting vote, may be counted to make a quorum; whether a member must reside in the district for which he was elected, or in the county or state; or whether his absence, temporary or permanent, in the sense of domicil, vacates his office or is ground for removal. When these memberships become statutory, as they will under the act, all such questions can be determined by the statute.

Section 27 of the act provides as follows: "The state executive committee of each party may make such rules for the government of such party, not inconsistent with law, as may be deemed expedient; and it may also revoke, or alter, or amend,

in any manner not inconsistent with law, any present or future rules of such party; and all acts of such state or other committees may be reviewable by the courts."

Having provided for statutory committees for the state and all subdivisions thereof, and made the state committee the supreme legislative tribunal of the party, within legal limitations, the legislature has now conferred upon the courts jurisdiction to test the validity of the acts of committees, by the law and the rules provided by the state committee "for the government of such party." But this power does not extend to the ascertainment and determination of the constitution or composition of the old committees temporarily continued in power and authority. How far the jurisdiction of the courts will extend under the statute it is not necessary now to inquire, but it does not reach this question. It is power only to review the acts of committees; not to say who constitute or compose them, under general party law, operative until displaced by the statute.

Upon these principles and conclusions, the peremptory writ of mandamus prayed for is refused.

ANNOTATION.

Determination of controversies within political party.

- I. Scope and introduction, 1035.
- II. Rules in general:
 - a. In absence of controlling legislation or clear legal right, 1036.
 - b. Where statutory provision or clear legal right is involved, 1041.
- III. Necessity for and conclusiveness of decision by party or other special tribunal, 1046.
- IV. Party regularity as affecting the decisions in the courts, 1058.

I. Scope and introduction.

Under our form of party government it is clear that certain questions are of a political nature, which the courts, in the absence of statute, should not undertake to decide, but

should leave for the determination of the proper party tribunals. On the other hand, under some circumstances, it may be necessary for the courts to assume jurisdiction to determine factional disputes within a party. This may be true in order to render effective our system of nominations and elections. Legal, as distinguished from political, rights, however, must be involved in order for the courts to entertain jurisdiction. And the question may be a very difficult one in any particular case, as to whether such rights are involved. This question has been, in recent years, somewhat simplified by the enactment of laws governing nominations and elections.

And of course the courts have jurisdiction to determine whether these laws have been violated, even though the contesting parties are rival factions within a political party. There remain, however, various questions, such as the regularity of party organization, party policies and discipline, or the composition of committees, which the courts will not determine, but will leave for settlement to the party itself through its duly constituted authorities.

The present annotation deals only with the question as to when, or under what circumstances, the courts will assume jurisdiction of matters arising out of controversies between factions of a political party, and purports, in general, to include only cases which discuss or pass upon this question. Cases, therefore, which pass upon particular questions on the merits, without any discussion of the jurisdiction of the court, are not included. As representing classes of cases not included, see *State ex rel. Yates v. Crittenden* (1901) 164 Mo. 237, 64 S. W. 162, involving the right of a state central committee of a party to set aside nominations of a county convention; *Cummings v. Bailey* (1907) 53 Misc. 142, 104 N. Y. Supp. 283, affirmed in (1907) 120 App. Div. 892, 105 N. Y. Supp. 1112; and *People ex rel. Coffey v. Democratic General Committee* (1900) 164 N. Y. 335, 51 L.R.A. 674, 58 N. E. 124, involving the question of the power of political committees to expel members. See also *Shields v. Jacob* (1891) 88 Mich. 164, 13 L.R.A. 760, 50 N. W. 105, where the court granted a writ of mandamus to compel election commissioners to print a certain ticket on the official ballot, holding that such commissioners could not determine, in preparing the ballots, the regularity of either of the tickets nominated by the separate divisions of a split convention, but must print thereon the names of both sets of candidates, and give for each set the party name as certified by the committee presenting it, without addition or distinctive designation.

Cases are not generally included which merely construe or apply pri-

mary election or other laws. It is intended to include such cases only in so far as they discuss the jurisdiction of the courts over political questions or factional controversies, or serve to show the relation of this class of cases to the general subject.

The annotation deals only with the question as to the power of the courts generally, with respect to the subject-matter under discussion, and not as to the propriety of the particular form of action or proceeding. It excludes, for instance, such questions as that presented in *Atty. Gen. v. Drohan* (1897) 169 Mass. 534, 61 Am. St. Rep. 301, 48 N. E. 279, as to whether membership in a committee of a political party is a public office so that the title thereto can be tried in quo warranto proceedings.

There are many cases to the effect that equity will not protect or enforce merely political rights. Cases to this effect are not included herein, for the reason that they proceed on grounds distinctive to courts of equity as distinguished from courts of law. Thus, such cases as *Kearns v. Howley* (1898) 188 Pa. 116, 42 L.R.A. 235, 68 Am. St. Rep. 852, 41 Atl. 273, denying an injunction against the adding of names to a political committee, or the striking of names therefrom, where no property rights existed, are excluded.

In this annotation it is not feasible to cover concrete sets of facts, and furnish an answer as to what should be the remedy under particular circumstances. The answer to such an inquiry depends largely upon statutory provisions in the various states. And it would be confusing, and lead away from the main purpose of the annotation, to attempt to solve questions based on special sets of facts. The circumstances are largely indicated, however, in setting out the cases, so that the value of the case on the particular subject-matter is, in general, shown.

II. Rules in general.

a. In absence of controlling legislation or clear legal right.

The courts have been reluctant to assume jurisdiction of questions of a

political nature. The rule appears to be that in factional controversies within a political party, where there is no controlling statute or clear legal right involved, the court will not assume jurisdiction, but will leave the matter for determination by the proper tribunals of the party itself, or by the electors at the polls. Supporting this proposition are the following authorities (see also III. *infra*):

Arkansas. — *Ferguson v. Montgomery* (1921) 148 Ark. 83, 229 S. W. 80.

Colorado. — *People ex rel. Eaton v. District Ct.* (1892) 18 Colo. 26, 31 Pac. 339; *People ex rel. Hodges v. McGaffey* (1896) 23 Colo. 156, 46 Pac. 930. See also Colorado cases controlled by statute, under II. b, *infra*.

Idaho.—*Walling v. Lansdon* (1908) 15 Idaho, 282, 97 Pac. 396.

Kansas.—*Sims v. Daniels* (1896) 57 Kan. 552, 85 L.R.A. 146, 46 Pac. 952; *Allen v. Burrow* (1904) 69 Kan. 817, 77 Pac. 555, 2 Ann. Cas. 539. See also *State ex rel. Dawson v. Branine* (1912) 87 Kan. 795, 125 Pac. 343.

Kentucky. — *Davis v. Hambrick* (1900) 109 Ky. 276, 51 L.R.A. 671, 58 S. W. 779.

Louisiana. — *State ex rel. Burke v. Foster* (1904) 111 La. 939, 36 So. 32; *Roussel v. Dornier* (1911) 129 La. 930, 41 L.R.A.(N.S.) 557, 57 So. 272.

Michigan. — *Stephenson v. Election Comrs.* (1898) 118 Mich. 396, 42 L.R.A. 214, 74 Am. St. Rep. 402, 76 N. W. 914; *Potter v. Deuel* (1907) 149 Mich. 393, 112 N. W. 1071.

Montana. — *State ex rel. Gillis v. Johnson* (1896) 18 Mont. 556, 46 Pac. 440.

Nebraska.—*Phelps v. Piper* (1896) 48 Neb. 724, 33 L.R.A. 53, 67 N. W. 755; *State ex rel. Dahlman v. Piper* (1896) 50 Neb. 25, 69 N. W. 378. See also *State ex rel. Sturdevant v. Allen* (1895) 43 Neb. 651, 62 N. W. 35.

New Hampshire. — *Atty. Gen. v. Barry* (1907) 74 N. H. 353, 68 Atl. 192.

New York. — *Re Fairchild* (1897) 151 N. Y. 359, 45 N. E. 943; *People ex rel. Simpson v. Police Comrs.* (1894) 10 Misc. 98, 31 N. Y. Supp. 112.

North Dakota.—*State ex rel. Fosser*

v. Lavik (1900) 9 N. D. 461, 83 N. W. 914.

Ohio.—See *Link v. Karb* (1914) 89 Ohio St. 326, 104 N. E. 632, and *State ex rel. Gongwer v. Graves* (1914) 90 Ohio St. 311, 107 N. E. 1018.

Pennsylvania.—*Re Beck* (1898) 7 Pa. Dist. R. 629.

South Dakota. — *Morrow v. Wipf* (1908) 22 S. D. 146, 115 N. W. 1121.

West Virginia.—*Bogges v. Buxton* (1910) 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *STATE EX REL. SMITH v. KANAWHA COUNTY* (reported herewith) ante, 1030. See also *Kump v. McDonald* (1908) 64 W. Va. 325, 61 S. E. 908.

In the absence of a statute conferring jurisdiction, courts will not undertake to settle and determine substantial controversies between rival political committees, or factions of such a committee, the right in which is dependent upon party rules, usages, and customs, or grant relief to either of such committees or factions as the representative of the party, in those cases in which the party is entitled to relief, but will refuse the relief asked until the controversy is settled and determined by some supervising board, committee, or other tribunal of the party. *STATE EX REL. SMITH v. KANAWHA COUNTY* (reported herewith) ante, 1030. After the decision in this case, the state executive committee of the party determined the questions involved in favor of the contention of the relator in that action, basing its decision on the customs and usages of the party. Thereafter the relator renewed his application to the county court to appoint the registrars recommended by him, and the court refused to do so. It was held on these facts, in *State ex rel. Smith v. County Ct.* (1916) 78 W. Va. 259, 88 S. E. 793, that the relator had a clear legal right which could be enforced by mandamus.

And in *Ferguson v. Montgomery* (Ark.) *supra*, the court said: "Except to the extent that jurisdiction is conferred by statute, or that the subject has been regulated by statute, the courts have no power to interfere with the judgments of the constituted

authorities of established political parties in matters involving party government and discipline, or to determine disputes within a political party as to the regularity of the election of its executive officers."

Party differences, it was said in *People ex rel. Simpson v. Police Comrs.* (N. Y.) *supra*, like family or religious disputes, should be settled within the organization, or by its dominating authority. And in this case, where a nomination was made by a convention regularly called, and the organization of the party had not repudiated this nomination, or ordered a new election, or in any authoritative manner recognized the nomination of another for the same office by a convention subsequently assembled by the deposed secretary of the first convention, it was held that the first nominee was entitled to a place on the ballot, and that mandamus should be issued to compel the printing of his name thereon.

Courts will not undertake to control the internal affairs of a political party, unless the same encroach upon, violate, or contravene the law. *Walling v. Lansdon* (Idaho) *supra*. The court said: "We are not inclined to inquire, as between two contending political factions of a party, whether or not the leaders of either faction combined and conspired together for the purpose of securing control of the political organization, except in so far as the acts of such parties, and the legality of the result accomplished by them, may be governed by the laws of the state. . . . As a rule, policies adopted by political parties are the result of the combined efforts and judgment of a few of the leaders of such political organization, and whatever evils may result from such combinations must be corrected within the party itself, as the courts will not undertake to regulate or control the internal affairs of a political organization. When, however, in carrying out the purposes of such combination, or controlling the affairs of a political party, the actors therein encroach upon, violate, or contravene the laws of the state, then and at such time the

courts will, in a proper proceeding, arrest such action, and enforce the laws of the state."

"It is much more proper," said the court in *Re Fairchild* (N. Y.) *supra*, "that questions which relate to the regularity of conventions, to the nomination of candidates, and the constitution of committees should be determined by the regularly constituted party authorities, than to have every question relating to a caucus, convention, or nomination determined by the courts, and thus, in effect, compel them to make party nominations and regulate the details of party procedure, instead of having them controlled by party authorities."

In the absence of statutory provisions on the subject, where there is a dispute as to who are the regularly elected members of the local political committee, the question must be decided by some tribunal within the party. *Atty. Gen. v. Barry* (1907) 74 N. H. 353, 68 Atl. 192.

So, in *Bogges v. Buxton* (1910) 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289, it was said that, in the absence of statute, courts do not exercise jurisdiction to interfere with or control matters purely political, pertaining to the management and proceedings of a political party.

And the court laid down the rule in *State ex rel. Gongwer v. Graves* (1914) 90 Ohio St. 311, 107 N. E. 1018, that "elections belong to the political branch of the government, and not to the judicial, and are not per se the subjects of judicial cognizance, but are matters for political regulation."

And in *Link v. Karb* (1914) 89 Ohio St. 326, 104 N. E. 632, it is said: "All the authorities seem to be in accord upon the proposition that elections belong to the political branch of the government, and are beyond the control of the judicial power, and that courts have no inherent power to try contested elections, and have never exercised such power, except where it has been conferred by express enactment or necessary implication." This case, however, and others cited therein relating to election contests, belong to a class not strictly within the

scope of the annotation, which deals with cases involving factional party contests, rather than with those involving the rights of individuals.

In *State ex rel. Gillis v. Johnson* (1896) 18 Mont. 556, 46 Pac. 440, where two factions of a party had filed separate county tickets under different designations, the court held that, as no confusion would result from the presence of both upon the ballot, it would not interfere, but would leave the contention for the electors to decide. The correctness of the decision in this case was questioned, however, in *State ex rel. Lannen v. Arms* (1900) 24 Mont. 447, 63 Pac. 401,

In *Stephenson v. Election Comrs.* (1898) 118 Mich. 396, 42 L.R.A. 214, 74 Am. St. Rep. 402, 76 N. W. 914, where, in a congressional convention which was regularly called, a disagreement arose as to contesting delegations, which resulted in a division and the nomination of two tickets, it was held that the court would not undertake to determine which was the legally constituted convention, but that both tickets were entitled to a place on the official ballot, and mandamus was awarded to accomplish this purpose. The court said: "It is a right of the voter to repudiate wrong and corruption and fraud, if they exist, and to prevent, or unearth and defeat, corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents the only pure republicanism of the district, and is the lawful nominee of the true party. The electors must decide between them. In such case we know of no way of determining which of these names ought, of right, to go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the merits of the question. The same may be true of the boards. They may not know what they should do, and we

cannot tell them, further than to say that, under the admitted facts and the precedents, both are entitled to places upon the ballot." And it was further said: "Among the dangers that courts should guard against is the unwarranted assumption of power under the false impression that they, and they only, can right all of the wrongs which arise from the conduct of public affairs. They have only such powers and authority as the Constitution and the laws confer upon them. We have seen that several courts have held that not until the intention of the legislature is clearly manifested will they undertake to control political action."

The general doctrine that the courts will proceed, in determining political questions, only so far as the statute allows, and that, in the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of committees and tribunals of established parties, in matters involving party government and discipline, is approved in *Kump v. McDonald* (1908) 64 W. Va. 325, 61 S. E. 908, but the facts of this case do not bring it within the class covered by the annotation.

It was said in *Re Beck* (1898) 7 Pa. Dist. R. 629, that disputes in political bodies are rarely entertained by the courts, if proper machinery for adjustment among themselves may be provided by these bodies in their fundamental law; that, as the functions of courts do not embrace the determination of political questions, and only rarely, and then by force of statute, reach political procedure and qualification, it is a wise rule that withholds judicial action save upon the mandate of a statute strictly construed and because of the impracticability of other remedial provisions.

In holding that it was not the province of the secretary of state, or of the courts, to determine which of two rival state conventions of the same party was entitled to recognition as the regular convention, but that the names of the candidates nominated by each convention should be certified to the several county clerks, the court in

Phelps v. Piper (1896) 48 Neb. 724, 33 L.R.A. 53, 67 N. W. 755, said: "Political parties are voluntary associations for political purposes. They establish their own rules; they are governed by their own usage. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body which can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party, believes to be the representative of its political doctrines and its party government. We doubt, even, whether the legislature has power to confer upon the courts any such authority. It is certain, however, that the legislature has not undertaken to confer it." To a similar effect is the decision in *State ex rel. Dahlman v. Piper* (1896) 50 Neb. 25, 69 N. W. 378.

And it was said in *Phillips v. Gallagher* (1898) 73 Minn. 528, 42 L.R.A. 222, 76 N. W. 285, that the questions with which a party convention deals are essentially political, and it would be a menace to the right of the members of a political party to select their own party nominees, and to the respect which should be entertained for judicial tribunals, for the courts to review and reverse the proceedings of a political convention, in the absence of fraud or oppression on its part, or on the part of its officers.

The decision of disputes as to party nominations rests with the party, in the absence of statutory regulations to the contrary, and the jurisdiction

of courts in such matters is purely statutory. *State ex rel. Burke v. Foster* (1904) 111 La. 939, 86 So. 32.

Judicial tribunals cannot pass upon the correctness of parliamentary rulings or tactics adopted in a political convention, such questions being purely political. *State ex rel. Fosser v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914.

In *Sims v. Daniels* (1896) 57 Kan. 552, 35 L.R.A. 146, 46 Pac. 952, it was held that no power was vested, either in the special board provided by the Australian Ballot Law, or in the courts, to pass on the merits of the claims of rival factions of a political party; but that, where both hold conventions and nominate candidates, both must be recognized and given a place on the official ballot.

And it was said in *Allen v. Burrow* (1904) 69 Kan. 812, 77 Pac. 555, 2 Ann. Cas. 539, that where two conventions are held, each claiming to be the authorized exponent of the same political party, the courts, from an unwillingness to undertake the settlement of purely political controversies, have generally required the nominees of each to be printed on the official ballot, where that was permitted by statute.

Sims v. Daniels (Kan.) *supra*, was overruled in *Miller v. Clark* (1900) 62 Kan. 278, 62 Pac. 664, in so far as it decided that the special tribunal provided by statute to determine such controversies as that in question could not make a final decision which would be conclusive upon the courts. See III. *infra*.

In several of the earlier Colorado decisions the view was taken that the courts would not decide controversies between factions of a party, where each faction, claiming to represent the party, made nominations, but that the matter must be determined by the party itself, under the penalty of having the tickets nominated by all of the factions placed on the official ballot, in case the party failed to adjust the differences.

Thus, in *People ex rel. Eaton v. District Ct.* (1892) 18 Colo. 26, 31 Pac. 839, the court, in holding that man-

damus would lie to compel the secretary of state, who had decided in favor of a certificate of nomination issued by one of two factions of a political convention, to certify also the certificate of nomination of the other factions, each certificate being in apparent conformity with the law, said that under the circumstances neither the secretary of state nor the courts were called upon to decide which of the two rival conventions was entitled to act for the party in the state; that until some tribunal was, by statute, clothed with such power, the matter should be left for adjustment elsewhere. The above decision by the Colorado court is approved and followed in *People ex rel. Hodges v. McGaffey* (1896) 23 Colo. 156, 46 Pac. 980.

And in *People ex rel. Lowry v. District Ct.* (1903) 32 Colo. 15, 74 Pac. 896, the court said that prior to 1897, under the Australian Ballot Act, the courts of that state were not clothed with power to determine which of two rival conventions or party organizations was entitled to act for a political party. For decisions in this state, controlled by legislation, see II. b, *infra*.

In this connection, it should be observed that the substantive question of law, as to whether two sets of nominees, each claiming to represent the same party, can be printed upon the ballot, is beyond the scope of the annotation.

Because of laches in failing to apply for an injunction to restrain the placing of names on the official ballot, the court in *State ex rel. Sligh v. Reek* (1896) 18 Mont. 561, 46 Pac. 442, and in *State ex rel. Stevens v. Reek* (1896) 18 Mont. 562, 46 Pac. 1117, among possibly other cases of the kind, declined to assume jurisdiction to determine a contention between rival conventions, each of which claimed to be the only regular convention of the party and nominated candidates for the same county officers.

b. Where statutory provision or clear legal right is involved.

For other phases of the question where express statutory provisions were involved, see III. *infra*.

20 A.L.R.—66.

As before stated, the annotation does not purport to cover cases dealing merely with questions as to the construction or effect of primary election laws, or other statutory provisions. Cases of this class are included only in so far as they discuss the question under consideration, of the jurisdiction of the courts as affected by the fact that the controversy is one within a political party, or as they may appear to be of value for illustrative purposes.

Where the matter in dispute is controlled by legislation, and the question is whether there has been a violation of a statute, or where otherwise a clear legal right is shown, controversies within a political party are subject to judicial hearing and determination. On this proposition attention is called to the following cases:

Idaho.—*Williams v. Lewis* (1898) 6 Idaho, 184, 54 Pac. 619; *Walling v. Lansdon* (1908) 15 Idaho, 282, 97 Pac. 396.

Indiana.—*State ex rel. Garn v. Election Comrs.* (1906) 167 Ind. 276, 78 N. E. 1016.

Kentucky.—*Com. v. Combs* (1905) 120 Ky. 368, 86 S. W. 697; *Neal v. Young* (1903) 25 Ky. L. Rep. 183, 75 S. W. 1082.

Louisiana.—*State ex rel. Trainor v. St. Paul* (1903) 111 La. 713, 35 So. 838.

Michigan.—*Baker v. Election Comrs.* (1896) 110 Mich. 635, 68 N. W. 752.

Montana.—*State ex rel. Scharnikow v. Hogan* (1900) 24 Mont. 383, 62 Pac. 583; *State ex rel. Hatch v. Smart* (1900) 24 Mont. 413, 62 Pac. 591; *State ex rel. Kennedy v. Martin* (1900) 24 Mont. 403, 62 Pac. 588. See also *State ex rel. Riley v. Weston* (1904) 31 Mont. 218, 78 Pac. 487.

New York.—*Re Woodworth* (1891) 16 N. Y. Supp. 147; *People ex rel. McCarren v. Dooling* (1908) 128 App. Div. 1, 112 N. Y. Supp. 71, affirmed without opinion in (1908) 193 N. Y. 604, 86 N. E. 1180. See also *People ex rel. Coffey v. Democratic General Committee* (1900) 164 N. Y. 335, 51 L.R.A. 674, 58 N. E. 124, and *Cummings v. Bailey* (1907) 53 Misc. 142, 104 N. Y. Supp. 283, affirmed without

opinion in (1907) 120 App. Div. 892, 105 N. Y. Supp. 1112, *infra*.

North Dakota.—*State ex rel. Wolfe v. Falley* (1900) 9 N. D. 450, 83 N. W. 860; *State ex rel. Fossler v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914; *State ex rel. Granvold v. Porter* (1902) 11 N. D. 309, 91 N. W. 944.

Pennsylvania.—See *Robb's Second Nomination* (1899) 7 Pa. Dist. R. 620, 21 Pa. Co. Ct. 433, and *Douglass's Nomination* (1900) 9 Pa. Dist. R. 187.

South Carolina.—*Hyde v. Logan* (1919) 113 S. C. 64, 101 S. E. 41. See also *Ex parte Sanders* (1898) 53 S. C. 478, 31 S. E. 290.

South Dakota.—*State ex rel. Howells v. Metcalf* (1904) 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923.

West Virginia.—*Franklin v. County Ct.* (1920) 86 W. Va. 479, 103 S. E. 330.

Wisconsin.—*State ex rel. Cook v. Houser* (1904) 122 Wis. 534, 100 N. W. 964.

It was said in *State ex rel. Howells v. Metcalf* (S. D.) *supra*: "Whenever the legislature in its wisdom sees fit to regulate nominations and the printing of ballots by statutory enactment, the duty of interpreting such enactments devolves upon the courts, and they should not attempt to escape responsibility, or avoid disagreeable consequences, by assuming that no judicial questions are involved. The auditor's duties and the candidate's rights respecting the preparation of ballots having been defined by statute in this state, the performance of such duties and the protection of such rights no longer present merely political questions, but must be dealt with as are other legal duties and other legal rights." The above is quoted with approval in *State ex rel. Cook v. Houser* (Wis.) *supra*.

Where the legislature of a state has regulated the method and manner of holding primary elections, the selection of delegates, and the conduct and duty of conventions, the court will go beyond the inquiry as to the acts of the party authorities with reference to such matters, and inquire whether or not the legal rights of the citizens participating in such matters have been infringed upon or denied by such

party authorities or conventions. *Walling v. Lansdon* (Idaho) *supra*.

And in *Walling v. Lansdon* (Idaho) *supra*, where the primary election law provided the method of electing delegates to a state convention, the court held that delegates could not be legally elected in any other manner, and determined which of two conventions, each claiming to represent the party, was composed of the legally elected delegates and entitled to have its nominees certified by the secretary of state. It is said in the syllabus by the court: "In determining factional disputes in a political organization, and the legality of party primaries and conventions, the courts will go as far as the law goes, and protect all legal rights conferred by law upon all persons participating therein. . . . Where the legislature of the state has regulated the method and manner of holding primary elections, the selection of delegates, and the conduct and duty of conventions, the courts will not be governed or controlled by the action or decision of the party authorities in such matters, but will determine and protect the legal rights of the citizens participating therein. . . . Party conventions, committees, or the party authority cannot decide or determine a matter which is regulated by law, and thereby abrogate the law or oust the courts of jurisdiction to hear and determine such matter. . . . A party state committee or a party state convention is not superior to the laws of this state, and neither can make rules and regulations in violation of the law, or confer rights or privileges upon persons not elected according to law, or deny rights or privileges to persons elected according to law. . . . A party state committee or a party state convention has no power or authority to seat, or recognize as members of such convention, delegates not elected to such conventions according to the law, or deny the right to sit or participate therein to delegates elected according to the law."

In *Williams v. Lewis* (1898) 6 Idaho, 184, 54 Pac. 619, the court passed upon the question as to which convention of a political party, where contention had

arisen within the party and each of two conventions had nominated candidates under the claim that it represented the party, was entitled to have its nominees certified by the secretary of state as the nominees of the party. The court decided in favor of the convention called by the regular state central committee, and issued a writ of mandamus to compel the secretary of state to certify the nominations made by this convention. It was said: "Many of the questions presented by the record relate to the government of political parties, and are to be controlled by such a party, either through meetings of the people composing the party, through conventions composed of delegates selected by the party, or through committees selected by such meetings or conventions, in the absence of statutory provisions relating thereto; and not by rules adopted by courts. This court feels unauthorized to prescribe the rules to be followed by the committees of the different political parties in the state, regulating the conduct of such committees in calling state nominating conventions; and we must assuredly feel unauthorized to say whether such committees shall be presided over by a chairman selected from the committee or not, or to say whether the secretary of such committee has authority to call a meeting of such committee or not. . . . This controversy is over two tickets, each of which claims to represent the same political party. It does not require much consideration, or the exercise of anything other than common sense, to reach the inevitable conclusion that a political party cannot exist without organization. It is a matter of general knowledge that all political parties have their organizations, usually, as in this state, headed by a state central committee, selected by the preceding state convention of the party. As between the two tickets in controversy here, one of them represents the organization of the People's Party, and the other does not. It is our duty to determine from the record before us which one of the tickets in controversy was nominated by a convention called by

the state central committee of the People's Party for the state of Idaho." The court took the view that the minority who rebelled against the action of the state central committee and held a separate convention must be regarded as bolters from the regular party convention, and that, while they had a right to nominate a ticket, they should select some name which would distinguish it from that of the party in question.

In *State ex rel. Scharnikow v. Hogan* (1900) 24 Mont. 383, 62 Pac. 583, it was said that the question did not properly arise as to what limits the courts should go in holding that party disputes must be settled in the judicatories of the parties, as the question involved was as to the force and meaning of the election law, and involved an inquiry as to whether the requirements of the law had been complied with so as to render the nomination in question valid.

And in *State ex rel. Hatch v. Smart* (1900) 24 Mont. 413, 62 Pac. 591, the court said there was presented a contention between rival factions within a political party, each asserting itself to be entitled to the use of the word "Democratic," and to have its candidates placed in the Democratic column upon the official ballot under the nominees of the state convention of that party; that under the statute of that state, as interpreted by the court, there could be but one nominee of the party for each office; and that the necessity arose, therefore, of determining which set of nominations was valid.

In *Neal v. Young* (1903) 25 Ky. L. Rep. 183, 75 S. W. 1082, although the court stated that, if the controversy were one merely as to which local committee represented the party, it would be a purely political question of which the courts would not take jurisdiction, it granted an injunction to restrain the state central committee of the party from interfering with the primary election, as legal rights under the primary election law were involved, and the case was not one involving merely political questions beyond the jurisdiction of the court.

Where a parish committee of a party, without authority, assumed to appoint commissioners for conducting an election of a state central committeeman, to act with the state commissioners provided for such elections by the state committee, it was held that a candidate for election on the state central committee had the right to an injunction to restrain the appointment of the additional commissioners, and that he was without any practical remedy except a resort to the courts. *State ex rel. Trainor v. St. Paul* (1908) 111 La. 713, 35 So. 888.

In *State ex rel. Granvold v. Porter* (1902) 11 N. D. 309, 91 N. W. 944, the court said that where two or more certificates are filed with the secretary of state, both or all purporting to represent the same political party and containing the names of different nominees for the same office, the power of the court may be invoked for the purpose of determining which, if any, of the persons so certified are the rightful nominees. See this case, also, under IV. *infra*, as to the extent of the court's inquiry in such a case.

And in *State ex rel. Wolfe v. Falley* (1900) 9 N. D. 450, 83 N. W. 860, it was held that where a judicial district central committee of a political party had called a convention for the purpose of nominating a district judge, and the convention divided, each convention making a nomination which was properly filed, and each candidate claiming to be the regular nominee, the court would, upon proper application, determine which was the regular party nominee. It was said that under the statute which gave the certifying officer no judicial powers, and required party nominations to be filed with the secretary of state, and which contemplated that no nominations should be filed with him except those made by political parties, it became absolutely necessary that the courts should pass upon the regularity of such nominations; that otherwise the door for fraud and deception would be wide open, with no power anywhere to close it.

The doctrine that courts can determine whether or not an assembly is a

political convention, organized as the law requires, is supported by *State ex rel. Fosser v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914.

Where violation or disregard of party rules was alleged, it was held in *Robb's Second Nomination* (1899) 7 Pa. Dist. R. 620, 21 Pa. Co. Ct. 433, on objection to nomination certificates, that the court had jurisdiction to hear the facts and determine the question, under a statute providing that any convention of delegates held under the rules of a political party might make nominations, and that any objection filed to a nomination certificate should be decided by the courts. And in this case the court held that a certificate of nomination was invalid, where it was made by a convention the majority of whose members did not, under the party rules, have even a *prima facie* right to sit in the convention, and there were not enough members with a *prima facie* title to organize a legal convention.

And in *Savage's Nomination* (1895) 8 Pa. Dist. R. 705, the court, on objections to a certificate of nomination, held that the nomination was invalid because the body making it was not constituted according to the established custom of the party which had previously governed such nominations, this custom, the court saying, being equivalent to a formal rule of the party.

So, in *Doyle's Nomination* (1899) 7 Pa. Dist. R. 635, among possibly other cases of the kind, the court, on objections to a nomination certificate, assumed jurisdiction to decide the question as to which of two rival city executive committees was the legal representative of a certain political party within a city, without discussing the question of the power of the court over such controversies.

That the court had jurisdiction, on objections to a certificate of nomination, to determine whether proceedings of a ward committee, acting under the party rules on a contested election, were fair and free from fraud, was held in *Douglass's Nomination* (1900) 9 Pa. Dist. R. 187. It was said merely that the members of

the party, having appointed the committee to determine a contest in which they all had an interest, had a right to an honest exercise of its powers by the committee, and in this right the court could protect them.

In *Brown's Nomination* (1897) 5 Pa. Dist. R. 663, the court took the view that delegates in a political convention whose seats were not contested should have first attempted to contest in the convention the rights of other delegates whose seats were contested, and that, if the rules of the party forbade the convention to consider these contests, redress might be had in the courts.

Among other cases holding nominations made by a convention conducted in defiance of the party rules invalid is *Boger's Nomination* (1897) 18 Pa. Co. Ct. 230.

There are a number of other cases decided by the Pennsylvania courts on objections to certificates of nomination, which merely decide the rights of the parties in the particular case, and are not, apparently, of any considerable value so far as the general question under consideration is concerned. Illustrative of this class are: *Sanner's Nomination* (1900) 9 Pa. Dist. R. 638, 24 Pa. Co. Ct. Rep. 43; *Reitzel's Nomination* (1901) 9 Pa. Dist. R. 645; *DeWitt's Nomination* (1901) 9 Pa. Dist. R. 648, 24 Pa. Co. Ct. Rep. 385; *Gerberich's Nomination* (1901) 9 Pa. Dist. R. 659, 24 Pa. Co. Ct. Rep. 250.

The district court was held, in *People ex rel. McGaffey v. District Ct.* (1896) 23 Colo. 150, 46 Pac. 681, to have jurisdiction to hear and determine which of two rival conventions was entitled to act for a political party, under the amendment of 1894 of the Australian Ballot Act, giving to the court certain powers in controversies "between any officials charged with any duty or function under this act, and any candidate, or the officers or representatives of any political party, or persons who have made nominations."

And after the amendment in 1897 of the Australian Ballot Law, the Colorado court, in *Spencer v. Maloney*

(1900) 23 Colo. 38, 62 Pac. 850, assumed jurisdiction to determine a factional dispute within a party, where each of two factions in a county claimed to represent the party and to have made nominations on its behalf. This amendment provided that the officer with whom the original certificate of nominations was filed should pass upon the validity of all objections, whether of form or substance. The court said: "A practical construction has been by us given to this section, authorizing the filing officer in the first instance, and the courts upon review, to determine the regularity of party conventions and the claims of rival factions of the same political party to have their nominees placed on the official ballot. This was done in the following, among other, cases: *Leighton v. Bates* (1897) 24 Colo. 303, 50 Pac. 856, 858; *Liggett v. Bates* (1897) 24 Colo. 314, 50 Pac. 860; *Whipple v. Owen* (1897) 24 Colo. 319, 50 Pac. 861; *McCoach v. Whipple* (1897) 24 Colo. 379, 51 Pac. 164; *Whipple v. Broad* (1898) 25 Colo. 407, 55 Pac. 172; *Whipple v. Wheeler* (1898) 25 Colo. 421, 55 Pac. 188. It is true that consent of parties does not confer jurisdiction of the subject-matter; neither will it necessarily invoke the discretion which this court has, under the statute, to review judgments of the inferior courts in election cases; but it should be said that in none of these later cases was the power of the court mooted, nor was our attention called to these former decisions. Neither party relied upon the doctrine of the earlier cases, but both urged the court to settle their disputes. The practice has thus grown up of entertaining such applications. To such an extent has it been encouraged that it may almost be said that political parties have rightly rested upon the belief that courts would determine such matters, and, except for extraordinary reasons, we ought not now to depart from what seems to be considered the established practice, though, in my judgment, it should never have been adopted." See Colorado cases under

II. *a. supra*, as to earlier rule in that state.

But under a subsequently enacted statute, it was held in *People ex rel. Lowry v. District Ct.* (1903) 32 Colo. 15, 74 Pac. 896, that the state central committee of a party, or the state convention, was the sole tribunal to determine controversies between factions of the party in a county, and that the court did not have concurrent jurisdiction in the premises. This statute, enacted in 1901, provided that the state central committee of any political party in the state should have full power to pass upon and determine all controversies concerning the regularity of the organization of the party within a district, county, or city, and concerning the right to the use of the party name, and might make such rules governing the method of passing upon and determining such controversies as it might deem best, and that all such determinations by the committee should be final, with certain exceptions relating to the powers of a state convention. In this connection, see III. *infra*. It was held, also, that the courts could not assume jurisdiction of such controversies between political factions in a county on the ground that the state committee had never met to determine the controversy and that until such meeting was held, and the proper action was taken, the courts had jurisdiction. The court said that where a state central committee existed, even though it might not have passed upon factional disputes of subordinate divisions of the party, the provisions of the statute could not be ignored, and a resort to the courts sanctioned, in case of internal disputes arising between members of the party, but that it was the duty of the faction, or factions, desiring the determination of the dispute, to call upon the state committee to act.

III. Necessity for and conclusiveness of decision by party or other special tribunal.

Over questions of party policies or organization, or the conduct or proceedings of conventions, the courts, in the absence of express statute, have

no jurisdiction; and where questions relating thereto have been submitted to and determined by the proper party tribunal, according to the rules and customs of the party, the courts will give effect to, and not attempt to review, such decision, but, in the absence of fraud, will regard it as conclusive. Supporting this doctrine are the following cases:

United States.—See *Re Appointment of Supers. of Election* (1881) 20 Blatchf. 13, 9 Fed. 14, *infra*.

Colorado.—*Whipple v. Broad* (1898) 25 Colo. 407, 55 Pac. 172. See also *People ex rel. Lowry v. District Ct.* (1903) 32 Colo. 15, 74 Pac. 896, cited *infra* (sustaining statutory provision).

Kentucky.—*Moody v. Trimble* (1900) 109 Ky. 189, 50 L.R.A. 810, 58 S. W. 504; *Davis v. Hambrick* (1900) 109 Ky. 276, 51 L.R.A. 671, 58 S. W. 799; *Cain v. Page* (1897) 19 Ky. L. Rep. 977, 42 S. W. 336.

Louisiana.—*Roussel v. Dornier* (1911) 129 La. 930, 41 L.R.A.(N.S.) 557, 57 So. 272.

Michigan.—*Stephenson v. Election Comrs.* (1898) 118 Mich. 396, 42 L.R.A. 214, 74 Am. St. Rep. 402, 76 N. W. 914; *Potter v. Deuel* (1907) 149 Mich. 393, 112 N. W. 1071. See also *Jennings v. Election Comrs.* (1904) 137 Mich. 720, 100 N. W. 995.

Minnesota.—See *Phillips v. Gallagher* (1898) 73 Minn. 528, 42 L.R.A. 222, 76 N. W. 285, *infra*.

Montana.—*State ex rel. Gilchrist v. Weston* (1902) 27 Mont. 185, 70 Pac. 519, 1134.

Nebraska.—*State ex rel. Nebraska Republican State Central Committee v. Wait* (1912) 92 Neb. 313, 43 L.R.A.(N.S.) 282, 138 N. W. 159.

New Hampshire.—*Atty. Gen. v. Barry* (1907) 74 N. H. 353, 68 Atl. 192.

New York.—*Re Fairchild* (1897) 151 N. Y. 359, 45 N. E. 943; *Re Pollard* (1893) 25 N. Y. Supp. 385; *Re Redmond* (1893) 5 Misc. 369, 25 N. Y. Supp. 881.

North Dakota.—*State ex rel. Fossor v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914; *State ex rel. Granvold v. Porter* (1902) 11 N. D. 309, 91 N. W. 944; *State ex rel. Buttz v. Liudahl* (1902) 11 N. D. 320, 91 N. W. 950; *State ex*

rel. *Mitchell v. Larson* (1904) 13 N. D. 420, 101 N. W. 315.

Ohio.—*Re Grear* (1899) 9 Ohio S. & C. P. Dec. 299, 6 Ohio N. P. 312.

Pennsylvania.—*Donahue's Nomination* (1891) 2 Pa. Dist. R. 5, 12 Pa. Co. Ct. 198; *Ker's Nomination* (1891) 2 Pa. Dist. R. 14, 12 Pa. Co. Ct. 200; *Com. ex rel. Mansfield* (1896) 18 Pa. Co. Ct. 428; *Magee's Nomination* (1897) 5 Pa. Dist. R. 654, 18 Pa. Co. Ct. 225.

South Carolina.—*Raines v. Stone* (1919) 112 S. C. 147, 99 S. E. 353.

Washington.—*See State ex rel. Cann v. Moore* (1900) 23 Wash. 276, 62 Pac. 769, *infra*.

West Virginia.—*Marcum v. Ballot Comrs.* (1896) 42 W. Va. 263, 36 L.R.A. 296, 26 S. E. 281; *Bogges v. Buxton* (1910) 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *Republican Executive Committee v. County Ct.* (1910) 68 W. Va. 113, 69 S. E. 522; *State ex rel. Smith v. County Ct.* (1916) 78 W. Va. 259, 88 S. E. 793. *See State ex rel. Testerman v. Lambert* (1919) 83 W. Va. 143, 98 S. E. 73, *infra* (recognizing rule).

The action of a political convention concerning a matter of party policy is not reviewable by the courts. *Magee's Nomination* (1897) 5 Pa. Dist. R. 654, 18 Pa. Co. Ct. 225. The court held in this case that, at least in the absence of a rule to the contrary, a nominating convention of one party was at liberty to choose a candidate of a different political faith.

In the absence of controlling legislation, the composition of a political committee according to the custom and usage of the party, with the sanction of the conventions of the party, will not be disturbed by the courts. *Potter v. Deuel* (1907) 149 Mich. 393, 112 N. W. 1071.

And it was held in *Davis v. Hambrick* (1900) 109 Ky. 276, 51 L.R.A. 671, 58 S. W. 779, that the decision of the state central committee of a political party, which by the rules of the party is invested with full control of the management of its affairs, in a contest as to which of two bodies of men constitutes the executive committee of a county, is conclusive upon the

courts, since the question is a political one, and the courts have no power to question the regularity of the proceedings, or the justice of the decision. The court said: "The legislature has not provided any means for determining controversies of this character, and it may be seriously doubted whether it has the power to confer such authority upon the courts. Political parties are voluntary associations for political purposes. They are governed by their own usages, and establish their own rules. Members of such parties may form them, reorganize them, and dissolve them at their will. The voters constituting such party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom and liberty of the voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, rules, or doctrines of a political party, or to determine, between conflicting claimants, rights growing out of its government. . . . The action of the state central committee must be treated as the final determination of all the rights of the parties growing out of this litigation, and the courts have no power to question the regularity of their proceedings or the justice of their conclusions."

It is said in the syllabus by the court in *Roussel v. Dornier* (1911) 129 La. 930, 41 L.R.A.(N.S.) 557, 57 So. 272, that, "in the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties, in matters of party government and discipline. The same rule applies to primary election laws."

As before indicated, the annotation does not deal with the questions of the construction and effect generally of primary election laws. See, in this connection, *Heiskell v. Ledgerwood* (1921) 144 Tenn. 666, 234 S. W. 1001,

holding that the decision of the state primary election board of the party was conclusive in a contest between candidates for membership of the state executive committee, the primary election law making no provision for an appeal, and the position of committeeman not being a public, but a political or party, office.

In *State ex rel. Buttz v. Liudahl* (1902) 11 N. D. 320, 91 N. W. 950, it was held that after a contest on the merits, after notice and a full and fair hearing before the state central committee, and a decision of such committee that certain delegates from a county convention should be seated in the convention, and that the opposing delegates should not be seated, followed by the adoption by the state convention of the decision and report of such committee, the courts will not interfere with the action of the convention, but it will be deemed conclusive even as against those persons nominated in a rival county convention for county officers. To similar effect is *State ex rel. Mitchell v. Larson* (1904) 13 N. D. 420, 101 N. W. 315.

The court said in *State ex rel. Buttz v. Liudahl* (N. D.) *supra*, that the powers of state conventions as the highest party organization are so well known that courts will take judicial recognition thereof.

The decision of the state authorities of the party through the state central committee and the state convention as to the right of a committee in a particular district to represent the party was held conclusive upon the courts, in *Caine v. Page* (1897) 19 Ky. L. Rep. 977, 42 S. W. 336. In this case a statute provided that, "in all cases, of a tie vote or contest, the committee or governing authority of the political party holding such primary election shall have the power to hear and determine such contests, and decide who shall be entitled to the nomination." In this instance the county committee had determined in favor of a certain candidate as the nominee at the primary election; but his opponent sought to compel a reconsideration on the ground that the committee was not properly constituted, it being alleged

that a certain person had participated in the decision of the contest who was not a member of the committee. It was successfully set up as a defense to the action that, whether or not there was any irregularity in the selection or appointment of this person as a committeeman, he had been recognized as such by the party and its regular committeemen in that county, as well as by the state central committee, and that his authority had been recognized and approved by subsequent state conventions of the party. The court held that the action of the state convention was a conclusive recognition of the particular committee as a governing authority of the party in the district in question, beyond which action and recognition the courts could not go, and said that, "when counsel questions the authority of the state convention in party organization, it is as if the Mohammedan should doubt the Koran, or a Christian the Book of books."

And in *Moody v. Trimble* (1900) 109 Ky. 139, 50 L.R.A. 810, 58 S. W. 504, it was held that the decision of a dispute as to which of two persons was the regular party nominee for Congress, when made by the governing authority of the party within the state, such as a state central committee, under authority conferred upon it by the state convention, is conclusive upon the courts. After referring to the fact that each candidate claimed to be the nominee of the convention the court said: "A settlement of this dispute might possibly be had in the courts, when the correctness of the various rulings of the presiding officers of the meeting would have to be inquired into, as well, possibly, as the regularity of the credentials of the various delegates. But, while we do not now decide that this cannot be done, it is certain that such questions are political, rather than judicial, in their character, and therefore the court will entertain jurisdiction to settle them, if at all, only in the event the governing authorities of the political parties have failed to do so. The settlement of such questions, in the nature of things, should be left to

party authority; and therefore we will not scan too closely party rules which undertake, however imperfectly, to confer authority on its various committees to manage party affairs to the best interests of the organization, or deny such authority even if it be conferred in terms somewhat general."

In *State ex rel. Smith v. County Ct.* (1916) 78 W. Va. 259, 88 S. E. 793, it was held that the determination by the state executive committee of a party of the right of a county executive committee to elect as its chairman, and a member thereof, a person outside of its own previously elected members, and of the regularity of its action in declaring vacant the seat of a member who had moved to another state, and filling the same, based upon the usages and customs of the party, and violative of no statute, was not reviewable by the courts.

And it was held in *Donahue's Nomination* (1891) 2 Pa. Dist. R. 5, 12 Pa. Co. Ct. 198, that where a city executive committee had recognized as legal a certain ward committee, as it had authority to do under the party rules, a nomination made by a convention organized and held under the authority of such ward committee was valid, rather than a nomination made by a convention held under the authority of a ward committee which the city executive committee had refused to recognize as regular and legal.

The same principle was applied in *Ker's Nomination* (1891) 2 Pa. Dist. R. 14, 12 Pa. Co. Ct. 200, holding that recognition by the city executive committee legalized the ward executive committee.

In *Boggess v. Buxton* (1910) 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289, it was held that when the state and congressional committees, and a congressional convention and a state senatorial convention, of a political party, had had the claims of two contesting county executive committees to represent the party before them for decision, and had decided that one of them was and the other was not, the true and legitimate county executive committee, the courts would not review

such decision, but would hold it conclusive in matters before the courts involving the question as to which was the lawful county executive committee. The court, however, expressly called attention to the fact that it did not decide as to the power of the courts, in the absence of a decision by the political authorities.

The decision in *Boggess v. Buxton* (W. Va.) supra, was approved and followed in *Republican Executive Committee v. County Ct.* (1910) 68 W. Va. 113, 69 S. E. 522. And in this case, where there were two executive committees in a county, each claiming to be the regular and lawful county committee of the party, and the question of regularity had been submitted to, and heard and determined by, the state central committee of the party, after due notice served on the contesting committee, it was held that the decision of the state committee would be treated as conclusive in a judicial proceeding, whether or not the contesting committee appeared and submitted the merits of its claim to the judgment of the state committee.

In *State ex rel. Cann v. Moore* (1900) 23 Wash. 276, 62 Pac. 769, the court said that it should require a clear and explicit expression of legislative intention to that effect, to justify the conclusion that it was the intention of the law to deprive a political convention of the recognized parliamentary right of control over its own proceedings, its officers, and its nominees; that the judicial branch of the government should not attempt to supervise political actions, and matters peculiarly within the control of political conventions; and that, unless a convention acts arbitrarily, oppressively, or fraudulently, its final determination as to candidates should be followed by the courts. The decision is of a class not strictly within the scope of the annotation, involving the right of a candidate who, through a mistake, was declared a nominee by the chairman of the convention. It was held that the action of the convention, which had acquiesced in the nomination and adjourned, was conclusive, no fraud being shown.

The rule was laid down in *Re Fairchild* (1897) 151 N. Y. 359, 45 N. E. 943, that in cases where questions of procedure in conventions or the regularity of committees are involved, which are not regulated by law, but by party usages and customs, the officer called upon to determine such questions should follow the decision of the regularly constituted authorities of the party, and that courts, in reviewing the determination of such officers, should not interfere with such determination. In this case the action of the state committee and state convention in determining the question of regularity of an assembly district convention, where two district conventions, each claiming to represent the party, had been held, was held conclusive. The decision was under a statute providing that any questions arising with reference to the validity of any certificate of nominations should be determined, in the first instance, by the officer with whom the certificate of nomination was filed, and that the supreme court, or any justice thereof, within the judicial district, or any county judge within his county, should have summary jurisdiction to review the determination of such officer and make such order as justice might require.

In *Re Fairchild* (N. Y.) *supra*, the court stated that the decisions of the supreme court in that state were conflicting, one class holding that the determinations of party conventions or party authorities had no weight whatever, while the other class was to the effect that, in determining questions as to the regularity of conventions, officers and courts should rely upon the action and determination of the regularly constituted party authorities upon the question, where there had been such a determination. The court said the latter view effectuated the obvious intent and purpose of the statute.

Several New York cases may, perhaps, be regarded as overruled by the above decision. Thus, in *Re Broat* (1894) 6 Misc. 445, 27 N. Y. Supp. 176, where two county committees, each claiming to represent the same politi-

cal party, had each called a convention, which in turn had made different nominations, the court held that the decision of the state committee of the party on the question of the regularity of the organization was not conclusive. It was said that, in proceedings of this character, the decisions of party conventions, committees, or caucuses, are not binding and have no weight with the court; and that the actions of all party caucuses, conventions, and committees have been, by legislation, subjected to the supervision and control of the courts.

And in *Re Heacock* (1896) 18 Misc. 311, 41 N. Y. Supp. 161, under a statute providing that the courts should make such order in the premises as justice might require, it was held that, in determining the regularity of nominations, the court was not bound by the decisions of party conventions. It was said that while the decision of the supreme political authority of the party might be conclusive, as a general rule, as to which of two well-defined organizations of the same party was the regular organization, the rule did not hold good when determining the regularity of nominations claimed to be made under the auspices of the same party organization, as in this case.

In a dispute as to what political organization should be recognized by the court in appointing supervisors of election, under a statute requiring the supervisors to be of different political parties, where there were two organizations claiming to represent the same party, the court, in *Re Appointment of Supers. of Election* (1881) 20 Blatchf. 13, 9 Fed. 14, approved the rule that that organization should be recognized by the court, which was recognized by the last state convention of the party, but held that this rule was subject to modification by a change of circumstances, such as had occurred in this case.

It is said in the syllabus by the court in *State ex rel. Nebraska Republican State Central Committee v. Wait* (1912) 92 Neb. 313, 43 L.R.A. (N.S.) 282, 138 N. W. 159: "Under the statutes of Nebraska, the national conven-

tion of a political party, or, when the convention is not in session, its national central committee, is the supreme governing body of such party as to national affairs, and has full authority to decide which of rival conventions or committees in the state is the regular and duly authorized convention or committee of such party."

The decision of a political convention as to the qualifications of its own members has been held conclusive upon the courts. *Stephenson v. Election Comrs.* (1898) 118 Mich. 396, 42 L.R.A. 214, 74 Am. St. Rep. 402, 76 N. W. 914.

And in *State ex rel. Granvold v. Porter* (1902) 11 N. D. 309, 91 N. W. 944, the court laid down the rule that a political convention is the judge of the qualifications of its members, and its determination of contests between claimants for seats therein is conclusive.

So, in *Re Grear* (1899) 9 Ohio S. & C. P. Dec. 299, 6 Ohio N. P. 312, the court said it is beyond question that a political convention is ordinarily the sole judge of the elections, returns, and qualifications of its own members; that, being a voluntary association, it must necessarily follow that no one has a right to participate therein against the rules and regulations, and contrary to the wishes, of the association itself.

And it was held in *State ex rel. Fosser v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914, that a political convention is the exclusive judge of the credentials and qualifications of persons claiming to be delegates thereto; and that a minority of the delegates, as thus determined by the convention, cannot, by withdrawing therefrom and joining themselves to the persons whose credentials have been rejected by the convention, constitute a legal county convention. The last proposition is supported, also, by *State ex rel. Granvold v. Porter* (N. D.) *supra*.

The court, also, in *Marcum v. Ballot Comrs.* (1896) 42 W. Va. 263, 36 L.R.A. 296, 26 S. E. 281, laid down the rule that, "in passing on the right of nominees for public office to appear on election ballots, this court recognizes

the right of the convention making them to judge of the election, qualification, and returns of its own members, and will not go back of its action to inquire as to the right or title of delegates admitted by it as members."

It was said in *Phillips v. Gallagher* (1898) 73 Minn. 528, 42 L.R.A. 222, 76 N. W. 285, that a party convention is a deliberative body, and unless it acts arbitrarily, oppressively, or fraudulently, its final determination as to candidates, or any other question of which it has jurisdiction, will be followed by the courts. The question involved in this case was the right of a convention to declare a ballot irregular, and to order another ballot, and it does not appear that a factional controversy, as that term is used in the annotation, was involved.

But while ordinarily a political convention may be the judge of the qualifications of its members, without power in the courts to review its decision, this rule has been held true only in a qualified sense, and not only to apply where a majority of those who participated in the convention had not even, under the party rules, a *prima facie* right to seats in the convention. *Robb's Second Nomination* (1899) 7 Pa. Dist. R. 620, 21 Pa. Co. Ct. 433. The court held that when authority to make a nomination was legally challenged by objections filed to a certificate of nominations, and violation or disregard of the party rules was alleged, it had jurisdiction under statutory provisions to hear and determine the question.

If a county delegation is admitted to a state convention without contest, there has been, of course, no determination of the question as to the regularity of such delegation. Thus, where two county conventions were held, each claiming to represent the party, and two sets of delegates were sent to different state conventions, each of which state conventions claimed to be the regular one, it was held that the facts that the delegates were admitted to one of these state conventions without contest, and that this state convention was afterwards declared by the courts to be the legal

one, did not settle the question as to which delegation was chosen by the regular convention of the party for the county; in other words, the recognition by the legal state convention of the delegation from one of the county conventions did not conclusively determine the question as to which of the county conventions was regular, where no contest was presented to the state convention. *Twombly v. Smith* (1898) 25 Colo. 425, 55 Pac. 254.

It was said in *Twombly v. Smith* (Colo.) *supra*, that, when the regularity of the proceedings of rival conventions making nominations is called in question, the courts should determine that question without respect to the action of any other convention of the same party which included territory greater than the district in which such nominations were made; that to hold otherwise would, in effect, result in delegating to conventions the power to make nominations for public officers in a given district not authorized under the call so to do, to the exclusion of the convention of the party for that district, called for that particular purpose.

And the decision of a county convention of a political party as to the qualifications of its members has been held not conclusive where manifestly unfair methods were used and delegates were seated who under no circumstances could make any just claim to an election. *Re Woodworth* (1891) 16 N. Y. Supp. 147. The statute defined conventions, or primary meetings, through which nominations might be made. And in this case, where the county committee adopted methods which resulted in the seating of delegates, without a hearing, who clearly had no right to a place in the convention, and a part of the regularly elected delegates withdrew and held a separate convention and nominated candidates, the court held that the latter convention, which was composed of the larger number of the duly and clearly elected delegates, constituted "an assemblage of voters or delegates representing" the party, within the meaning of the statute, and that it should grant the application to com-

pel the printing of the names of nominees of that convention, as the regular nominees of the party, on the ballot. The court said: "But it is insisted that a political convention is a law unto itself, and that whatever methods it adopts for its own government are conclusive, and cannot be made the subject of judicial inquiry. To a certain extent this contention may be, and doubtless is, true. . . . But, where the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned, and no court or judge would be justified in sustaining them, when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business, even though they be recognized and approved by senatorial and state conventions of the same political organizations. The trend of public opinion, as well as of legislation, at the present time, appears to be in favor of a radical reform in our political methods, and it is the plain duty of all good citizens, and especially those clothed with judicial authority, to encourage such a sentiment with all the force they can command. The order asked for is granted." An appeal was dismissed in (1892) 64 Hun, 522, 19 N. Y. Supp. 525, on the ground that the matter was not appealable, and only an abstract question was at that time involved; but the court also approved the decision of the lower court on the merits. See, in this connection, *Allen v. Burrows* (1904) 69 Kan. 812, 77 Pac. 555, 2 Ann. Cas. 539, *infra*.

However, the doctrine of *Re Woodworth* (N. Y.) *supra*, as to the jurisdiction of the courts to determine the regularity of rival factions, each claiming to represent the party, was modified in *Re Pollard* (1893) 25 N. Y. Supp. 385, so that it should apply only where the matter had not been, in good faith, adjudicated by a higher party tribunal. From the last opinion, it appears that, after the decision in the *Woodworth Case*, the other faction

had been recognized by the state and district conventions of the party as entitled to represent it in the particular county; and the court held that, in view of these decisions by the party itself, it would not adhere to its decision as to the regularity of the opposing faction, even though it was of the opinion that that faction had shown at the first hearing its title to regularity. The court said: "I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly established upon the original hearing, and that it would, in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party conventions to have adopted the decision of the general term, which was deliberately made after a careful and impartial hearing, but there is no way in which they can be compelled to do so; and consequently it seems to me that the only rule for courts and judges to adopt, in this and all other similar contests, is that they will interfere only in cases where there has been no adjudication of the question of regularity by some division of the party which is conceded to be superior, in point of authority, to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudication is not involved. The adoption of a different rule will inevitably tend to bring party organizations and the courts into unseemly conflicts over questions which are peculiarly within the cognizance of the former tribunals—a result which most certainly ought, if possible, to be avoided."

And in *Re Redmond* (1893) 5 Misc. 369, 25 N. Y. Supp. 381, where the question of the regularity of a county convention of a party had been passed upon by the state convention of the party, it was held that the action of the state convention must be regarded as conclusive. The court said that a state convention, like the state legislature, is the sole judge of the election of its own members; that when it has passed judgment upon conflicting claims, where questions of regularity

only are concerned, its determination should be accepted as final; that such determination might be unjust and in direct violation of the equities of any given case, and in theory it might be right and proper to disregard such an adjudication and to insist that no party division could exercise supervisory control over any smaller division; but that if such a theory were put into practice it would be subversive of party discipline and reduce political parties to mere associations of independent and irresponsible mobs.

Where the question is as to the violation of statutory provisions in the selection of delegates, the decision of a party tribunal, it appears, is not conclusive, but the matter is one for the determination of the courts. Thus, in *State ex rel. Scharnikow v. Hogan* (1900) 24 Mont. 383, 62 Pac. 583, where it was contended that the action of a state convention in seating certain delegates was final as to which faction of the party represented it in a particular county, the court said that the question did not properly arise as to the limit to which courts should go in holding that party disputes should be settled by the party itself; that the question was as to the force and meaning of a part of the election law, and involved an inquiry as to whether the requirements of the law had been complied with, so as to render the nomination valid; and that to permit a political convention to determine such a question would be to say, that political parties possessed judicial power, and might oust the courts of jurisdiction in matters falling within their cognizance. This case was interpreted in *State ex rel. Gilchrist v. Weston* (1902) 27 Mont. 185, 70 Pac. 519, 1184, as holding that no action by a state convention could render valid a nomination for the office of district judge, where the convention assuming to make it did not properly represent the electors of the district. The case, it was said, turned upon the question of fact whether the delegates who sat in the district convention had been regularly chosen by the electors of the district to make the

nomination; and, it being made to appear that such was not the case, this fact was held determinative of the right of the candidate to have his name appear upon the ballot, although the state convention had assumed to declare that the delegates were the regularly accredited delegates of the county composing the district. The decision, the court stated, rests upon the theory that the people in the political subdivisions of the state have the right to nominate candidates for local officers through representative conventions composed of electors of their own choosing, or in mass meetings, held after due notice, as well as to elect officers from among candidates so nominated; and that no action on the part of the state conventions may dispense with a substantial observance of this fundamental principle.

And it was held in *State ex rel. Kennedy v. Martin* (1900) 24 Mont. 403, 62 Pac. 588, that, while a political convention must be allowed to decide such questions as that of the qualification of its own members, it must not, in the settlement of such controversies, disregard legislative enactment, with the enforcement of which the courts alone have to do.

And in *State ex rel. Kennedy v. Martin* (Mont.) supra (as construed in *State ex rel. Gilchrist v. Weston* (Mont.) supra), it was held that where a ticket had been nominated by a representative county convention, regularly called for that purpose by the local party authorities prior to the meeting of the state convention, the state convention, though the delegates chosen by the county convention refused to sit in it, but joined in an independent movement, had no power to authorize loyal members of the party residing in the county to take charge of party affairs therein, and to nominate a ticket to be printed upon the official ballot under the party's designation, to the exclusion of the ticket already nominated. This decision, it was said, rests upon the principle that when the candidates of a party have been once regularly nominated by a representative convention of the party, and their certificates

of nomination filed with the proper officer, the right of such candidates to have their names appear upon the official ballot becomes fixed by law, and is not subject to control by a state convention.

Also, in *State ex rel. Hatch v. Smart* (1900) 24 Mont. 413, 62 Pac. 591, the court held that, while a state convention of a political party had final authority within its legitimate field, its jurisdiction, under the statute, was not unlimited, and it was without jurisdiction to set aside nominations of a county convention held under a call by the regularly constituted authority of the party, the members of the party in each county having the right to control their own local affairs.

"In each of these cases," said the court in the *Weston Case* (Mont.) supra, referring to the above decisions in that state, "this court felt impelled, in view of the provisions of the election laws and the Constitution, to investigate the facts, and to determine therefrom whether the candidates whose rights were in issue had been nominated by representative conventions, called by authority, and conducted in accordance with party usages."

But it was held in *State ex rel. Gilchrist v. Weston* (Mont.) supra, that the decision of the state committee and state convention of the party as to which of two rival factions was entitled to represent the party within a county was conclusive, where such decision was rendered before the nomination of candidates by either of the factions. The court said, however, that, had one or both of the rival county conventions nominated candidates for local officers before the meeting of the state convention, a different question would have been presented, and the court would, perhaps, have been required, under its earlier decisions, to hold tenable the position taken by the defendants that the action of the state convention was without significance. The court recognized the necessity for exclusive party control of the organization, and held that the courts would not interfere

until, by the exercise of power on the part of a local organization, rights of private individuals had become involved.

A political party has the right to determine who shall compose its executive committee, how its members shall be chosen, what powers it shall exercise, and how vacancies in the committee shall be filled; and the courts will not interfere where there is no violation of law or of the rules of the party, or arbitrary or capricious action. *Raines v. Stone* (1919) 112 S. C. 147, 99 S. E. 353.

While approving the cases to the effect that, when a dispute arises in a political party which has a tribunal of its own to which an appeal can be made, this must be done, and the decision of such tribunal is final, the court in *State ex rel. Testerman v. Lambert* (1919) 83 W. Va. 143, 98 S. E. 73, held that in case of a disputed succession in the official personnel of a political party, where there is no higher authority within the party to which the controversy can be submitted for determination, the court will decide which of the two claimants is entitled to nominate election officers, on application for mandamus to compel the appointment of such officers on the recommendation of party officials.

Where the party rules provided a tribunal for settling contests of delegates, it was held in *Hutchins's Nomination* (1898) 8 Pa. Dist. R. 109, that a contestant must first resort to this tribunal before seeking relief in the courts.

And which of two or more bodies of voters, each claiming to be the convention contemplated by the Code, was the true one, it was held, in *McDonald v. Hinton* (1896) 114 Cal. 484, 35 L.R.A. 152, 46 Pac. 870, must be determined, in the first instance at least, by the registrar to whom certificates of nomination are presented for filing; and the mere fact that a certificate was in due form was held not in itself conclusive as to his duty to file it. The court did not decide whether it might determine which of the two conventions represented the

party, holding merely that a decision, in the first instance at least, must rest with the registrar, the proceeding for a mandamus to compel the registrar to place the petitioner's name on the ballot being based on the theory that he was bound to file the certificate merely because it was in due and regular form.

Where the question as to who are the regularly elected members of a local committee of a political party has been determined by the proper tribunal within the party, the court will make such a decree as is necessary to enforce the rights of the regularly constituted committee. *Atty. Gen. v. Barry* (1907) 74 N. H. 353, 68 Atl. 192.

And it was held in *Atty. Gen. v. Barry* (N. H.) *supra*, that the state committee and the state convention of the party were its regularly constituted tribunals to determine who constituted the local executive committee in a city ward, and, the relators having been recognized as such committee, their rights would be enforced in the courts.

In several cases the decision has turned directly on express statutory provisions.

In *Packer's Nomination* (1896) 5 Pa. Dist. R. 601, the court ruled against the contention that a conference of delegates of necessity had the power to determine the qualifications of its own members, and that such determination was conclusive, and could not be made the subject of judicial review; stating that the Ballot Law of 1893 intended to commit all controversies concerning nominations, substantial as well as formal, to the court of the proper county. The court cited, as in accord with this ruling, *Critchfield's Nomination* (1895) 3 Pa. Dist. R. 761.

But see *Com. ex rel. Mansfield* (1896) 18 Pa. Co. Ct. 428, in which the court said that the actions of party tribunals were as final and conclusive on the subject of nominations as they were before the passage of the Primary Law of 1893; that the court only dealt with the candidate's right to have a place on the official ballot; and that, in order to ascertain that right,

it must know (1) whether the alleged nomination originated with an organization that had the legal right to make and certify such nominations; (2) whether that organization had acted under the rules prescribed for its government and the result of the action had been certified according to the facts; and (3) whether the certificate was sufficient in contents and form.

Where the legislature, in authorizing an official ballot and granting to party nominees the right to have their names placed thereon under the party designation, subjected that right, in case of a controversy between two or more sets of nominees, each claiming the same party designation, to the decision of a party tribunal created under the statute to determine such controversies, no provision being made for a judicial review of its decisions, it was held that necessarily the decision of the tribunal so provided for was exclusive, and unimpeachable except for jurisdictional defects. *State ex rel. Cook v. Houser* (1904) 122 Wis. 534, 100 N. W. 964.

And it was held, also, in *State ex rel. Cook v. Houser* (Wis.) *supra*, that since the exclusive jurisdiction to determine factional disputes had been conferred by statute upon a special tribunal the decision of the national convention of the party as to which of two sets of delegates from the state, each claiming the right to represent the party in such convention, was entitled to recognition, was not of any significance as a guide to the secretary of state or the tribunal authorized by statute to determine such disputes. In this case, where two conventions had nominated state officers, each convention claiming to represent the party, and the national convention thereafter decided in favor of one of the factions, the court, in holding that this decision or recognition by the national convention was without effect as regarded the state nominations, said that as soon as the nominations were made by the two conventions, and duly certified, the rights of the nominees to places upon the official ballot under the party designa-

tion became vested in them as representatives of their respective organizations, subject to the decision of the special statutory tribunal as to which of the conventions was regular, and such right could not, therefore, be in any way affected by the determination of any other tribunal.

Although not involving a factional dispute within the party, as those terms are here used, attention is called also to *Beasley v. Adams* (1904) 118 Ky. 695, 82 S. W. 249, holding that the decision of the party contest committee provided by statute was final, under a section of the primary election law providing that, in case of a contest, the committee or governing authority of the political party holding the primary should have "power to hear and determine such contest, and decide who shall be entitled to the nomination." The court said this language precluded the idea that there should be an appeal, that the entire matter was referred to the governing authority of the party for its decision, and that this was eminently proper, as the question was purely political.

And in *Com. v. Combs* (1905) 120 Ky. 368, 86 S. W. 697, the court said that a party or primary election had, since the enactments of the present statutes on the subject, ceased to be solely a matter of party concern, but was one of which the law took cognizance; and that, if there was a contest or dispute over a party nomination, the governing authorities of the party were given exclusive jurisdiction to determine it.

A statute providing that the state central committee of any political party in the state should have full power to pass upon and determine all controversies concerning the regularity of the party organization within the counties, cities, congressional districts, etc., in the state, and making determinations of the committee final, was held in *People ex rel. Lowry v. District Ct.* (1903) 32 Colo. 15, 74 Pac. 896, not unconstitutional, in so far as it withdrew the determination of such question from the district court, as in violation of a constitutional provision giving such courts original jurisdic-

tion of all causes at law and in equity. The contention was that in view of this constitutional provision the legislature could not divest the district courts of any of their jurisdiction and confer a portion of it upon some other tribunal. The court said: "The fallacy of the argument consists in the assumption that a political controversy like that now before us is a case cognizable at law or in equity. It is not of that character. It is purely political—one peculiarly within the province of political parties to determine for themselves. In the absence of a statute conferring such power upon the courts, they do not possess it as an incident to, or embraced within, the jurisdiction to determine all 'causes at law or in equity.'" This conclusion, it was held, was further evident from a constitutional provision giving the legislature authority to pass laws to secure the purity of elections, and to guard against abuses of the elective franchise, the court saying that the statute, if it needed any constitutional support, might safely rest upon this provision.

And it was held in *State ex rel. Burke v. Foster* (1904) 111 La. 939, 36 So. 32, that a provision of the Constitution vesting in district courts original jurisdiction in all cases where "civil or political rights" were involved had no application to a dispute as to a party nomination; but that the question was within the jurisdiction of the board of contest created by statute, the decision of which, the statute provided, should be final.

That the court had power to review the action of a political convention in seating delegates was held in *Re Lazarus* (1910) 140 App. Div. 406, 125 N. Y. Supp. 414, where the statute provided for review of any action or neglect with regard to any right given to, or duty prescribed for, any political convention, although a statute also gave to such convention the right to decide all questions as to delegates thereto.

Under the provision of the Australian Ballot Law which created a special tribunal, consisting of certain state officers, with power to inquire in-

to the regularity of nomination papers filed with the secretary of state and to consider other questions arising in relation thereto upon notice, and provided that the decision by a majority of said officers should be final, it was held in *Miller v. Clark* (1900) 62 Kan. 278, 62 Pac. 664, that after a hearing before this tribunal, and a finding by it that one of two candidates was regularly nominated by a convention which divided into two parts, each naming a candidate, the tribunal's decision would not be disturbed by the court, in the absence of bad faith or arbitrary conduct showing wrongful acts amounting to fraud on the part of said officers.

While the last case was approved and followed in *Allen v. Burrow* (1904) 69 Kan. 812, 77 Pac. 555, 2 Ann. Cas. 539, it was there held that the courts would assume jurisdiction where fraud was shown on the part of the special statutory tribunal. In the syllabus by the court, it is said: "A dispute as to which of two persons is the regular nominee of a political party for a public office can ordinarily be settled only by the special tribunal to which the statute commits the determination of such questions; but, if it is established that a majority of the members of such tribunal have entered into a corrupt agreement with one of the parties to give him the decision regardless of the merits of the case, the courts will take jurisdiction of the controversy, and decide it in a proceeding in mandamus to compel the certifying of the proper name for printing on the official ballot." See, in this connection, *Re Woodworth* (1891) 16 N. Y. Supp. 147, *supra*.

In *Chapman v. Miller* (1894) 52 Ohio St. 166, 39 N. E. 24, where rival conventions had each nominated candidates for county officers, it was held that, upon submission to the state supervisor of elections of objections to the certificates of nomination, his decision was final. It appears, however, that the statute expressly provided that the decision of the state supervisor should be final. And it was held that this necessarily excluded jurisdiction of the courts to

interfere with the decision on its merits, although they might compel performance of the legal duty thus established by granting mandamus. Among possibly other cases giving effect to the express provision of the statute making the decision of certain officers, upon objections to nomination certificates, final, so as to exclude judicial interference, are *Randall v. State* (1901) 64 Ohio St. 57, 59 N. E. 742; *State ex rel. Hildebrandt v. Stewart* (1904) 71 Ohio St. 55, 72 N. E. 307; and *State ex rel. Buel v. Joyce* (1912) 87 Ohio St. 126, 100 N. E. 325.

In *Hyde v. Logan* (1919) 113 S. C. 64, 101 S. E. 41, it was held that the court had jurisdiction to review the action of a city executive committee of a political party in ascertaining and declaring the result of a primary election for mayor and alderman. It was contended that the matters in controversy were only political in their nature, and should therefore be left to the decision of those in whom the party in convention vested the power to decide them. The court said this was a misconception of the issues, which were not of a political nature at all, but rather of a legal nature, to wit, whether the result of the election was ascertained and declared in the manner prescribed by law. It was said that the courts of that state had always exercised jurisdiction to review the decision of those appointed by law to hold and ascertain the result of all elections held pursuant to law, and that ever since party primaries had been regulated by statute, a like jurisdiction had been exercised with regard to them.

See also *Ex parte Sanders* (1898) 53 S. C. 478, 31 S. E. 290, where, the result of a primary election being contested, it was held that the decision of the contest by the state executive committee of the party was of a judicial, or quasi judicial, nature, and reviewable by the courts.

IV. Party regularity as affecting the decisions in the courts.

Although the phase of the present subject indicated by the above sub-

title is involved more or less in many of the cases previously cited in the annotation, particularly those under III. *supra*, and the other parts of the annotation should be consulted in this connection, it seems desirable to group cases more directly to the effect that, in determining the rights of candidates or nominees where there are factional controversies within a party, the court, assuming that it has jurisdiction, will extend its inquiry only so far as is necessary to determine which faction or convention was "regular," under the party rules and customs.

The rule was laid down in *Addle v. Davenport* (1900) 7 Idaho, 282, 62 Pac. 681, that "in a contest between tickets nominated by rival county conventions as to which ticket or convention is entitled to the party name, both conventions claiming to represent the same political party, the court will not inquire into the matter further than to determine which of such conventions was controlled by the party organization, and such convention is entitled to the sole use of the party name, and to have its ticket placed upon the official ballot." The court held in this case that the ticket nominated by one of the factions should be placed upon the official ballot, for the reason that, from the stipulated facts, it appeared that this faction had the party organization.

In determining which set of candidates nominated by two rival county conventions was entitled to represent the party on the ballot, the court in *Spencer v. Maloney* (1900) 28 Colo. 38, 62 Pac. 850, held that the fundamental question was which of the two conventions was the regular one. The court said: "This is controlling, for we have held that that one of two or more rival nominating conventions which, according to the usages of the party and fair dealing, is the regular one, is entitled to have its nominees, to the exclusion of the lists of the rival faction, appear upon the official ballot. And if neither convention is in all respects regular, then the inquiry is, which more nearly approaches regularity, or which was organized and

conducted more in consonance with the principles of honesty and good faith which should govern men in the ordinary business relations."

It is said in *Walling v. Lansdon* (1908) 15 Idaho, 282, 97 Pac. 396: "The courts generally, in the absence of a statute regulating such matters, have inclined to the holding that a judicial inquiry as to the legality of party conventions and primaries, and the rights of persons to participate therein, would not extend beyond the inquiry of which contending party or faction had behind it the political organization to which it belonged. In other words, when the party organization recognizes the right of persons or delegates to a seat in a convention, or to participate in the deliberations of a convention, the courts would not make any further inquiry, except to ascertain what that decision was.

. . . These cases announce the general doctrine that, in the absence of legislation upon matters in relation to the conduct of conventions, primary elections, and the actions of committees with reference thereto, the court will not extend its inquiry, in determining the legality of contesting factions, beyond the ascertainment of which faction is indorsed, recognized, and approved, by the paramount authority within the party limits." See also *Williams v. Lewis* (1898) 6 Idaho, 184, 54 Pac. 619, *supra*, II. b, which approves the same principle.

The Indiana election law expressly provided that, in case of a division in any party and a claim by two or more factions to the same party name, title, or device, the board of election commissioners should give preference of name to that convention which was held at the time and place designated in the call of the regularly constituted party authorities. *State ex rel. Garn v. Election Comrs.* (1906) 167 Ind. 276, 78 N. E. 1016. And the court in this case passed upon the question as to which of two sets of candidates nominated by different conventions, each claiming to represent the party, was entitled to a place on the official ballot, but declined to issue mandamus, because of defects in the pleadings.

The court said: "We need not seek to determine whether the decision of the state committee as to who constitute the local authorities is sufficiently potent in any case to place a claim of regularity on the plane of legal right. What we do decide is that a call for a local convention which is issued by the county central committee, which has been selected and organized pursuant to the call of the state central committee and is acting pursuant to its rules, is the 'call of the regularly constituted party authorities.' . . . A court is not the forum for the determination of questions of a political character, but, as between a dissenting local organization and the representatives of the general body in the locality, the courts, recognizing the fact that those who thus separate themselves are dissenters, deny to them the rights which belong to the regular membership. It is with a party as with a church, the courts will not attempt to settle those questions of right and duty, arising in the organization, which are so complex that individual opinion must for each man be the final arbiter, but, as respects rights of property or whatever is so analogous thereto as to be cognizable by the courts, the rule is, even in the case of an adhering minority, that it is those who adhere and submit themselves to the regular order of the general organization, and not the seceding majority, who are to be recognized as the representatives of the general organization in the locality."

In *Whipple v. Broad* (1898) 25 Colo. 407, 55 Pac. 172, where it was said that the contest was one for supremacy between two rival factions of a party over a question of party policy the determination of which had been properly submitted to a convention of delegates of that party, the court, in affirming a judgment of the district court, sustained the nominations made by a convention composed of the majority of the uncontested delegates who were regularly elected and had responded to the call, as against nominations made by another faction of the party in whose favor the secretary of

state had decided. The court took the view that, in the absence of fraud, that convention is the party convention which is properly summoned, called to order, and attended by a majority of the legally elected delegates; that with the wisdom of the policy adopted by such a convention the courts have nothing to do, and have no control, even though the action complained of is, in the opinion of the court, unwise and destructive of the party organization. The court said, however, that if it could be shown that a sufficient number of delegates were guilty of fraud, or that their votes were secured by bribery or other improper means, or that members of a rival party improperly obtained seats in the convention and controlled its action, so that the work of the convention would not be that of the majority of the party delegates, the court would be at liberty to go behind the action of the convention.

The contention of the losing faction in *Whipple v. Broad* (Colo.) *supra*, was that it was entitled to the use of the party name and emblem because of its adherence to the basic principles of the party, while, as it charged, the other faction had no longer the right to use the party name and emblem, because it had departed from such principles.

Where there had been no adjudication by the state party authorities of the question as to which of two rival county conventions represented the party, the court in *Twombly v. Smith* (1898) 25 Colo. 425, 55 Pac. 254, decided the question in favor of that convention which had been called pursuant to the action of the county central committee, after it had removed its chairman, although the other convention was held pursuant to a call by him issued before his removal, since the committee had power to rescind or revoke its previous action in regard to matters which had not been consummated.

In *State ex rel. Howells v. Metcalf* (1904) 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, where two conventions, each claiming to represent the party in a county, had nominated different

sets of candidates, the court held that that faction of the convention which assembled at the place designated by the chairman and a majority of the county committee, organized, and proceeded to nominate candidates, must be regarded as the regular representative of the party, in the absence of anything justifying delegates in refusing to attend at the place selected.

It is said in the syllabus by the court in *State ex rel. Granvold v. Porter* (1902) 11 N. D. 309, 91 N. W. 944, that, "in determining which of two sets of nominees of a split political convention are entitled to have their names placed upon the official ballot as the party nominees, the inquiry of the court should be limited to ascertaining which of the conventions from which the nominating certificates emanate is the regular one, and should not extend to an examination of political methods and tactics further than is necessary to ascertain the identity of the regular party convention."

And in *State ex rel. Fosser v. Lavik* (1900) 9 N. D. 461, 83 N. W. 914, where the two factions of a county political convention each nominated a list of county officers, claiming to be the convention representing the party, the court, on application for mandamus to compel the filing of nomination certificates by one of the factions, said it was clear that the one duty of the court was to determine which faction, if either, constituted the *de facto* convention of the party.

In *State ex rel. Granvold v. Porter* (N. D.) *supra*, the court held that the voluntary withdrawal of delegates from a political convention which has been regularly organized does not deprive those who remain of the power to act, or destroy the identity of the convention; that in such assemblages the presence of a majority of those entitled to participate is not necessary to constitute a quorum, and those not present are presumed to assent to the action taken by the majority of those who are present and vote.

In *State ex rel. Riley v. Weston* (1904) 31 Mont. 218, 78 Pac. 487, the court, on petition for mandamus to

compel the placing of names of nominees on the ballot, where there were two conventions each claiming to represent the party in a county, undertook to determine only which was the regularly constituted and organized convention of the party.

Relative to the duty of the court to apply and follow party rules or customs in considering objections to nominations, it was said in *Re Wilkes-Barre Twp. Nominations* (1895) 7 Kulp. (Pa.) 529: "Where nominations are made at a caucus called and held under the rules of the party, the validity of the nominations cannot be questioned upon the ground that some of the electors refused to be bound by its action and held another caucus. In a dispute between the nominees of such caucuses the rules of the party must be taken as the law governing the matter, and the court will be bound to adjudge the certificates filed by the officers of the former caucus valid,

and that filed by the latter invalid. But where usage is set up as authority for declaring the action of one caucus valid, and that of the other invalid, the fact that a considerable number of the electors have not acquiesced in it, taken in connection with the fact that it has not been uniformly followed, but has varied in different years, prevents its recognition as equivalent to an established rule of the party."

Party usage, in the absence of any guiding statute, it was held in *Spelling v. Brown* (1898) 122 Cal. 277, 55 Pac. 126, should guide the secretary of state in determining which of two certificates of nomination was issued by the regular party convention.

As enforcing the right to a nomination made by the regularly called convention of the party, see also *People ex rel. Simpson v. Police Comrs.* (1894) 10 Misc. 98, 31 N. Y. Supp. 112, *supra*, II. a. R. E. H.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,

v.

MOLLIE ASH.

Mississippi Supreme Judicial Court (Division B) — March 27, 1922.

(— Miss. —, 91 So. 31.)

Railroad — duty to trespasser — mist on windows of engine.

A railroad company owes no duty to a trespasser on its track, except not to wilfully or wantonly injure him after discovering his presence there, and where a trespasser who was walking on the track during a severe storm was killed by a passenger train, and the engineer and fireman testified that on account of the torrential rain which was being driven against the windows of the cab, and the accumulation of mist and water on the glass of these windows, their view was entirely obstructed, and it was impossible to see a person on the track, and that for that reason they could not and did not see the deceased on the track, and where all the facts and circumstances of the killing are in evidence, and there is nothing in the evidence to contradict or discredit the testimony of the engineer and fireman, the jury should be peremptorily instructed to find for the defendant.

[See note on this question beginning on page 1064.]

Headnote by COOK, J.

APPEAL by defendant from a judgment of the Circuit Court for Panola County in favor of plaintiff in a suit brought to recover damages for the alleged negligent killing of her husband. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. May, Sanders, & McLaurin, for appellant:

At the time the deceased was killed he was a trespasser, and the only duty that defendant owed to him was not wilfully or wantonly to injure him, if, and when, his position of peril was discovered.

Hubbard v. Southern R. Co. 120 Miss. 835, 83 So. 247; Fuller v. Illinois C. R. Co. 100 Miss. 705, 56 So. 783; Alabama G. S. R. Co. v. Daniell, 108 Miss. 358, 66 So. 730; Yazoo & M. Valley R. Co. v. Smith, 111 Miss. 471, 71 So. 752; New Orleans, M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655.

Mr. J. F. Dean, for appellee:

Henry Ash, deceased, was a licensee. Illinois C. R. Co. v. Dillon, 111 Miss. 520, 71 So. 809.

But if, as the engineer and fireman both testified, they were maintaining a lookout, then they owed plaintiff's husband the duty not wilfully or negligently to injure him, after his position of peril was discovered.

Harrison v. Southern R. Co. 93 Miss. 40, 46 So. 408; New Orleans, M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655; Kansas City, M. & B. R. Co. v. Hawkins, 82 Miss. 211, 34 So. 323; Jamison v. Illinois C. R. Co. 63 Miss. 33; Fuller v. Illinois C. R. Co. 100 Miss. 705, 56 So. 783; Gulf & S. I. R. Co. v. Boone, 120 Miss. 632, 82 So. 335; Alabama G. S. R. Co. v. Daniell, 108 Miss. 358, 66 So. 730.

The fact that the engineer in charge of his train was running from 30 to 35 miles an hour, in wanton and in reckless disregard of the life of anyone who might be on the track, entitled plaintiff to a verdict.

Illinois C. R. Co. v. Cole, 113 Miss. 896, 74 So. 766.

Cook, J., delivered the opinion of the court:

Appellee, Mollie Ash, for herself and children, instituted this suit against the Illinois Central Railroad Company, seeking to recover damages for the negligent killing of her husband, Henry Ash, and, from a judgment in her favor, for the sum of \$2,309.09, this appeal was prosecuted.

The pertinent facts as disclosed by the record are as follows: Henry Ash, sixty-five years of age, was instantly killed by a north-bound passenger train of appellant, at a

point about 1½ miles south of Sardis, Mississippi, at about 3 o'clock in the afternoon, while a very severe wind, hail, and rain storm was raging. The deceased, his wife, Mollie Ash, his daughter, Gertrude Ash, and his daughter's two children, were working in a field adjacent to the railroad track when signs of an approaching storm caused them to leave the field and start for their home, about a half mile north of where they were working, and in going to their home they chose the railroad track, which was the shortest and best route. While the storm of wind, hail, and rain was at its worst stage, these parties were traveling north along the railroad track and facing the storm; Gertrude Ash and her children being in front, Mollie Ash some distance behind Gertrude, and the deceased a number of yards further to the rear. The deceased was walking in the middle of the track, with his head down and his hat pulled down over his ears and eyes, and at this juncture the north-bound passenger train ran over him, killing him instantly.

The plaintiff's testimony was to the effect that no alarm was sounded and no effort made to stop the train, which ran about a half mile before stopping. Mollie Ash testified that, on account of the noise of the storm, she did not hear the train approaching, and that by accident she looked back and discovered the train, but too late to warn deceased of his peril, and she described the location and position of the deceased at the time he was struck. The deceased was not at or near a crossing when he was struck, and, while there was testimony that pedestrians made frequent use of the railroad at this point as a walkway, the proof was to the effect that the railroad was used in about the same way and to the same extent as people are accustomed to use a railroad track, where it is the most convenient and best route available.

The engineer and fireman testified that at the time the deceased was struck a very severe storm was

raging, the rain falling in torrents, and the wind blowing it in sheets; that on account of the rain being driven against the cab windows, and the accumulation of water on this glass, coupled with the steam rising from the locomotive, caused by the rain descending on it, they were unable to see the pilot of the locomotive or the track ahead, and were unable to see a man on the track; that they did not see the deceased on the track, and did not know the train had struck anything until they were signaled by the conductor to stop and back up. As to the severity of the storm and the obstruction of the view through the windows of the train by the wind and rain, and the accumulation of water on the glass, they were corroborated by several passengers on the train, some of whom described the rain as almost a cloud-burst, and the wind as having attained almost cyclonic velocity. A passenger who was standing at the rear door of the train and looking south discovered that a man had been run over, and he gave the notice of that fact to the conductor, and the train was stopped after it had proceeded about a half mile, and it was then backed up to the point of the accident and the body of the deceased and members of his family carried into Sardinia. Some of the witnesses for the plaintiff testified that situated as they were, out in the rain and in an open space, they could see some distance through the storm and rain, and there was also some testimony which tended to show that, while the train was being backed up to the point of the injury, a person looking back south could see some distance down the track.

At the close of all the evidence the appellant requested the court to instruct the jury peremptorily to find for the defendant, and the refusal of the court to grant this instruction is assigned as error.

It is clear from the testimony in this record that the deceased was a trespasser on the railroad track at the time he met his death, and, this being true, the defendant owed him

no duty except not to wilfully or wantonly injure him after discovering his presence on the track. Counsel for appellee does not dispute this principle, which is established in this state by an unbroken line of decisions; but the contention is made that the testimony for appellee creates a conflict in the evidence, from which the jury was warranted in reaching the conclusion that if the engineer and fireman were at their post of duty, as they say they were, they could have seen, and in fact did see, the deceased, in time to have warned him of his peril and avoided striking him.

We do not agree with this contention. Both the engineer and fireman testified that on account of the driving rain, and the accumulation of mist and water on the glass of the windows through which they were endeavoring to look, they could not see the track ahead, could not see as far as the front of the locomotive, and did not see the deceased. The appellee offered the testimony of certain witnesses to the effect that situated as they were in an open space, with an unobstructed view, they were able to see an object several hundred feet; but this was not in contradiction of the evidence of the trainmen that, situated as they were, they were unable to see, and did not see, the deceased, and, in the absence of any evidence in contradiction thereof, we are unable to say that the statement of the facts as given by the engineer and fireman is unreasonable, and we do not think there is any evidence which would warrant a jury in reaching the conclusion that their testimony is untrue.

It follows from these views that we have reached the conclusion that the peremptory instruction to find for the defendant should have been granted, and therefore the judgment of the court below is reversed, and judgment entered here for appellant.

Railroad—
duty to trespasser—mist on
windows of
engine.

Suggestion of error overruled.

ANNOTATION.

State of weather as affecting liability for injury to one struck by train or street car.

- I. In general, 1064.
- II. Liability of railroad company:
 - a. Negligence and contributory negligence for jury, 1066.
 - b. Contributory negligence matter of law, 1072.
 - c. Absence of negligence matter of law, 1076.
- III. Liability of street car company:
 - a. Negligence and contributory negligence for jury, 1076.
 - b. Contributory negligence matter of law, 1078.

I. In general.

In determining the liability of a railroad or street car company for injury to one struck by a train or street car, the courts take into consideration primary and manifestly relevant atmospheric conditions, such as fog, or a snow, rain, or dust storm, or heavy clouds obscuring the sun or moon, as well as various collateral meteorological conditions, such as the force and direction of the wind, or phase of the moon, which affect the visibility of the train or street car. See the cases cited throughout this annotation.

Moreover, inferences derived from common experience are unhesitatingly employed. Thus, in *Ducharme v. Holyoke Street R. Co.* (1909) 203 Mass. 384, 89 N. E. 561, wherein it appeared that the plaintiff was struck from behind by the defendant's electric car while he was driving along the highway, and a judgment in his favor was affirmed, the court said: "It is a matter of common knowledge that weather conditions are variable both in place and time; and it has been said that this is especially true of the climate of New England. . . . Sunshine or moonlight may quickly and repeatedly alternate with thick clouds and rain or snow. . . . And on a moonlight night, when there are clouds in the sky, it often happens that periods of bright moonlight and of complete obscuration by heavy clouds, with resultant darkness, succeed each other at short and frequent

intervals. . . . The accident occurred at twenty minutes after 7 o'clock, about three hours after sunset, on a winter's night. The evidence for the plaintiff tended to show that it was a dark and cloudy night; according to the defendant's evidence, it was a bright night. This was a material question upon the main issues in the case. The moon had risen more than four hours before the happening of the accident, and was full two days afterwards."

The precise time of day when the accident occurred, in connection with the season of the year or other circumstances, is generally a very material fact. Thus, in *Elgin, J. & E. R. Co. v. Lawlor* (1907) 132 Ill. App. 280, wherein a judgment was affirmed in favor of the plaintiff, who was struck by a string of freight cars which were being pushed over a crossing about 6 P. M., September 22, the court said: "Though it was shortly after sunset, the amount of light depended, also, upon other conditions, such as whether it was cloudy, and the number of trees, etc., in that vicinity." This case was affirmed in (1907) 229 Ill. 621, 82 N. E. 407.

It has been held that adverse weather conditions necessitate the exercise of a high degree of care by both the railroad company and the public. As was said in *Rote v. Pennsylvania & M. Valley R. Co.* (1907) 34 Pa. Super. Ct. 508: "Because the night was dark and foggy the law did not require the plaintiff to remain at home, or oblige the defendant to stop running its cars. It did impose on both the duty of proceeding with more than ordinary care."

Similarly, in *Chicago & E. R. Co. v. Fretz* (1909) 173 Ind. 519, 90 N. E. 76, it was said: "Even if appellee knew there was a crossing of the railway to be encountered, she was not thereby precluded from traveling upon the highway, and it was not in it-

self negligence for her to do so, even on a dark and rainy night, or to do so with the side curtains on the buggy. The use of the highway and the crossing by appellee and the railroad was a reciprocal use, with the precedence in crossing with the railroad train, in which certain duties were imposed by statute upon the railroad's servants, and certain duties upon appellee by the commonly recognized law."

But in *Ziserman v. Philadelphia Rapid Transit Co.* (1913) 241 Pa. 13, 88 Atl. 80, wherein the action was for injuries caused by a collision between a wagon and a trolley car on a "dark, wet, and misty evening," it was held that a charge that the weather conditions required a greater degree of care than usual was properly refused, the court saying that "the duty that rested upon the defendant was the exercise of due care under the circumstances."

A majority of the cases cited throughout this annotation support the doctrine that weather conditions affecting the visibility of a railroad train or street car may have an important bearing in relieving a person injured from the imputation of contributory negligence.

Thus, in *Schilawske v. Detroit, J. & C. R. Co.* (1919) 206 Mich. 214, 172 N. W. 369, a judgment in favor of one struck by a street car while crossing a street on an exceedingly dark and stormy night was affirmed, the court saying: "It is . . . true that the confusion and bewilderment produced by the darkness and the storm introduce an element of uncertainty into the attempt to arrive at a judgment as to how an ordinarily prudent and careful man would have acted under the very unusual circumstances in which the deceased found himself.

. . . He was beset with new and unusual perils. There was a driving wind, with sleet and snow. The pavement was coated with ice. His range of vision in either direction was limited. If he ought to have had in mind the possibility of a car without a headlight suddenly looming out of the darkness, bearing down on him at a speed of 30 or 40 miles an hour,

from which direction ought he to have expected it? Or why a street car more than a rapidly approaching automobile, without lights, hurrying in one direction or the other along almost any portion of the width of the pavement? If he had stopped a few feet north of the second track to look carefully to the west, might not that very delay and diverting his attention towards that direction have resulted in a failure to escape an automobile or a street car from the east, which might have caught him as suddenly and without warning as the car which actually did appear from the west? He had no more reason to expect it from the one direction than the other. Or might not even such a slight delay have resulted in his being trapped in the 'devil's strip' between two cars approaching from opposite directions, with equal disregard of their duties towards persons on the highway? Prudence may have suggested to him that the safest course was to make the crossing as rapidly as possible under the circumstances."

So, in *Brott v. Auburn & S. Electric R. Co.* (1917) 220 N. Y. 92, 115 N. E. 273, 16 N. C. C. A. 758, wherein it appeared that the plaintiff's intestate had been killed while crossing the defendant's tracks in front of an approaching car, for the purpose of becoming a passenger thereon, the court said: "Her possible confusion, arising from the severe wind and driven snow, must be taken into consideration in connection with the fact that she assumed that the car would be stopped before it reached the white post, in determining whether she should be charged with negligence, as a matter of law, in continuing her effort to cross the tracks in front of the approaching car."

In some instances, however, a contrary doctrine has been applied. This doctrine was stated at length in *Osborn v. Wabash R. Co.* (1914) 179 Mo. App. 245, 166 S. W. 1119, wherein the court said: "But it is said that Osborn faced an unusual and confusing obstruction to the free exercise of his senses of sight and hearing, by reason of the fog. There is no evidence

whatever that his hearing was interfered with. No one else had any difficulty in hearing the train. And while it is, perhaps, well known that in a dense fog—so dense that objects only a few feet away are not distinguishable—sounds are distorted and misleading, yet such is not the case where the fog is of that character that objects can be seen 50 yards away. We are also reminded that the deceased was in an inclosed cart, with his ears partly muffled. This, however, cannot serve to relieve deceased of negligence, but rather increased the degree of care required of him under such circumstances. The rule is well stated in 2 White on Personal Injuries on Railroads, § 1083, where it is said that it is the duty of a person intending to cross a railroad track to listen as well as look, and if dust temporarily obscures his view he must stop and wait to get a better view, or listen for a train, and that a like rule obtains in a case where the view is obscured by falling snow, or a fog; and a traveler, who, under such circumstances, drives upon the track without taking the extra precautions demanded by the unusual conditions, cannot recover. A railroad crossing is a warning of danger, and one who crosses it knows he is encountering a danger, and must act with care proportionate to the danger. 3 Elliott on Railroads, § 1165. If he is in an inclosed vehicle with his ears muffled, and a fog is prevailing, these conditions, so far from relieving him of care, should increase the amount of care to be taken. Ordinary care under normal conditions would not be ordinary care under such unusual conditions. For 'no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety.' *Sanguinette v. Mississippi River & B. T. R. Co.* (1906) 196 Mo. 489, 95 S. W. 386. 'The measure of precaution to be observed by a traveler depends often upon the circumstances and surroundings.' *Laun v. St. Louis & S. F. R. Co.* (1909) 216

Mo. 579, 116 S. W. 553. If the fog was so great that he could not see down the track for more than 50 yards, then it was all the more incumbent upon him to listen."

The reason for this latter view was tersely expressed in *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1912) 24 N. D. 40, 138 N. W. 976, as follows: "The deceased was not excused by the weather from the exercise of ordinary care, even if it was sufficiently thick to render it difficult to observe the train or to hear its approach. The greater the danger the greater the care necessary for him to exercise, and the greater the caution necessary to constitute ordinary care."

In applying the same view in *Gage v. Atchison, T. & S. F. R. Co.* (1914) 91 Kan. 253, 137 Pac. 938, Ann. Cas. 1915B, 410, the court said: "The range of [plaintiff's] vision was so limited by rain and snow that he could not see a railway locomotive beyond the distance of 300 feet, and he was fully conscious of the limitation. He knew the wet condition of the road and knew how to handle an automobile. He was in a place of safety when he saw the train, had he been in control of his car; but he was driving at such speed that when he applied the brakes the momentum of the car carried it up the slight incline and upon the railway track before it stopped. Ordinary prudence required him to control his car so that he could use his faculty of sight near the track, where it would be of most benefit to him, and so that he could stop before going on the track, if a train should appear within the distance he was able to see."

II. Liability of railroad company.

a. Negligence and contributory negligence for jury.

In each of the following cases of injury caused by a railroad train the visibility of which was affected by the weather conditions prevailing at the time of the accident, it was held that the issues of negligence and contributory negligence were for the

jury, and a verdict for the plaintiff, unless otherwise stated, was affirmed.

Bright sun.

Merrill v. Minneapolis & St. L. R. Co. (1910) 27 S. D. 1, 129 S. W. 468. Accident at crossing about sundown July 7. Bright sun dazzled eyes of plaintiff, who wore glasses, as she looked toward approaching train. The sun's rays reflected on her glasses, obstructing her vision, and she testified that she did not see or hear the engine until it was right upon her, too late to protect herself. The court said: "We do not think plaintiff was required to stop and wait until the sun went down before attempting to cross defendant's tracks, but she was, under such circumstances, required to use all that care and caution which any other ordinarily prudent and cautious person would have done under the same or like circumstances, in an attempt to discover an approaching train at the place in question. It was her plain duty to stop, carefully look, and listen as she approached these tracks. She testified that she did."

Clouded sky.

Beckwith v. New York C. & H. R. R. Co. (1889) 54 Hun, 446, 7 N. Y. Supp. 719, 721, affirmed in (1891) 125 N. Y. 759, 27 N. E. 408. Passenger train with a locomotive headlight. Accident about 10 P. M., February 25. "The night was dark and hazy."

Rowe v. Western Maryland R. Co. (1909) 224 Pa. 405, 73 Atl. 456. Freight cars running wild and at high speed. "The accident happened before sunrise on a damp, cloudy morning, when it was so dark that objects could not be readily distinguished, and there was testimony that the cars made only a low rumbling sound."

Dust storm.

St. Louis, A. & T. H. R. Co. v. Odum (1894) 52 Ill. App. 519. Engine and caboose. Accident in daytime. "There was much dust upon the highway obscuring the view."

Fog.

Pennsylvania R. Co. v. Miller (1900) 39 C. C. A. 642, 99 Fed. 529. Accident at crossing about 5 A. M.

"The weather was foggy, and a slight sleet of snow and rain was falling." Plaintiff's view of track was obstructed by a fence, telegraph and telephone poles, and buildings.

Louisville & N. R. Co. v. Womack (1909) 97 C. C. A. 559, 173 Fed. 752. Plaintiff was on a hand car which collided with a freight train "in the early morning," June 17. The survivors upon the hand car testified that they saw the stack and front of the engine at a distance of 200 yards. The court said: "Now, it is plain that if the train could be seen by those upon the hand car at a distance of 200 yards, the lookout upon the engine ought to have seen the hand car nearly as soon. The only obstacle to a clear vision for a mile or more was a summer morning fog hanging on the river where it was crossed by the railway bridge. There was a conflict of opinion as to the thickness and height of the fog at this bridge, and as to its effect in hiding the approach of the train and hand car from each other. It cannot be said that there was not material evidence from which the jury might have inferred that if the men on the engine had been as watchful for persons or obstructions upon the track as the statute, under the construction of the Tennessee court, required them to be, they might have seen this hand car before they say they saw it."

O'Hara v. Central R. Co. (1910) 106 C. C. A. 177, 183 Fed. 739. Crossing accident. Train seen approaching, but speed and distance miscalculated in dense fog.

Lehtohner v. New York, N. H. & H. R. Co. (1911) 110 C. C. A. 129, 188 Fed. 59. Plaintiff's intestate crossing tracks to station platform, about 6:30 A. M., December 21. It was foggy and very dark. The locomotive, which was running without a headlight, sounded no whistle and rang no bell.

Smith v. Chicago, P. & St. L. R. Co. (1908) 236 Ill. 369, 86 N. E. 150. Collision between a backing locomotive and a train in the daytime. "There was at the time a heavy fog, so that an object could not be seen more than about 20 feet beyond the tender."

Coulter v. Illinois C. R. Co. (1914) 264 Ill. 414, 106 N. E. 258. Street car conductor killed by train backed over crossing without light or signal. "The night on which the accident occurred was very dark, misty, and foggy."

Chicago, I. & L. R. Co. v. Turner (1904) 33 Ind. App. 264, 69 N. E. 484. Accident about 7:20 A. M., September 16. "The fog was so dense that decedent was unable to see the train. It extended more than one half mile each way from the crossing, and prevented him seeing the train until it was too late to prevent the accident. He could not have seen the train or headlight just before driving on the track by looking in its direction. . . . The engineer testified that he could not see 60 feet ahead of his engine on account of the density of the fog."

Meyer v. Chicago, R. I. & P. R. Co. (1907) 134 Iowa, 722, 112 N. W. 194. Accident about 10 A. M. "There is evidence tending to show that it was very foggy that morning and at the time of the accident. . . . Had it not been for the fog it fairly appears that the train could have been seen."

Brusseau v. New York, N. H. & H. R. Co. (1905) 187 Mass. 84, 72 N. E. 348. Train running over a crossing about midnight, no signals being given. "The night was somewhat foggy."

Slattery v. New York, N. H. & H. R. Co. (1909) 203 Mass. 453, 133 Am. St. Rep. 311, 89 N. E. 622. Train running over a crossing about 6:42 A. M., December 14. "The accident happened before the sun was up, and there was testimony that on the morning in question 'it was kind of dark and foggy like.'" A directed verdict for the defendant was reversed.

Thompson v. Toledo, A. A. & N. M. R. Co. (1892) 91 Mich. 255, 51 N. W. 995. Locomotive running rapidly without a headlight. Accident about 5 A. M., September 26. "It was dark and foggy." A judgment for the plaintiff was reversed solely for erroneous instructions.

Keim v. Union R. & Transit Co. (1886) 90 Mo. 314, 2 S. W. 427. Accident at crossing, about 4 A. M., September 28. There were several tracks at the crossing. "The morning was

dark and foggy. . . . Owing to the misty and foggy character of the morning the headlight would impart but little, if any, information as to the track that the engine was on, or its distance from the crossing, as it only cast a circle of light 15 or 20 feet ahead of it."

State ex rel. Iron Mountain & S. R. Co. v. Reynolds (1920) 286 Mo. 204, 226 S. W. 564. Limited passenger train making up time. Accident at crossing about 6:25 A. M., December 21. "It was dark and there was a fog, which, with the embankments, prevented deceased from seeing the rays of the headlight." Signals were not given.

Covell v. Wabash R. Co. (1899) 82 Mo. App. 180. A backing train of freight cars, about 5 A. M., March 19. "Because of the darkness and smoky, foggy condition of the atmosphere, the plaintiff could not see and detect the moving of the cars at a distance sufficient to escape collision with a train running at speed, and without light and other warning, as was this one."

Hickey v. New York C. & H. R. R. Co. (1896) 8 App. Div. 123, 40 N. Y. Supp. 484. Train at crossing about 1 o'clock in the morning. "It was very dark and there was a dense fog."

Noble v. New York C. & H. R. R. Co. (1897) 20 App. Div. 40, 46 N. Y. Supp. 643, affirmed in (1899) 161 N. Y. 620, 55 N. E. 1098. Passenger train, about 6:05 P. M., November 2. "The night of the accident was dark and very foggy."

Pruey v. New York C. & H. R. R. Co. (1899) 41 App. Div. 158, 58 N. Y. Supp. 797, affirmed in (1901) 166 N. Y. 616, 59 N. E. 1129. Backing locomotive with no light on the tender. "The morning was dark, foggy, misty, and, according to some of the witnesses, Cimmerian in its density—a darkness quite common in this latitude on a muggy, foggy morning, at 6 o'clock, in the early part of February." But in the dissenting opinion it was said that a witness testified that, although he was farther than the plaintiff's intestate from the locomotive, he distinctly saw it approaching in the breaking daylight.

Turell v. Erie R. Co. (1900) 49 App.

Div. 94, 63 N. Y. Supp. 402. Hour not stated, but grocery store was open. "The morning was very foggy, but the evidence indicates that sight was unobscured for a distance of at least 200 feet. Nevertheless his [plaintiff's] statement that he did look, but did not see the train, required the submission of the question to the jury as one of fact." A judgment dismissing the complaint was reversed.

Wilcox v. New York, L. E. & W. R. Co. (1895) 88 Hun, 263, 34 N. Y. Supp. 744, 12 Am. Neg. Cas. 355. Accident about 6 A. M., June 9. Testimony that "the fog hid the approach of the train."

Doud v. Delaware, S. & S. R. Co. (1902) 203 Pa. 227, 52 Atl. 249. Locomotive backing without a light. "It was a wet, foggy, dark night."

Bard v. Philadelphia & R. R. Co. (1901) 199 Pa. 94, 48 Atl. 684. Locomotive running rapidly and without a headlight. Accident after 5:30 A. M., November 23. "It was very dark and foggy, and for this reason the plaintiff could see but a very short distance in any direction." A judgment for the defendant was reversed.

Bond v. Pennsylvania R. Co. (1907) 218 Pa. 34, 66 Atl. 983, on second appeal in (1909) 224 Pa. 460, 73 Atl. 931. Train drawn by locomotive without a headlight, about 5:30 P. M., January 19. "The corroborated testimony of the plaintiff is that it was dark and foggy," and he testified that if it had been daylight he could have seen the train. A judgment for the plaintiff was reversed solely for erroneous instructions on another point.

Murray v. Pennsylvania R. Co. (1913) 242 Pa. 424, 89 Atl. 557. Accident at crossing over four tracks. "Dense fog." Plaintiff, while waiting for passing of train on one track, was struck by train on another, which gave no signals.

Clinger v. Payne (1921) 271 Pa. 88, 113 Atl. 830. Accident at crossing before daybreak. "Heavy fog." Plaintiff drove truck to within 5 feet of track, alighted therefrom, and approached closer, looking and listening. Struck while driving over crossing, by locomotive traveling swiftly because

of adverse grade, without headlight, and giving no signals of approach.

Collins v. Chicago & N. W. R. Co. (1912) 150 Wis. 305, 136 N. W. 628. Bridge carpenter injured while at work, by construction train running at high speed, without signals, on foggy day.

Hailstorm.

Delaware, L. & W. R. Co. v. Devore (1902) 52 C. C. A. 77, 114 Fed. 155, writ of certiorari denied in (1903) 190 U. S. 561, 47 L. ed. 1184, 23 Sup. Ct. Rep. 855. Passenger train. Accident about 7:20 P. M., November 22. "The evening was very dark and cloudy. 'It was storming some—a sort of hail, sleeting.'" The wind was blowing hard. A judgment for the plaintiff was reversed for errors in instructions. But a judgment for the plaintiff on a new trial was affirmed in Delaware, L. & W. R. Co. v. Devore (1903) 58 C. C. A. 543, 122 Fed. 791.

Rainstorm.

Pennsylvania Co. v. Keane (1891) 41 Ill. App. 317. Dummy train. Accident about 6:20, "on a dark and rainy morning in July," "the rain falling so fast that it was about equal to a fog." "Blinding rain."

Cleveland, C. C. & St. L. R. Co. v. Moss (1900) 89 Ill. App. 1. Accident at crossing about 3:20 P. M., February 3. Rain and sleet. Plaintiff carried umbrella, obstructing view.

Chicago & E. R. Co. v. Fretz (1909) 173 Ind. 519, 90 N. E. 76. Accident at crossing about 10 P. M., April 14. "A dark and rainy night." Plaintiff ignorant of crossing; train coasting at high speed with steam shut off.

Louisville & N. R. Co. v. Ueltschi (1906) 29 Ky. L. Rep. 1136, 97 S. W. 14. Accident about noon. "There was a storm, and a heavy rain was falling, accompanied by thunder and lightning, and a strong wind was driving the rain in sheets, so that, as one witness testified, you could hardly see. It was a blinding rainstorm."

Palmer v. Chicago & A. R. Co. (1909) 142 Mo. App. 633, 121 S. W. 1087. Accident at crossing about midnight. "The night was wild and very dark. It was raining hard, and a strong wind was blowing from the

north, which drove the rain into the faces of the occupants of the buggy." No one on the train saw or heard the collision. "The engineer said the night was so dark he could not see farther than the front of his engine." Witnesses for the defendant said there were green lights on the sides of the engine, and a headlight consisting of a coal-oil lamp set back in a lantern. "They also say a glare was cast every few seconds when the fireman opened the fire box of the engine to put in fuel. The degree of brilliancy of this glare, and whether or not it was thrown at a time when plaintiff could have seen it if he had been looking, are left indefinite. Neither is there testimony as to how brilliant the green lights were on the sides of the engine, or how far they could be seen through the thick weather of that night. It looks like plaintiff could only have seen the one on the south side as he drove northward; and, considering the state of the weather, we cannot say as a matter of law he was bound to see this lamp, or, indeed, any of the alleged lights about the locomotive, had he been attentive. Moreover, the jury fairly might infer there was no headlight burning, and might find there was no glare from the fire box of a kind to warn plaintiff as he approached the track. We do not feel authorized to hold otherwise, in view of the engineer's statement that the illumination cast by the headlight failed to reveal to his gaze the buggy and team on the track. If this statement is true, the condition of the atmosphere prevented lamps from shining far. We are much impressed by the testimony of the engineer that he could not see ahead of the locomotive." See also *Holland v. Northern P. R. Co.* (1909) 55 Wash. 266, 104 Pac. 252.

Smith v. Boston & M. R. Co. (1899) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290. Crossing accident. "Cloudy and misty night." View obstructed by snow fence and dwelling house; no signals given by the approaching train.

Willis v. Atlantic & D. R. Co. (1898)

122 N. C. 905, 29 S. E. 941. Licensee on hand car injured by excursion train running at high speed out of schedule time, and without a headlight, "in approaching darkness and in a raging storm."

Morrow v. North Carolina R. Co. (1907) 146 N. C. 14, 59 S. E. 158. Passenger train running rapidly. Accident between 4 and 5 P. M., December 17. "A cloudy day, and drizzling rain upon melting sleet and ice. . . . On account of the thawing of the ice, and heavy atmosphere, a fog was rising." Smoke from another train mingled with the fog and settled over the track. The plaintiff gave those reasons for his failure to detect the train until it was within 6 feet of him.

Unger v. Philadelphia, B. & W. R. Co. (1907) 217 Pa. 106, 66 Atl. 235. A work train moving backwards. "It was dark, foggy, and raining," and at night. There was no light at the crossing, and the only light on the rear of the train was a lantern on the platform of the last car. "It cannot be said with certainty that if he (plaintiff) looked he saw the train, or that, if he saw it, he observed in the darkness and storm that it was backing to the crossing, since the natural inference from the position of the engine would be that it would move in the opposite direction."

Norfolk & W. R. Co. v. Holmes (1909) 109 Va. 407, 64 S. E. 46. Locomotive backing without a light. Accident between 7 and 8 P. M., September 28. "It was a dark, drizzly, or misty night, with the spot badly lighted."

Snowstorm.

Erie R. Co. v. Weinstein (1909) 92 C. C. A. 189, 166 Fed. 271. "There was evidence that there was such a snowstorm blowing in the face of one looking in the direction from which the train approached as to greatly obscure the view, and also evidence as to the speed of the train which might, in connection with the snowstorm, lead to an inference that the train was not in sight when he [plaintiff] started to cross."

Hines v. Betts (1920) 146 Ark. 555,

226 S. W. 165. Pedestrian struck by passenger train running at high speed without signals, at public crossing. Accident at about 5:45 P. M., February 8. "There was a strong wind blowing and a heavy snow falling."

Lake Shore & M. S. R. Co. v. Foster (1898) 74 Ill. App. 387. Passenger train. Accident December 16, about 6:30 P. M. "The night was very dark and stormy." "It was snowing." Headlight on locomotive.

Harper v. Barnard (1896) 99 Iowa, 159, 68 N. W. 599. Accident at crossing about 10 A. M., October 29. "All the witnesses agree that it was rather a dark, cloudy morning, and that snow and rain were falling." The plaintiff's view of approaching train was obstructed by snow-covered trees and bushes.

Frederickson v. Iowa C. R. Co. (1912) 156 Iowa, 26, 135 N. W. 12, Ann. Cas. 1915B, 224. Crossing accident. Passenger train. "Wind was high," and "at times the air was so full of drifting snow that a person could not see far."

Atchison, T. & S. F. R. Co. v. Morgan (1890) 43 Kan. 1, 22 Pac. 995, 11 Am. Neg. Cas. 538. Locomotive backing rapidly. Accident about noon. "It was snowing very hard, and the wind was blowing a gale."

Campbell v. Northern P. R. Co. (1913) 122 Minn. 102, 141 N. W. 855. Accident at crossing on November 11, about half an hour after sundown. Train drifting, headlight dimly lit, and no signals given. "It was quite dusk or dark, cloudy, snowing, and the wind blowing from the northwest."

Tischman v. Erie R. Co. (1911) 81 N. J. L. 268, 81 Atl. 114, affirmed on opinion below in (1912) 83 N. J. L. 793, 85 Atl. 1135. Accident on double-track grade crossing at 6:30 P. M., January 16. "Dark and stormy." "Snowing very heavily." Plaintiff stopped and looked, but did not see train because of storm.

Smith v. Lehigh Valley R. Co. (1902) 170 N. Y. 394, 63 N. E. 338, 11 Am. Neg. Rep. 322. Passenger train about midnight. "The weather was

intensely cold, and a strong wind was blowing . . . which filled the air with particles of snow and sleet. . . . The condition of the atmosphere was, however, not such as continuously to obstruct the vision; for the plaintiff's witnesses agree that there were lulls in the storm, and in those intervals a clear enough view might be had of distant objects." A judgment for the plaintiff was reversed for erroneous instructions on another point. The question of contributory negligence was held to be for the jury. See also the discussion of the facts in the same case in the court below. (1901) 61 App. Div. 46, 69 N. Y. Supp. 1112.

Coulter v. Great Northern R. Co. (1896) 5 N. D. 568, 67 N. W. 1046, wherein a directed verdict for the defendant was reversed. "This was a crossing case, and the facts disclosed that plaintiff, at about dusk in the evening, drove a team and wagon over a public crossing, and was struck and injured by a passenger train. The proof showed that a heavy snowstorm was raging at the time, which probably obstructed plaintiff's view of the approaching train. . . . The headlight on the engine was lighted, and there was no obstruction to plaintiff's view, aside from the snowstorm." The foregoing quotation, stating the facts in the case above cited, is taken from the opinion of the court in Pendroy v. Great Northern R. Co. (1908) 17 N. D. 433, 117 N. W. 531, 534; but those facts are not all mentioned in the earlier case.

Kuntz v. New York C. & St. L. R. Co. (1903) 206 Pa. 162, 55 Atl. 915. Locomotive at crossing, about 6 A. M., early in February. "This was before daylight, and a snowstorm of unusual force and severity was prevailing. . . . The headlight of the engine was to some extent obscured by the snow that clung to the glass, and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight, under ordinary circumstances, when 1,500 feet away. . . . The storm prevented his seeing more than 50 or 100 feet. Whether under the circum-

stances he exercised proper care was for the jury."

Kasarda v. Lehigh Valley R. Co. (1908) 222 Pa. 146, 70 Atl. 943. Passenger train. Accident "at an early hour, before it was yet day." "What obscured the situation were the darkness of the morning and the wind and snow that prevailed." "A very stormy morning."

Valin v. Milwaukee & N. R. Co. (1892) 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084. Locomotive with tender and snow pilot. Accident about noon, March 4. "A cold, windy, blustering day." "It was snowing some, and the snow was drifting, the wind blowing, one witness said, 'from the northeast.'" View obstructed by pile of logs and stumps.

Shaver v. Davis (1921) — Wis. —, 185 N. W. 227. Accident at crossing shortly before noon, February 23. "The wind was blowing and the snow drifting." The plaintiff was busily occupied in driving a heavy truck through snow drifts; train was coasting down grade with steam shut off.

Gray v. Wabash R. Co. (1916) 35 Ont. L. Rep. 510, 20 Can. Ry. Cas. 391, 28 D. L. R. 244. Accident at crossing. "The appellants were driving in a buggy with the cover up; the train that caused their injury was almost directly behind them; and both were approaching the awkward crossing, where the accident happened, in a snowstorm."

Wind storm.

Kerr v. Bush (1918) 198 Mo. App. 607, 200 S. W. 672. Train running over crossing without headlight or signals being given. "The night was very dark, stormy, and surly." "A rather strong March wind was blowing."

McCaffrey v. Baltimore & O. R. Co. (1911) 201 N. Y. 115, 94 N. E. 624. Relief engine. Plaintiff crossing track to take train. "Engine was backing up on the track noiselessly, without a light that would attract his notice in the wind and storm that were prevailing at the time." "It cannot properly be held that he was guilty of negligence as a matter of law."

Law v. Missouri, K. & T. R. Co. (1902) 29 Tex. Civ. App. 134, 67 S. W. 1025. Accident about 11 A. M., December 25. Plaintiff struck by train while walking along track with brim of hat pulled down low, to protect his face from cold and severe wind blowing from the north with unusual force and violence. Sound of approaching train deadened by roar of wind.

b. Contributory negligence matter of law.

In each of the following cases of injury caused by a railroad train the visibility of which was affected by weather conditions it was held that the plaintiff was guilty of contributory negligence as a matter of law.

Clouded sky.

Chicago & N. W. R. Co. v. Andrews (1904) 64 C. C. A. 399, 130 Fed. 65. A judgment for the plaintiff was reversed by a majority of the court. But Thayer, J., dissenting, said (at p. 75) that on a dark lowering day a cloud of smoke falling on a railroad track would naturally render an approaching train invisible for a few moments to one standing on or close to the track in a straight line with the smoke and the train, although it might be visible to persons standing elsewhere. A petition for a writ of certiorari was denied in (1904) 195 U. S. 628, 49 L. ed. 351, 25 Sup. Ct. Rep. 787.

Oleson v. Lake Shore & M. S. R. Co. (1896) 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736. Train running over a crossing. "The day was somewhat dark and overcast, atmosphere heavy, and the clouds obscured the sun."

Dust storm.

Pittsburg, C. C. & St. L. R. Co. v. Austin (1911) 141 Ky. 722, 133 S. W. 780. Accident at crossing. Blinding dust storm. "Whirlwind of dust." Plaintiff with head bent down went on track without stopping or looking.

Keele v. Atchison, T. & S. F. R. Co. (1910) 151 Mo. App. 864, 131 S. W. 730. Accident at crossing about 6:30 P. M., May 7. "A strong, gusty wind was blowing from the west or southwest, [and] the air near the crossing was filled with sand and dust."

Plaintiff's intestate, a girl of fifteen, approaching track holding rim of her hat down to shield her face, did not look towards train. In the same case, on a later appeal, it was held in (1914) 258 Mo. 62, 167 S. W. 433, that defendant's demurrer to the evidence should have been sustained.

Holland v. Northern P. R. Co. (1909) 55 Wash. 266, 104 Pac. 252. Train at crossing, about noon. The wind was blowing a gale in the direction of the train, and raising such dense clouds of dust that the plaintiff was sometimes unable to see the horse she was driving. She failed to recover, because the defendant's negligence was not proved. Her counsel conceded that, as she could not see the train, it was evident that the defendant's servants on the locomotive could not see her horse and vehicle.

Haetsch v. Chicago & N. W. R. Co. (1894) 87 Wis. 304, 58 N. W. 393. Train running over a crossing. Accident occurred about 7:45 P. M., October 31. "The night was dark and windy, and there was much dust flying in the air about the highway. The wind was blowing in the direction the train was running. . . . But the headlight of the engine was high above the train, and the darkness added intensity to the light. The wind and dust would have much more easily obscured the view of an approaching train in the daytime than they would or could an approaching headlight in the nighttime. The headlight was intended to be seen at night from a long distance, as a warning to travelers, and to light up the track, and discover obstructions in advance of the train, and it answers well its purpose. It is inconceivable that the dust in the air raised by the wind from a highway would cut off, or much obscure, a distant view of that headlight. Mere dust in the air, raised by the wind, was never so dense as that." **Fog.**

Tomlinson v. Chicago, M. & St. P. R. Co. (1904) 67 C. C. A. 218, 134 Fed. 233. Passenger train with locomotive headlight. Accident about 6 P. M., November 29. "It was very dark," a fog or mist seemed to be rising from

the ground, but "no witness testified that there was sufficient mist to have obscured a view of the headlight, nor did the evidence warrant even a probability of the existence of such a condition."

Chicago, B. & Q. R. Co. v. Munger (1909) 94 C. C. A. 176, 168 Fed. 690. Freight train. Accident in daytime. "The fog was unusually heavy that morning, but so that an engine could be discerned a distance variously estimated from about 50 to 200 feet. . . . Decedent, however dense and thick the fog may have been, was guilty of culpable negligence."

Lake Shore & M. S. R. Co. v. Dylinski (1896) 67 Ill. App. 114. Train. Accident on a foggy morning, September 26. Servant on hand car struck by following train must have known that the latter would be somewhat obscured.

Chicago & N. W. R. Co. v. Thomson (1906) 128 Ill. App. 594. Fast mail train. Accident between 7:30 and 8 A. M., September 8. Dense fog together with smoke from another locomotive. Railroad section man walking on track should have known that approaching train or its headlight would be obscured.

Cleveland, C. C. & St. L. R. Co. v. Houghland (1908) 44 Ind. App. 73, 85 N. E. 369, 88 N. E. 623. Accident about 8:10 A. M., January 20. "A dense fog obscured the deceased's view of the approaching engine and caboose," but he heard the locomotive signal and could have heard the train. "But for the fog the deceased could have plainly seen the engine."

Starry v. Dubuque & S. W. R. Co. (1879) 51 Iowa, 419, 1 N. W. 605. Accident about 6 P. M., October 26. "It was foggy, dark, and misting." The train consisted of two flat cars pushed by an engine, and several other cars in the rear; train traveling very slowly, and carrying headlight. Plaintiff's intestate stepped on track despite warning of signalman on train.

Osborn v. Wabash R. Co. (1914) 179 Mo. App. 245, 166 S. W. 1118. Accident occurred about 1 P. M., on January 20. "The day . . . was cloudy and misty, and a fog prevailed."

Plaintiff's intestate, a rural mail carrier, in an inclosed wagon, drove on crossing with ears muffled, and without stopping or looking.

Hauser v. Central R. Co. (1892) 147 Pa. 440, 23 Atl. 766. The plaintiff was hurt while attempting to cross a railroad track immediately in front of an approaching train. "She did not succeed even in getting on the track, because the physical presence of the locomotive, directly in front of her, was an impassable obstacle to her progress across the track." The accident occurred at night, the headlight was burning, and there was some evidence that it was foggy. "It would be impossible to conceive of a fog so dense that so large an object as a locomotive could not be seen at the instant before contact with it."

Rainstorm.

Gage v. Atchison, T. & S. F. R. Co. (1914) 91 Kan. 253, 137 Pac. 938, Ann. Cas. 1915B, 410. Accident at crossing. "Rain and snow." Vision of plaintiff, driving an automobile, limited to 300 feet.

Farmer v. New York, N. H. & H. R. Co. (1914) 217 Mass. 158, 104 N. E. 492. Accident at crossing. "The night was dark and rainy." Plaintiff drove automobile with wind shield up and side curtains down, on track at high speed.

Mynning v. Detroit, L. & N. R. Co. (1887) 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147. Locomotive pushing string of freight cars. Accident at crossing between 6 and 7 P. M., October 30. "It was quite dark. A rainstorm was approaching, with considerable wind from the southwest." There was evidence that the plaintiff neither looked nor listened for the approaching train. The court said: "We have the case of the deceased approaching the railroad crossing upon a dark and stormy night, without any other warning of danger than that afforded by the track itself, the existence of which he knew, and that it was used almost daily in passing engines and cars over it. Had he taken the ordinary precaution, upon approaching a railroad crossing, of looking or listening in order to ascer-

tain if the train was approaching before stepping upon the track, it is evident from the testimony of the witnesses who witnessed the catastrophe that he would have seen or heard it. The testimony precludes the fact, or any inference to be drawn from the facts, that the deceased exercised any or the remotest degree of caution on that occasion."

Kwiatkowski v. Grand Trunk R. Co. (1888) 70 Mich. 549, 38 N. W. 463. Accident at crossing. "The deceased left home in the evening with an umbrella, it being dark and rainy." The train carried a "blazing headlight which lighted the track for at least a block," and there was evidence that it was making considerable noise. "It . . . seems, under all the testimony, that he (plaintiff) must have put up his umbrella, and rushed heedlessly and thoughtlessly upon the track, without looking to right or left."

Tolman v. Syracuse, B. & N. Y. R. Co. (1885) 98 N. Y. 198, 50 Am. Rep. 649. Crossing accident. The night was dark and misty, but it appeared by plaintiff's own witnesses that the headlight of the train could have been seen in time to prevent the accident, had plaintiff been looking.

Heaney v. Long Island R. Co. (1889) 112 N. Y. 122, 19 N. E. 422. Accident about 6 o'clock on a May morning which was "cloudy and rainy or drizzly," causing smoke from a passing locomotive to settle on the track and temporarily to obscure a view of the approaching train. No negligence of the defendant was shown, and it was held that the plaintiff should have awaited the disappearance of the smoke.

Spila v. New York C. & H. R. R. Co. (1911) 147 App. Div. 666, 132 N. Y. Supp. 151, rehearing granted in (1912) 148 App. Div. 923, 132 N. Y. Supp. 1147, and judgment affirmed on reargument in (1912) 149 App. Div. 961, 134 N. Y. Supp. 1147. Plaintiff riding bicycle over crossing at "5 P. M., on a cloudy and rainy June day." View obscured by smoke from locomotive of another train.

Blight v. Camden & A. R. Co. (1891) 143 Pa. 10, 21 Atl. 995. Accident at

crossing about 5 P. M., August 5. Plaintiff's intestate, with companion, crossing tracks at public crossing. "It was raining violently at the time of the accident, and both the men had umbrellas." "The clouds were heavy and dark, and the rain fell in torrents." It was contended that plaintiff and his companion looked and listened before stepping on tracks. The court said: "Whether the umbrellas and the rain really interfered with their vision and caused the survivor to say he did not see the train, it is an absolute certainty that they attempted to cross the track immediately in front of an approaching locomotive, and the fatal result necessarily and instantly followed. The undisputed facts, fully shown by the plaintiff's testimony, bring the case directly within the ruling of several of our decisions."

Snowstorm.

Grand Trunk R. Co. v. Cobleigh (1897) 24 C. C. A. 342, 51 U. S. App. 15, 78 Fed. 784. Train running over crossing. "The accident took place on a November day, about noon, when there was a snowstorm." The plaintiff said that the bluster of snow came directly in his face and blinded his view of the train, but "the testimony of other witnesses who were in the vicinity of the crossing at the time tended to show that the snowstorm was not such as to obscure appreciably seeing the train a long distance away as it approached."

Chicago, M. & St. P. R. Co. v. Donaldson (1907) 85 C. C. A. 185, 157 Fed. 821. Passenger train, lighted, and with locomotive headlight. Accident about 5:30 P. M., December 4. "There was a little snow on the ground, which was being occasionally raised by a northwest wind. The course of the wind was across the track, and, if deceased had looked in the direction of the train, it would not have been in his face."

Rowe v. Chicago, M. & St. P. R. Co. (1909) 144 Iowa, 378, 122 N. W. 929. The plaintiff left the defendant's freight train while it was waiting for a passenger train to arrive and pass, and went into the defendant's depot.

About the time the latter train was due, or a little later, in daylight, he started toward the freight train and had walked two or three steps when he was struck by the locomotive of the passenger train. He was without defect of sight or hearing. He testified that "there was quite a blizzard, a good deal of snow in the air, and the wind was blowing very strong so it would whip a person around." Other witnesses for him emphasized the character of the storm, while witnesses for the defense contended that it was not severe and did not obstruct a ready view of the train. The jury returned a special finding that the plaintiff "could have seen the train if he had looked, or could have heard the train if he had listened."

Butterfield v. Western R. Corp. (1865) 10 Allen (Mass.) 532, 87 Am. Dec. 678. Plaintiff struck by train while walking across tracks at public crossing, without looking for train. "He states his reasons for neglecting to look. It was a stormy night, raining, blowing hard from the northwest, and snowing some. He had his hand up, holding his hat on his head, and this prevented him from seeing the train. The traveling on the highway was very bad; considerable snow had fallen some time before, and its surface was frozen; the road had been plowed out to the crossing, and the crust had slipped back into the path. The ice did not fall over, but slid right back. He could not tell which furrow he walked in; sometimes one, and sometimes the other. He was listening for the cars; his attention was called to the subject, and he expected to hear the bell or the whistle, but there was no bell sounded or whistle blown. From this statement it is to be inferred that he had occasion to use his eyes pretty constantly for the guidance of his own footsteps as he walked, and that he was under the necessity of obstructing his sight for the purpose of preserving his hat from being blown away. Yet, as he had the control of his own movements, and could stop or check his speed at pleasure, it was in his power to look up frequently, and

he might easily have seen the train. The noise of the wind and storm, and the breaking of the snow crust as he walked, must have made it more difficult than usual to hear the noise of the train, and furnished no excuse for trusting exclusively to his sense of hearing. We must assume it to be true that neither the bell nor whistle was sounded, and that the defendants violated their duty in this respect. A traveler has a right to expect that they will perform this duty, and has some right to expect that he will hear the noise. But this expectation does not excuse him from exercising reasonable care to ascertain by sight as well as hearing whether there is a train coming immediately upon him as he attempts to cross the track."

Schwartz v. Mineral Range R. Co. (1908) 153 Mich. 40, 17 L.R.A.(N.S.) 1253, 116 N. W. 540. Train late. Accident in middle of day. "All the circumstances required great care" on plaintiff's part; "the snow was being drifted and whirled through the air by the high wind, and tended, with the snow fence [7½ feet high], to obscure the view of a train approaching."

Brickell v. New York C. & H. R. R. Co. (1890) 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449. Accident in the forenoon. The plaintiff should have looked or listened for the train, especially because, as was said of this case in *McCaffrey v. Delaware & H. Canal Co.* (1891) 62 Hun, 618, 16 N. Y. Supp. 495, 497, "the snow tended to obscure the vision."

Wilber v. New York C. & H. R. R. Co. (1897) 17 App. Div. 623, 45 N. Y. Supp. 761. Train at crossing, about 1 P. M. "Assuming that the atmosphere was filled with blowing snow, so as to obscure the plaintiff's vision, it was then the more incumbent upon him to approach the crossing with a care and caution commensurate with the dangers of the place, which would be increased . . . by the blowing snow."

Bremiller v. Buffalo, R. & P. R. Co. (1895) 90 Hun, 226, 35 N. Y. Supp. 561. Accident in middle of forenoon, February 27. "The morning was stormy," but "neither the plaintiff

nor any other witness testified that the snow was falling so fast as to prevent her from seeing the train."

Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. (1912) 24 N. D. 40, 138 N. W. 976. Accident at crossing, December 14. "The day was cold with considerable wind from the northwest and some snow blowing, and perhaps falling, but the amount of the snow and storm was not sufficient to prevent a fairly clear view of the track." The plaintiff drove on track with back turned toward approaching train and coat collar turned up over ears.

c. Absence of negligence matter of law.

Rainstorm.

In the reported case (*ILLINOIS C. R. Co. v. ASH*, ante, 1061, it appears that the plaintiff's intestate was struck and killed by one of the defendant's passenger trains, while trespassing on the track during a very heavy rainstorm, and the engineer and fireman testified, without being contradicted, that on account of such rainstorm their view was obstructed and it was impossible for them to see the plaintiff's intestate on the track. It is held that a peremptory instruction for the defendant was warranted by the evidence.

III. Liability of street car company.

a. Negligence and contributory negligence for jury.

In each of the following cases of accidents by collision with street cars, the visibility of which was affected by weather conditions, a judgment for the plaintiff was affirmed, or a judgment for the defendant, by nonsuit or otherwise, was reversed, the questions of negligence and contributory negligence being held to be for the jury.

Storm.

Norfolk & P. Traction Co. v. Rephan (1911) 110 C. C. A. 254, 188 Fed. 276. Plaintiff attempting to cross street. "It was in the nighttime and during a rainstorm." Motorman failed to keep a proper lookout and gave no signals.

Grogan v. Boston Elev. R. Co.

(1907) 194 Mass. 448, 80 N. E. 485. The plaintiff was driving across the defendant's track. "It was a wet and stormy day with the wind blowing hard, and . . . the car was going 'at a breakneck speed.'"

Bady v. Detroit United R. Co. (1914) 180 Mich. 380, 147 N. W. 450. "It is gathered from the testimony of the plaintiff and his witnesses that the night in question was a dark and stormy one, that the car was being operated at a high rate of speed, without a headlight, and that no warning was given as it approached the intersection of the avenues. It further appeared that there was no street light at the intersection. Under this state of facts, we do not think it should be said, as a matter of law, that plaintiff was not in the exercise of ordinary care in attempting to go across the track. That question was one of fact to be determined in view of all the circumstances by the jury. In determining the question, it was proper for the jury to consider to what extent the storm and darkness might have prevented him from discovering the car in season to avoid it, and it was likewise proper for them to consider to what extent the failure to have a headlight in the usual position on the car might have misled him, and also to consider whether his lack of appreciation of the danger he was in was due in any manner to the failure of defendant to do the usual thing and sound the gong as the car approached the intersection."

Schilawske v. Detroit, J. & C. R. Co. (1919) 206 Mich. 214, 172 N. W. 369. Plaintiff's intestate, an aged man, struck while attempting to cross street. "It was a stormy night, with rain, snow, and sleet, and a high wind blowing . . . from the east." "Before the accident occurred the street lights had gone out." Car without headlight and traveling at the rate of 30 or 40 miles an hour. Sound of approach deadened because of ice on the rails.

Boyer v. St. Paul City R. Co. (1893) 54 Minn. 127, 55 N. W. 825. Accident "early in the evening," June 11. "Se-

vere storm of wind and rain." "Storm and darkness."

Engelman v. Metropolitan Street R. Co. (1908) 133 Mo. App. 514, 113 S. W. 700. The plaintiff was driving on defendant's track when struck by car approaching from behind. The night was dark, and it was snowing, raining, and sleeting. "According to all the evidence, the motorman could not have seen plaintiff's wagon on the track a greater distance than 25 feet. And it is also equally apparent that if plaintiff had been looking at the time for an approaching car she could have seen it a greater distance on account of the headlight. But it is evident that she could not have seen it for so great a distance as it might have been seen on an ordinarily dark night, by reason of the storm of rain and snow prevailing at the time. It was, in our opinion, a question for the jury to say, considering the conditions and the rate of speed at which the car was going, whether plaintiff exercised that degree of care required of her in looking for its approach."

Brott v. Auburn & S. Electric R. Co. (1917) 220 N. Y. 92, 115 N. E. 273, 16 N. C. C. A. 758. Accident at way station crossing about 10 A. M., March 6. "The day was cold, and there was snow on the ground and in the air, and the wind was blowing a gale." The plaintiff's intestate was struck while crossing in front of one of defendant's cars while it was at a distance of 300 feet, for the purpose of becoming a passenger thereon. The car was running from 25 to 30 miles an hour, and its speed was not reduced until collision was imminent.

Schwarzbaum v. Third Ave R. Co. (1900) 54 App. Div. 164, 66 N. Y. Supp. 367. "The accident happened at about 10 o'clock on a very dark February night. Heavy rain was falling."

Fog or mist.

Indianapolis Street R. Co. v. Slifer (1905) 35 Ind. App. 700, 74 N. E. 19. Accident at 11 P. M., July 5. The car was lighted inside, but had no light in front. "It was a dark, foggy night."

Waring v. Dubuque Electric Co. (1921) — Iowa, —, 185 N. W. 130.

Plaintiff injured while driving automobile across tracks at street intersection. "It was a 'dark, cloudy, foggy, drizzly night.'" The fog described by witnesses to be of various degrees, from "slight" to "very dense." Side curtains on automobile down and wind shield closed. Headlight on car was dim, and, owing to fog and darkness, plaintiff could not see car. No signals given.

See to the same effect, *Waring v. Dubuque Electric Co.* (1922) — Iowa, —, 186 N. W. 42, a companion case growing out of the same state of facts.

Whitman v. Louisville R. Co. (1909) 134 Ky. 6, 119 S. W. 165. Accident about 6 A. M., November 22. "According to the proof for the plaintiff it was a dark, foggy morning, and not light. According to the proof for the defendant there was sufficient light to justify the putting out of the headlight on the car." A judgment for the defendant was reversed on account of erroneous instructions.

Cutler v. Grand Rapids, G. H. & M. R. Co. (1907) 147 Mich. 615, 111 N. W. 191. Accident about 7 A. M., November 3. Head-on collision between electric cars, wherein plaintiff, a motorman on one of them, was injured. "There was . . . a dense fog which seriously interfered with the view of the motorman." Defendant's car displayed no light and gave no signal.

Campbell v. St. Louis & Suburban R. Co. (1903) 175 Mo. 161, 75 S. W. 86. Accident shortly after 6 P. M., November 3. The car was lighted inside, but had no headlight. "It was a dark, foggy night." "This was not a passenger car, whose familiar appearance would be at once recognized by one used to seeing street cars, . . . but it was a construction car, whose outlines at night were not so easily seen, or, if seen, recognized for what it was."

Koster v. Coney Island & B. R. Co. (1914) 165 App. Div. 224, 151 N. Y. Supp. 56. Collision between trolley car and delivery wagon at street crossing, between 3 and 4 A. M., July 18. "It was wet and misty, and the rails were slippery," causing car wheels to skid when brake was applied.

Rote v. Pennsylvania & M. Valley R. Co. (1907) 34 Pa. Super. Ct. 508. Plaintiff was injured while driving a horse and buggy on defendant's tracks. "The night was dark and a heavy fog was hanging over that portion of the city so that it was impossible to see for any distance." Car approached without warning.

Memphis Street R. Co. v. Carroll (1919) 141 Tenn. 265, 209 S. W. 640. Accident at street crossing, shortly after 6 A. M., January 5. "The morning was dark, cool, and misty." Car without headlight speeding over down grade. (This case was reversed because of the failure of the trial court to submit the question of contributory negligence to the jury.)

b. Contributory negligence matter of law.

In each of the following cases of accident by collision with street cars the visibility of which was affected by weather conditions, the plaintiff was held to be guilty of contributory negligence as a matter of law, and a directed verdict for the defendant, or a judgment of nonsuit, was affirmed:

Storm.

Davis v. Detroit United R. Co. (1910) 162 Mich. 240, 127 N. W. 323. "The accident happened in daylight, on a stormy day, with snow, sleet, and rain at intervals. Plaintiff was holding her umbrella close to her to protect herself from the sleet, and towards the west. As plaintiff, going north on Farrar street, stepped off the curb onto Gratiot avenue, a car passed going east. 'When she stopped within a few feet of the track, she looked out from behind her umbrella westward to see if another car were coming. The sleet struck her in the eyes, interfering with her sight; but she thought she could see well enough to make sure there was no car coming. Observing none, and hearing no warning from any, she started on to cross the first pair of tracks, turning to look eastward for a west-bound car that might be coming upon the second pair of tracks. She had taken more than two steps, and was just upon the first track, when she saw the fender of an east-bound car in front of her. She

tried to dodge back, but before she could do so was struck by the corner of the vestibule and thrown to the pavement.' . . . If plaintiff could not see because of the sudden gust blowing the sleet in her eyes, she should have awaited the cessation of the gust, and it was negligence on her part to proceed to cross, relying upon such a view."

Memphis Street R. Co. v. Roe (1907) 118 Tenn. 601, 102 S. W. 343. The plaintiff was driving "after dark" when a street car struck and overturned his wagon. "Clouds of dust intensified the darkness of the night in obscuring objects a short distance away. . . . The vision of the defendant in error was seriously affected by these conditions, but not more so than that of the motorman in charge of the car."

Fog or mist.

Barry v. Boston Elev. R. Co. (1907) 194 Mass. 265, 80 N. E. 225. Head-on collision between electric cars. The plaintiff, the motorman on one of them, should have waited before running his car on that track. Accident about 7 A. M., October 30. "It does not appear how light it was, but it does appear that the lights were lighted. . . . The day was so foggy that he

could see ahead three or four car lengths only."

Beirne v. Lawrence & M. Street R. Co. (1908) 197 Mass. 173, 83 N. E. 359. "The car here in question was lighted by thirteen incandescent lights inside the car and one on the dashboard. The accident happened in the morning, while it was still dark, and although it was 'misty and cloudy' it was not the case of a fog which interfered with seeing objects, as, for example, was the case in *Barry v. Boston Elev. R. Co.* (Mass.) supra. Plaintiff must have looked carelessly."

Savage v. Nassau Electric R. Co. (1899) 42 App. Div. 241, 59 N. Y. Supp. 225, 6 Am. Neg. Rep. 619, affirmed in (1901) 168 N. Y. 680, 61 N. E. 1134. Collision between electric cars, the plaintiff being a motorman on one of them. Accident between 5 and 6 A. M., May 14. "The weather was so densely foggy that a car could not be seen at a distance of more than 15 or 20 feet." A judgment of nonsuit was affirmed because the plaintiff was running on the wrong track and too rapidly in the fog.

Johnson v. Third Ave. R. Co. (1902) 69 App. Div. 247, 74 N. Y. Supp. 599. Plaintiff endeavoring to cross street. "It was a rainy, foggy night." No evidence that plaintiff looked before stepping on track. L. F. C.

JOSEPH C. CORDREY, Respt.,

v.

STEAMSHIP "BEE."

BEE STEAMSHIP COMPANY, Appt.

Oregon Supreme Court (Dept. No. 2)—October 4, 1921.

(— Or. —, 201 Pac. 202.)

Conflict of laws — power of state to enforce lien against foreign vessel.

1. A state may enforce a lien against a foreign vessel which inflicts an injury upon one of its citizens within its territorial limits by a tort not within the jurisdiction of the admiralty courts.

[See note on this question beginning on page 1095.]

Admiralty — jurisdiction conferred by state statute.

2. A state statute cannot confer jurisdiction on admiralty courts ex-

cept for matters maritime in their nature.

[See 1 R. C. L. 408; 1 R. C. L. Supp. 133.]

— jurisdiction over torts — injury to one on land.

3. Admiralty has no jurisdiction of a suit for damages inflicted upon a longshoreman at work upon a wharf, by the breaking of a sling by which the cargo was being unloaded from a vessel.

[See 1 R. C. L. 417; 1 R. C. L. Supp. 140.]

Constitutional law — due process — seizure of vessel as notice.

4. A provision for seizure of a vessel to answer in damages for injury inflicted upon a citizen of the state where the injury occurs is sufficient notice to the owner of the vessel of the pendency of the proceeding to constitute due process of law.

Commerce — interference — seizure of foreign vessel.

5. Subjecting a vessel of a foreign state to seizure, to satisfy a claim for personal injury to a citizen of a state which it visits, does not unconstitutionally interfere with interstate commerce.

Lien — foreclosure — method.

6. The statutory provision for foreclosure of liens by suits is exclusive and must be followed.

— personal judgment — action at law.

7. There is no authority to proceed as in an action at law to foreclose a lien and render a personal judgment against the owner of the property, where the statute provides for foreclosure by suit in equity, and authorizes a personal judgment only where there is a personal obligation for payment of the debt.

(Bean, J., dissents in part.)

APPEAL by claimant from a judgment of the Circuit Court for Multnomah County (Kavanaugh, J.) in favor of plaintiff in a proceeding brought to establish and enforce a lien on the defendant vessel for an injury sustained by him while assisting in unloading the vessel. *Reversed.*

Statement by Burnett, Ch. J.:

While on the dock at which the steamship Bee was berthed in Portland in this state and was discharging her cargo of cement, the plaintiff, a stevedore, was hurt by a sling load of cement which fell on the truck he was operating, so that it threw him on the dock and injured him. The home port of the ship was in the state of California, and it was owned by a corporation of

Appeal — error in form of action.

8. It is reversible error to take a verdict which shall be binding upon the judge as to the facts in an action which, under the statute, must be tried as a suit in equity.

Trial — amendment — before submission.

9. An amendment of a complaint to claim damages which, if claimed originally, would have permitted the removal of the cause to the Federal court, made just before the jury retires, is too late under a statute permitting amendments at any time before the cause is submitted.

Pleading — discrepancy between language and figures — which controls.

10. The language controls the figures where there is a discrepancy in the claim of damages in a complaint between the original words and figures used.

Evidence — defect in implement — owner's knowledge.

11. The jury may consider the fact that an implement which broke to the injury of one engaged in unloading a vessel was furnished by the owner of the vessel, upon the question of the owner's knowledge of the defect.

Shipping — injury by vessel — defective tackle.

12. An injury to one assisting in unloading a vessel by a defect in the ship's tackle is a tort committed by the ship itself within the meaning of a statute giving a lien upon vessels which commit injury.

that state. The plaintiff had judgment in personam against the owner of the vessel, from which that owner appeals. The further facts appear in the opinion.

Messrs. McCamant, Bronaugh, & Thompson and McCutchen, Willard, Mannon, & Greene, for appellant.

When equity takes jurisdiction for the foreclosure of a lien, it will decide the whole controversy and decree accordingly.

Shultz v. Shively, 72 Or. 450, 143 Pac. 1115.

A re-enactment of a former statute is to be read as a part of the earlier act, and not of the new one, if the latter is in conflict with another act, passed after the former, but before the latter.

Small v. Lutz, 41 Or. 570, 67 Pac. 421, 69 Pac. 225; *Renshaw v. Lane County Ct.* 49 Or. 526, 89 Pac. 147; *State v. McGinnis*, 56 Or. 163, 108 Pac. 132; *Bayless v. Douglass County*, 57 Or. 301, 111 Pac. 384.

State statutes cannot authorize proceedings in rem according to the course in admiralty.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

The defendant vessel, being owned in San Francisco, is a foreign vessel for the purposes of this case.

The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; *The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491.

It is not competent for the state of Oregon to impose a lien enforceable in the state courts by proceedings in rem on a foreign vessel engaged in interstate commerce, under such circumstances as would not authorize a lien under the general maritime law.

The Roanoke, 189 U. S. 185, 194, 47 L. ed. 770, 772, 23 Sup. Ct. Rep. 491; *The Robert v. Parsons (Perry v. Haines)* 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; *Southern P. Co. v. Jensen*, supra; *The New Brunswick*, 64 C. C. A. 325, 129 Fed. 893; *The Golden Rod*, 80 C. C. A. 246, 151 Fed. 6; *The Cimbria*, 156 Fed. 378; *The Rockaway*, 156 Fed. 692; *American Trust Co. v. W. & A. Fletcher Co.* 97 C. C. A. 477, 173 Fed. 471; *The Athina*, 230 Fed. 1017; *Corsica Transit Co. v. W. S. Moore Grain Co.* 165 C. C. A. 283, 253 Fed. 689.

When a vessel is completed, and is engaged in foreign or interstate commerce, she is not subject to seizure under proceedings in rem in the state courts, except possibly in her home port.

The Minnie R. Childs, 10 Ben. 553, Fed. Cas. No. 9,640; *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49; *Weston v. Morse*, 40 Wis. 455.

A state statute is invalid if it works

material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 541, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596; *Chelentis v. Luckenbach S. S. Co.* 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501, 19 N. C. C. A. 309; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 11 A.L.R. 1145, 40 Sup. Ct. Rep. 438, 20 N. C. C. A. 635.

Section 7504 is applicable, in any event, only to cases where the injury is done by a vessel negligently navigated. It does not purport to apply to every case where the negligence of the owner is the proximate cause of the injury.

The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; *The Onoko*, 47 C. C. A. 111, 107 Fed. 984; *Tropical Fruit S. S. Co. v. Towle*, 138 C. C. A. 293, 222 Fed. 867; *The Theta*, 7 Asp. Mar. L. Cas. 480, L. R. [1894] Prob. 280; 24 R. C. L. 1202.

In the absence of evidence that claimant knew or ought to have known that the sling which broke was defective, plaintiff has failed to make out a case of negligence.

Duntley v. Inman, P. & Co. 42 Or. 334, 59 L.R.A. 785, 70 Pac. 529; *Finn v. Oregon Water Power & R. Co.* 51 Or. 66, 93 Pac. 690; *Gynther v. Brown & McCabe*, 67 Or. 310, 134 Pac. 1186; *Buchanan v. Lewis A. Hicks Co.* 66 Or. 503, 133 Pac. 780, 134 Pac. 1191.

In any event claimant was entitled to an instruction that the mere breaking of the sling did not charge the defendant vessel with responsibility for plaintiff's injuries.

Kincaid v. Oregon Short Line & U. N. R. Co. 22 Or. 35, 29 Pac. 3; *Duntley v. Inman P. & Co.* 42 Or. 334, 59 L.R.A. 785, 70 Pac. 529; *Finn v. Oregon Water Power & R. Co.* 51 Or. 66, 93 Pac. 690; *Buchanan v. Lewis A. Hicks Co.* 66 Or. 503, 133 Pac. 780, 134 Pac. 1191; *Gynther v. Brown & McCabe*, 67 Or. 310, 134 Pac. 1186; *Sappenfield v. Main Street & Agri. Park R. Co.* 91 Cal. 48, 27 Pac. 590, 13 Am. Neg. Cas. 387; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331.

The complaint is based on the relation of master and servant alleged to

subsist between defendant and plaintiff. This is an essential allegation, and plaintiff can recover, if at all, only by establishing the fact so alleged.

New Albany Forge & Rolling Mill v. Cooper, 131 Ind. 363, 30 N. E. 294; Indiana Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; Reier v. Detroit Steel & Spring Works, 109 Mich. 244, 67 N. W. 120.

When damages are predicated on future suffering or permanent disability, it is incumbent on plaintiff to establish the reasonable certainty of such suffering or disability. In the absence of evidence sustaining plaintiff's contention that such suffering or disability is reasonably certain, the jury should be charged that no damages can be awarded on those grounds.

Strohm v. New York, L. E. & W. R. Co. 96 N. Y. 305; Tozer v. New York C. & H. R. R. Co. 105 N. Y. 617, 11 N. E. 369; Briggs v. New York C. & H. R. R. Co. 177 N. Y. 59, 101 Am. St. Rep. 718, 69 N. E. 223, 15 Am. Neg. Rep. 396; Brininstool v. Michigan United R. Co. 157 Mich. 172, 121 N. W. 728; Collins v. Janesville, 99 Wis. 464, 75 N. W. 88; Groundwater v. Washington, 92 Wis. 56, 65 N. W. 871; Raymond v. Keseberg, 91 Wis. 195, 64 N. W. 861; Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; Hardy v. Milwaukee Street R. Co. 89 Wis. 187, 61 N. W. 771, 7 Am. Neg. Cas. 283; Gifford v. Washington Water Power Co. 85 Wash. 341, 148 Pac. 11; Rugenstein v. Ottenheimer, 70 Or. 600, 140 Pac. 747, 78 Or. 371, 152 Pac. 215, Ann. Cas. 1917E, 953; Albright v. Keats Auto Co. 85 Or. 134, 166 Pac. 758; Spain v. Oregon-Washington R. & Nav. Co. 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104.

Where there is a discrepancy between the language and the figures in a contract, the former will be followed and the latter disregarded.

13 C. J. 537; Payne v. Clark, 19 Mo. 152, 59 Am. Dec. 333; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Romine v. Haag, — Mo. —, 178 S. W. 147; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775.

A proceeding in which the process runs against property is in rem.

22 Cyc. 1102; Cunningham v. Shanklin, 60 Cal. 118; Gorham Co. v. United Engineering & Contracting Co. 202

N. Y. 342, 95 N. E. 805; Holcomb v. Kelly, 114 N. Y. Supp. 1048; Doughty v. Doughty, 27 N. J. Eq. 315; Joyner v. Joyner, 131 Ga. 217, 18 L.R.A.(N.S.) 647, 127 Am. St. Rep. 220, 62 S. E. 182; Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160; Kean v. Rogers, — Iowa, —, 118 N. W. 515.

The proceeding authorized by §§ 10,281–10,296 is a proceeding in rem.

Keating v. Spink, 3 Ohio St. 105, 62 Am. Dec. 235; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554; Pacific Coast S. S. Co. v. Bancroft-Whitney Co. 36 C. C. A. 135, 94 Fed. 180; The L. B. X. 88 Fed. 290; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; The Robert W. Parsons, 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8.

These sections provide an admiralty and not a common-law remedy.

The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Willapa, 25 Or. 71, 34 Pac. 689.

The exclusiveness of the jurisdiction is applicable both to remedy and to subject-matter. The state courts cannot apply an admiralty remedy.

Benedict, Admiralty, 4th ed. § 128; Keating v. Spink, 62 Am. Dec. 241, note; The Minnie R. Childs, 10 Ben. 553, Fed. Cas. No. 9,640; The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; Warren v. Kelley, 80 Me. 512, 15 Atl. 49; Weston v. Morse, 40 Wis. 455.

Messrs. William P. Lord and A. I. Moulton for respondent.

Burnett, Ch. J., delivered the opinion of the court:

We deduce from the bill of exceptions substantially this state of facts: The vessel in question had arrived in Portland with a cargo of cement consigned to local parties. The consignee, or someone operating for him on the land, telephoned to the longshoremen's union for a number of stevedores to assist in unloading the cargo. Several men, including the plaintiff, were sent by the union to the dock. On arriving there, someone acting as mate of the vessel directed the plaintiff, with others, to remain on the dock for service there, while the rest were taken into the hold of the vessel. The plaintiff took an ordinary hand truck and was engaged in receiving from the sling of the vessel truck

loads of cement. The ship's tackle, by means of pulleys and ropes, took a number of sacks of cement in a sling from the hold of the vessel, hoisted it up, and swung it out over the dock, lowering it upon the trucks. While the plaintiff was waiting to receive a load in this manner, the sling broke before the load reached the dock, and the sacks of cement falling upon the truck threw the plaintiff over upon his back, by which he suffered the injuries complained of.

Section 10,281, Or. Laws, provides that "every boat or vessel used in navigating the water of this state or constructed in this state shall be liable and subject to a lien . . . for damages or injuries done to persons or property, by such boat or vessel. . . ."

After providing for the priority of liens, the statute, in § 10,283, declares that "any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent, or consignee of the boat or vessel, may, at his option, commence an action against such boat or vessel by name."

We find this in § 10,284: "Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which such boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him."

Section 10,285 states: "Whenever such complaint shall be filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel, and furniture, and retain the same until discharged from such custody by due course of law."

Section 10,286 is as follows: "Upon the return of any warrant issued as prescribed in the last sec-

tion, proceeding shall be had in the circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accrued."

In § 10,287 it is said: "The master, owner, agent, or consignee of the boat or vessel may appear on behalf of such boat or vessel and answer the complaint."

Section 10,288 provides that "if in any action commenced under the provisions of this chapter the master, owner, agent, or consignee shall not appear and answer the complaint, the plaintiff may proceed to take judgment in the same manner and under the same restrictions as in a civil action against a natural person; if an issue of fact be joined, the same proceeding shall be had as in other actions."

There are other sections which provide for filing an undertaking, or making a deposit in lieu thereof, for the discharge of the boat. The judgment prescribed in § 10,291 is to the effect that, if judgment be rendered against the boat or vessel, the court shall make an order directed to the sheriff, commanding him to sell the same for the satisfaction of the judgment.

The owner of the vessel, the Bee Steamship Company, appeared as claimant, traversed most of the complaint, denied the jurisdiction of the court over the controversy or over the steamship, and averred that the accident happened on account of the negligence of the plaintiff himself; that he assumed the risks of the employment, of which the liability to the injury complained of was one; that at the time of the accident, and for a long time prior thereto, the steamship had been engaged in interstate commerce, and was discharging a cargo which had been transported on the vessel from the state of California to the state of Oregon when the accident occurred. It is also said as a further affirmative defense that the plaintiff was employed by the Oregon Portland Cement Company,

an Oregon corporation which was in actual possession of the dock upon which the cargo was being stored; and that the injury of the plaintiff was sustained while he was working for the Oregon Portland Cement Company, with the conclusion that the accident was to be governed only by what is known as the Industrial Accident Law.

That portion of the answer averring contributory negligence is denied. The answer which sets up assumption of risk is traversed as to the allegations of the foreign status of the claimant and its ownership of the Bee, as well as to the averments that the plaintiff was an experienced man and informed of all the incidents of the work and of the risks and dangers attached thereto. Otherwise, the new matter in the answer is not denied.

The principal effort of the claimant and owner of the vessel is to establish its contention that the state courts have no jurisdiction of the subject-matter of the litigation. It maintains that only the Federal courts of admiralty have any authority over the grievance complained of. It is true that under § 2 of article 3 of the United States Constitution it is said that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to all cases of admiralty and maritime jurisdiction."

Federal legislation in pursuance of this provides that the district courts shall have original jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum and value of \$3,000, and arises under the laws or Constitution of the United States, and treaties which are made or shall be made under their authority, or is between citizens of different states, and in all civil causes of admiralty or maritime jurisdiction, saving to suitors

in all cases the right of a common-law remedy where the common law is competent to give it. Section 24 of the Judicial Code of the United States. A later amendment enacted October 6, 1917, by Congress, adds to the saving clause as follows: ". . . And to claimants the rights and remedies under the workmen's compensation law of any state." U. S. Comp. Stat. § 991 (3) Fed. Stat. Anno. Supp. 1918, p. 401.

In this branch of the case, therefore, the crucial question is whether the grievance complained of is of admiralty cognizance, or whether it belongs to the state courts. In *Philadelphia W. & B. R. Co. v. Philadelphia, H. de G. S. B. Co.* 23 How. 209, 16 L. ed. 433, it is said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract, but in torts it depends entirely on locality."

It is taught in *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498, that the Federal maritime jurisdiction is exclusive; that state legislation cannot bring within admiralty jurisdiction a subject not maritime in its nature, "but when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure." We learn from *The Willapa*, 25 Or. 71, 74, 34 Pac. 689, that state laws cannot confer admiralty jurisdiction upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such laws, for it is exclusively conferred upon the district courts of the United States. The case of *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, was founded on a breach of a maritime contract, and the court held that the statute of the state of California, almost precisely in terms like our own, authorizing an action against the steamer by name, established a

proceeding in the nature and with all the incidents of a suit in admiralty. It was decided there that this was without the scope of state legislative power. In *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717, and *The Roanoke*, 189 U. S. 185, 194, 47 L. ed. 770, 772, 23 Sup. Ct. Rep. 491, both cited in the defendant's brief, the question involved was that of furnishing materials for repairs of a vessel lying in a foreign port. This, of course, under the authorities, carries a lien, according to the general maritime law, in favor of the parties furnishing the materials.

In all of the cases cited by the defendant in support of its contention that the state has no authority to impress a lien upon the defendant's steamship, there appears the element either of maritime tort or maritime contract. For instance, in *Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596, the cause of action was for an injury aboard the ship. In *The Rockaway* (D. C.) 156 Fed. 692, it was held that a state statute may create a lien on a domestic vessel for repairs at the home port, and that this would be enforceable in admiralty, because the nature of the contract was maritime. The same reason applies in *American Co. v. W. & A. Fletcher Co.* 97 C. C. A. 477, 173 Fed. 471, to the effect that supplies and repairs to foreign vessels are lienable by the general maritime law, while the same services rendered to a domestic vessel are made lienable only by state statutes; but, because of their maritime nature, when such liens are given they are enforceable only in the admiralty courts. In *The Athinai* (D. C.) 230 Fed. 1017, it is said that it is beyond the power of any state to create a lien enforceable in the admiralty by process in rem against a foreign ship, claims against foreign vessels being within the exclusive jurisdiction of admiralty. The point of that case is that state courts can neither increase nor diminish the

jurisdiction of admiralty. To say that the state courts cannot create a lien enforceable in the courts of admiralty is but another way of declaring that the state can neither enlarge nor restrict the authority of the admiralty courts. The reason for the opinion in that case is thus stated: "Any such legislation, creative of a lien enforceable in admiralty, and upon shipping, must rest upon the making or implication of a contract maritime in its nature, or on the commission of a maritime tort."

It is enunciated in *Corsica Transit Co. v. W. S. Moore Grain Co.* 165 C. C. A. 283, 253 Fed. 689, as follows: "To sustain a state statute giving a lien on a vessel, the cause of the action must be maritime in nature, and a breach of an executory contract for the charter of a vessel is not maritime in nature, and therefore cannot be enforced in a proceeding in rem in an admiralty court."

So, also, in *The Minnie R. Childs*, 10 Ben. 553, Fed. Cas. No. 9,640, a lien for supplies to domestic ships created by state law is maritime, and hence cognizable in admiralty. We find in *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49, that the statute of a state may create a lien on a domestic vessel based on maritime service, but the jurisdiction to foreclose it belongs to the United States courts. Likewise, *Weston v. Morse*, 40 Wis. 455, teaches us that a case for sailors' wages and supplies furnished to a domestic vessel, made lienable by a state statute, is enforceable only in admiralty, for the basic reason that they are for incidents maritime in their nature. In *Chelentis v. Luckenbach Co.* 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501, 19 N. C. C. A. 309, a sailor aboard ship on the high seas, while at work on the deck, was caught by a wave which came aboard and threw him against the vessel, breaking his leg. He sued the owners of the vessel for common-law damages, but the court held that under the maritime law, the case being one

of maritime tort, the liability of the boat or its owners could not be extended beyond the measure allowed by the maritime jurisdiction. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 11 A.L.R. 1145, 40 Sup. Ct. Rep. 438, 20 N. C. C. A. 635, Stewart was doing maritime work on a barge for the Knickerbocker Ice Company while the barge lay in navigable waters. While so engaged he fell into the Hudson river and was drowned. It was there held that the clause saving to claimants the rights and remedies under the state Workmen's Compensation Act was an attempt by Congress to delegate its legislative power to states, and that, on the other hand, the state could neither add to nor take from admiralty jurisdiction. Thus we find, without variation, that the sine qua non of admiralty jurisdiction is that the contract involved must be maritime in its nature, dependent upon the nature of the contract, or that the tort in question must be a maritime tort, dependent upon the locality where the injury was received.

Bearing in mind, therefore, that the injury received by the plaintiff, and upon which this proceeding is based, happened to him while he was on the land, and that for all that appears in the record he never was aboard the steamship *Bee*, we find the rule to be thus: "Suits for injuries to a person sustained on land, although originating or caused by a vessel, are not cognizable in admiralty." 1 C. J. 1286.

In *Ryley v. Philadelphia & R. R. Co.* (D. C.) 173 Fed. 839, the decedent was injured on a barge navigating the Delaware river, but died ashore. It was held that admiralty had no jurisdiction, because the injury was not fully consummated in navigable water. The *Albion* (D. C.) 123 Fed. 189, was a case where the libellant walked off the dock at night, under the impression that a gangplank was there. But it had been removed, and hence he fell. It was held that admiralty jurisdiction extends only to torts committed

on navigable waters. We find in *Price v. The Belle of the Coast* (D. C.) 66 Fed. 62, that the libellant was helping to carry a heavy barrel of oil off the vessel, and fell into a hole after leaving the ship, and it was there decided that because the injury was received ashore admiralty had no jurisdiction. In *The Mary Garrett* (D. C.) 63 Fed. 1009, the libellant, a seaman employed on the ship, was hurt on the dock while discharging freight, making the instance, according to the decision, not within admiralty jurisdiction. A seaman who deserted the ship claimed damages for arrest on land, and it was said in the opinion in *Bain v. Sandusky Transp. Co.* (D. C.) 60 Fed. 912, that "jurisdiction over torts, in admiralty, is clearly limited to maritime torts, . . . and the tort must be committed on the water, and not on land."

A similar instance is treated in *The H. S. Pickands*, 42 Fed. 239. Access to the steamer was gained by a ladder about 12 feet in length, leading from the wharf to the bulwarks of the vessel, the foot of which ladder had been secured by a cleat on the dock which prevented its slipping. The libellant was employed in doing some work in repairing the boiler of the vessel. Having occasion to leave the ship, he went to the ladder; but in the meantime it had been moved away from the cleat, leaving the foot of the ladder insecure. While he was on the ladder in the act of leaving the vessel, the ladder slipped and he fell to the wharf, receiving an injury; and it is said in the opinion that, to give admiralty jurisdiction, the injury must have been consummated, and the damage received, upon the water. "The mere fact that the wrongful act was done upon a ship is insufficient." The *Mary Stewart* (D. C.) 5 Hughes, 312, 10 Fed. 137, is a case almost precisely like the one in hand. There, the libellant was on the dock in the employ of the stevedore who was loading the ship with cotton bales by aid of the ship's tackle. Owing to the

breaking of the ship's rope, a bale being hoisted aboard fell on the libellant on the dock, and injured him. The rule was thus laid down: "Not only the wrong must originate on water, but the damage . . . must also happen on water."

The deduction is that a state statute cannot confer jurisdiction on admiralty courts except for matters

Admiralty—
jurisdiction
conferred by
state statute.

maritime in their nature. Another

similar case is that of Keator v. Rock

Plaster Mfg. Co. (D. C.) 256 Fed. 574, where a vessel was unloading rock from its hold. The bucket containing a load of rock spilled its contents on a workman standing on the dock, and it was decided that the matter was not of maritime cognizance. See also Smalls v. Atlantic Coast Shipping Co. (D. C.) 261 Fed. 928. In Billings v. Breinig, 45 Mich. 65, 7 N. W. 722, a ferryman was ashore in the act of lowering his ferry cable to permit the passage of a vessel, when a ship navigating the stream struck the cable so that it killed the ferryman, and it was determined that this did not furnish a chose in action for admiralty jurisdiction. One of the early cases is that of The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125. By the negligence of its crew aboard the vessel while moored to the dock, the ship took fire, which spread to and consumed some warehouses and their contents, located on the dock; and it was held that this was not within admiralty jurisdiction. The same doctrine is taught in *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. These precedents are conclusive

—jurisdiction
over torts—
injury to one on
land.

that the mishap involved in the present controversy is not maritime in its

nature, and is beyond the jurisdiction of the Federal courts. There is, therefore, no ground for saying that the admiralty courts have anything to do with the grievance here in question.

The investigation consequently takes this form: Can the state provide a remedy for a tort happening within its jurisdiction, and apply a lien against foreign property involved in the commission

Conflict of laws
—power of state
to enforce lien
against foreign
vessel.

of that tort? In *The Robert W. Parsons* (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8, a case cited for the defendant, we find this language: "It is equally well established that for causes of action not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement."

In *Missouri v. Lewis* (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, it is said: "There is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit, for all or any part of its territory."

We learn from *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 1153, 5 Am. Crim. Rep. 218: "That commonwealth [Pennsylvania] has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty, and property in all the states of the Union."

Again, in *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344, 345, it is said: "The 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations may be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

In *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77, 78, we find this language: "The state has full con-

trol over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. . . . The state is not tied down by any provisions of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

See also *League v. Texas*, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475.

Recalling the terms of the statute under consideration, we note that there is no provision explicitly requiring service of summons or notice of the pendency of the proceeding upon the owner of the vessel against which the process has been issued. Upon filing a statement of the plaintiff's claim, the clerk, a ministerial officer, issues a warrant empowering the sheriff, so to speak, to arrest the vessel. Indeed, it is provided that "the master, owner, agent, or consignee of the boat or vessel may appear on behalf of such boat or vessel and answer the complaint."

True enough, they have the privilege of answering, but on what compulsion must they? Is this due process of law? Does the owner have his day in court by virtue of the statute? The question is not without difficulty, but there is abundant authority in the precedents for saying that the seizure of one's property is notice to him of an invasion of his rights, calling upon him to defend. We are not concerned about the amount of notice, for that is for the legislature to determine. The question is whether or not it has ordained notice. In *Keating v. Spink*, 3 Ohio St. 105, 62 Am. Dec. 214, the court had under consideration a statute almost in the same terms as our own, and, speaking by Mr. Justice Ranney, it said:

"This statute, then, as stated by the court in *The Huron v. Simmons*, 11 Ohio, 461, 'treats the boat as a person, and makes it responsible, in its own name, for all debts contracted for its use, and for all injuries committed against persons or property on board, by her officers or crew.' The liability is upon the craft, the proceeding is against the craft, and the judgment operates alone upon the craft. Its seizure is indispensable to the jurisdiction of the court, and its continued custody, unless released upon bond and security, indispensably necessary to the further proceedings, after final judgment.

"The proceeding, therefore, is strictly and technically in rem; it is pursued without reference to the owner, to enforce a liability which the thing itself has incurred, and the thing itself is condemned to make reparation. Possession is the essential element upon which the jurisdiction of the court depends; and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists, it is this—that 'the law regards the seizure of the thing as constructive notice to the whole world.' *Hollingsworth v. Barbour*, 4 Pet. 475, 7 L. ed. 926. Other means for giving notice may be provided at the discretion of the sovereign power, upon the observance of which the jurisdiction may, or may not, depend; but where they are not prescribed, the power of the court over the thing, when taken into the custody of the law, is perfect and complete, and the final disposition of it binding upon the world. As the subject of liability and seizure described in this statute, are so uniformly attended by the owner or master representing all interests, the legislature has regarded the seizure and taking the thing into custody as effectual notice to those interested of the pendency of the proceedings, and has, therefore, provided for no other."

In *The Mary*, 9 Cranch, 126, 144, 3 L. ed. 678, 684, Chief Justice Marshall delivered the opinion, and, among other things, said: "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary*, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

In the celebrated case of *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. ed. 565, 570, the court said: "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings as authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely in personam,—constructive service in this

form upon a nonresident is ineffectual for any purpose."

The *Ann* (D. C.) 5 Hughes, 292, 8 Fed. 923, was a case dependent upon the seizure of a vessel. The court there said: "It is true that there was no notice, by service or publication of notice, to the owner or holders of maritime or other liens, that the vessel was being proceeded against; but a proceeding in rem forms an exception to the general rule of notice, particularly when based upon actual manucaption of the thing which is the instrument of the wrong, and in such cases the seizure has been held to be constructive notice to everyone having any interest in the thing seized."

The reason for the sufficiency of notice arising from the mere seizure of the property may be found, in part, at least, in the presumption "that a person takes ordinary care of his own concerns." Or. Laws, § 799, subd. 4. In the case of a sea-going vessel especially, which is constantly in charge of a master or other representative of the owner, or of the owner himself, the mere taking is such an invasion of property rights as to notify the owner, as a practical matter, that he must defend. While a foreign vessel is in the state and its owners are without the jurisdiction, and likely unknown, it is clearly in the power of the state, by virtue of its authority over property within its boundaries to devise a process to subject the offending vessel itself to the payment of damages for a tort committed with it as an instrument. Of course, as taught in the excerpt from *Pennoyer v. Neff*, supra, the remedy is limited to the res itself, and cannot result in a judgment in personam. We arrive at the conclusion, therefore, that, having authority over the property within its jurisdiction, and the matter not being cognizable in the Federal courts of admiralty, the state has authority to formulate a process whereby the offending property itself may be proceeded against, seized, and sub-

jected to the redress of the wrong committed. Seizure itself is notice, the quantity of which is for the legislative power to determine. The

Globe, 2 Blatchf. 427, Fed. Cas. No. 5,483; *Bradstreet v. Neptune Ins. Co.* 3

Sumn. 609, Fed. Cas. No. 1,793; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *Bierne v. The Triumph*, 2 Ala. 738; *Ridley v. Ridley*, 24 Miss. 648; *Stewart v. Board of Police*, 25 Miss. 479; *Calhoun v. Ware*, 34 Miss. 146; *New Orleans, J. & G. N. R. Co. v. Clements*, 35 Miss. 17; *Kwilecki v. Holman*, 258 Mo. 624, 167 S. W. 989; *Beech v. Abbott*, 6 Vt. 586; *Luther v. Fowler*, 1 Grant, Cas. 176.

It is fallacious to assume, as the claimant does, that the statute upon which this litigation is based is unconstitutional in that it attempts to usurp a Federal function in the regulation of interstate commerce; at least, so far as it may be applied to foreign ships. It is not reasonable to say that a vessel of a sister state may come within the boundaries of this state and injure the persons or property of our citizens, and that they are without redress for a non-maritime tort merely because such ship is carrying goods hither from another state. The interstate commerce legislation does not countenance or authorize the commission of land torts by any vessel, whether

domestic or foreign. Hence, our statute, giving a remedy for such grievances, does not infringe upon that Federal function.

Thus far we have a chose in action not included in admiralty cognizance, for which the state has fashioned a proceeding in rem, notice of which depends upon the seizure of the offending thing, the vessel. What, then, of the method of trial? We note that the statute provides only for a lien and for a sale of the property seized. The

original statute was enacted in territorial days, in 1853. Statutes of Oregon 1853, p. 152. This enactment was amended in 1876 (Laws 1876, p. 9) only in respect to the authority for contracting debts against the vessel. The original law made the vessel liable for debts contracted by the master, owner, agent, or consignee. The Amendment of 1876 limited that clause to "debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel." In all other respects the law has remained the same to this day. That amendment in no wise changes the original procedure. The Code of Civil Procedure was adopted by the legislative assembly of this state in October, 1862, and took effect on the 1st day of June next following. Treating of the foreclosure of liens upon real or personal property, the statute, as now embodied in § 422, Or. Laws, reads thus: "A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money."

It has been held uniformly by this court that the remedy in equity devised by this section is exclusive and must be followed.

Thompson v. Mar- Lien-fore-
shall, 21 Or. 171, closure-method.
27 Pac. 957; *McNeff v. Southern*

P. Co. 61 Or. 22, 120 Pac. 6; Caro v. Wollenberg, 68 Or. 420, 136 Pac. 866. The later enactment embodied in § 422, Or. Laws, supercedes the former where they are in conflict.

When this cause came on for trial, the claimant, appearing for the ship, objected to the same being tried as an action at law, and demanded that it be tried as a suit in equity, but this was denied, and the cause proceeded as an action at law, resulting in a personal judgment against the claimant. Under § 422, supra, it is only where a promissory note or other personal obligation for the payment of a debt has been given that the court in a foreclosure suit can render a personal decree. Where this feature is absent, the only thing that can be done is to foreclose the lien, which includes a

—personal judgment—
—action at law.

sale of the property. The court was in error in proceeding as in an action at law and in rendering a personal judgment. The jury was not called upon to enlighten the conscience of the chancellor. It was impaneled and to it was committed exclusively the decision of the questions of fact involved. We have not had the benefit of the personal estimate of the trial judge concerning the credibility of witnesses, or as to the true state of facts in the case. The cause was tried in the circuit court as one where the judge was bound by the verdict of the jury at all

hazards, whether in accord with his judgment of a question of fact, or not. The case must be reversed on this ground, at least.

Another matter which claims our attention is here noted: According to the bill of exceptions, at the time the judge charged the jury at the conclusion of the trial, the fourth paragraph of the complaint read as follows: "That by reason of the injuries received by plaintiff on account of the negligence of the said steamship as aforesaid the plaintiff

has been damaged in the sum of 7,500

(~~\$2,800~~) twenty-eight hundred dollars, and will necessarily incur an expense of ninety-nine (\$99) dollars in endeavoring to cure himself from said injury."

In other words, as the complaint was typewritten originally in the part involved, the plaintiff was "damaged in the sum of (\$2,800) twenty-eight hundred dollars," and the change consisted, whenever or however made, in drawing a pen through the figures "2,800," and writing over them "7,500." According to the bill of exceptions, the claimant contended that, because there was a discrepancy between the writing and the figures in the fourth paragraph, the complaint was to be treated as alleging damages in the sum of \$2,899 only. But after the testimony had been taken and the cause argued to the jury, and the court had instructed the jury, just before the jury retired, the plaintiff asked permission to amend the complaint to conform the written portion of the paragraph to the figures, and the amendment was allowed by the court over the objection of the claimant. The jury retired and returned with a verdict in the sum of \$3,600, in favor of the plaintiff.

Section 102, Or. Laws, establishes this rule: "The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause; and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

This function is to be exercised at

any time before the cause is submitted. Here, the parties had done all that they could do.

Trial—amendment—before submission.

The case was submitted, to all intents and purposes. The time for the application of this section had passed. It was too late to enlarge the demand of the complaint. Bearing in mind that the vessel was a foreign craft owned in and sailing from San Francisco, that the claimant was of citizenship diverse from that of the plaintiff, and that under the Federal statute the courts of the United States have original jurisdiction where the matter in controversy exceeds the value of three thousand dollars and arises between citizens of different states, the allowance of the amendment would give sanction, in effect, to a practice whereby a defendant could be haled into court to answer a claim not of sufficient amount to give the Federal court jurisdiction, and would be cut off from his right to remove the cause to that court until he had answered and submitted himself to the jurisdiction of the state court, when his right of removal would be lost. The amendment would then cast him in damages to a much greater amount than the limit of state jurisdiction. The amendment ought not to have been allowed. Whenever or however the alteration was made,

Pleading—discrepancy between language and figures—which controls.

the legal effect of the complaint is a claim for damages in the sum of \$2,899, and should have been so construed by the court. In other words, the language controls the figures. 13 C. J. 537; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Romine v. Haag, — Mo. —, 178 S. W. 147; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Payne v. Clark, 19 Mo. 152, 59 Am. Dec. 333. It is not a case within § 719, Or. Laws, reading thus: "When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter."

The present is a case of written language controlling mere figures. The complaint, therefore, was one for \$2,800 general damages and \$99 special damages. The application to amend came too late and should not have been allowed in any event, under the circumstances relating to Federal jurisdiction and the right to remove the cause to the United States courts.

It is urged against the validity of the judgment that "in the absence of evidence that the claimant knew, or ought to have known, that the sling which broke was defective, plaintiff has failed to make out a case of negligence."

The bill of exceptions discloses that the sling which broke was furnished from aboard the vessel. This circumstance is one which the jury has a right to consider on the question of claimant's knowledge of its defect. It is also contended that this was not a tort committed by the vessel, and that, in the language of *The Osceola*, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, the ship must be "the offending thing."

Evidence—defect in implement—owner's knowledge.

In that case it was held that an accident on board a ship was not inflicted by the vessel. And in *The Onoko*, 47 C. C. A. 111, 107 Fed. 984, cited by the claimant on this point, it was held that the statute of Louisiana, practically like that of this state, gave a cause of action in personam, and not in rem. In *Tropical Fruit S. S. Co. v. Towle*, 138 C. C. A. 293, 222 Fed. 867, it was held that a seaworthy ship was not liable in damages for injury to a sailor aboard. The general admiralty rule relating to the employment of sailors was applied in that proceeding, to the effect that where the ship is seaworthy, and the seaman is injured aboard the vessel, all he can claim is wages and proper treatment while he is being cured of his injury. His right to general damages beyond that depends upon the ship's not being seaworthy, or, in other words, not being a suitable

place in which to work. In *The Theta*, 7 Asp. Mar. L. Cas. 480, a captain in going to his own ship had to cross another lying between his vessel and the dock. He fell through a hatchway on the other ship, and it was held not to be an injury by that ship aboard of which he was hurt. In the instant contention we have a ship performing a usual function of a vessel, that of discharging its cargo, in the process of which, by defect of its tackle,

Shipping—
injury by vessel
—defective
tackle.

the plaintiff was injured. This is clearly a tort committed by the ship itself. The plaintiff was entitled to a foreclosure of the lien, limited to a sale of the vessel, and not including a personal judgment. The claimant's rights were infringed by the rendition of a judgment larger than the demand of the complaint when properly construed as a matter of law. The claimant was entitled to the judgment of the trial court sitting as a chancellor and passing directly upon the effect and value of the evidence.

For these reasons the judgment is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Johns and Brown, JJ., concur.

Bean, J., dissenting in part:

I heartily concur in the able opinion of Chief Justice Burnett on what might be termed the main question in the case, to the effect that the statute upon which this litigation is based is not unconstitutional, and does not infringe upon the Federal law. I am unable to give my assent to the proposition that the action is cognizable only as a suit in equity for the foreclosure of a lien. I am constrained to mention this for the reason that for more than thirty years it has been the unquestioned practice in causes arising under §§ 10,281 et seq., Or. Laws, in so far as I am able to ascertain, to try the cause as an action at law. *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; *The Victorian*

No. 2, 26 Or. 194, 46 Am. St. Rep. 616, 41 Pac. 1103. When those causes were tried, the distinction between an action at law and a suit in equity was at least as broad as it is to-day. Eminent counsel appeared for the parties in those cases. We note on the record the names of Messrs. Bronaugh, McArthur, Fenton, and Bronaugh, Jr.; Messrs. Cox, Cotton, Teal, and Minor; and Messrs. Williams, Wood, and Linthicum. See also *Benbow v. The James Johns*, 56 Or. 554, 108 Pac. 634.

The Oregon statute was construed in *The Bee* (D. C.) 216 Fed. 709, by Judge Bean, who was for a long time a member of this court. It is there stated: "The remedy provided by the state law for enforcing the lien given by the statute is an action against the boat or vessel by name, rather than in personam against the owner (Lord's Or. Laws, § 7506), but after the seizure of the vessel and the return of the warrant the proceedings are to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued (§ 7509). And if an issue of fact be joined the same proceedings shall be had as in other actions (§ 7511). This being so, it would seem to follow that the trial should be governed and the liability of the parties determined by the same rule as if the action were in personam against the owner. . . ."

This language indicates that it is also understood by the Federal courts in Oregon that a proceeding under the statute in question is an action at law.

As indicated by § 10,281, Or. Laws, which declares: "Every boat or vessel used in navigating the water of this state or constructed in this state shall be liable and subject to a lien: . . . for damages or injuries done to persons or property, by such boat or vessel . . ."—it would seem to the writer that, strictly speaking, while the boat is subject to a lien, there is no definite

or fixed amount of the lien until judgment therefor is rendered, so that when the lien is finally perfected it is merged in a judgment, and is not required to be foreclosed within the meaning of § 422, Or. Laws. It does not appear that in the enactment of the latter section it was the intention of the lawmakers to change the mode of procedure under the Boat Lien Law. The law provides for a special proceeding, but it is denominated by the statute as an "action." The case at bar does not come within the ordinary list of causes of equitable cognizance. It was appropriately tried as a law action. It would be a very radical change for this court to try a damage case for personal injuries *de novo*.

It is presumed that the legislature does not intend to make unnecessary changes in the pre-existing body of law. The construction of a statute will, therefore, be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question. *Black, Interp. of Laws*, p. 110, § 52; *Manuel v. Manuel*, 13 Ohio St. 458; *Bear v. Bear*, 33 Pa. 525; *Thompson v. Mylne*, 4 La. Ann. 206; *Childers v. Johnson*, 6 La. Ann. 634. We quote from *Maxwell, Interp.* 2d ed. 96: "One of these presumptions is that the legislature does not intend to make any change in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they are not really used."

If it be granted that the cause is a suit in equity, I see no reason why it should not be tried *de novo* in this court.

As to the amendment of the complaint, as I understand the record, the complaint was first typewritten, alleging damages in the sum of "\$2,800) twenty-eight hundred dollars, and will necessarily incur an expense of ninety-nine (\$99) dollars in endeavoring to cure himself from said injury." Afterwards a pen was drawn through the figures "2,800" and "7,500" written over the same. At the time of the submission of the cause to the jury, after the instructions had been given by the court, in order to make the allegation of damages clear, plaintiff was permitted to correct the complaint to conform the written portion of the paragraph to the figures. The so-called amendment was a mere correction of an apparent clerical error, and in no way affected the issues. This was over the objection of claimant.

Section 102, Or. Laws, provides that the court may at any time, in the furtherance of justice and upon such terms as may be proper before the cause is submitted, allow any pleading or proceeding to be amended "by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

An application to amend a pleading at the trial is addressed to the sound discretion of the trial court, and the ruling of the court in such a matter should not be disturbed, except in the case of an abuse of discretion. *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414; *Wallace v. Baisley*, 22 Or. 572, 30 Pac. 432; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Filkins v. Portland Lumber Co.* 71 Or. 249, 142 Pac. 578; *Heywood Bros. & W. Co. v. Doernbecher*, 48 Or. 359, 86 Pac. 357, 87 Pac. 530; *Ridings v. Marion County*, 50 Or.

30, 91 Pac. 22; *Beard v. Royal Neighbors*, 60 Or. 41, 118 Pac. 171.

The trial court is in a better position than is the appellate court to decide in regard to whether or not the circumstances warrant the allowance of an amendment of a pleading in order that the ends of justice may be met. There had been no application for the removal of the cause to the Federal court. I do not think there was any abuse of discretion in allowing the amendment.

The service of process upon the Bee Steamship Company, a corporation, the owner of the vessel, being only a constructive service, the owner appeared for the boat and answered the complaint, and asked for judgment in its favor for costs and disbursements. It made a general appearance in the case, and is bound by the judgment. Where an undertaking is given for the discharge of

a boat, under the provisions of § 10,289, in a proceeding of this kind, as was done in the present case, the manner of rendering and executing judgment is directed by § 10,292, Or. Laws, which reads thus: "If an undertaking with surety shall have been given according to § 10,289, and judgment shall have been rendered in favor of the plaintiff, a judgment shall also be rendered upon the undertaking, and execution shall be issued for the amount of judgment and costs in favor of the plaintiff, against the principal and security in such undertaking."

Judgment was rendered against claimant and its surety, and the requirements of the latter section were followed in this case. There was no error in so doing.

The judgment of the circuit court should be affirmed.

Motion for rehearing in banc denied January 3, 1922.

ANNOTATION.

Power of the state to create and enforce liens on ships for a nonmaritime tort.

This annotation does not embrace the question as to what is and what is not a maritime tort.

The creation and enforcement of a lien for a nonmaritime tort against a foreign vessel engaged in interstate commerce, under a state statute which embraces all vessels, whether domestic or foreign, and whether engaged in intrastate or interstate commerce, does not offend against the commerce clause of the Federal Constitution. *Martin v. West* (1911) 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42, affirming 51 Wash. 85, 21 L.R.A.(N.S.) 324, 97 Pac. 1102, and holding that a collision between a vessel and a supporting pier of a bridge over a navigable waterway of the United States, caused by the negligent management of the vessel, and resulting in the collapse of a span of the bridge, and its fall into the stream, is a nonmaritime tort. The

Washington statute in question provided: "All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable. . . . (6) For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands." The state court said in its opinion, *inter alia*: "Such liens created by state statutes are enforceable in the state courts when the subject-matter is not within the jurisdiction of admiralty. The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That, wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem

or in personam, proceedings in rem to enforce such liens are within the exclusive jurisdiction of the admiralty courts. But the converse of this proposition is equally true that, if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state.' *Knapp S. & Co. Co. v. McCaffrey* (1900) 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824. The state court, therefore, has jurisdiction in the case at bar to enforce a lien for the damage done."

(But it should be noted that the limitation of a shipowner's liability for maritime torts not the result of his own fault, provided by U. S. Rev. Stat. §§ 4283-4285, Comp. Stat. §§ 8021-8023, 6 Fed. Stat. Anno. 2d ed. pp. 336, 360, 363, was extended to nonmaritime torts by the provisions of the Act of June 26, 1884 (23 Stat. at L. 57, chap. 121, Comp. Stat. § 8028, 6 Fed. Stat. Anno. 2d ed. p. 368), § 18, limiting the individual liability of a shipowner for "any or all debts and liabilities," except wages and liabilities incurred prior to such enactment, to his share in the vessel, and the aggregate liabilities of all the owners of a vessel on account of the same to the value of the vessel and freight pending. *Richardson v. Harmon* (1911) 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27. The court said and held: "If thus the owner's liability for a tort permitted or incurred through the master or crew, although nonmaritime because due to a collision between the ship and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper district court of the United States, 'all proceedings,' by the express terms of § 4285, Revised Statutes, 'against the owner, shall cease.' The procedure in any such case is prescribed by the 54th and 55th rules in admiralty, where it is said that the court shall, 'on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said

owner or owners in respect of any such claim or claims.'")

It has been held in several cases that an action in rem may be brought in a state court under a state statute against a vessel for a nonmaritime tort. *The Bee* (1914) 216 Fed. 709; *Chicago v. The Queen City* (1885) 17 Ill. App. 203; *The City of Erie v. Canfield* (1873) 27 Mich. 479; *People's Ice Co. v. The Excelsior* (1880) 43 Mich. 336, 5 N. W. 398; *John Spry Lumber Co. v. The C. H. Green* (1889) 76 Mich. 320, 43 N. W. 576; *The Tempest v. Lucas County* (1897) 7 Ohio C. D. 137; *CORDREY v. THE BEE* (reported herewith) ante, 1079.

Where a stevedore on land, loading a California ship, is injured in Oregon by negligence of the mate on the ship, the tort is nonmaritime and is governed by the law of the state where the injury occurs. *The Bee* (Fed.) supra.

In *Chicago v. The Queen City* (1885) 17 Ill. App. 203, supra, it was held that the owner of a bridge and approaches may bring an action against a vessel in an Illinois court under the Illinois "Attachment of Water Craft Act" of 1874, for injury done to the bridge and its approaches by the vessel, as this is not a marine tort. It was also held that a vessel owned in Buffalo was within the act which provided that "every sail vessel, steamboat, steam dredge, barge, lighter, and other water craft of above 5 tons' burden, used or intended to be used in navigating the waters or canals of this state, or used in trade or commerce between ports and places within this state, or having their home port in this state, shall be subjected to a lien thereon, which lien shall extend to the tackle, etc., for all damages for injuries done to persons or property by such water craft," etc.

In *The Tempest v. Lucas County* (1897) 7 Ohio C. D. 137, supra, the court sustained an action by the board against the steamboat for injury to a bridge, under the Ohio statute providing that "any steamboat or other water craft, of 20 tons' burden and upward navigating the waters within or bordering upon this state, shall be

liable, and such liability shall be a lien thereon . . . for injuries done to persons or property by such craft."

In *The City of Erie v. Canfield* (1873) 27 Mich. 479, *supra*, it was held under the Michigan statute that an action would lie in the state court against a brig which had run into and broken a boom of saw logs in a navigable river, on the ground that this was not a maritime tort.

This case was followed in *People's Ice Co. v. The Excelsior* (1880) 43 Mich. 336, 5 N. W. 398, *supra*, where the court stated that the complaint set up a cause of action clearly within the Michigan Boat and Vessel Law, where the cause of action set up in the complaint was the destruction of ice formed on the premises of the complainant within its boom on Belle Isle, and the damage was done by running the vessel rapidly up and down the Detroit river close to the boom, so that the swell thereby created broke up the ice field. See also on further appeal in (1880) 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

So, where a boom broken by the vessel was fastened to piles, it was held that the state court had jurisdiction, the court saying: "It cannot be questioned that these piles were real estate, and that the injury to them, if wrongfully done, would constitute a trespass upon real property. The proof is conclusive that the part of the boom consisting of the piles to which the chain was attached was wrenched from its position, one pile pulled entirely out, and the other over, and in consequence the boom became broken and the logs escaped, being carried down the river by the force of the current." *John Spry Lumber Co. v. The C. H. Green* (1889) 76 Mich. 320, 43 N. W. 576, *supra*.

It will be seen that the reported case (*CORDREY v. THE BEE*, *ante*, 1079), while holding that a state has power to create by statute a lien upon a foreign vessel for a nonmaritime tort committed within its borders, holds, also, that under the Oregon statutes the lien is to be foreclosed in equity as an exclusive remedy, even though (as we are informed in the

dissenting opinion) an undertaking had been given for the discharge of the boat.

This restricted view of the nature of the remedy is not in accord with the view expressed in *The Bee* (1914) 216 Fed. 709, *supra*, where the court, sitting as a court of common law, made the statement quoted in the dissenting opinion in the reported case (*CORDREY v. THE BEE*).

An action in personam may be brought in a state court against the owner of a vessel for a nonmaritime tort, under a state statute, although such statute gives a lien on the vessel. *Johnson v. Chicago & P. Elevator Co.* (1886) 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254.

In an action in personam brought in a state court against the owner of a tugboat, wherein his right, title, and interest in the tugboat was attached, it was held that the injury done by the jib boom of a schooner striking against an elevator situated on the bank of the Chicago river, through the negligent towing of such schooner, constitutes a wrong the remedy for which is wholly at common law, and may be pursued in a state court according to the provisions of a state statute; although such statute gives a lien on the vessel. *Johnson v. Chicago & P. Elevator Co.* (U. S.) *supra*, see also *Rose's Notes* to this case.

In *State ex rel. Raymond v. Voorhies* (1887) 39 La. Ann. 499, 4 Am. St. Rep. 274, 2 So. 37, an action for a penalty for failure to take a pilot, it was held that a state court can entertain jurisdiction of a suit in personam against the master and owners of a vessel, coupled with a sequestration, to enforce a money claim secured by lien, by a state statute and not created by the maritime law.

In this connection reference may be made to *Gindele v. Corrigan* (1889) 129 Ill. 582, 16 Am. St. Rep. 292, 22 N. E. 516, where in "a proceeding by attachment," under the Illinois Water Craft Act, in a case of collision between domestic vessels in an inland canal, it was said and held: "The state may, by statute, authorize the attachment of the property of the

debtor or tort-feasor, as a security for the satisfaction of the judgment to be recovered, and in such case the proceeding is in personam, and not in rem. The object of the attachment in such case is to secure a lien upon the property seized for the payment of the judgment, and not for the condemnation of the property attached. . . . It is manifest that appellants have voluntarily submitted themselves to the jurisdiction of the state court; and it is clear that, after having done so by filing the bond provided by the statute for the release of the vessel, the proceeding was no longer in rem, but necessarily in personam, and no other than a personal judgment could have been rendered. This being so, the proceedings here have no similitude to an admiralty proceeding in rem."

The state reports contain a number of cases of proceedings under various state "water craft" acts, in some of which it does not appear whether the tort complained of was or was not a maritime tort under the modern rules, and in others, where the tort seems unmistakably maritime under those rules. By way of illustration of cases of the first class, reference may be made to *Otis v. Thorn* (1850) 18 Ala. 395; *The Farmer v. McGraw* (1855)

26 Ala. 189, 62 Am. Dec. 718; *Loy v. The F. X. Aubury* (1862) 23 Ill. 412, 81 Am. Dec. 292; *The Blue Ridge v. The Time* (1845) 9 Mo. 650; *Holloway v. The Western Belle* (1847) 11 Mo. 147; *Finch v. Brown* (1835) 13 Wend. (N. Y.) 601. By way of illustration of cases of the second class, reference may be made to *The Norway v. Jensen* (1869) 52 Ill. 373; *Howes v. The Red Chief* (1860) 15 La. Ann. 321; *Pousargues v. The Natchez* (1860) 15 La. Ann. 80 (compare *Young v. The Princess Royal* (1870) 22 La. Ann. 388, 2 Am. Rep. 731); *Swearingen v. The Lynx* (1850) 13 Mo. 519; *The Clipper v. Logan* (1849) 18 Ohio, 394 (compare *The Ohio v. Stunt* (1856) 10 Ohio St. 583; *The Ocean v. Marshall* (1860) 11 Ohio St. 379); *McRoberts v. The Henry Clay* (1863) 17 Wis. 102.

As to *Lusk v. Davis* (1866) 27 Ind. 334, decided under the Indiana Water craft Act, it may be noted that this statute was held void (under *The Hine v. Trevor* (1867) 4 Wall. (U. S.) 555, 18 L. ed. 451), in *Ballard v. Wiltshire* (1867) 28 Ind. 341.

Phillips v. Portage Transit Co. (1908) 137 Wis. 189, 118 N. W. 539, is not sufficiently reported on the facts to be of value on the subject.

B. B. B.

GRACE P. FRENCH

v.

W. BRUCE PIRNIE.

Massachusetts Supreme Judicial Court — March 2, 1922.

(— Mass. —, 134 N. E. 353.)

Landlord and tenant — unavoidable casualty — freezing of heating system.

The freezing in the attic, of a pipe leading to the expansion tank of a hot-water heating system, which causes the heater to burst, is not an unavoidable casualty within the meaning of provisions in a lease requiring lessee to deliver up the property in as good order as when it was received, "unavoidable casualty" excepted, and relieving him from liability for rent in case the property is injured by such casualty.

[See note on this question beginning on page 1101.]

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County (Morton, J.), made during the trial of an action brought to recover

rent due under a written lease, and to recover damages for injury to the leased premises, alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. *Overruled.*

The facts are stated in the opinion of the court.

Mr. Byron W. Reed, for defendant:

The general rule is that a lease is to be construed according to the intention of the parties thereto, and that such intention is to be gathered from the whole instrument, rather than from a single clause thereof.

Shaw v. Appleton, 161 Mass. 313, 37 N. E. 372; Cummings v. Hackett, 98 Mass. 51.

Inasmuch as the doctrine appears to be that a covenant to turn the leased premises over to the landlord in good repair requires the tenant to rebuild in case of fire or other unavoidable casualty, even though there is no fault on the tenant's part, the words "fire or other unavoidable casualty excepted" are inserted in the lease for the tenant's protection; and if the injuries herein were caused by "other unavoidable casualty," within the meaning of the lease, the lessee is not bound to repair them, and, further, is entitled to an abatement of the rent until the premises are put by the lessor into tenantable condition, or the lease is canceled by the lessor.

Ball v. Wyeth, 8 Allen, 275; 39 Cyc. 666; Callaway v. Spurgeon, 63 Ill. App. 573; Welles v. Castles, 3 Gray, 325; Phillips v. Sun Dyeing, Bleaching & Calendering Co. 10/R. I. 458.

Mr. Joseph G. Bryer, for plaintiff:

The defendant did not contend that the damages complained of were the result of reasonable use and wear, or of fire; and he is therefore left in a position where, if he is either to prevail in his declaration in set-off, or to defend the claim which the plaintiff made in her declaration with reference to the expense of repairs, he must show that the situation at the premises in question was the result of unavoidable casualties.

Welles v. Castles, 3 Gray, 325.

Crosby, J., delivered the opinion of the court:

The plaintiff seeks to recover rent due, under the terms of a written lease from her to the defendant, and damages for injury to the leased premises caused by the defendant's alleged carelessness and neglect in allowing the hot-water heater to be-

come frozen and burst, and as a result of which water ran over the walls and ceilings. The defendant filed a declaration in set-off, alleging that the premises became uninhabitable owing to the bursting of the heater; that he made repairs upon it and also made other necessary repairs after he had notified the plaintiff to put the premises in proper condition for use and occupation, in accordance with the terms of the lease; and that the plaintiff refused to make such repairs.

The defendant testified "that the heater was not frozen, but that a small pipe in the attic, leading to the expansion tank, was frozen, owing to the extreme cold, in spite of the fact that the house was normally warm, and that the water rose in the pipes as the heater, which he had just stoked, grew hotter, until it reached the frozen pipe, when the heater burst from pressure. He further testified that the plaintiff came to the house, and that he explained the accident to her, and requested her to repair the heater, and that she refused to do so, giving as reason that the accident was due to his negligence in not keeping a sufficient fire in the heater."

The lease contained the usual covenants that the lessee would "quit and deliver up the premises to the lessor, her attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties, excepted, as the same now are, or may be put into by the lessor," and "that in case the premises, or any part thereof during said term, be destroyed or damaged by fire or other unavoidable casualty so that the same shall be thereby rendered unfit for use and habitation . . . the rent . . . reserved, or a just and proportional part thereof . . . shall be suspended or abated until the said premises shall have been

put in proper condition for use and habitation by the said lessor."

The presiding judge stated "that although the freezing of the pipe in the attic and the subsequent bursting of the heater were not, in his opinion, due to any negligence on the part of the defendant, that the freezing of the pipes in the attic was not 'other unavoidable casualty' within the meaning of the lease; that, under the lease, the defendant was bound to foresee and prevent the accident by wrapping the pipe or heating the attic; and that therefore no proportion of the rent could be abated."

Thereafter he submitted to the jury the question whether there had been a waiver of the lease by the plaintiff, and instructed them that the unpaid rent was due without any abatement because of repairs made by the defendant, and directed a verdict for the plaintiff on the defendant's declaration in set-off; to which instructions and direction the defendant accepted.

By the terms of the lease the defendant was bound to deliver up the premises in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties, excepted, at the end of the term, as they were in when the tenancy began, or were put into by the lessor. There was no contention that the damages complained of were the result of reasonable use and wear; and as they were not caused by fire, the question remains whether the freezing of the pipe, followed by the bursting of the heater, was "unavoidable casualties" within the meaning of that phrase in the lease. We are of opinion

Landlord and tenant—unavoidable casualty—freezing of heating system.

that the occurrence was not of that extraordinary and unusual character which was beyond human control,

and that it stands differently than damage to the premises caused by lightning, flood, cyclone, earthquake, or other agencies that no

human power can control or prevent.

Welles v. Castles, 3 Gray, 323, was an action to recover rent reserved in a written lease of a shop. The lease contained covenants substantially identical with those above quoted. The lessee, who occupied the premises during the entire term, contended that he was relieved from the payment of rent because, during the term, the landlord had neglected to repair adjoining tenements, thereby causing injury to the leased premises. In that case, in defining the words "unavoidable casualty," it was said at page 325: "This phrase is in very common use in leases in this country, and has, as we suppose, a well-settled and understood meaning. It does not signify a mere want of repair, arising from lapse of time or improper use of the premises, or from trespasses or nuisances occasioned by the acts of the tenant or of third persons. Neither does it include any injuries which may happen by reason of the common and ordinary use and occupation of the estate leased, or of adjoining premises. The term has a much more restricted meaning, and comprehends only damage or destruction arising from supervening and uncontrollable force or accident. By a strict definition, as applied to the subject-matter, it signifies events or accidents which human prudence, foresight, and sagacity cannot prevent. . . . Looking at the connection in which they stand, and applying to them the maxim of construction, 'noscitur a sociis,' they clearly signify occurrences of an unusual and extraordinary character. The language of the proviso is, 'in case the premises or any part thereof shall during said term be destroyed or damaged by fire or other unavoidable casualty;' that is, by causes like fire, such as lightning, earthquakes, and wind, which usually result without any direct agency of the tenant, and which are ordinarily beyond human control."

The freezing of pipes in this climate in the winter time is not an occurrence of an unusual, unexpected, or extraordinary character; it happens frequently in extremely cold weather; it cannot be said to be beyond human control. The language above quoted is decisive of the question presented in the case at

bar, and makes it plain that the instruction to the jury that the unpaid rent was due without any abatement because of repairs made by the defendant was correct. It follows that the defendant was not entitled to recover on the declaration in set-off.

Exception overruled.

ANNOTATION.

What is unavoidable or inevitable casualty or accident within provision of lease.

- I. In general, 1101.
- II. Application of rules:
 - a. Unavoidable casualty, 1102.
 - b. Unavoidable accident, 1102.
 - c. Inevitable casualty, 1103.
 - d. Inevitable accident, 1104.

I. In general.

Broadly speaking, it may be said that, as a general rule, terms such as "unavoidable casualty," "inevitable casualty," "unavoidable accident," and "inevitable accident," when used in a lease, do not refer to common and ordinary happenings which are within human foresight and control, but rather signify occurrences of an unusual, unexpected, or extraordinary character, which usually occur without any direct participation by the landlord or tenant. This conclusion is deducible from the following decisions:

United States. — *Hodgson v. Dexter* (1802) 1 Cranch, C. C. 109, Fed. Cas. No. 6,565, affirmed in (1803) 1 Cranch, 345, 2 L. ed. 130.

Illinois. — *John Morris Co. v. Southworth* (1894) 154 Ill. 118, 39 N. E. 1099, reversing (1893) 50 Ill. App. 429.

Iowa. — *Healey v. Tyler* (1911) 150 Iowa, 169, 129 N. W. 802; *Woodbury Co. v. William Tackaberry Co.* (1914) 166 Iowa, 642, 148 N. W. 639.

Kentucky. — See *Hill v. Wilson* (1894) 15 Ky. L. Rep. 814.

Massachusetts. — *Bigelow v. Collamore* (1849) 5 Cush. 226; *Welles v. Castles* (1855) 3 Gray, 323, set out and quoted in the reported case (*FRENCH v. PIRNIE*, ante, 1098);

Kramer v. Cook (1856) 7 Gray, 550; *FRENCH v. PIRNIE* (reported herewith) ante, 1098.

Minnesota. — See *Rustad v. Lampert* (1921) — Minn. —, 183 N. W. 843.

Pennsylvania. — See *Kelly v. Duffy* (1887) 8 Sadler, 214, 11 Atl. 244.

Rhode Island. — Compare *Phillips v. Sun Dyeing, Bleaching, & Calendering Co.* (1873) 10 R. I. 458, which is set out infra.

Texas. — *Howeth v. Anderson* (1860) 25 Tex. 557, 78 Am. Dec. 538; *Tays v. Ecker* (1894) 6 Tex. Civ. App. 188, 24 S. W. 954.

England. — *Saner v. Bilton* (1878) L. R. 7 Ch. Div. 815, 47 L. J. Ch. N. S. 267, 38 L. T. N. S. 281, 26 Week. Rep. 394; *Manchester Bonded Warehouse Co. v. Carr* (1880) L. R. 5 C. P. Div. 507, 49 L. J. C. P. N. S. 809, 43 L. T. N. S. 476, 29 Week. Rep. 354, 45 J. P. 7.

In some cases it has been held that a casualty or accident may be inevitable or unavoidable without happening by the act of God or being caused by the public enemy. *Hodgson v. Dexter* (Fed.); *John Morris Co. v. Southworth* (Ill.); and *Phillips v. Sun Dyeing, Bleaching, & Calendering Co.* (R. I.) supra.

And it seems unquestioned that occurrences of an unusual and extraordinary character, and which are not within human control, such as lightning, earthquakes, unprecedented floods, winds, etc., constitute inevitable or unavoidable casualties or accidents. See *Healey v. Tyler* and

Woodbury v. William Tackaberry Co. (Iowa.), and Hill v. Wilson (Ky.) supra; Welles v. Castles (1855) 3 Gray (Mass.) 323; Tays v. Ecker (Tex.) supra. See also Turner v. Townsend (1894) 42 Neb. 376, 60 N. W. 587.

II. Application of rules.

a. Unavoidable casualty.

In Woodbury Co. v. William Tackaberry Co. (1914) 166 Iowa, 642, 148 N. W. 639, it was said that it could not well be questioned but that the depositing of mud and debris in the basement of the leased premises by an "unprecedented flood" was the result of "unavoidable casualty," as used in a provision of the lease fixing the rights of the parties in respect of repairs and tenantable conditions.

And in Phillips v. Sun Dyeing, Bleaching, & Calendering Co. (1873) 10 R. L. 458, it was held that the words "unavoidable casualty" in a provision in a lease for abatement of rental were to be interpreted, not according to their strict and philological signification, which might defeat the intention of the parties, but rather in conformity with their popular, everyday acceptance. It was accordingly held that there was in the explosion of a boiler such a degree of unexpectedness, as of something unforeseen and not contemplated in the making of the contract, that it was proper to regard such explosion as an unavoidable casualty; and that this was so although it was alleged that the explosion was not a casualty, but an occurrence in the natural course of things, due to the age of the boiler.

But in Bigelow v. Collamore (1849) 5 Cush. (Mass.) 226, it was held that a stipulation in a lease suspending the payment of rent if the premises were destroyed or damaged by fire or other unavoidable casualty did not cover the breaking down of a mill wheel from general decay.

And the reported case (FRENCH v. PIRNIE, ante, 1098) is authority for the proposition that damages caused by the bursting of the hot water

heater in the leased premises, as the result of the freezing of the pipe leading to the expansion tank, were not the result of "unavoidable casualty" within the meaning of a provision relating to surrender of the premises and abatement of rent, since the freezing of the pipe in question in such a climate as that of Massachusetts was not an occurrence of an unusual, unexpected, or extraordinary character, so as to bring the case within the general definition of the term "unavoidable casualty," as generally used in leases.

And the construction of the phrase "unavoidable casualty" which was adopted in the preceding case was applied in Tays v. Ecker (1894) 6 Tex. Civ. App. 188, 24 S. W. 954, where the building which was the subject of the lease was condemned by the city authorities as unsafe and untenable, it having been held that such condemnation did not constitute an "unavoidable casualty" within a provision suspending rent, and that the tenant continued liable for the rent for the balance of the term.

And in Welles v. Castles (1855) 3 Gray (Mass.) 323, quoted in the reported case (FRENCH v. PIRNIE), it was held that injury to leased premises resulting from the neglect of the landlord to keep adjoining premises in repair did not entitle the lessee to an abatement of rent for injuries from "unavoidable casualty."

And in Kramer v. Cook (1856) 7 Gray (Mass.) 550, where the wall of premises leased with covenants to restore in good order, "unavoidable casualties" excepted, fell because of the lessor's failure to support the same after notice by the adjoining owner that he intended to build on his premises, pursuant to which he made excavations which undermined the partition wall, it was said that "the falling of the wall, by reason of not being properly shored up, would not seem to be an unavoidable casualty."

b. Unavoidable accident.

It was said obiter in Turner v.

Townsend (1894) 42 Neb. 376, 60 N. W. 587, that perhaps a tenant, at the expiration of his lease, would not be compelled to restore or pay for the restoration of a window which had been blown out by a storm, as it might be that a storm would be considered an inevitable accident within the meaning of the tenant's covenant to yield up the premises at the expiration of the term in as good condition as when received, loss by fire or other "unavoidable accidents" excepted.

And an accidental fire which, without fault or negligence on the part of the lessee, destroyed the leased premises, was regarded in *Howeth v. Anderson* (1860) 25 Tex. 557, 78 Am. Dec. 538, as an "unavoidable accident" within the meaning of a provision requiring the lessee to redeliver in good condition, unavoidable accidents excepted.

c. Inevitable casualty.

A fire which, against the will and without the negligence or other default of the tenant, destroyed the leased premises, was held in *Hodgson v. Dexter* (1802) 1 Cranch, C. C. 109, Fed. Cas. No. 6,565, affirmed without decision upon this point in (1803) 1 Cranch (U. S.) 345, 2 L. ed. 130, to be an "inevitable casualty" as to the tenant, within the meaning of a provision in the lease requiring him to deliver up the premises in repair, excepting, etc. The court said: "The question arising is, whether the facts stated in the plea bring the defendant's case within the exception of inevitable casualties. It is admitted that a casualty may be inevitable without happening by the act of God, or by the public enemies of the country. In the present case the expression seems to me to mean only such casualties as are inevitable by the defendant, and not such as might not be avoided by the united efforts of the whole society. . . . Where there has been no negligence or default, there the greatest degree of care and diligence has been used. When, therefore, the plea avers that the house was burned without the

negligence or default of the defendant, it is tantamount to saying that it was burned notwithstanding the greatest degree of care and diligence on his part. The question then occurs, whether a casualty which happens notwithstanding the use of the greatest degree of care and diligence on the part of the defendant to prevent it is not, as to him, an inevitable casualty. It is necessary for us to inquire what degree of negligence is sufficient to charge the defendant, because the plea denies all negligence whatever. If issue had been joined on the plea, it might have become a question what degree of negligence the plaintiff must prove in order to maintain the issue on his part. The term 'negligence' cannot be appropriated exclusively to the omission of any given degree of care and diligence. Its degrees are infinitely variable, from the omission of the greatest possible care, to the very boundary of fraud. I have no hesitation, therefore, in saying that an accident which happens without the slightest degree of negligence or default of the defendant is, as to him, an inevitable casualty.

. . . . By common acceptance, unavoidable accident means a casualty which happens when all the means which common prudence suggests have been used to prevent it. . . . When we consider the subject of this contract, that it was the lease of a house for eight months only, we can hardly suppose that the lessee would take pains to insert a clause to guard himself from accidents which might arise from the unusual casualties of earthquakes, tempests, lightning, or public enemies, and entirely overlook the common accident of fire, or that he meant to make himself or the United States insurer against fire. It is not usual for lessees for short terms to become the insurers of the premises against accidental fire, and I shall not presume a contract of that kind, unless it was in very express terms."

So it has been said that the explosion of a boiler, due to a latent defect, is, as to a lessee who is without negligence, an inevitable casualty

within a provision relating to termination of the lease where the premises are rendered untenable by fire or other casualty. *John Morris Co. v. Southworth* (1894) 154 Ill. 118, 39 N. E. 1099, reversing (1893) 50 Ill. App. 429.

d. Inevitable accident.

In *Healey v. Tyler* (1911) 150 Iowa, 169, 129 N. W. 802, it was said that an "exceptional flood caused by a freshet in a stream" was an "inevitable accident" within the delivery-up provision of a lease.

And in *Davis v. George* (1892) 67 N. H. 393, 39 Atl. 979, it seems to have been assumed that the destruction of the leased premises by fire apparently caused by defective construction of the chimneys and flues was by "inevitable accident" within a provision of the lease dealing with delivery up of the premises at the end of the term. And *Kelly v. Duffy* (1887) 8 Sadler (Pa.) 214, 11 Atl. 244, goes on the theory that, in an action brought after the termination of the lease, on the covenant to surrender premises at the expiration of the term in as good order and condition as they were in at any time during the term, ordinary decay and inevitable casualty only excepted, where the premises were destroyed by fire, lessee is not liable if he made every practicable effort which, under the circumstances, ought to have been made, to save the building; and that whether he did so or not is a question for the jury.

But in *Saner v. Bilton* (1878) L. R. 7 Ch. Div. (Eng.) 815, 47 L. J. Ch. N. S. 267, 38 L. T. N. S. 281, 26 Week. Rep. 394, the phrase "inevitable accident," in a clause in a lease providing that in case the property at any time during the term shall "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent shall cease, was held not to apply to anything arising from the acts or defaults of either of the contracting parties, and hence that the lessee continued liable for rent, although, through the defective construction of the building, he was de-

prived of the possession for a considerable period while repairs were being made. The court said: "It is to be observed that the words 'inevitable accident' are coupled with the word 'other,' which seems to show to some extent that they are to be construed by the rule of ejusdem generis; that is, the inevitable accident pointed at is one of a kind similar to 'flood, fire, storm, or tempest,' referred to in the earlier words. In my opinion, the injury sustained by the building was not an inevitable accident within the meaning of those words. I think that the words do not apply to anything arising from the acts or defaults of either of the contracting parties. Those acts and defaults were made the subject of express covenant. I think the words do not apply to things existing at the time of the contract, or to the natural results of things existing, which were known or might have been known to the contracting parties; and further than that, it is obvious from the very words that they do not apply to a thing which is evitable or avoidable. It is to be an 'inevitable accident;' but here the accident, according to the defendant's own case, might have been avoided if the building had been properly constructed, and consequently it was not an 'inevitable accident.' It is said that 'inevitable accident' includes that which was not evitable by the acts of the defendant. I do not think that is the real meaning. The clause is, I think, intended to apply to matters outside the existing state of things, and outside the acts and defaults of the contracting parties. That being so, I determine that the defendant is not entitled to any abatement of rent in respect of the occupation of the warehouse by the plaintiff for the execution of the repairs." And in *Manchester Bonded Warehouse Co. v. Carr* (1880) L. R. 5 C. P. Div. (Eng.) 507, 49 L. J. C. P. N. S. 809, 43 L. T. N. S. 476, 29 Week. Rep. 354, 45 J. P. 7, where the lessees of a building covenanted to deliver it up at the end of the term with the inside in good and tenantable repair,

damage by fire, storm, or tempest, or "other inevitable accident," excepted, the court adopted the rule of *Saner v. Bilton* (Eng.) supra, that "inevitable accident" meant some accident ejusdem generis, and did not extend to use of the property by the tenant; and, applying the rule, held that where the building was destroyed by the overloading of the floors, the tenant was liable for the cost of putting the "inside" of the building in good and tenantable repair.

And in *Peck v. Scoville Mfg. Co.* (1892) 43 Ill. App. 360, where a tenant covenanted to yield up the premises in as good condition as when entered upon, "loss by fire or inevitable accident" excepted, it was held that the tenant was liable for the expense of replacing a window broken by a stone accidentally kicked by a passing team on the ground; that such an injury to the premises was not an inevitable accident, since the window might have been protected

by a blind or wire netting. The court said: "A window broken by a stone accidentally kicked by a passing team is not broken by inevitable accident. The kicking of the stone, so far as appellee (the tenant) is concerned, may have been inevitable, but not the breaking of the window; that might have been protected by a blind or wire netting."

In *Rustad v. Lampert* (1921) — Minn. —, 183 N. W. 843, it was held that where the boiler to the heating plant on leased premises was cracked when the premises were delivered up, proof of such fact made it incumbent on the tenant, in order to relieve himself from liability under a provision requiring delivery up in a certain state of repair, inevitable accident excepted, to prove that the damage was the result of "inevitable accident." The court found that the cracking was caused by negligence and careless handling by the tenant, so as to render him liable under the lease.

G. J. C.

G. E. COOPER et al., Plffs. in Err.,

v.

R. E. ROLLINS et al.

Georgia Supreme Court—February 14, 1922.

(152 Ga. 588, 110 S. E. 726.)

Constitutional law — regulation of barbers' trade.

1. The act of the legislature "regulating the occupation of barbers," approved August 17, 1914 (Acts 1914, p. 75), as amended by the Act of 1920 (Acts 1920, p. 109), is not unconstitutional, (a) because it violates the provision of our state Constitution (art. 1, § 4, ¶ 1) which provides that "laws of a general nature shall have uniform operation throughout the state," or (b) because it violates the equal protection clauses of the 14th Amendment of the Constitution of the United States and of the Constitution of this state.

[See note on this question beginning on page 1111.]

— when act declared unconstitutional.

2. This court will not declare an act of the legislature unconstitutional unless the conflict between the act and the Constitution is clear and palpable.

[See 6 R. C. L. 98-100; 2 R. C. L. Supp. 25, 26.]

— regulation of trades — police power.

3. What trades or occupations shall be regulated, and the nature and extent of the regulations to be applied, are questions for the legislature to determine, and fall within the proper exercise of the police power.

Headnotes 1-3 by HINES, J.

20 A.L.R.—70.

er of the state; and, unless the regulations are so unreasonable and extravagant that the property or personal rights of the citizen are unnecessarily and arbitrarily interfered with, without due process of law, they do not extend beyond the power of the state to pass.

[See 6 R. C. L. 217, 482.]

— who may attack constitutionality of statutes.

4. Residents of a state cannot attack the constitutionality of a statute on

the ground that it discriminates against nonresidents.

[See 6 R. C. L. 89-91; 2 R. C. L. Supp. 21.]

— reasonableness of classification.

5. A statute requiring the examination and licensing of barbers only in towns having a population in excess of 5,000 inhabitants is not void for unreasonableness of classification.

[See 6 R. C. L. 388; 2 R. C. L. Supp. 107.]

ERROR to the Superior Court for Fulton County (Pendleton, J.) to review a judgment in favor of defendants in a suit brought to test the constitutionality of an act regulating the occupation of barbers. *Affirmed.*

Statement by Hines, J.:

Plaintiffs filed their equitable petition on their behalf and on behalf of all other persons similarly situated, seeking to have the "Barber Act" and its administration declared to be unconstitutional. The plaintiffs are residents of Georgia. The suit is brought against R. E. Rollins, L. E. Cooper, and W. H. Bedgood, as members of the State Board of Barber Examiners. Bedgood was stricken as a defendant, and B. E. Archer was substituted in his place as a member of said board. Plaintiffs alleged that the act (Laws 1914, p. 75) as amended (Laws 1920, p. 109), creating this board, is unconstitutional: (a) Because it discriminates between barbers and those engaged in other kinds of manual labor; (b) because it does not operate uniformly throughout the state, but is applicable only to barbers in cities and towns in excess of 5,000 inhabitants; (c) because it violates article 1, § 4, of the Constitution of this state, and the 14th Amendment to the Constitution of the United States, in that § 9 of the original act exempts from its provisions barbers engaged within the state at the date of such act, and who had been practising such occupation for a period of three years prior to its approval; (d) because it violates the same provisions of the state and Federal Constitutions, for the reason that it permits barbers who had been engaged in their trade

for the period of three years prior to the approval of this act to continue their occupation by making an affidavit of these facts and paying the sum of \$2, while a person who had learned to practise such occupation without the state is required to pay the sum of \$5 and to submit to an examination before said board; (e) because the classification of towns and cities into those having populations in excess of 5,000 inhabitants and those having less population, and making said act applicable to those of the former population, and not to those of the latter, is arbitrary and unreasonable.

It was agreed between the plaintiffs and the defendants in the court below that the only question involved was the constitutionality of this law upon the several grounds set forth in the petition.

Messrs. Roy Lewis, J. L. Anderson, and John T. Pearson for plaintiffs in error.

Messrs. James A. Miller and Bond Almand, for defendants in error:

The Barber Law of 1914 is a general law because it operates throughout the state on the class dealt with; its operation being uniform in that it affects all alike who come within the scope of its operation, and is not contrary to art. 1, § 4, ¶ 1, of the state Constitution, or to the 14th Amendment to the Federal Constitution.

Starnes v. Mutual Loan & Bkg. Co. 102 Ga. 597, 29 S. E. 452; Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891;

Sasser v. Martin, 101 Ga. 447, 29 S. E. 278; Stewart v. Anderson, 140 Ga. 31, 78 S. E. 457; Bone v. State, 86 Ga. 108, 12 S. E. 205.

Nor does the law violate the equal protection clauses of the state or Federal Constitutions, in that the law affects all alike and similarly situated that come within the scope of its operation.

Stewart v. Anderson, 140 Ga. 31, 78 S. E. 457; McGinnis v. Ragsdale, 116 Ga. 245, 42 S. E. 492; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 53 L. ed. 1288, 34 Sup. Ct. Rep. 856; Clark v. Reynolds, 136 Ga. 817, 72 S. E. 254; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Miller v. Wilson, 236 U. S. 378, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 780; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; Williams v. Arkansas, 217 U. S. 77, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 3 Ann. Cas. 865; Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; Armour & Co. v. Augusta, 134 Ga. 178, 27 L.R.A. (N.S.) 676, 67 S. E. 417; State v. Shapiro, 131 Md. 168, 101 Atl. 703, Ann. Cas. 1918E, 196; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; 6 R. C. L. §§ 392, 393; 12 C. J. 1161; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

In administering the law, the board has administered it equally, judiciously, and with due regard to the rights and property of the plaintiffs, there being no evidence of an arbitrary use of power that would warrant a holding that the law was unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312.

Legislative regulation of the trade or occupation of a barber is a proper and legitimate use of the police power in the interest of the health and welfare of the public.

Com. v. Ward, 136 Ky. 146, 123 S. W. 673; Moler v. Whisman, 243 Mo. 571, 40 L.R.A. (N.S.) 629, 147 S. W. 985, Ann. Cas. 1918D, 392; State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; State v. Armeno, 29 R. I. 431, 72 Atl. 216; Ex parte Lucas, 160 Mo. 218, 61 S. W. 218; State v. Walker, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 828, 3 N. C. C. A. 599; State v. Zeno, 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 90 S. W. 748; State v. Briggs, 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424; Jackson v. State, 55 Tex. Crim. Rep. 557, 117 S. W. 818; 12 C. J. pp. 924, 1273; Cosgrove v. Augusta, 103 Ga. 835, 42 L.R.A. 711, 68 Am. St. Rep. 149, 31 S. E. 445; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; 6 R. C. L. p. 199; Klafter v. State Examiners, 259 Ill. 15, 46 L.R.A. (N.S.) 532, 102 N. E. 193, Ann. Cas. 1914B, 1221; People v. Griswold, 213 N. Y. 92, L.R.A. 1915D, 538, 106 N. E. 929; Com. v. Zimmerman, 221 Mass. 184, 108 N. E. 893, Ann. Cas. 1916A, 858; Keller v. State, 122 Md. 677, 90 Atl. 603.

Hines, J., delivered the opinion of the court:

1. Every presumption will be made in favor of the constitutionality of an act of the legislature. Allison v. Thomas, 44 Ga. 649. Before an act of the legislature will be declared unconstitutional, the conflict between the act and the fundamental law must be clear and palpable. Wellborn v. Estes, 70 Ga. 390. A state statute will not be set aside by the courts in a doubtful case. Macon & W. R. Co. v. Davis, 13 Ga. 68, 83. These elementary principles do not require any elucidation. They have become firmly embedded in the constitutional law of the state, and should not be departed from.

2. It is urged that this act is un-

Constitutional law—when act declared unconstitutional.

constitutional because it discriminates between persons engaged in the trade of barbering and persons engaged in other trades involving manual labor. This involves the question whether the legislature has the power to require the members of one trade or occupation to be examined and licensed, without requiring the members of all other trades or occupations to be so examined and licensed. Is it a denial of the equal protection of the law to require those who are engaged in the pursuit of one trade to be examined and licensed, while the legislature does not require those engaged in other occupations to be so examined and licensed? At this time the question does not admit of debate. The courts are generally agreed that it is competent for the legislature to prohibit persons from practising the calling of a barber without first having obtained a license or certificate of registration. *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; *State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; *State v. Zeno*, 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 81 N. W. 748; *State v. Armeno*, 29 R. I. 431, 72 Atl. 216; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424. The power of the legislature to regulate this trade and to require barbers to be examined and licensed is derived from the police power of the state. This power enables the legislature to make all needful rules and regulations for the health, safety, and welfare of the people of the state. The health of the citizens, as affected by diseases spread from barber shops conducted by unclean and incompetent barbers, is justification for such laws. 12 C. J. 924, § 432.

The regulation of the occupation of barbers, and leaving other occupations of like kind unregulated, is not a denial of the equal protection of laws, within the meaning of the 14th Amendment to the Constitution of the United States. What

such regulation shall be, and to what particular trade or business such regulation shall apply, are questions ^{—regulation of trades—police power.} for the state to determine, and their determination comes within the proper exercise of the police power of the state; and, unless the regulations are so unreasonable and extravagant in their nature and purpose that the property or personal rights of the citizens are unnecessarily, and, in the main, arbitrarily, interfered with or destroyed, and without due process of law, they are not beyond the power of the state to pass. *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Williams v. Arkansas*, 217 U. S. 79, 88, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865.

3. It was insisted by counsel for the plaintiffs in error that this statute violates article 1, § 4, ¶ 1, of the Constitution of this state (Civ. Code, § 6391), which declares that "laws of a general nature shall have uniform operation throughout the state." The act (§ 1) declares that "it shall be unlawful for any person to follow the occupation of barbering in cities or towns in excess of five thousand inhabitants unless he will have first obtained a certificate of registration as provided in this act."

It is insisted that this classification of the cities and towns of the state into those having populations in excess of 5,000 inhabitants and into those having less than such number of inhabitants, and making this act applicable only to barbers following their occupations in cities or towns having populations in excess of 5,000 inhabitants, violates this provision of the state Constitution. In this we do not agree with the learned counsel for the plaintiffs in error. The Constitution of Georgia recognizes certain territorial jurisdictions, such as the state, its counties, cities, and militia districts. Whatever laws apply to all or any one of these territorial jurisdictions as a class cannot be called spe-

cial laws, but are general statutes, having uniform operation throughout the state. *Starnes v. Mutual Loan & Bkg. Co.* 102 Ga. 597, 29 S. E. 452. The act involved in the case last cited was one fixing the venue of justices' courts in cities having a population of more than 5,000 inhabitants.

Our state Constitution only requires a law to have uniform operation, and that means that it shall apply to all persons, matters, or things which it is intended to affect. If it operates alike on all who come within the scope of its provisions, constitutional uniformity is secured. Uniformity does not mean universality. This constitutional provision is complied with when the law operates uniformly upon all persons who are brought within the relations and circumstances provided by it. *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891. This act operates upon all barbers in towns and cities throughout the state having populations in excess of 5,000 inhabitants, and is therefore uniform in its operation.

4. It is next insisted that this act violates both the state and the Federal Constitutions, because it denies to the barbers of the state the equal protection of the laws. It is asserted that § 9 of the original act exempts from its provisions barbers engaged within the state at the date of the approval of the act, and who had been practising their trade for a period of three years prior to its approval, and permits such barbers to continue their occupations by making an affidavit of these facts and paying the sum of \$2, while persons who had learned to practise such occupation without the state are required to pay the sum of \$5 and to submit to an examination before said board. It is insisted that this discrimination denies to the barbers who do not come within this exemption the equal protection of the laws, and conflicts with the due process clauses of the state and Federal Constitutions. Before a law

can be declared violative of these constitutional provisions because it omits certain classes, the court must be able to say that there is no fair reason for not requiring its extension to others whom the act leaves untouched. The selection of the exempted classes is within the legislative power, subject only to the restriction that it be not arbitrary or oppressive, and apply equally to all persons similarly situated. This act is

—regulation of
barbers'
trade.

not unconstitutional because its provisions do not apply to those who were engaged as barbers in this state at the date of its approval, and who had been so engaged in this state for three years prior thereto. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. "Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as the result of an examination before a board of medical experts." *Watson v. Maryland*, 218 U. S. 173, 177, 54 L. ed. 987, 989, 30 Sup. Ct. Rep. 646.

The plaintiffs are residents of Georgia; and it does not lie in their mouths to attack the constitutionality of this statute on the ground that it discriminates against nonresident barbers. Only those whose rights are directly affected can properly question the constitutionality of a state statute.

—who may
attack constitutionality of
statutes.

Eliopolo v. Stubbs, 143 Ga. 602 (3), 85 S. E. 853; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 161, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Williams v. Walsh*, 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137; *Collins v. Texas*, 223 U. S. 288, 295, 56 L. ed. 439, 443, 32 Sup. Ct. Rep. 286; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; *Hendrick v.*

Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140.

5. It is next insisted that this act is unconstitutional because of the classification of the towns and cities therein provided. It is contended that such classification has no reasonable relation to the subject-matter of the statute, and is arbitrary and capricious. The purpose of the act is "to insure the proper sanitary conditions in barber shops, and to prevent the spreading of disease in the state of Georgia." Is the application of this law to barbers in towns or cities having populations in excess of 5,000 inhabitants without some reasonable relation to its subject-matter? Is such classification unnatural, arbitrary, and capricious? The legislature may make classifications for the purpose of legislation. It may classify cities. The classification must have some reasonable relation to the subject-matter of the statute. There must be a legitimate ground for differentiation. Arbitrary or capricious discriminations are not permissible under the Constitution. *Stewart v. Anderson*, 140 Ga. 31, 33, 78 S. E. 457. A state statute which, in carrying out a public purpose, is limited in its application, is not a denial of the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States and of the similar provision in our state Constitution, if, within the sphere of its operation, it affects all persons similarly situated. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. So, a statute making it unlawful for mine owners, employing ten or more miners underground, and paying therefor by the ton mined, not to screen the coal before it is weighed, was held valid, and it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed. *McLean v. Arkansas*, 211 U. S. 539, 546, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206. There is more

reason for dividing towns and cities into those having 5,000 or more inhabitants and those having less than that number than there is in dividing mines into those working ten miners or more and those working less. So, a classification in a state statute prohibiting drumming or soliciting on trains for business for certain named establishments was held by the Supreme Court of the United States to be a reasonable classification, and was upheld. *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865.

The spread of disease by insanitary barbers or barber shops will affect more people in large towns or cities than in small ones. The character of barbers and barber shops is more generally known in villages than in large towns, and villagers can more easily protect themselves against insanitary barbers. Knowledge of the personal and professional habits of barbers and of the condition of barber shops is more easily acquired in small towns than in large cities. The business of the barber may be everybody's business in the hamlet or small town. This may not be so in large towns. In small towns everybody knows the barber, his shop, and his personal and professional habits of cleanliness. The relation between barbers in small centers of population and their customers is closer and more intimate than in populous cities. This relation is friendlier in the small town than in the big one. If the barber in a small town has a communicable disease, knowledge of this fact spreads rapidly in a village. Knowledge of such fact travels more slowly in a city. If a customer catches a contagious disease from a village barber, this becomes common knowledge at once of all the villagers. This is not so in Atlanta, Augusta, Macon, or Savannah.

For these reasons customers of barbers in large towns need greater

protection than those of barbers in small ones. Other reasons can be given to justify this classification, but we deem the above sufficient. So we reach the conclusion that this classification has a reasonable relation to the subject-matter of this statute, and that the statute is not unconstitutional for any of the reasons assigned.

We do not deal with any questions raised by the petition in this case except the constitutionality of this act, as that was the only question decided by the judge below by the agreement of the parties.

Judgment affirmed.

All the Justices concur.

Petition for rehearing denied.

ANNOTATION.

Constitutionality of statute regulating barbers.

- I. Scope of note, 1111.
- II. Regulative statutes in general:
 - a. Nature and source of power to regulate, 1111.
 - b. Delegation of power, 1112.
 - c. Basis for classification, 1112.
 - d. Validity of specific requirements, 1113.
- III. Sunday-closing statute:
 - a. Validity of special statute:
 1. Majority view, 1114.
 2. Minority view, 1115.
 - b. Validity of general statute as applied to barber, 1117.

I. Scope of note.

With the exception hereafter stated, there are reviewed in this annotation the decisions on the constitutionality of a statute which regulates barbers. Decisions on the validity of a Sunday-closing statute as applied to barbers are included, except one class of decisions which has been previously considered in this series. See the annotation to *State v. Murray*, 8 A.L.R. 566, discussing, inter alia, the validity of a statute which imposes a more severe penalty on a barber for a violation of a Sunday-closing law than is imposed on persons engaged in other occupations.

II. Regulative statutes in general.

a. Nature and source of power to regulate.

It is competent for the legislature to prohibit persons from practising the calling of a barber without first having obtained a license or certifi-

cate of registration. *State v. Zeno* (1900) 79 Minn. 80, 48 L.R.A. 88, 79 Am. St. Rep. 422, 81 N. W. 748; *State v. Armeno* (1909) 29 R. I. 431, 72 Atl. 216.

Registration, etc., may be required by the legislature by virtue of the police power. *State v. Armeno* (R. I.) supra; *State v. Sharpless* (1903) 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; *State v. Walker* (1907) 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257.

It is the health of the citizens, as affected by the diseases spread from barber shops conducted by unclean and incompetent barbers, that justifies license laws. *State v. Zeno* (Minn.) supra.

So, in *State v. Walker* (Wash.) supra, it was held that it is competent for the legislature, by virtue of the police power, to prohibit persons from practising the calling of a barber without first having obtained a license or certificate of registration, the health of citizens, as affected by the diseases spread from barber shops conducted by unclean and incompetent barbers, justifying the exercise of such power. But the provisions of the Washington statute for the regulation of barbers have been held to be valid only in so far as they promote the public health and safety. *Timmons v. Morris* (1921) 271 Fed. 721. See *infra*, II. d.

The power of the legislature to impose a license fee on barbers is, in at least one jurisdiction, derived from a constitutional provision. *Louisville*

v. Schnell (1908) 131 Ky. 104, 40 L.R.A.(N.S.) 637, 114 S. W. 742.

b. Delegation of power.

The legislature may delegate the power of regulation of barbers to municipalities (Louisville v. Schnell (1908) 131 Ky. 104, 40 L.R.A.(N.S.) 637, 114 S. W. 742; Hanzal v. San Antonio (1920) — Tex. Civ. App. —, 221 S. W. 237), or to boards of health (La Porta v. Board of Health (1904) 71 N. J. L. 89, 59 Atl. 115).

A statute authorizing a board of examiners to prescribe the qualifications required of barbers in order to obtain a license is not unconstitutional as a delegation of legislative power. State v. Briggs (1904) 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424.

Nor it is a valid objection to a statute requiring registration that it is a delegation of legislative power to provide that the law shall apply to a given town only on a vote of its town council, or that the application of the law in a town shall be left to a vote of the town council, and not to the vote of the electors. State v. Armeno (1909) 29 R. I. 431, 72 Atl. 216.

c. Basis for classification.

It is competent for the legislature to classify barbers according to the population of the communities within which they conduct their business, and, as classified, to prescribe different regulations governing their occupation. State v. Sharpless (1903) 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737.

An act regulating barbers in cities and towns of the state having a population in excess of 5,000 inhabitants is held in the reported case (COOPER v. ROLLINS, ante, 1105) not to violate a section of the Georgia Constitution requiring that laws of a general nature shall have uniform application throughout the state. The court upholds the reasonableness of the classification and its relation to the subject-matter of the statute on the ground that the habits of barbers in villages are better known to the public than are those of barbers in large towns or cities. The same result has

been reached under similar constitutional provisions of other states. Com. v. Ward (1909) 136 Ky. 146, 123 S. W. 673; Ex parte Lucas (1901) 160 Mo. 218, 61 S. W. 218.

A statute requiring a person who has not previously engaged in the occupation of a barber to pass an examination in order to be entitled to pursue that occupation, but imposing no such requirement on a person previously engaged in the occupation, does not make an unreasonable or arbitrary classification, in violation of the due process or equal protection clauses of the Federal Constitution. People v. Logan (1918) 284 Ill. 83, 119 N. E. 913; Criswell v. State (1915) 126 Md. 103, 94 Atl. 549.

Similarly, in the reported case (COOPER v. ROLLINS) it is held not to be a denial of the equal protection of the laws, or a deprivation of liberty or property without due process of law, forbidden by the state and Federal Constitutions, for a state legislature to permit barbers who have been for three years engaged in their occupation in the state to continue their occupation on making an affidavit of this qualification and paying a fee of \$2, and to require those who have been engaged in the occupation outside the state to pay a fee of \$5 and submit to an examination. Substantially to the same effect is Com. v. Ward (Ky.) supra.

Where the legislature has conferred on a municipality authority to exact from persons engaged in various trades, including barbers, license fees between certain minimum and maximum rates, the city may grade barber shops on any reasonable basis. Within this rule an ordinance requiring each barber shop to pay a license fee of \$5 per year, and \$2 additional for each barber chair where more than two chairs are used, is not an unreasonable classification, but is authorized by the statute. Nor is the tax in such a case a property tax. The tax is not on the chairs, but on the occupation. "The chairs referred to are barber chairs, used by barbers in plying their trade. They are named not as a species of taxation,

but as a basis of classification. The tax is upon the vocation, not on the means of exercising it." *Louisville v. Schnell* (1908) 131 Ky. 104, 40 L.R.A.(N.S.) 637, 114 S. W. 742.

Similarly, an ordinance providing for the licensing of barber shops is not invalid because a higher proportional charge is made against shops with a small number of chairs than against those with a large number, since the inspection of a small shop will cost more proportionally than the inspection of a large one. *Hanzal v. San Antonio* (1920) — Tex. Civ. App. —, 221 S. W. 237.

In the reported case (*COOPER v. ROLLINS*) it is held not to be a denial of the equal protection of the laws for the legislature to require barbers to be examined and licensed without requiring those engaged in other occupations to be examined and licensed. The court explains that the health of citizens may be affected by diseases spread by unclean or incompetent barbers, and that, therefore, a statute regulating barbers only does not make such an unreasonable classification as to violate the constitutional provision forbidding a state to deny to any person within its jurisdiction the equal protection of the laws.

d. Validity of specific requirements.

Under a charter authorizing a city to license and regulate all trades, professions, and occupations, an ordinance has been held to be valid which provides for the regulation and inspection of barber shops and all of their equipment and appliances, and the periodical physical examination of every person who may engage in the occupation of a barber, in order to ascertain if he is free from infections, contagious, or communicable diseases. *Hanzal v. San Antonio* (1920) — Tex. Civ. App. —, 221 S. W. 237.

Where a board of health has been given ample authority to prevent the spreading of contagious diseases, the board may, on the principle that powers conferred for the preservation of the public health should receive a

liberal interpretation, prescribe rules to be observed in barber shops to prevent contagious skin diseases, and may fix a license fee. In such a case a license fee of \$2 is reasonable, especially where it appears that the fees collected will not meet the expense of enforcing the regulation. *La Porta v. Board of Health* (1904) 71 N. J. L. 88, 58 Atl. 115.

A statute requiring that an applicant for a certificate to engage in the occupation of a barber shall spend three years as an apprentice, or shall study for that period in a barber school; has been held not to impose an unreasonable restriction on the right to engage in the occupation. *People v. Logan* (1918) 284 Ill. 32, 119 N. E. 913. In that case the court said: "It is argued that the requirement of three years' service as an apprentice or study in a barber school has no direct relation to the public health or safety, but is rather intended to restrict and discourage the public from engaging in this occupation. The intention is to restrict the public from engaging in this occupation to the extent that only those may do so who have learned the trade, know how to prepare, use, and care for the tools, know what sanitary precautions must be taken to avoid the risk of spreading disease, and are acquainted with the sanitary regulations which the board of examiners is authorized by § 11 to adopt. Three years seem a long time to require for learning the trade of a barber, but we cannot say that it is so unreasonably long as to constitute an unreasonable restriction upon the right to engage in the trade."

Likewise a statutory requirement that a student in a school for barbers shall complete a two-year course in order to be entitled to a barber's license has been held not to be invalid. *Moler v. Whisman* (1912) 243 Mo. 571, 40 L.R.A.(N.S.) 629, 147 S. W. 985, Ann. Cas. 1913D, 392.

In *Timmons v. Morris* (1921) 271 Fed. 721, it was held that if a statute authorized a board of examiners to reject an application for a barber's license on the ground that the appli-

cant lacked proficiency in matters not affecting the public health or safety, it was, to that extent, a deprivation of liberty without due process of law, in violation of the 14th Amendment to the Federal Constitution.

On a similar ground, in *Moler v. Whisman* (Mo.) *supra*, the court stated that, under the Missouri Constitution, a section of a statute was invalid which prohibited a student or apprentice or his instructor in a school for barbers, from making any charge for the services of the student or apprentice. The court said: "If students of the barbers' trade be compelled to labor two years without pay, and without their instructors receiving any remuneration for their services (as required by § 1187, *supra*), it is difficult to see why they would not thereby be deprived of the gains of their own industry, as prohibited by our organic law. . . . The practice of boys or young men apprenticing themselves to skilful mechanics, artisans, or professional men in order to qualify themselves for useful trades and professions is almost as old as civilization itself; but the barbers' law is the first regulation which has ever come to our knowledge that prohibits both the apprentice and his master from receiving any remuneration whatever for services of the apprentice, thereby compelling the apprentice to waste two years of his time while qualifying for a public barber. It is true, as announced in *Ex parte Lucas* (1901) 160 Mo. 218, 61 S. W. 218, that the barber trade, because of its intimate relation to the public health, is a proper subject of legislative control, under the general police power of the state; but it does not follow that the legislature may impose arbitrary or capricious exactions upon the students of that occupation, which have no relation to the public health. The legislature, having recognized the legitimacy of this profession, cannot destroy it under the guise of 'regulation.' The learned attorney for defendants has not assigned any reason or called our attention to any fact even remotely indicating that the public health will be

promoted, protected, or safeguarded by requiring students of the barber's trade to work for two years without compensation."

III. Sunday-closing statute.

a. Validity of special statute.

1. Majority view.

Special laws prohibiting barbering on Sunday have been sustained by the courts in a majority of the cases.

Colorado. — *McClelland v. Denver* (1906) 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014.

Michigan. — *People v. Bellet* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094.

New York. — *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, affirming (1896) 1 App. Div. 459, 37 N. Y. Supp. 314.

Ohio. — *Stanfeal v. State* (1908) 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138.

Oregon. — *Ex parte Northrup* (1902) 41 Or. 489, 69 Pac. 445.

Tennessee. — *Breyer v. State* (1899) 102 Tenn. 103, 50 S. W. 769. Compare *Ragio v. State* (1888) 86 Tenn. 272, 6 S. W. 401, holding that a statute declaring it to be a misdemeanor for barbers to engage in their regular business or to keep open bathrooms on Sunday was invalid because it embraced two distinct subjects.

Washington. — *State v. Bergfeldt* (1905) 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979 (writ of error dismissed in (1908) 210 U. S. 438, 52 L. ed. 1138, 28 Sup. Ct. Rep. 764), overruling *Tacoma v. Krech* (1896) 15 Wash. 296, 34 L.R.A. 68, 46 Pac. 255.

In *McClelland v. Denver* (1906) 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014, the court sustained such a law against constitutional objections, and held also that it was not invalid because it fixed the period of closing from 12 o'clock Saturday night until 5 o'clock Monday morning.

In *People v. Bellet* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094, it was urged that such an act was invalid as conflicting

with the provision of the state Constitution that no person shall be deprived of life, liberty, or property without due process of law, and also as conflicting with the 14th Amendment of the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The court said: "We think the statute under consideration is within the police power of the state, and not in conflict with any express provision of the Constitution, and that it does not conflict with the 14th Amendment of the Constitution of the United States."

In *People v. Havnor* (1896) 149 N. Y. 195, 81 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, affirming (1896) 1 App. Div. 459, 37 N. Y. Supp. 314, the court upheld the validity of a statute prohibiting barbering on Sunday, except during a portion of the day, in the city of New York and the village of Saratoga Springs. The law was sustained against the objections that it worked a deprivation of liberty and property without due process of law and that it violated the 14th Amendment by denying equal protection of the laws. The court, per Vann, J., held that where the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution, and that when thus exercised, even if the effect is to interfere to some extent with the use of property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment on liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity, involve some sacrifice of natural rights. On the other point the court said: "The learned counsel for the

defendant, however, criticizes the act in question as class legislation, and claims that it is invalid under the 14th Amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That Amendment does not relate to territorial arrangements made for different portions of a state, nor to legislation which, in carrying out a public purpose, is limited in its operation, but, within the sphere of its operation, affects alike all persons similarly situated. It was not designed to interfere with the exercise of the police power by the state for the protection of health or the preservation of morals. The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Justices Gray and Bartlett wrote long dissenting opinions, which were concurred in by Justice Haight. A writ of error to the United States Supreme Court, sued out to review the decision, was dismissed. See (1898) 170 U. S. 408, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631.

In *Ex parte Northrup* (1902) 41 Or. 489, 69 Pac. 445, the court held that a law making it a misdemeanor to carry on the business of barbering on Sunday was not "special legislation" because there was no general Sunday law in that state, and that such special law did not deprive a barber of liberty or property without due process of law, or invade the constitutional guaranty of equality of rights.

2. Minority view.

According to some courts, statutes providing that barbers shall not engage in their business on Sunday are invalid. In *Ex parte Jentzsch* (1896) 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803, a prosecution was brought under a statute providing as follows: "Every person who as proprietor,

manager, lessee, employee, or agent keeps open or conducts, or causes to be kept open or conducted, any barber shop, bathhouse and barber shop, barber shop of a bathing establishment or hairdressing establishment, or any place for shaving or hairdressing used and conducted in connection with any other place of business or resort, or who engages at work or labor as a barber in any such shop or establishment on Sunday, or on a legal holiday, after the hour of 12 o'clock M. of said day, is guilty of a misdemeanor." It was urged that the statute was unconstitutional because it infringed the inalienable rights guaranteed by the Constitution, and because it was within the prohibition against special legislation. The enactment was sought to be upheld on the ground that it was a police regulation in that it protected labor from the oppression of capital. The court said: "It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy-nilly, he shall not work upon holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little farther, would send him from the jail to the poorhouse. . . . No reason has been or can be shown why the followers of one useful and unobjectionable employment should be debarred from the right to labor upon certain days, and others in like classes of employment be not so debarred. If it be constitutional to single out one such class and deny its members the right to labor on one day in the week, it would be constitutional

to prohibit them from following their vocation upon six days of the week. When any one such class is singled out and put under the criminal ban of a law such as this, the law not only is special, unjust, and unreasonable in its operation, but it works an invasion of individual liberty,—the liberty of free labor which it pretends to protect." To the same effect see *State v. Granneman* (1896) 132 Mo. 326, 33 S. W. 784.

In *Armstrong v. State* (1907) 170 Ind. 188, 15 L.R.A.(N.S.) 646, 84 N. E. 3, it was said: "The business of barbering is cleanly in itself, and ordinarily conducted in a quiet and orderly way, and the suspension of such work on Sunday cannot be said to promote the health, comfort, safety, and welfare of society in general, in any manner or to any degree other and different from the cessation of work in other ordinary vocations of life. It must follow, therefore, that this act is special legislation, is violative of the Constitution, and void."

It has been held, moreover, that such a statute deprives barbers of their property without due process of law, and unjustly discriminates against them, in violation of the state and Federal Constitutions. *Eden v. People* (1896) 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108, cited with approval in *Bailey v. People* (1901) 190 Ill. 36, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98. On this point the court said in *Eden v. People*: "The statute, as has been seen, declares 'that it shall be unlawful for any person or persons to keep open any barber shop, or carry on the business of shaving, hair cutting, or tonsorial work, on Sunday.' That act is plain, and its meaning is obvious. The owner of a place where is carried on the barber business is prohibited from doing any business whatever one day in the week. He may have in his employ a dozen men, and yet during one day in seven he is deprived of their labor and also deprived of his own labor. The income derived from his place, and his own labor and the labor of his employees, is his property, but the legis-

lature has by the act taken that property from him. The journeyman barber who works by the day or the week, or for a share of the amount he may receive from customers for his services, is by the law denied the right of laboring one day in the week. He may rely solely upon his labor for the support of himself and family; his labor may be the only property that he possesses; and yet this law takes that property away from him." The court further held that the act could not be defended as a proper exercise of the police power, saying: "It will not and cannot be claimed that the law in question was passed as a sanitary measure, or that it has any relation whatever to the health of society. As has been heretofore seen, as a general rule a police regulation has reference to the health, comfort, safety, and welfare of society. How, it may be asked, is the health, comfort, safety, or welfare of society to be injuriously affected by keeping open a barber shop on Sunday? It is a matter of common observation that the barber business, as carried on in this state, is both quiet and orderly. Indeed, it is shown by the evidence incorporated in the record that the barber business, as conducted, is quiet and orderly,—much more so than many other departments of business. In view of the nature of the business, and the manner in which it is carried on, it is difficult to perceive how the rights of any person can be affected, or how the comfort or welfare of society can be disturbed." See to the same effect, with respect to an ordinance prohibiting the keeping open of a barber shop on Sunday, *Marengo v. Rowland* (1914) 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198.

b. *Validity of general statute as applied to barber.*

Laws relating to the observance of Sunday by all classes of labor are valid as a legitimate exercise of the police power of the states, and such laws prohibit barbers from plying their trade on Sunday. *Petit v. Minnesota* (1900) 177 U. S. 164, 44 L. ed.

716, 20 Sup. Ct. Rep. 666; *State v. Frederick* (1885) 45 Ark. 348, 55 Am. Rep. 555, explained by *Quarles v. State* (1891) 55 Ark. 11, 14 L.R.A. 192, 17 S. W. 269; *State v. Linsig* (1916) 178 Iowa, 484, 159 N. W. 995; *State v. Nesbit* (1898) 8 Kan. App. 104, 54 Pac. 326; *State v. Petit* (1898) 74 Minn. 376, 77 N. W. 225, affirmed in (1900) 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *State v. Sopher* (1903) 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482.

The Minnesota Statute of 1894 provides as follows: "All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health, or comfort of the community: Provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity." That act has been held not to be unconstitutional as "class legislation," because the proviso makes a distinction between barbers and other classes of laborers, in that it declares that keeping barber shops open is not a work of necessity or charity as a matter of law, whereas whether the performance of all other kinds of labor is excepted from the statute is to be determined as a question of fact. *Petit v. Minnesota* (1900) 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, affirming (1898) 74 Minn. 376, 77 N. W. 225. In arriving at its decision in that case the state court said: "Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more, and during later, hours than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employees would ordinarily be deprived of rest during half of that day. In view of all these facts, we cannot say that the legis-

lature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact. It will be noted that what the law forbids is not a man's shaving himself, or even getting someone else to shave him, but the keeping open a barber shop for that purpose on Sunday. The object of the law was

not to interfere with those who wish to be shaved on Sunday, or primarily to protect the proprietors of barber shops, but mainly to protect the employees in them, by insuring them a day of rest." The foregoing decision, it seems, does not conflict with the views of courts holding that the ordinary work of a barber is not a work of necessity or charity within the exception of the general Sunday laws. See *Armstrong v. State* (1907) 170 Ind. 188, 15 L.R.A. (N.S.) 646, 84 N. E. 3. W. S. R.

**EMPLOYERS' INDEMNITY CORPORATION, Plff. in Err.,
v.
MYRTLE GRANT.**

United States Circuit Court of Appeals, Sixth Circuit — March 15, 1921.

(271 Fed. 136.)

Insurance — accident — shooting of insured.

1. The death of a railroad conductor from a gunshot wound inflicted by a passenger whom he was trying to induce to vacate a toilet when the train was entering a station may be found to be accidental, within the meaning of an insurance policy, if, at the time, he did not know that the passenger was armed, and did not and had no reason to anticipate, in the light of all the circumstances, that he would be shot in pressing his demand.

[See note on this question beginning on page 1123.]

Appeal — ruling on motion for directed verdict — view of evidence.

2. Upon review of a denial of the motion to direct a verdict for defendant, the evidence must be viewed in the aspect most favorably tending to support the verdict.

Trial — question for jury — death by shooting as accident.

3. The jury must determine whether or not the death of the holder of an accident insurance policy by being shot by another was an accident, where the evidence is conflicting as to

whether or not his own wrongful conduct produced his death, or he voluntarily and intentionally committed acts from which he foresaw, or should have foreseen, that death or injury might result.

Appeal — refusal to direct verdict — absence of error.

4. It is not error to refuse to direct a verdict for defendant in an action on an accident insurance policy if it is plain that the court could not have said, as matter of law, that the death was not accidental.

ERROR to the District Court of the United States for the Eastern District of Michigan (Tuttle, Dist. J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Knappen and Donahue, Circuit Judges, and Westenhaver, District Judge.

Messrs. Sibley, Armstrong, McNair, & Mead, for plaintiff in error:

Grant's death was not caused by accidental means, and plaintiff cannot recover.

Fidelity & C. Co. v. Carroll (Fidelity & C. Co. v. Stacey) 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955, reversing 137 Fed. 1012; Maryland Casualty Co. v. Spitz, L.R.A. 1918C, 1191, 159 C. C. A. 119, 246 Fed. 817; Hutton v. States Acci. Ins. Co. 267 Ill. 267, L.R.A. 1915E, 127, 108 N. E. 296, Ann. Cas. 1916C, 577; Meister v. General Acci. Corp. 92 Or. 96, 4 A.L.R. 718, 179 Pac. 913; Taliaferro v. Travelers' Protective Asso. 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; Clay v. State Ins. Co. 174 N. C. 642, L.R.A. 1918B, 508, 94 S. E. 289; Price v. Occidental L. Ins. Co. 169 Cal. 800, 147 Pac. 1176; Prudential Casualty Co. v. Curry, 10 Ala. App. 642, 65 So. 852.

Messrs. Lodge & Brown, for defendant in error:

Grant's death was accidental.

Phelan v. Travelers' Ins. Co. 38 Mo. App. 640; Collins v. Fidelity & C. Co. 63 Mo. App. 253; Lovelace v. Travelers' Protective Asso. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; Furbush v. Maryland Casualty Co. 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135; Hutchcraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570; Jones v. United States Acci. Asso. 92 Iowa, 652, 61 N. W. 485; Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; Robinson v. United States Mut. Acci. Asso. 68 Fed. 825, affirmed in 20 C. C. A. 262, 36 U. S. App. 690, 74 Fed. 10; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Railway Mail Asso. v. Moseley, 127 C. C. A. 427, 211 Fed. 1; Union Casualty & S. Co. v. Harroll, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; Supreme Council, O. C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Stephens v. Railway Officials & E. Asso. 75 Miss. 84, 21 So. 710; Campbell v. Fidelity & C. Co. 109 Ky. 661, 60 S. W. 492; Blackstone v. Standard Life & Acci. Ins. Co. 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156; DeGogorza v. Knick-

erbocker L. Ins. Co. 65 N. Y. 235; Estabrook v. Union Mut. L. Ins. Co. 54 Me. 224, 89 Am. Dec. 743; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685, affirming 27 Fed. 40; Richards v. Travelers' Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; Railway Officials & E. Acci. Asso. v. Drummond, 56 Neb. 235, 76 N. W. 562; Butero v. Travelers' Acci. Ins. Co. 96 Wis. 536, 65 Am. St. Rep. 61, 71 N. W. 811; American Acci. Co. v. Carson, 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169; Button v. American Mut. Acci. Asso. 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861; Clay v. State Ins. Co. 174 N. C. 642, L.R.A. 1918B, 508, 94 S. E. 289; Cooke, Ins. § 50, p. 81.

The policy must be construed most strongly against the insurer.

Niagara F. Ins. Co. v. Scammon, 100 Ill. 644; Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 956; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; Darrow v. Family Fund Soc. 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1093; Union Mut. Acci. Asso. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642; Travelers' Preferred Acci. Asso. v. Kelsey, 46 Ill. App. 371; Jones v. United States Mut. Acci. Asso. 92 Iowa, 652, 61 N. W. 485; Star Acci. Co. v. Sibley, 57 Ill. App. 315.

Grant was insured against this very injury.

Wilson v. Northwestern Mut. Acci. Asso. 53 Minn. 470, 55 N. W. 626; Berliner v. Travelers' Ins. Co. 121 Cal. 458, 41 L.R.A. 467, 66 Am. St. Rep. 49, 53 Pac. 918; Union Mut. Acci. Asso. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642; Star Acci. Co. v. Sibley, 57 Ill. App. 315; Travelers' Preferred Acci. Asso. v. Kelsey, 46 Ill. App. 371; National Acci. Soc. v. Taylor, 42 Ill. App. 97; Holiday v. American Mut. Acci. Asso. 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448; Hess v. Preferred Masonic Mut. Acci. Asso. 112 Mich. 196, 40 L.R.A. 444, 70

N. W. 460; *Willey Casualty Co. v. Sheppard*, 61 Kan. 351, 47 L.R.A. 650, 59 Pac. 651; *Kentucky Life & Acci. Ins. Co. v. Franklin*, 102 Ky. 512, 43 S. W. 709; *Stone v. United States Casualty Co.* 34 N. J. L. 371; *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 57 N. W. 366; *Johnson v. London Guarantee & Acci. Co.* 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115; *Eaton v. Atlas Acci. Ins. Co.* 89 Me. 570, 36 Atl. 1048; *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212.

Westenhaver, District Judge, delivered the opinion of the court:

This action is based on a policy of accident insurance issued October 31, 1917, to Alexander Grant, by occupation a passenger conductor on the Wabash Railroad, whereby the plaintiff in error insured Grant "against loss resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent, and accidental means." The insured having met his death while the policy was in force, Myrtle Grant, the beneficiary, brought this action and recovered judgment for the full amount of the policy. This error proceeding is prosecuted by the insurer to reverse that judgment. The main ground relied on for reversal is that the insured's death was not accidental within the true meaning of the policy. This question was raised by a motion for a directed verdict and by numerous requests to charge, and is preserved by several of the assignments of error. The disposition of it requires a brief statement of the evidence.

The insured, while on duty as a passenger conductor, was on June 12, 1918, shot and killed by a colored passenger, James Morgan, at Montpelier, Ohio, a junction and terminal point of the Wabash Railroad. A few minutes before reaching Montpelier, Morgan, who had boarded the train at Chicago with a ticket entitling him to travel to Adrian, Michigan, had entered the toilet room and had locked the door on the inside. The conductor's duty, as evidenced by bulletins and rules of-

ferred in evidence, required him, while this train was lying at Montpelier, to see that the toilet room was closed, locked, and kept out of use. What happened thereafter depends on the testimony of three witnesses—Albert H. Doyle, an express messenger, Frank Anderson, a colored news agent, and James Morgan, the man who did the killing, and whose deposition was taken after he had been tried, found guilty of first degree murder, and sentenced to be electrocuted. This evidence, viewing it, as is our duty, in that aspect tending most favorably to support the verdict, tends to show these facts:

The conductor, shortly after the train came to a stop, tried the toilet room door, and finding it occupied and locked on the inside, requested, directed, and finally ordered, Morgan to unlock the door and come out. Morgan answered some three or four times that he could not do so, notwithstanding the conductor repeatedly instructed him that all he had to do was to shove back the bolt and open the door. This conversation was exchanged in an ordinary manner and without any threats of violence or display of anger on either side. Morgan, for some unknown reason, was evidently unwilling to comply with the conductor's order and vacate the toilet, and the conductor evidently interpreted his conduct and replies as a refusal so to do. At some time in the course of this controversy, if such it be, the conductor had stood on the arm and back of the car seat next to the toilet room and had looked in over its glass top. What the conductor saw he related to no one. Morgan, however, says that he was then buttoning up his "pants," and that his revolver was in a small hand bag which he had with him. Anderson, the news agent, saw Grant try the door, but does not relate, even if he heard, the remarks then exchanged. At some time, probably after Grant had left, Anderson also got on the arms of

Appeal—ruling on motion for directed verdict—view of evidence.

the car seat and looked in, at which time he says Morgan was standing on the toilet seat in such an unusual position and attitude that he quickly jumped down. He saw, however, no revolver in Morgan's possession. Grant left, and there is some discrepancy as to the space of time which elapsed before his return. He went to the express car, got a loaded revolver, and returned, followed by Doyle, the express messenger. In answer to some remarks, Grant said: "Well, I want to scare him out." Upon returning, he got up again on the arms of the car seat, holding by his left hand to an air valve at the side of the car, and, holding the revolver with his right hand clasped around the cylinder, displaying both ends of it, he tapped lightly on the glass top of the toilet, saying, "Come out of here." At approximately the same time, and as soon as his head appeared above the wooden side of the toilet room, a pistol shot sounded, and Grant fell dead to the floor. This shot was fired by Morgan. The bullet entered Grant's forehead just above and slightly to one side of the base of the nose.

A jury would be warranted in finding that the tapping, order or request, and the appearance of Grant's head above the wooden side of the toilet room, were substantially simultaneous with the firing of the shot, and that Grant had no knowledge that Morgan was armed, or, except as may be inferred from this statement of the evidence, was intending violence. All the testimony tends to show that Grant was in good humor and unexcited, and was not discourteous or violent, or threatening in speech or manner. Morgan's testimony and counsel's inferences, so far as they conflict, if at all, with the foregoing statement of the evidence, must in this proceeding be disregarded.

The trial judge submitted to the jury the issue as to whether Grant's death was due to accidental means. In doing so, he charged the jury in substance that they should approach

this question from the standpoint of Grant at the time and under the circumstances as they appeared to him; that his death was not accidental, or covered by the policy, if Grant anticipated, or, under the circumstances, should have anticipated, the fact that Morgan might act in the way he did; and that the burden of proof was upon the beneficiary to show that Grant's death was caused by an agency which, independently of all other causes, constituted an accident; but that, on the other hand, if Grant did not anticipate, or have reason to anticipate, in the light of all the circumstances, that he would get shot, then his death was accidental, and the beneficiary might recover.

In submitting to the jury upon this evidence the issue as to whether Grant's death was accidental, and in thus charging, we perceive no error against the insurer. Policies of accident insurance, indemnifying against death from external, violent, and accidental means, either with or without restrictive or defining language as to what is or is not accidental means, have often been considered by the courts. The law is well settled as to what are or are not accidental means within the meaning of a policy thus phrased; indeed, we discover no inconsistency or conflict in the cases, either in the statement of the law or in the application of the law to the facts of the different cases. And because of this settled state of the law, and the absence of any conflict in the cases, we do not deem it necessary to review the cases or to restate the general principles as to what is or is not accidental within the language of an accident insurance policy. It will be sufficient to refer to a few of the leading cases. See *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Western Commercial Travelers' Asso. v. Smith* (C. C. A. 8th C.) 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401;

Insurance—
accident—
shooting of
insured.

Hutchcraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570.

In some cases, however, the insured met his death as the result of an intentional and designed killing by some third person; and if such killing was not the direct result of misconduct of the deceased, or was unforeseen, and not reasonably to be anticipated by him, then his death is held to be the result of external, violent, and accidental, means. For cases so holding, see the following: *Robinson v. United States Mut. Acci. Asso.* (C. C.) 68 Fed. 825, affirmed on another ground in 20 C. C. A. 262, 36 U. S. App. 690, 74 Fed. 10; *Railway Mail Asso. v. Moseley* (C. C. A. 6th C.) 127 C. C. A. 427, 211 Fed. 1; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Furbush v. Maryland Casualty Co.* 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135, on second appeal, 133 Mich. 483, 95 N. W. 551; *Hutchcraft v. Travelers' Ins. Co.* supra; *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Ripley v. Railway Pass. Assur. Co.* 2 Bigelow, Ins. Rep. 738, Fed. Cas. No. 11,854; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877. Of these cases, the one last cited may be taken as typical. Lovelace, the insured, attempted to eject a man, who was drunken and boisterous, from the office of a hotel. In doing so, and in overcoming resistance, he used no other means than his hands, and while engaged in the effort the other drew a pistol and shot him, causing death. A recovery on the ground that the death was accidental was sustained, because Lovelace neither used nor attempted to use other than natural, physical means to eject by force, and while so doing did not know, or have reason to believe, that the other person was armed.

There is another group of cases, on which the plaintiff in error mainly relies, in which the assured was killed by a third person, where recovery is not allowed; but in all these cases the deceased engaged in an encounter under such circumstances that he invited his adversary to mortal combat, and either foresaw or should have foreseen that death or injury might result. See *Taliaferro v. Travelers' Protective Asso.* (C. C. A. 8th C.) 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; *Hutton v. States Acci. Ins. Co.* 267 Ill. 267, L.R.A.1915E, 127, 108 N. E. 296, Ann. Cas. 1916C, 577; *Meister v. General Acci. Corp.* 92 Or. 96, 4 A.L.R. 718, 179 Pac. 913. Of these cases *Taliaferro v. Travelers' Protective Asso.* may be taken as typical. The deceased had drawn a revolver and had struck his adversary in the face before the latter drew his revolver and fired, and it was held that the insured's death was not accidental, because he foresaw or should have foreseen that death or injury might probably result from his own conduct. Other cases in which death was due, not to intentional killing, but to other causes alleged to be accidental, are cited and relied on, particularly *Fidelity & C. Co. v. Carroll* (*Fidelity & C. Co. v. Stacy*) (C. C. A. 4th C.) 5 L.R.A.(N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955, and *Maryland Casualty Co. v. Spitz* (C. C. A. 3d C.) L.R.A.1918C, 1191, 159 C. C. A. 119, 246 Fed. 817. No criticism can be made of the law stated therein or the judgments rendered; but they are not in point, and are sufficiently distinguished by reference to *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

Obviously, in applying these legal principles, many cases of intentional and designed killing will arise, in which it will become necessary to determine from conflicting evidence whether the deceased, by his wrongful conduct, produced his death, or voluntarily and intentionally com-

mitted acts from which he foresaw, or should have foreseen that death or injury might result. In all such cases the issue must be submitted to a jury under a proper charge. This course was pursued in the following cases: *Furbush v. Maryland Casualty Co.* 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Railway Mail Asso. v. Moseley* (C. C. A. 6th C.) 127 C. C. A. 427, 211 Fed. 1. The same course was followed, when the issue was as to whether the death was accidental, in the following cases: *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Preferred Acci. Ins. Co. v. Patterson* (C. C. A. 3d C.) 130 C. C. A. 175, 213 Fed. 597.

In the case at bar it is plain that

the court below could not say, as a matter of law, that Grant's death was not accidental, and therefore no error results to the plaintiff in error from the fact that this issue was submitted to a jury under a proper charge.

Appeal—refusal to direct verdict—absence of error.

Three other errors were relied on, namely, admission in evidence of various rules of the railroad and of the statutes of Ohio and Michigan relating to a conductor's duties and powers; permitting an amendment at the close of all the testimony, so as to avoid a technical variance between the declaration and the policy sued on; and misconduct of counsel in argument to the jury. No error is perceived in any of these rulings. The alleged errors are so unsubstantial as not to call for further comment.

The judgment of the court below is affirmed, with costs.

ANNOTATION.

Accident insurance: death or injury intentionally inflicted by another as due to accident or accidental means.

The question whether an injury received by insured while assaulting another is an accident within an accident policy, which is closely related to the question here considered, is covered in the annotation in 4 A.L.R. 723.

For applicability of provisions as to injuries intentionally inflicted where insured is injured because of mistake of identity, see annotation in 8 A.L.R. 322.

As to death or injury resulting from insured's voluntary act as caused by accident or accidental means, see annotation in 14 A.L.R. 788.

For death or injury in battle as due to accident or accidental means, see annotation in 11 A.L.R. 1113.

For death as within provision exempting insurer, or limiting liability in case of "injury" intentionally inflicted, see annotation in 6 A.L.R. 1338.

It is a well-established rule that where insured is intentionally injured by another, and the injury is not the

result of misconduct or an assault by the insured, but is unforeseen in so far as he is concerned, the injury is accidental within the meaning of accident policies.

United States.—*Ripley v. Railway Pass. Assur. Co.* (1870) Fed. Cas. No. 11,854, affirmed on other grounds in (1873) 16 Wall. 336, 21 L. ed. 469; *Robinson v. United States Mut. Acci. Asso.* (1895) 68 Fed. 825, affirmed on other grounds in (1896) 20 C. C. A. 262, 36 U. S. App. 690, 74 Fed. 10; *Interstate Business Men's Acci. Asso. v. Lester* (1919) 168 C. C. A. 309, 257 Fed. 225, writ of certiorari denied in (1919) 250 U. S. 662, 63 L. ed. 1195, 40 Sup. Ct. Rep. 11; **EMPLOYERS' INDEMNITY CORP. v. GRANT** (reported herewith) ante, 1118.

Alabama.—*Travelers' Ins. Co. v. Dupree* (1919) 17 Ala. App. 131, 82 So. 579.

Arkansas.—*Ætna L. Ins. Co. v. Little* (1920) 146 Ark. 70, 225 S. W. 298.

California.—*Richards v. Travelers' Ins. Co.* (1891) 89 Cal. 170, 23 Am. St. Rep. 452, 26 Pac. 762; *Price v. Occidental L. Ins. Co.* (1915) 169 Cal. 800, 147 Pac. 1175.

Georgia.—*Travelers Ins. Co. v. Wyness* (1899) 107 Ga. 584, 84 S. E. 113; *Gaynor v. Travelers Ins. Co.* (1913) 12 Ga. App. 601, 77 S. E. 1072; *Newsome v. Travelers Ins. Co.* (1915) 143 Ga. 785, 85 S. E. 1035.

Indiana.—*Supreme Council, O. C. F. v. Garrigus* (1885) 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; *Travelers Protective Asso. v. Fawcett* (1913) 56 Ind. App. 111, 104 N. E. 991.

Iowa.—*Jones v. United States Mut. Acci. Asso.* (1894) 92 Iowa, 652, 61 N. W. 485; *Allen v. Travelers' Protective Asso.* (1913) 163 Iowa, 217, 48 L.R.A.(N.S.) 600, 143 N. W. 574; *Kascoutas v. Federal L. Ins. Co.* (1921) — Iowa, —, — A.L.R. —, 185 N. W. 125.

Kentucky.—*Hutchcraft v. Travelers' Ins. Co.* (1888) 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570; *American Acci. Co. v. Carson* (1896) 99 Ky. 441, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169; *Campbell v. Fidelity & C. Co.* (1901) 109 Ky. 661, 60 S. W. 492; *Ætna L. Ins. Co. v. Rustin* (1912) 151 Ky. 103, 151 S. W. 366, rehearing denied in (1913) 152 Ky. 42, 153 S. W. 14; *Interstate Business Men's Acci. Asso. v. Ford* (1914) 161 Ky. 163, 170 S. W. 525.

Michigan.—*Furbush v. Maryland Casualty Co.* (1902) 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135.

Mississippi.—*Fidelity & C. Co. v. Johnson* (1895) 72 Miss. 333, 30 L.R.A. 206, 17 So. 2.

Missouri.—*Phelan v. Travelers' Ins. Co.* (1889) 38 Mo. App. 640; *Collins v. Fidelity & C. Co.* (1895) 63 Mo. App. 253.

Nebraska.—*Railway Officials & E. Acci. Asso. v. Drummond* (1898) 56 Neb. 235, 76 N. W. 562.

Oklahoma.—*Union Acci. Co. v. Willis* (1915) 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812; *General Acci. F. & L. Assur. Corp. v. Hymes* (1919) 77 Okla. 20, 8 A.L.R. 318, 185 Pac. 1085.

Tennessee.—*Accident Ins. Co. v. Bennett* (1891) 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723.

Utah.—*Warner v. United States Mut. Acci. Asso.* (1893) 8 Utah, 431, 32 Pac. 696.

Virginia.—*Standard Acci. Ins. Co. v. Walker* (1920) 127 Va. 140, 102 S. E. 585.

Washington.—*Buckley v. Massachusetts Bonding & Ins. Co.* (1920) 113 Wash. 13, 192 Pac. 924.

Wisconsin.—*Button v. American Mut. Acci. Asso.* (1896) 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861.

It will be observed that in the reported case (*EMPLOYERS' INDEMNITY CORP. v. GRANT*, ante, 1118) it was held that the death of a railroad conductor from a gunshot wound, inflicted by a passenger whom he was trying to induce to vacate a toilet when the train was entering a station, might be found to be accidental within the meaning of an accident policy if, at the time, he did not know that the passenger was armed, and did not and had no reason to anticipate, in the light of all the circumstances, that he would be shot in pressing his demand.

And in *Hutchcraft v. Travelers' Ins. Co.* (Ky.) supra, where the death of the insured, who was assassinated by a robber, was held to have resulted from accidental means, although the robber intentionally inflicted the injury, the court said: "Accidents are of two kinds: First, those that befall a person without any human agency, as the killing of a person by lightning; here the elementary properties of lightning and its flash are not caused or controlled by human agency; but the fact that the person was struck by unintentionally placing himself within its range is, as to him, accident. Second, those that are the result of human agency. The latter are divided as follows: First, that which happens to a person by his own agency; as, if he is walking or running, and accidentally falls and hurts himself; here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was, therefore, accidental. Second, that which befalls a person by the agency of another person, without the concurrence of the latter's will;

as where one, standing on a scaffold, unintentionally lets a brick fall from his hand, and it strikes a person below; here, the dropping of the brick, as it was not intended by the former and was unforeseen by the latter, is, in the broadest sense, an accident. Third, that which a person intentionally does, whereby another is unintentionally injured; as, where one intentionally fires a gun in the air and accidentally shoots another person; here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but as to the person shot, it was by purely accidental means. Fourth, so, also, as we think, if one person intentionally injures another, which was not the result of a rencounter, or the misconduct of the latter, but was unforeseen by him; such injury, as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is, as to him, accidental, although inflicted intentionally by the other party. It is conceded that in the three instances first named the injury would be by 'accidental means.' And, doubtless, it will not be denied that if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whoever might be on board, whereby one or more persons were shot or mashed, that the casualty befalling these persons, as far as they were concerned, would fall within the term of 'accidental, means.' In other words, we do not regard it as essential, in order to make out a case of injury by 'accidental means,' so far as the injured party is concerned, that the party injuring him should not have meant to do so; for if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen,—a casualty,—it seems clear that the fact that the

deed was wilfully directed against him would not militate against the proposition that, as to him, the injury was brought on by 'accidental means.'"

And the same conclusion has been reached in other cases where the insured was killed by a robber. *Ripley v. Railway Pass. Assur. Co. (Fed.)*; *Travelers Protective Assn. v. Fawcett (Ind.)*; *Railway Officials & E. Acci. Assn. v. Drummond (Neb.)*; and *Warner v. United States Mut. Acci. Assn. (Utah) supra*.

And it has been held that injury was accidental as to the insured, although it was intentional on the part of a burglar, who shot him while they were scuffling together. *Allen v. Travelers' Protective Assn. (1913) 163 Iowa, 217, 48 L.R.A. (N.S.) 690, 143 N. W. 574.*

And the injury has been held accidental where the insured was attacked unexpectedly, without provocation, by one who attempted to assassinate him. *Phelan v. Travelers' Ins. Co. (1889) 38 Mo. App. 640*; *Collins v. Fidelity & C. Co. (1895) 63 Mo. App. 258.*

And in *Kascoutas v. Federal L. Ins. Co. (1921) — Iowa, —, — A.L.R. —, 185 N. W. 125*, it was held that death resulting from a murderous assault, for which the insured was in no wise to blame, was within the protection of a policy insuring against injury caused by accidental means.

And in *Phoenix Acci. & Sick Ben. Assn. v. Stiver (1908) 42 Ind. App. 636, 84 N. E. 772*, the injury was held to have been caused by accidental means where the insured was stabbed by an insane person, while on the public highway, going to his home, the stabbing being without provocation, and wholly unexpected and unforeseen by the insured.

And death by the intentional discharge of a firearm at the insured by an unknown person is accidental. *Button v. American Mut. Acci. Assn. (1896) 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861.*

So also is a homicide resulting from bad feeling between the insured and the one who killed him. *Standard Acci. Ins. Co. v. Walker (1920) 127 Va. 140, 102 S. E. 585.*

And in *Gaynor v. Travelers Ins. Co.*

(1913) 12 Ga. App. 601, 77 S. E. 1072, it was apparently assumed that the insured's death, which resulted from a shot fired by another while the insured was walking along the street, was caused by accidental means, but recovery was denied in this case on the ground that the death was within the provision excluding liability where injury was intentionally inflicted.

In *Supreme Council, O. C. F. v. Garrigus* (1885) 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818, where it was apparently assumed that the contract was governed by the law of Kentucky, an answer that insured became engaged in an "affray" and a pistol-shot wound was intentionally inflicted, was held demurrable, there being no allegation of a statute in Kentucky similar to that in Indiana, which makes an agreement to fight an element of an "affray," no such element being involved in the common-law definition of an "affray," presumed to obtain in Kentucky.

And in *Travelers' Ins. Co. v. Dupree* (1919) 17 Ala. App. 131, 82 So. 579, where the insured was in his own office when a person entered, and, without provocation, used abusive language toward him, and made demonstrations with his fists as if to attack him, whereupon the insured arose from his chair and in self-defense struck his assailant, who knocked him down and injured him, it was held that the injury resulted from accidental means, the court holding that, although the insured struck the first blow, this was not such a voluntary act on his part as would preclude a recovery.

And in *Richards v. Travelers' Ins. Co.* (1891) 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762, where there was some evidence that the wound from which the insured died was inflicted by another after he had failed in an attempt to blackmail the deceased, it was held that it might be found from such evidence that the injury resulted from accidental means. The court stated that it is impossible to give a precise definition of the word "accidental;" that as every effect has a cause, there is one sense in which nothing is accidental; but said that the authorities

seemed to agree that "accident" must be given its popular meaning,—that is, a casualty,—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured.

And in *Withers v. Pacific Mut. L. Ins. Co.* (1920) 58 Mont. 485, 193 Pac. 566, the evidence was held to make out a prima facie case of death by accidental means where there was testimony that the insured was killed by a shot in the neck, fired from a revolver in the hands of his wife.

And in *Ætna L. Ins. Co. v. Rustin* (1912) 151 Ky. 103, 151 S. W. 366, rehearing denied in (1913) 152 Ky. 42, 153 S. W. 14, where there was evidence, in an action on an accident policy, that the insured was found on his porch, shot in the abdomen, and said that a man had shot him, it was held that a prima facie case of death by accidental means was made.

And in *Price v. Accidental L. Ins. Co.* (1915) 169 Cal. 800, 147 Pac. 1175, it was held that the fact that the insured was killed by a bullet from a firearm discharged by another person, standing alone, would justify, if not require, the inference that the killing was accidental; but it was held that this inference might be overcome by other evidence, and that if it should appear that the killing was the result of an encounter with deadly weapons, and that the insured had himself invited and brought on the conflict, the fatal result would not be accidental so far as he was concerned. The facts of the case do not appear.

In *Union Acci. Co. v. Willis* (1912) 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812, the injury was held to have resulted from accidental means where the insured died from a fractured skull, caused by a fall on a pavement, when he was struck intentionally by another.

In *Wayne v. Travelers Ins. Co.* (1921) 220 Ill. App. 493, although the decision was rested on another ground, the view was expressed that the insured's death did not result from "accidental means" where his unexpected death occurred soon after a

hypodermic injection of arsenobenzol by a reputable physician who was treating him for an ailment, the court stating that it could not be said that the unexpected death which followed the injection, even if it could be called an accidental death, came within the terms of the policy insuring against loss effected by accidental means.

In *Jones v. United States Mut. Acci. Asso.* (1894) 92 Iowa, 652, 61 N. W. 485, an instruction was held proper that, if the plaintiff, in an action on an accident policy, had shown by the evidence that the insured came to his death as the result of a pistol shot at the hands of another, the law would presume that the shot was accidental, and that it was not inflicted with a murderous intent, and that the burden would be on the defendant to overcome the presumption that death was not caused by accidental means. The court stated that it made no difference, so far as the insurer was concerned, whether or not the other person fired the shot with the intent to kill the insured; that if he had such intent when he fired, and if the insured was not at fault, clearly, as to the latter, the injury resulting from the shot was accidental.

In *Ætna L. Ins. Co. v. Little* (1920) 146 Ark. 70, 225 S. W. 298, where the insured went to his brother-in-law's house shortly after the occupants had retired, and knocked at the bedroom window, or rattled it, and was killed by a shot fired through the windows by his brother-in-law, it was argued that the insured's death was brought about by his own agency, and was the

probable, and not the unexpected, result of his conduct; but the court held that the presumption was otherwise; stating that it having been shown that the insured died as a result of accidental means, the presumption was that the death was accidental, and that the burden was upon the insurer to show otherwise. It further was held that the testimony did not show that the killing was not accidental where a witness, who lived a block and a half from the brother-in-law's house, testified that he was sitting on his porch when the shot was fired, and called the brother-in-law on the telephone, and that the latter, in response to a question, stated that he had shot the insured, and that he got to the brother-in-law's house just as the ambulance was leaving, and that the brother-in-law and his wife left for the hospital four or five minutes after he arrived.

In *Interstate Business Men's Acci. Asso. v. Lester* (1919) 168 C. C. A. 309, 257 Fed. 225, writ of certiorari denied in (1919) 250 U. S. 662, 63 L. ed. 1195, 40 Sup. Ct. Rep. 11, where a physician, who was a member of the National Guard, was shot while with a detachment on strike duty, and while attending a wounded soldier, the injury was held accidental, the court holding that his merely going into an environment of greatly increased hazard, with conscious knowledge of such hazard, would not cause an injury or death which resulted therefrom not to be accidental within the meaning of an accident policy. J. T. W.

TOWN OF TALLASSEE et al., Appts.,

v.

STATE OF ALABAMA EX REL. T. W. BRUNSON et al.

Alabama Supreme Court—June 9, 1921.

(206 Ala. 169, 89 So. 514.)

Judgment — quo warranto — bar to subsequent proceeding — different relator.

1. A final judgment for defendant on demurrer in a quo warranto proceeding by an individual relator acting for the general public to dissolve

an alleged municipal corporation and oust its officers because of defect in description of the territory to be incorporated is a bar to a subsequent proceeding by another relator, acting in the same capacity, to effect an ouster for the same reasons.

[See note on this question beginning on page 1133.]

— on demurrer — finality.

2. A final judgment for defendant, and sustaining demurrers to complaints which plaintiff declines to

amend, is tantamount to one upon the merits on final submission.

[See 15 R. C. L. 986; 3 R. C. L. Supp. 515; see also note in 13 A.L.R. 1104.]

APPEAL by defendants from a decree of the Circuit Court for Elmore County (McMorris, J.) in favor of plaintiff in an action brought to dissolve the defendant town as a corporate entity, and to oust the individual defendants from the exercise of the powers of their office. *Reversed.*

Statement by Gardner, J.:

The following portion of the statement of the case, in quotation, is taken from brief of counsel for appellant, the correctness of which is not questioned by opposing counsel:

"This is an action in the nature of quo warranto by the state on the relation of T. W. Brunson against the town of Tallassee and the individuals acting as its mayor and aldermen, for the purpose of dissolving it as a corporate entity.

"It is alleged in the petition that T. W. Brunson is a citizen of Elmore county, Alabama, resides within the corporate limits of the town of Tallassee, and is over the age of twenty-one years; that D. H. Sayers, Jesse Gulledege, J. M. Herren, M. F. Bruce, G. W. Martin, and H. J. Sullivan have associated themselves together as mayor and councilmen of the town of Tallassee, and as such are levying and collecting taxes, passing ordinances, and exercising all the rights, privileges, and franchises of a municipal corporation without having been duly incorporated; that the invalid and void proceedings of the purported corporation consisting in the fact that there was on the 9th day of December, 1907, filed in the office of the judge of probate of Elmore county, Alabama, a petition, signed by twenty-five persons, purporting to fix the boundaries of the limits of the proposed town of Tallassee, and petitioning to be incorporated under the name of town of Tallassee, but that the

only description of the boundaries of the limits of the proposed town set out in said petition is in words and figures as follows: Block Nos. 32, 43, and 44, according to the survey of John M. Gray, 1853; that there is attached to said petition referred to no accurate map or plat showing the boundaries or limits of the proposed municipal corporation; that there does not appear anywhere of record that notice was given by publication or by posting, as required by law, to the effect that an election would be held to determine whether the inhabitants of the described community desired to become incorporated under the name of town of Tallassee; that a plat showing the limits of the proposed town was on file in the office of the judge of probate of Elmore county; that on January 14, 1908, the probate judge of Elmore county certified blocks 42, 43, and 44, according to the survey of John M. Gray of 1853, so incorporated under the name of the town of Tallassee, but that said certificate of incorporation is null and void, and that the alleged town of Tallassee is a nullity for the reasons set forth in the petition.

"Thereupon the defendants filed their plea and answer, setting up the facts as to the incorporation of the town of Tallassee and its history since the incorporation. Plea No. 8 alleges that immediately after the making of the order or decree of the probate judge of Elmore county, declaring the territory de-

scribed in the petition for incorporating a municipality under the laws of the state of Alabama, the town of Tallassee, through its mayor and aldermen, selected under the law of the state, began to exercise all the privileges and franchises of a municipal corporation, and on the 19th day of March, 1908, the state of Alabama, on the relation of one J. H. Cole, and said J. H. Cole, filed in the circuit court of Elmore county, Alabama, against the town of Tallassee and its then acting mayor and aldermen, an information in the nature of an application for a writ of quo warranto, seeking to oust its said mayor and aldermen from the exercise of the privileges and franchises of a town or municipality, alleging that the order of incorporation was void and invalid for the same reason, or substantially the same reason, as is alleged in the information in this cause for the invalidity of the same, and, said information being submitted to said court on demurrers of the defendants thereto, it was ordered and adjudged by said court by a judgment thereon duly made on the 6th day of April, 1908, and duly entered on the minutes of said court, that the causes alleged therein for the invalidity of said proceedings of incorporating said town were wholly insufficient, and, the plaintiffs declining to plead further, said information was dismissed."

The judgment in the former litigation above referred to in the name of the State of Alabama ex rel. J. H. Cole, and J. H. Cole v. Town of Tallassee et al., is as follows:

"Come the parties by their attorneys, and the relator by leave of the court amends its second ground of objection to said petition filed in the probate court so that said ground shall read as follows:

"Second. For that an accurate plat of the territory proposed to be embraced within said corporate limits is not alleged in said petition to be attached to and made a part of said petition.

"And the respondents renew to

said information, as amended, the motion to strike and the demurrers to the same heretofore filed.

"Upon consideration, it is ordered and adjudged by the court that said motion to strike be, and the same is hereby, overruled.

"It is further considered by the court, and it is the judgment of the court, that the demurrer to said information and the several grounds thereof be, and the same are hereby, sustained, and, the relator declining to amend said information, it is considered by the court and it is the judgment of the court that judgment final be entered in favor of the respondent to said information on said demurrers.

"It is therefore ordered and adjudged by the court that the respondents go hence and recover of the relator and the sureties on his bond for the costs in this behalf expended, for which let execution issue. And the said relator and the state of Alabama on the relation of said relator jointly and severally except to said ruling and judgment of the court sustaining said demurrers."

In paragraph 7 the defendant set up that after the incorporation, in 1908, the town immediately, through its officers, duly elected, began to exercise the privileges and franchises of a town until the 1st of January, 1909, when it became dormant, and remained so until the 1st of January, 1910, at which time it was duly revived, and through its officers duly elected again began to exercise the privileges and franchises of a municipality, and has continuously since that time exercised the same, and has continuously since said time levied and collected taxes, adopted ordinances, and other matters which are set forth by way of reasons why the court should not exercise its discretion in granting the relief prayed.

In support of the defenses interposed the records of the proceedings of incorporation were introduced in evidence, and also the record of the proceedings in the cause of State of

Alabama ex rel. J. H. Cole and J. H. Cole v. Town of Tallassee et al., showing the information by the plaintiff in the cause for a writ of quo warranto, and attacking the proceedings of the incorporation of the town of Tallassee for the same reasons assigned in the present case, and a judgment in said case, hereinabove set out. It was further shown by the proof that the parties defendant in the cause of State ex rel. Cole v. Town of Tallassee were the town of Tallassee and its then acting mayor and aldermen, and also showed the activities of the town since the time of incorporation.

Upon the final hearing of the cause the court entered a judgment granting the relief prayed, to the effect that the town of Tallassee has no existence as a municipal corporation, and ousting the same from the exercise of such rights and powers, and also a judgment of ouster against the mayor and aldermen, respondents to the cause. From this judgment the appeal is prosecuted.

Messrs. P. B. McKenzie, George F. Smoot, and J. Lee Holloway for appellants.

Messrs. Holley & Milner, for appellees:

To determine the purpose of a plea, reference must be had both to the matter and its general frame and structure.

31 Cyc. 147; Vaughan v. Everts, 40 Vt. 526.

Judgment in favor of defendant in an action of quo warranto by a private relator is no bar to subsequent action to oust an illegal corporation.

State ex rel. Bradford v. Stock, 38 Kan. 184, 16 Pac. 799; State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio, 262; Angell & A. Corp. 8th ed. § 764; Wilcox, Mun. Corp. § 503.

In order that the state may be barred or estopped from questioning the validity of a municipal corporation, it must have acquiesced for twenty years or more; and if the acquiescence has been for less than that time, then it must be shown that the municipality has been recognized as such by legislative enactment, or that the property rights of individuals, said rights having been acquired in

reliance upon the validity of the municipality, will be impaired.

People ex rel. Slusser v. Gary, 196 Ill. 310, 63 N. E. 749; State ex rel. Young v. Harris, 12 Ann. Cas. 260, and cases cited in note, 102 Minn. 340, 13 L.R.A. (N.S.) 533, 113 N. W. 887; State v. Tillamock, Ann. Cas. 1914C, 488, and note, 62 Or. 332, 124 Pac. 637; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People ex rel. Misner v. Hanker, 197 Ill. 409, 64 N. E. 253.

Gardner, J., delivered the opinion of the court:

This is an action in the nature of a quo warranto against the municipality of Tallassee, and the individuals acting as its mayor and aldermen for the purpose of dissolving it as a corporate entity and ousting the individual respondents from the exercise of the powers of their office.

The principal grounds of attack as to the validity of the incorporation proceedings rest upon the insufficiency of the description of the property to be embraced as a part of the municipality in the petition filed before the probate judge. The cases of Foshee v. Kay, 197 Ala. 157, 72 So. 391; State ex rel. Wagon v. Altoona, 200 Ala. 502, 76 So. 444; and State ex rel. Allen v. Phil Campbell, 177 Ala. 204, 58 So. 905, are cited in support of this insistence.

The answer sets up several matters of defense, among them being that of *res judicata*, as disclosed by paragraph 8, the substance of which appears in the foregoing statement of the case. Another defense most strenuously insisted upon is that which appears in ¶ 7, wherein it is insisted that the state has long acquiesced in the exercise of corporate functions by the municipality, and circumstances disclosing that important public interests have become affected, and that, on account of such considerable delay, sound judicial discretion requires a denial of such relief, and refusal to oust the municipality from the exercise of its franchises. In support of this defense is cited the case of Atty.-Gen. ex rel. Mann v. Metheun, 236

Mass. 564, 129 N. E. 662. We have reached the conclusion, however, that this case may be determined upon the defense first mentioned, that of *res judicata*, and we will therefore confine ourselves to a discussion and determination of that one question.

It appears from the pleadings and proof that within a year after the incorporation of this municipality a proceeding in the nature of a quo warranto was begun in the name of the state on the relation of J. H. Cole, and J. H. Cole individually, against the town of Tallassee and the individuals holding the positions of mayor and aldermen thereof, seeking the dissolution of the corporate entity upon practically the same grounds as appear in the instant case.

The principal cause set forth in the petition in the cause here under consideration, that of the insufficiency of the description of the area involved, was also one of the grounds on the former attack. Respondents interposed demurrers in the former action, which were sustained. Relators declined to amend the information, and final judgment was entered in favor of the respondents. The ruling of the court thus appears to have been upon the merits, and not upon any mere question of amendable defect in pleadings, or for any such question as misjoinder of parties. Under these circumstances we are of the opinion that the judgment rendered was tantamount to one upon the merits on a final submission.

**Judgment—on
demurrer—
finality.**

This question is discussed in 2 Van Fleet's Former Adjudication, § 309; and the following cases are also in point: Perkins v. Moore, 16 Ala. 17; Howard v. Howard, 26 Ala. 682; Stein v. McGrath, 128 Ala. 175, 30 So. 792; People ex rel. Chilcoat v. Harrison, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539.

The only remaining question, therefore, is whether or not this judgment may be properly pleaded as *res judicata* in this action. This

question was considered by the court of civil appeals of Texas in the case of McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518, where it was held under similar circumstances that the former judgment was binding and conclusive.

It is to be noted in the first place that the relator in the former litigation, as well as in the instant case, does not seek the assertion or protection of any private right, but merely acts for and on behalf of the public generally.

The question was also discussed by the supreme court of Illinois in People ex rel. Chilcoat v. Harrison, supra, with like result, and there it was pointed out that in such cases, where no private interest is involved, the right sought to be enforced is a public right, wherein the people are regarded as the real party in interest. The case of State ex rel. Smyth v. Kennedy, 60 Neb. 300, 83 N. W. 87, supports a like conclusion, and quotes the following from New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905: "The very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies."

The opinion also quotes from authorities to the effect that a judgment in quo warranto is final and conclusive, and that such is also the effect of a judgment in the more modern proceeding in the nature of a quo warranto. The cases of Shumate v. Fauquier County, 84 Va. 574, 5 S. E. 570, and People ex rel. Bryant v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54, also support this view.

It is not questioned that the subject-matter of the former litigation was identical with that here involved, and the judgment rendered was by a court having full jurisdiction of the cause. While the nominal parties in the two suits are different, yet the real parties are the same, for the actors in both suits

represented the public, and the respondents represented not only the municipality but the inhabitants thereof. This is pointed out very clearly in 1 Freeman on Judgments, § 178, as well as by some of the authorities cited therein.

As contrary to this view counsel for appellees cite *State ex rel. Bradford v. Stock*, 38 Kan. 184, 16 Pac. 799; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; and *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171. The latter case may well be rested upon the principle that the former litigation there involved was not bona fide, and that, therefore, is not an authority contrary to the conclusion here reached. The case of *State ex rel. Bradford v. Stock*, supra, may be distinguished, we think, upon the theory the opinion discloses the former litigation was by an individual in the assertion of a private interest, and it was held this was not binding upon the state in the exercise of sovereign power to have determined a question of great governmental importance. In the case of *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* supra, the court gives but scant consideration to this question, merely stating its conclusion without any discussion or citation of authority.

We have concluded that upon both principle and the weight of authori-

ty the defense of
—quo warranto—
bar to subse-
quent proceeding
—different
relator.
res judicata should
be held to be sus-
tained. It was in-
dicated in *State ex*

rel. Knox v. Dillard, 196 Ala. 539, 72 So. 56, that a judgment of dismissal under circumstances similar to those here involved, after demurrers had been sustained and petitioner declined to plead further, would be res judicata of the respondent's rightful occupancy of the office in question. But we think the case of *Montgomery v. Walker*, 154 Ala. 242, 129 Am. St. Rep. 54, 45 So. 586, is here very much in point by way of analogy. That was a case of petition by a taxpayer of

the city of Montgomery, seeking writ of mandamus to compel the city of Montgomery to put in force the provisions of a certain act which provided for the establishment of a board of commissioners of police. It appeared that previously another taxpayer (one Thomas) had filed a similar petition seeking the same end, [the city] attacking the constitutionality of the act. Upon appeal in that case it was held the act was unconstitutional; the decision being rested upon a previous ruling of the court in *Little v. State*, 137 Ala. 659, 35 So. 134. In a later case, however, the *Little Case* was overruled, but that of the former taxpayer had not been overruled *eo nomine*. The opinion in the *Walker Case* points out as a general rule a former adjudication is res judicata only as to parties and their privies; but it was held that the taxpayer represented not only himself, but every other taxpayer on the one side, and that the city of Montgomery represented the great body of people on the other, and that the mere fact that the machinery of the law was set in motion by a different taxpayer did not affect the question, for the issues were the same, and so, likewise, were the interests involved. As said by the court: "It would seem, then, that there should be some limit to such proceedings. If, after the determination of such a question, any other citizen could inaugurate similar proceedings and relitigate the same questions, the matter would never be finally settled until every citizen in the city had haled the city council into court and thus kept them in continual litigation."

It was further held that whether or not the former decision was correct will not be inquired into, the court saying: "For this court to inquire into the question as to whether the former decision was erroneous or not would be to destroy the doctrine of res judicata, which the wisdom of our laws has set up for the protection of the citizens."

However, as said in the case of *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965: "But the judgment of a court of competent jurisdiction will sometimes operate as an estoppel and a former adjudication against persons who are not named in the proceeding and who were not parties to the record by name. It is enough if they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard. When a judgment is rendered against a county, city, or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the citizens and taxpayers. This is upon the principle that they are represented in the litigation by agencies author-

ized to speak for them, and to protect their interests."

Upon principle we consider the *Walker Case* as decisive of the instant case. Only a public question was involved; only the public interest concerned; and if the mere fact of a change in the nominal party is to prevent the application of the rule of *res judicata*, there could then be no stability of decision upon questions of this character, which would always be open to attack.

We are therefore of the opinion that this defense was well sustained by the proof, and that the court below erred in granting the relief prayed. The judgment will therefore be here reversed and one rendered dismissing the proceeding.

Anderson, Ch. J., and Sayre and Miller, JJ., concur.

ANNOTATION.

Judgment in favor of defendant or respondent in an action or proceeding involving a matter of public right or interest as a bar to a subsequent action or proceeding by a different plaintiff or relator.

Judgments in contests to try title to office are excluded from this annotation, as, in general, brought in the assertion of a private interest.

It has been held that "a citizen of a county, acting as relator in a matter affecting only the public right, and applying in the name of the state for a writ of mandamus, will not be regarded as acting in any personal sense whatever, but only as a representative of the public interest, and is concluded with reference to any fact adjudged or admitted, or which might have been adjudged, in a former judicial proceeding in which the same public interest was plaintiff or defendant, and is bound by the facts that are or might have been adjudged in the former proceeding as fully as though he were named as a party thereto." *State ex rel. Davis v. Willis* (1910) 19 N. D. 209, 124 N. W. 706, where the former proceeding was by the attorney general for a certiorari to test the result of an election to create a new county, he asserting that

the election was not in favor of the new county, and the application for the writ was denied.

In *El Reno v. Cleveland-Trinidad Paving Co.* (1910) 25 Okla. 648, 27 L.R.A.(N.S.) 650, 107 Pac. 163, it was held that "when a resident taxpayer of an improvement district in a city of the first class brings a suit for himself and all others similarly situated, against the city and certain other defendants, to enjoin the carrying into effect of a contract for paving and guttering said district, upon the ground that said contract was invalid, and a final judgment adverse to said plaintiffs is entered therein and remains unappealed from, there is sufficient identity between the parties filing such suit and a subsequent suit brought by one of the defendants of the former suit against his codefendants, wherein the validity of said contract is involved, to justify the pleading of the decree entered in the first suit as *res judicata* as to all questions concerning the validity of the

contract that are identical in both cases, and that were or could have been tried in the former."

A new county, in a suit against its parent county, obtained the right to certain taxes, and in collecting such taxes it sold the land of N., which was bought by C., who brought an action against N. to quiet title. It was held that N. was bound by the judgment in the suit between the two counties. *Cannon v. Nelson* (1891) 83 Iowa, 242, 48 N. W. 1033.

In *People ex rel. Gibbons v. Clark* (1920) 296 Ill. 46, 129 N. E. 583, it was held that where a resident and taxpayer files a bill on behalf of himself and all other taxpayers of the county, against the county, to enjoin the extension of taxes, a decree dismissing the bill bars other taxpayers from raising the same questions again in proceedings by the county to collect the tax.

But in *Price v. Gwin* (1896) 144 Ind. 105, 43 N. E. 5, it was held that a judgment for the defendants in an action by the board of county commissioners to restrain the sheriff and others from carrying out a contract for the repair of the courthouse was not a bar to an action by a taxpayer for the same relief, as the plaintiff was not a party to the first action.

In *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* (1868) 18 Ohio St. 262, referred to in the reported case (*TALLASSEE v. STATE*, ante, 1127), it was held that a judgment in favor of the defendant, heretofore rendered by the district court of a county, upon an information in the nature of a quo warranto, filed by the prosecuting attorney of that county, upon an individual relation, was not a bar to a subsequent information of a similar character, filed by the attorney general, in behalf of the state, in the exercise of discretion given him by statute.

A judgment in favor of the defendant upon the merits, in a suit or proceeding by an individual plaintiff or relator, acting in the public interest, against a municipality or other public corporation or its legal representatives, relative to a matter of public

concern, is a bar to subsequent proceedings by other individual parties or relators, acting in the same capacity, to effect the same result as the first suit or proceeding.

United States.—*McIntosh v. Pittsburg* (1901) 112 Fed. 705.

Alabama.—*Montgomery v. Walker* (1908) 154 Ala. 242, 129 Am. St. Rep. 54, 45 So. 586; *TALLASSEE v. STATE* (reported herewith) ante, 1127.

Connecticut.—*Terry v. Waterbury* (1869) 35 Conn. 526.

Illinois.—*Harmon v. Auditor* (1887) 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; *People ex rel. Chilcoat v. Harrison* (1912) 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539; *Greenberg v. Chicago* (1912) 256 Ill. 213, 49 L.R.A. (N.S.) 108, 99 N. E. 1039. See also *People ex rel. Gibbons v. Clark* (1920) 296 Ill. 46, 129 N. E. 583, supra; *Dal Pino v. Cook County* (1909) 151 Ill. App. 245, affirmed in (1910) 245 Ill. 496, 92 N. E. 291.

Kansas.—*Sabin v. Sherman* (1882) 28 Kan. 289.

Kentucky. — *Home Constr. Co. v. Duncan* (1902) 24 Ky. L. Rep. 94, 68 S. W. 15.

Louisiana. — See *Taxpayers v. O'Kelly* (1897) 49 La. Ann. 1039, 22 So. 311.

North Dakota.—See *State ex rel. Davis v. Willis* (1910) 19 N. D. 209, 124 N. W. 706, supra.

Oregon.—See the observations of the court in *Rose v. Portland* (1917) 82 Or. 541, 162 Pac. 498.

South Carolina. — *State ex rel. Brown v. Chester & L. N. G. R. Co.* (1880) 13 S. C. 290.

Texas.—*McClesky v. State* (1893) 4 Tex. Civ. App. 322, 23 S. W. 518.

Washington. — *Stallcup v. Tacoma* (1895) 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541.

Thus, it has been held that—

—a judgment for the defendant in a mandamus proceeding by one taxpayer against a municipality, invalidating an act of the legislature, is *res judicata* in a similar proceeding by another taxpayer, seeking, on behalf of the public generally, the enforcement of the same statute on the

ground of its constitutionality, *Montgomery v. Walker* (Ala.) *supra*;

—an adverse decision in a suit by a taxpayer on behalf of himself and all other taxpayers who may wish to join in the suit, to enjoin the enforcement of a statute because of its unconstitutionality, bars a second action by another taxpayer on behalf of himself and others who wish to join, attacking the statute because the constitutional requirements were not followed in its passage, although that specific ground of attack was not raised in the former action, *Greenberg v. Chicago*, (1912) 256 Ill. 213, 49 L.R.A. (N.S.) 108, 99 N. E. 1039;

—a judgment sustaining the validity of an ordinance to widen a street, rendered in a suit by one property owner, is conclusive as to other property owners or citizens of the municipality, *McIntosh v. Pittsburg* (1901) 112 Fed. 705;

—a judgment dismissing on demurrer a bill by the state attorney on relation of certain taxpayers, to have declared invalid an ordinance of the city, and for the removal from the streets of obstructions authorized by such ordinance, is conclusive in another proceeding by other taxpayers, seeking the same relief, *People ex rel. Chilcoat v. Harrison* (1912) 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539;

—a judgment of the court for a town, and against the petitioning citizens asking for a highway, is a bar to a subsequent petition by other citizens having the same general interest in the result of both proceedings, asking for substantially the same highway, although the subsequent petition is based upon a law enacted subsequently to the judgment relied upon; there being, however, no new matter of fact alleged as a ground for the highway, and the statute on which the latter petition is based expressly exempting from its operation suits then pending, *Terry v. Waterbury* (1869) 35 Conn. 526;

—a petition to enjoin county commissioners from canvassing votes polled at an election is barred by a prior judgment in favor of such com-

missioners in a suit seeking the same relief, prosecuted by another citizen, *Sabin v. Sherman* (1882) 28 Kan. 289;

—the judgment in a suit by a taxpayer to enjoin issuance of bonds by a city, adverse to the taxpayer, is conclusive upon all the taxpayers of the city, *Harmon v. Auditor* (1887) 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161;

—a judgment dismissing a suit by a taxpayer against the commissioners of a county, to enjoin the issuance of certain bonds, is conclusive upon another suit by other taxpayers, in the name of the state, to have the bonds declared void, *State ex rel. Brown v. Chester & L. N. G. R. Co.* (1880) 13 S. C. 290;

—a judgment in a suit by taxpayers, sustaining the validity of bonds issued by the municipality, is conclusive in a subsequent suit by other taxpayers to enjoin the paying of interest on the bonds, *Stallcup v. Tacoma* (1895) 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541.

It will be seen that it is held in the reported case (*TALLASSEE v. STATE*, ante, 1127) that a final judgment for defendants on demurrer in a quo warranto proceeding by an individual relator, acting for the general public, to dissolve an alleged town and oust its officers because of defect in description of the territory to be incorporated, is a bar to a subsequent proceeding by other relators, acting in the same capacity, to effect an ouster for the same reason.

In *State ex rel. Forgues v. Superior Ct.* (1912) 70 Wash. 670, 127 Pac. 313, it was held that a judgment dismissing on demurrer an action by a taxpayer to enjoin the holding of a local option election on the ground that the petition therefor was insufficient is a bar to a similar action by another taxpayer, although he is the holder of a retail liquor license and of an internal revenue license.

In *Taxpayers v. O'Kelly* (1897) 49 La. Ann. 1039, 22 So. 311, *supra*, it was held that a suit by taxpayers to enjoin the collection of certain taxes upon the ground that an election authorizing the same was invalid was

concluded by a prior adjudication of the validity of the election in a suit to which the officers of the municipality were parties; it is not made clear whether the complainant in the latter suit was a taxpayer or not.

In *Harmon v. Auditor* (1887) 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161, supra, the court said: "The present suit was begun by Harmon and others, also taxpayers and property owners of the town, as representatives of the same class for whose benefit the Pickney bill was filed. The complainants in this proceeding were represented by the complainants in the former suit, and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and, in the pursuit of that remedy, individuals have the right to represent the class to which they belong. This jurisdiction, in some respects, rests on the principles of a proceeding in rem."

In *McClesky v. State* (1893) 4 Tex. Civ. App. 322, 23 S. W. 518, supra, it was held that a judgment for the defendants on the merits in an action by the state, on the relation of certain citizens, against a town and its officers, to annul its incorporation, is a bar to another suit by the state for the same relief against the town and its officers, on the relation of another citizen. (It should be noted that although the court said, as to the first action, "that the trial in the first suit was upon the merits, and embraced the whole subject-matter of this litigation in the sense of rendering the decree an effective adjudication, as distinguished from a dismissal upon formal grounds, we entertain no doubt," the relators in that action consented to the judgment, the attorney for the state not objecting, and the court costs in that action were ordered taxed against the defendants.)

It was held in *Mathers v. Cincinnati* (1878) 7 Ohio Dec. Reprint, 496 (see also p. 521), that a pending taxpayer's action against a city, brought, after the refusal of the city solicitor to bring it, to enjoin the city from

granting a street car route, is a bar to another taxpayer's action, brought for the same purpose.

In order that a judgment for the defendant in the first suit by citizens or taxpayers may be a bar to a similar suit by other citizens or taxpayers, the prosecution of that suit must have been bona fide, and free from fraud or collusion. *Simpson County v. Buckley* (1904) 85 Miss. 713, 38 So. 104; *Lindsay v. Allen* (1904) 112 Tenn. 637, 82 S. W. 171. See also *People ex rel. Childress v. Illinois C. R. Co.* (1921) 298 Ill. 516, 131 N. E. 624, infra. Compare *McClesky v. State* (1893) 4 Tex. Civ. App. 322, 23 S. W. 518, set out supra.

Thus, a judgment dismissing a suit brought by a citizen and taxpayer to restrain the removal of a county seat by county officers from one place to another is not a bar to a similar suit by other taxpayers, where it appears that the judgment in the first suit was by consent or compromise, and the first suit was really abandoned. *Simpson County v. Buckley* (Miss.) supra.

So, a judgment entered in a suit by citizens and taxpayers to enjoin the removal of a county seat, under an agreement with defendants by which the plaintiffs abandoned the suit, is not conclusive upon other taxpayers, and hence is not a bar to a subsequent suit by other taxpayers, involving the same question. *Lindsay v. Allen* (1904) 112 Tenn. 637, 82 S. W. 171, where the court says: "While it is proper and just that even the rights of the public of and concerning any special matter should be concluded by one fair litigation in which the matters involved were faithfully presented and considered, it should be emphasized that the litigation must be bona fide, fair, and honest from the beginning to the end. Those who assume, as citizens and taxpayers, to stand forth as the champions of public rights, and the conservators of the interests of all other citizens and taxpayers standing in the like case, must discharge their voluntary trust with candor and with such reasonable skill as to enable the court to see that there

has been no such gross negligence in the conduct of the cause as would be equivalent to a fraudulent surrender of the rights involved in the controversy, and no such blundering abandonment of acquired advantages as would justly sustain an imputation of fraudulent purpose or gross incompetency on the part of those in charge of the public's case. In short, before the rights of the public are concluded, there must be a reasonable fair presentation of the case to a court of competent jurisdiction, and a consideration and determination of the matter by the court."

The foregoing statement was partly quoted in *People ex rel. Childress v. Illinois C. R. Co.* (1921) 298 Ill. 516, 131 N. E. 624, in holding that judgment for the complainants in a friendly mandamus proceeding to validate town bonds for roads, brought by certain citizens, asking that the officials issue the bonds, and perfunctorily answered by the commissioner of highways and the town clerk, does not bar other taxpayers from contesting taxes to pay such bonds.

Special statutes.

In Georgia, the statute provides a method for judicial validation of bonds of counties, municipalities, or divisions, making the judgment of validation forever conclusive upon the validity of the bonds against the county, municipality, or division, and providing that "the validity of said bonds shall never be called in question in any court in this state."

Such judgment is conclusive upon a taxpayer or citizen. *Rountree v. Rentz* (1904) 119 Ga. 885, 47 S. E. 328; *Baker v. Cartersville* (1906) 127 Ga. 221, 56 S. E. 249; *Farmer v. Thomson* (1909) 133 Ga. 94, 65 S. E. 180; *Holton v. Camilla* (1910) 134 Ga. 560, 31 L.R.A. (N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199; *Thomas v. Blakely* (1914) 141 Ga. 488, 81 S. E. 218; *Whiddon v. Fletcher* (1920) 150 Ga. 39, 102 S. E. 350. See also *Lippitt v. Albany* (1908) 131 Ga. 629, 63 S. E. 33.

Under a statute providing for contests by citizens as to the result of a local election in regard to the sale of intoxicating liquors, it was held that

a judgment against the contestants, and holding that the majority of the legal votes cast at the election was against the sale, was conclusive against a citizen indicted for selling such liquors, although he was not a party to the contest. *Locke v. Com.* (1902) 113 Ky. 864, 69 S. W. 763.

In *Home Constr. Co. v. Duncan* (1902) 24 Ky. L. Rep. 94, 68 S. W. 15, it was held that an action by taxpayers, on behalf of themselves and other taxpayers, being a proceeding in rem, provided by law to test the validity of a city ordinance, a judgment determining that the ordinance was valid was binding upon all the city's taxpayers.

It has been held in Ohio that where a city solicitor prosecutes under the Municipal Code an action to final judgment, no taxpayer of the corporation has the right to maintain any action for the same cause, but all become bound by the judgment finally rendered in such case. *Cincinnati Union Stock Yards Co. v. Cincinnati* (1913) 34 Ohio C. C. 251; *Thoms v. Greenwood* (1878) 6 Ohio Dec. Reprint, 639.

Miscellaneous.

Where city commissioners of a market place sued the city and its marshal to enjoin them from removing a market house erected in the street under an ordinance, the city was not estopped to deny the validity of the ordinance, although, some years before, the city attorney brought an action against the city to have the ordinance declared void, etc., and made parties defendant many persons, including the commissioners of the said market place, in which action, while other defendants filed an elaborate answer, the city simply made a general denial, and by the judgment the bill was dismissed (*Peters v. St. Louis* (1910) 226 Mo. 62, 125 S. W. 1134, 21 Ann. Cas. 1069), the court considering that the parties to the present action were not adversary parties in the former action.

The following cases, while beyond the strict scope of this annotation, are of interest in this connection:

Where a citizen brought an action to restrain A and B from selling liquor

In a certain town, and it was adjudicated therein that a majority of the voters had filed a petition under statute, requesting that the bar to prosecution for selling intoxicating liquors in said town be removed, and that therefore such bar was removed, such adjudication was held binding on a stranger, in a suit by another citizen to restrain such stranger from selling intoxicating liquors in said town. *McConkie v. Remley* (1903) 119 Iowa, 512, 93 N. W. 505.

Where the state, on the relation of the attorney general, had applied for a quo warranto against the governor's appointees, the purpose of the action being to obtain an adjudication upon the validity of the statute under which they had been appointed, and the judgment was of ouster, and held that the statute was unconstitutional, the state, on the relation of the attorney general, may not, by a new application for quo warranto, try the question over again, though some of the respondents and interveners were not parties to the first action. *State ex rel. Smyth v. Kennedy* (1900) 60 Neb. 300, 83 N. W. 87.

A judgment in an action by the state, on the relation of the mayor of a city, against the county assessor, directing the defendant to extend certain taxes upon the rolls, is no bar to an action against the county by a taxpayer, to strike such taxes off the rolls as against its property, as both parties to the prior action represented interests adverse to the taxpayer. *Northern P. R. Co. v. Snohomish County* (1918) 101 Wash. 686, 172 Pac. 878.

In *Sauls v. Freeman* (1888) 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525, it was held that a judgment in mandamus, commanding the county commissioners to call an election on the question of changing the location of the county site, is a bar to a bill in equity, instituted by registered voters other than those who were relators in the mandamus, to restrain the commissioners from moving the county records to the place chosen as the county site at such election, the matters alleged in the bill being such as could have been set up by the commissioners in the mandamus proceeding.

B. B. B.

JOHN L. DOWNING

v.

MERCHANTS' NATIONAL BANK OF GREENE, IOWA, Appt.

Iowa Supreme Court — October 18, 1921.

(192 Iowa, 1250, 184 N. W. 722.)

Negligence — duty with respect to entrances to business room.

1. A bank owes the duty to all who come to its banking house on business to exercise reasonable care and prudence to provide a safe and suitable entrance to the banking rooms, and have the approaches thereto so constructed and maintained that customers will not be liable to step into dangerous pitfalls by reason of misleading doors.

[See note on this question beginning on page 1147.]

Trial — negligence as question of law.

2. The courts should declare to the jury as matter of law that one seeking for damages for personal injuries was guilty of contributory negligence, if under the facts disclosed all fair-minded and reasonable men would agree that it was so.

[See 20 R. C. L. 166.]

Negligence — duty of customer to see that entrance door does not open upon steps.

3. The court cannot say, as matter of law, that one about to enter a business building to which the public is invited for the transaction of business is negligent in failing to look to the floor of the vestibule before crossing

the threshold of an open door apparently leading into the business room, to see that the door does not open upon a flight of steps.

[See 20 R. C. L. 115; 3 R. C. L. Supp. 1032.]

Trial — question for jury — negligence of one entering bank.

4. The jury must determine whether or not one entering a bank to do business with its officer is negligent in stepping through an open door without looking to see whether or not it led to a flight of steps, where a view through the door exposed the inside of the bank and the officer sought, and what appeared to be the bank counter, although it in fact led to the basement past a railing above and through which the view was obtained.

— negligence of bank toward customer.

5. The jury must determine whether or not a bank is negligent in maintain-

ing a vestibule entrance to its banking room with two doors, one leading into the room and the others to a flight of steps to the basement, but which, when open, gave a view of the interior of the banking room.

— one entering bank on business as licensee.

6. One entering a bank to transact business with it, and also with an employee who is a municipal officer and transacts the municipal business in the bank with the consent of its authorities, is something more than a licensee in regard to the care due him with respect to safety of the premises.

[See 20 R. C. L. 66.]

Appeal — excess of verdict — when set aside.

7. A verdict will not be set aside for excess if it is not so large as to indicate passion and prejudice on the part of the jury.

[See 20 R. C. L. 282.]

APPEAL by defendant from a judgment of the District Court for Butler County (Kelley, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sager & Sweet and J. G. Mitchell, for appellant:

The record conclusively demonstrates that the plaintiff was guilty of contributory negligence as a matter of law, which was the efficient cause of his injury, and by reason of which there can be no recovery.

Devaney v. Omaha & C. B. Street R. Co. 184 Iowa, 1084, 169 N. W. 381; McCormick v. Ottumwa R. & Light Co. 146 Iowa, 119, 124 N. W. 889; Williams v. Chicago, M. & St. P. R. Co. 139 Iowa, 552, 117 N. W. 956; Brooks v. W. T. Joyce Co. 127 Iowa, 266, 103 N. W. 91, 18 Am. Neg. Rep. 78; Milne v. Walker, 59 Iowa, 186, 13 N. W. 101; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Buchholtz v. Radcliffe, 129 Iowa, 27, 105 N. W. 336, 19 Am. Neg. Rep. 219; Ryerson v. Bathgate, 67 N. J. L. 337, 57 L.R.A. 307, 51 Atl. 708, 11 Am. Neg. Rep. 300; Dreier v. McDermott, 157 Iowa, 726, 50 L.R.A. (N.S.) 566, 141 N. W. 315; Clark v. Fehlhaber, 106 Va. 803, 13 L.R.A. (N.S.) 442, 56 S. E. 817; Watson v. Manitou & P. P. R. Co. 41 Colo. 138, 17

L.R.A. (N.S.) 916, 92 Pac. 17; Bremer v. Pleiss, 121 Wis. 61, 98 N. W. 945, 16 Am. Neg. Rep. 275; Sanderson v. Chicago, M. & St. P. R. Co. 167 Iowa, 90, 149 N. W. 188; Burk v. Walsh, 118 Iowa, 397, 92 N. W. 65; Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256; Campbell v. Abbott, 176 Mass. 246, 57 N. E. 462; Hutchins v. Priestly Exp. Wagon & Sleigh Co. 61 Mich. 252, 28 N. W. 85; Illinois C. R. Co. v. Sanderson, 175 Ky. 11, L.R.A. 1917D, 890, 192 S. W. 869; Steger v. Immen, 24 L.R.A. (N.S.) 246, and note, 157 Mich. 494, 122 N. W. 104; Speck v. Northern P. R. Co. 108 Minn. 435, 24 L.R.A. (N.S.) 249, 122 N. W. 497, 17 Ann. Cas. 460; Johnson v. Ramberg, 49 Minn. 341, 51 N. W. 1043; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; McNaughton v. Illinois C. R. Co. 136 Iowa, 177, 113 N. W. 844; Piper v. New York C. & H. R. R. Co. 156 N. Y. 224, 41 L.R.A. 724, 66 Am. St. Rep. 559, 50 N. E. 851, 4 Am. Neg. Rep. 331; Weller v. Consolidated Gas Co. 198 N. Y. 98, 139 Am. St. Rep. 798, 91 N. E. 286; Rohrbacher v. Gillig, 203 N. Y. 413, 96

N. E. 783; *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420; *Hertz v. Advertiser Co.* 201 Ala. 416, L.R.A. 1918F, 137, 78 So. 794; *Stanwood v. Clancey*, 106 Me. 72, 26 L.R.A.(N.S.) 1213, 45 Atl. 293; *McCarvell v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 319, 54 N. E. 259.

The record entirely fails to disclose any evidence of negligence on the part of the defendant, and there can, therefore, be no liability.

McNaughton v. Illinois C. R. Co. 136 Iowa, 177, 113 N. W. 844; *F. W. Woolworth & Co. v. Conboy*, 23 L.R.A.(N.S.) 743, 95 C. C. A. 404, 170 Fed. 934; *Hunnewell v. Haskell*, 174 Mass. 557, 55 N. E. 320, 7 Am. Neg. Rep. 53; *Lord v. Sherer Dry Goods Co.* 205 Mass. 1, 27 L.R.A.(N.S.) 232, 137 Am. St. Rep. 420, 90 N. E. 1153, 18 Ann. Cas. 41; *Hollenbaek v. Clemmer*, 66 Wash. 565, 37 L.R.A.(N.S.) 698, 119 Pac. 1114, 2 N. C. C. A. 530; *Brooks v. W. T. Joyce Co.* 127 Iowa, 269, 103 N. W. 91, 18 Am. Neg. Rep. 78; *Milne v. Walker*, 59 Iowa, 186, 13 N. W. 101; *Buchholtz v. Radcliffe*, 129 Iowa, 27, 105 N. W. 336, 19 Am. Neg. Rep. 219; *Bird v. Hart-Parr Co.* 165 Iowa, 542, 146 N. W. 74; *Larned v. Vanderlinde*, 165 Mich. 464, 131 N. W. 165; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580; *Hertz v. Advertiser Co.* 201 Ala. 416, L.R.A. 1918F, 137, 78 So. 794.

The plaintiff, upon his own showing, was a mere licensee to whom the defendant owed no duty other than to protect him against wanton and wilful injury, and the record is susceptible of no other inference than that the defendant discharged its full duty toward the plaintiff.

Benson v. Baltimore Traction Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756; *Menteer v. Scalzo Fruit Co.* 240 Mo. 177, 144 S. W. 833; *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 458, note; 29 Cyc. 451; *Burner v. Higman & S. Co.* 127 Iowa, 580, 103 N. W. 802; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800, 15 Am. Neg. Rep. 221.

The verdict of the jury is excessive and due to passion and prejudice.

Etzkorn v. Oelwein, 142 Iowa, 107, 120 N. W. 636, 19 Ann. Cas. 999; *Chapman v. Pfarr*, 145 Iowa, 196, 123 N. W. 992.

Messrs. M. Hartness and E. H. McCoy, for appellee:

The plaintiff was not guilty of contributory negligence, and the question of contributory negligence was a question of fact for the jury and not a question of law for the court.

Mathews v. Cedar Rapids, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; *Lichtenberger v. Meriden*, 91 Iowa, 45, 58 N. W. 1058; *Earl v. Cedar Rapids*, 126 Iowa, 361, 106 Am. St. Rep. 361, 102 N. W. 140; *Gardner v. Waterloo Cream Separator Co.* 134 Iowa, 6, 111 N. W. 316; *Overton v. Waterloo*, 164 Iowa, 332, 145 N. W. 889; *Erickson v. Manson*, 180 Iowa, 378, 160 N. W. 276; *Brown v. Stevens*, 136 Mich. 311, 99 N. W. 12, 16 Am. Neg. Rep. 101; *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Hendricken v. Meadows*, 154 Mass. 599, 28 N. E. 1054; *Hommel v. Badger State Invest. Co.* 166 Wis. 235, 165 N. W. 20; *Steinke v. Halvorsen*, 46 N. D. 10, 178 N. W. 964; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555.

Defendant was negligent in leaving the door leading to the basement open, and in not providing barriers or light to prevent persons from falling down the stairway.

Gardner v. Waterloo Cream Separator Co. 134 Iowa, 6, 111 N. W. 316; *Wilsey v. Jewett Bros. & Co.* 122 Iowa, 315, 98 N. W. 114; *Burner v. Higman & S. Co.* 127 Iowa, 580, 103 N. W. 802; *Roth v. Buettell Bros. Co.* 142 Iowa, 212, 119 N. W. 166; *Upp v. Darner*, 150 Iowa, 403, 32 L.R.A.(N.S.) 743, 130 N. W. 409, Ann. Cas. 1912D, 574; *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21; *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504; *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Brown v. Stevens*, 136 Mich. 311, 99 N. W. 12, 16 Am. Neg. Rep. 101; *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Hendricken v. Meadows*, 154 Mass. 599, 28 N. E. 1054; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Hommel v. Badger State Invest. Co.* 166 Wis. 235, 165 N. W. 20; *Steinke v. Halvorsen*, 46 N. D. 10, 178 N. W. 964.

Even if the plaintiff was to concede, which he does not, that the only purpose in going to the bank was to see Carney, the township clerk, the plain-

tiff would be an invitee under the record and entitled to the same degree of care as if he went to the bank to transact banking business only.

Croft v. Chicago, R. I. & P. R. Co. 132 Iowa, 687, 108 N. W. 1053, 20 Am. Neg. Rep. 534; Connell v. Keokuk Electric R. & P. Co. 131 Iowa, 622, 109 N. W. 177; Whitman v. Chicago G. W. R. Co. 171 Iowa, 277, 153 N. W. 1023; Noyes v. Des Moines Club, 178 Iowa, 815, 160 N. W. 215; Cleveland, C. C. & St. L. R. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, 5 N. C. C. A. 101; 29 Cyc. 457.

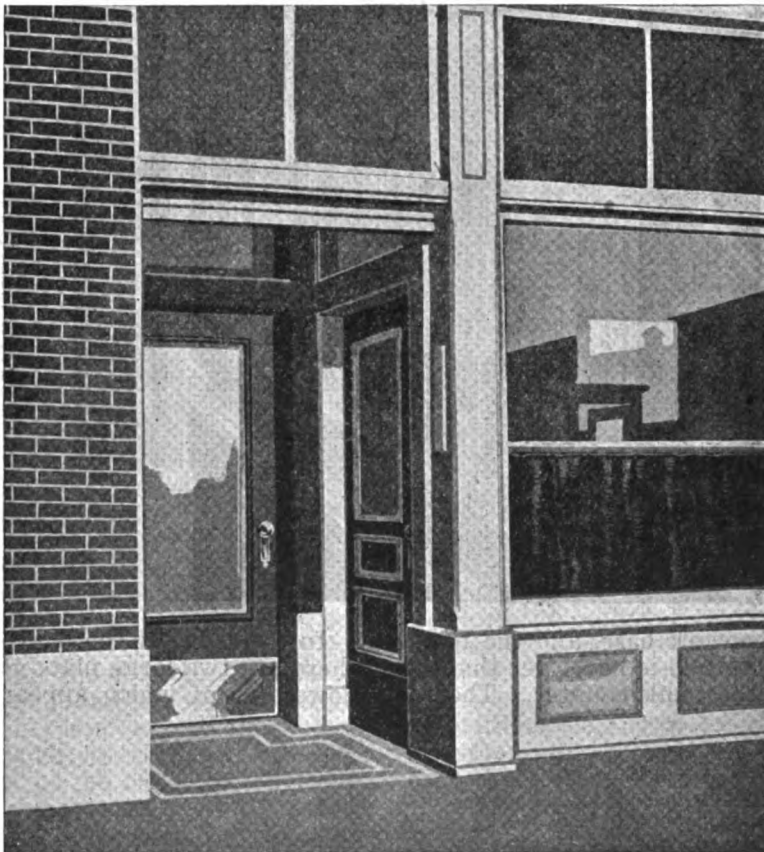
The verdict was not excessive nor the result of passion and prejudice.

Rose v. Ft. Dodge, 180 Iowa, 331, 155 N. W. 170; Whitney v. Sioux City, 172 Iowa, 336, 154 N. W. 497; Long v. Ottumwa R. & Light Co. 162 Iowa, 11, 142 N. W. 1008; Sherwood v. Crescent

Faville, J., delivered the opinion of the court:

The appellant is the owner of a bank building in Greene, Iowa. The building faces the south and is located immediately adjacent to a sidewalk. In the front of the building is a vestibule containing two doors. One door on the north side of the vestibule opens into the lobby of the bank. On the east of the vestibule is also a door which opens into a stairway leading to the basement. The exterior of the building showing this vestibule and the doors is shown in the following photograph:

The stairway in question starts immediately from the threshold of the east door. On the inside of the

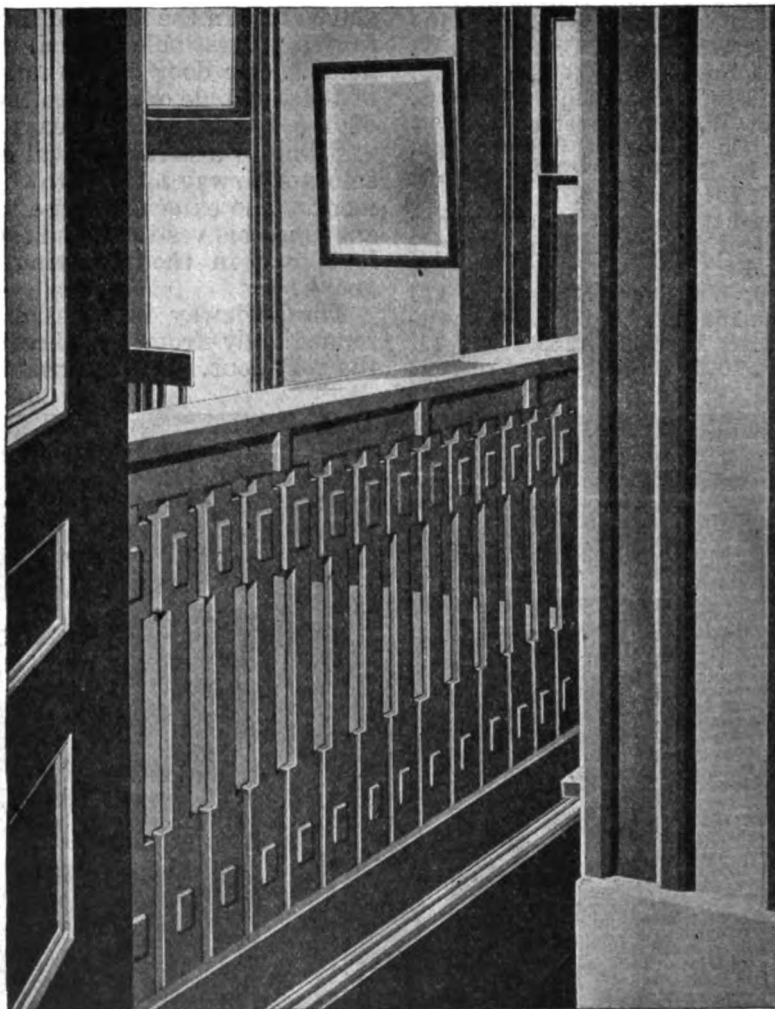


Creamery Co. 130 Minn. 263, 153 N. W. 525; Peery v. Illinois C. R. Co. 128 Minn. 119, 150 N. W. 382.

building the stairway is separated from the banking room by a balustrade or railing. This balustrade is

the same height as the bank counter and has something of the same general appearance and construction. The base of the bank counter is solid, while the balustrade has an open

lowing photograph shows a view of this balustrade, taken through the open doorway leading from the vestibule to the stairway in controversy:



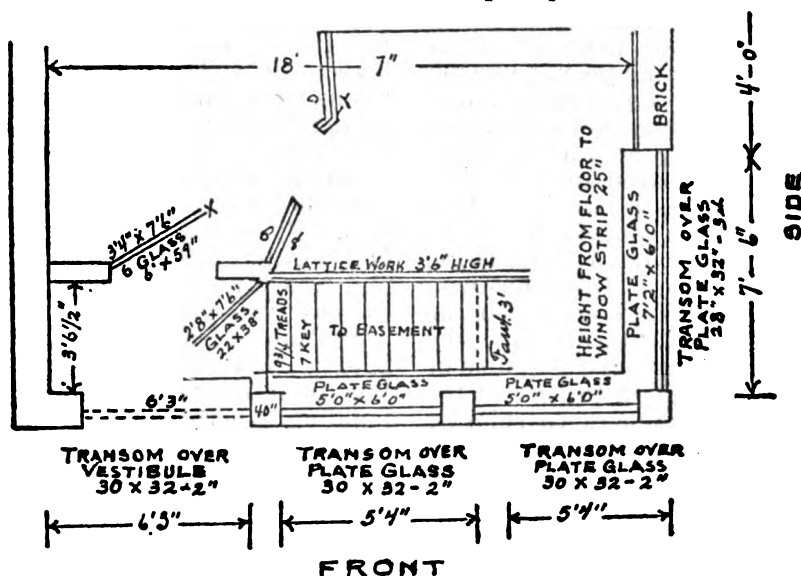
or latticework base, and the top of the balustrade is narrower than the top of the bank counter. The fol-

In the front of the bank building there are two large plate glass windows, one of which appears in the

(192 Iowa, 1250, 184 N. W. 722.)

first photograph. The following is a plat of a portion of the ground floor of the bank showing the situation:

open doorway in the direction of the bank officer, and as soon as he stepped through the doorway, he was precipitated down the stairway.



About 5 o'clock in the afternoon of April 1, 1916, the appellee, desiring to transact some business with an officer of the bank, entered the vestibule of the bank. It was a bright day and the sun was shining. The appellee had been to the bank once or twice before the day in question. At the time he entered the vestibule the evidence tends to show that the door leading into the bank lobby or corridor was closed and the curtain drawn, and that the door on the right or east side of the vestibule, leading to the stairway, was open. This door swung into the vestibule, so that, when opened, it partially, at least, obstructed the door leading into the bank. As the appellee entered the vestibule, he claims, the open doorway was in front of him, and he looked through the opening and across the balustrade, above referred to, and saw the officer of the bank for whom he was looking in the banking room. He testified that he believed the balustrade to have been the bank counter, and believed that he was walking into the bank proper. He immediately proceeded through the

and suffered the injuries complained of.

I. It is urged in behalf of the appellant that, under the circumstances surrounding the accident, the appellee was guilty of contributory negligence, and that the court should have so directed the jury and withdrawn the case from its consideration. If all fair-minded and reasonable men would agree, under the facts disclosed, that the appellee was guilty of contributory negligence, then the court should so declare, as a matter of law.

Trial—negligence as question of law.

It is urged that the appellee must be held to be guilty of contributory negligence because of the fact that, under the circumstances disclosed, he passed through the open doorway without looking to see where he was stepping. It must be remembered that this was a building that the public was invited to enter. If the jury believed the appellee's testimony regarding the conditions surrounding him at the time, he believed, and had reason to believe, that he was walking through the

open doorway into the bank building to transact business with an officer of the bank, whom he saw, and who was behind what appeared to appellee to be the counter of the bank.

It is strenuously argued that, if he had looked to the floor, he would have seen the open stairway, and that it was his duty so to look, and to observe where he was walking. We are not prepared to hold that,

Negligence—
duty of customer
to see that
entrance door
does not open
upon steps.

as a matter of law, a person about to enter a bank, store, or other business building, which the public is invited to enter for the transaction of business, is guilty of negligence in failing to look to the floor of the vestibule or corridor of such a place of business before crossing the threshold of an open door.

As a general rule, it may be stated that the defendant owed a duty to all persons who properly came to the bank on business to exercise reasonable care and prudence to provide a safe and suitable entrance to said bank, and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors. As bearing on this general proposition, see *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175; *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Gillvon v. Reilly*, 50 N. J. L. 26, 11 Atl. 481.

—duty with respect to entrances to business room.

"It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any." *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21.

The cases discussing the question of contributory negligence and negligence, where the facts are similar to those in the case at bar, are somewhat numerous. We cannot review all of them.

In *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229, plaintiff was a guest at a hotel. His room was in the hallway and was numbered "38." It was the corner room. About 2½ feet from it was another room numbered "40." The doors of the two rooms were alike. Gas was burning in the hall, but not very brightly. The plaintiff had recently been a guest at the hotel, and occupied room 38, which was now assigned him. By mistake he opened room No. 40, and fell down an opening, and was injured. It was held that the case was properly for the jury.

In *McRickard v. Flint*, 114 N. Y. 226, 21 N. E. 153, it appeared that the plaintiff was in defendants' building, where he observed a folding door that was usually kept closed during the day. When he approached the folding door, it was partly open, and he opened it farther and entered. It was between 12 and 1 o'clock in the afternoon, and within the room it was light. If the plaintiff had stopped and looked about him when he entered the door, he could evidently have seen the situation. The court held that the question of contributory negligence of the plaintiff was properly for the jury.

In *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504, it appeared that the defendant's store had two entrances, which presented the same appearance when the outside doors were closed. Between these doors was a display window. The northerly entrance was intended for purchasers. When the doors were closed, as they were at the time of the injury, the entrances were externally alike. Plaintiff and her friend, passing the store, saw in the window an article which one of them wished to purchase. Plaintiff opened the southerly door and plunged into a cellar. It was held that the questions of negligence and contributory negligence were properly for the jury.

Rhodus v. Johnson, 24 Ind. App. 401, 56 N. E. 942, is a case where a woman stepped from a hallway through an open door into an ele-

vator shaft. The evidence shows that, when she opened the door, she walked in without paying any attention to what she was stepping into. The court said: "The question to be determined from the evidence is, whether appellee was proceeding as an ordinarily prudent person would have proceeded under the circumstances. The open doorway, if not an invitation to enter, was certainly not a warning of danger. What is due care must depend upon circumstances." The court held that the question of contributory negligence was for the jury.

In *Foren v. Rodick*, *supra*, it appeared that a set of offices in a building were occupied by a physician, and a sign bearing the physician's name was affixed to the outside of the building a few feet above the sidewalk, one end being fastened to the casing on the right-hand side of the cellar door, and the other end to the casing on the left-hand side of the main entrance door. The plaintiff, desiring to visit the physician, by mistake, opened the door to the cellar, and fell and was injured. The evidence showed that the double doors of the main entrance were open, revealing a vestibule or lobby; that the store and sidewalk and, to some extent, the landing at the entrance, were lighted by electric lights, and the cellar was well provided with windows. The plaintiff testified that she took no pains to know where she was stepping. The court said: "She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances." It was held to be a case for the jury.

In *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978, an elevator well in a building opened directly

on the street by a doorway separated by a post 1 foot wide from the entrance to the hallway of the building, which was of about the same construction, and the threshold of which was a continuation of that of the elevator entrance, but not quite of the same width. The entrance to the hallway proper had no door, but the entrance to the elevator could be closed by a door and by hooking a chain across it. Plaintiff, seeking to enter the hallway on a dark evening, stepped into the elevator entrance, which was not closed, and was injured. The plaintiff had passed very many times, and was aware that the two entrances were close to each other. The court held that the case was properly submitted to the jury.

In *Engel v. Smith*, 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21, we quote from the syllabus as follows (46 N. W. 21):

"In front of the rear door of their store, and about a foot and a half distant from it, defendants maintained a hatchway opening into the cellar. There was no railing around the hatchway, and such door was freely used for entrance into the store. Plaintiff, who did business in the store, went out to the knowledge of one of defendants' employees, and in his absence the hatchway was opened. The door was left unlocked, and no one stationed at the opening to give notice thereof. Plaintiff returned through such door, and fell through the hatchway. Held, that defendants were negligent.

"Plaintiff was fully acquainted with the location of the hatchway, and knew that it was customary, at the time of day the accident happened, to use it. He did not stop to see whether the trapdoor was open, but it had been customary to keep the door locked when the hatchway was opened. Held, that the question of contributory negligence was for the jury."

Appellant relies upon *McNaughton v. Illinois C. R. Co.* 136 Iowa, 177, 113 N. W. 844, as being con-

trolling in this case. We do not so regard it. In that case a lady entered the women's waiting-room of a railway station and immediately opened a door supposing it to be the door to the toilet room, stepped through, and fell to the bottom of a stairway. The word "Basement" was painted upon the door, although it was obscured by the people gathered about it. The door to the toilet room was properly designated, but this was somewhat obscured from view by its location. The situation is altogether different from that disclosed in the instant case. We held in the *McNaughton Case* that it was not negligence, under the circumstances, for the railway company to maintain this closed door, with a knob and catch on it, leading to the basement. We said: "Every precaution had been taken, save that of locking it, against its improper use."

The situation is altogether different from that in the case at bar, where the door in question was so located that, when open, as the evidence tends to show it was when the accident happened, it was the apparent way provided for persons having business with the bank to enter for the transaction of such business. The open door, the presence of the man with whom appellee had business, the appearance of the balustrade, and all the attendant circumstances were such that the jury might have found that appellee was not guilty of negligence in failing to look toward the spot where he was about to step as he passed through the open doorway. As bearing on this question, see *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; *Overton v. Waterloo*, 164 Iowa, 332, 145 N. W. 889; *Erickson v. Manson*, 180 Iowa, 378, 160 N. W. 276.

Under all the facts and circumstances disclosed by this record, it was undoubtedly a question for the jury to determine whether or not the appellee was guilty of negligence in stepping through the open doorway

under the circumstances disclosed, and it was not error to refuse to direct a verdict on this ground. As bearing somewhat on the general proposition involved, see *Gardner v. Waterloo Cream Separator Co.* 134 Iowa, 6, 111 N. W. 316.

Neither was it error on the part of the court to refuse to direct the jury to return a verdict in favor of appellant on the ground that the evidence fails to show that it was guilty of negligence. It must be remembered that this building was one to which the public was invited to come for the purpose of transacting business. It certainly was for the jury to say whether the appellant was guilty of negligence in maintaining this building with the two doors in close proximity opening from this vestibule, one of which the public was invited and expected to enter, and the other of which opened directly into a precipitous stairway. It was for the jury to say whether it was negligence to permit the door leading to this stairway to be open under the circumstances disclosed by the record, if the jury found that it was open, and to leave the same without barrier or guard to protect one who might enter the vestibule. The question of appellant's negligence under all of the facts was clearly one for the jury, and the court did not err in not directing a verdict.

II. It is urged that the appellee was a mere licensee. The evidence of the appellee was to the effect that he went to the bank to transact some business with the bank regarding the settlement of a sale; also to see one of the officers of the bank in regard to a township matter. The bank knew that the officer of the bank was also an officer of the township, and did township business at the bank with the consent of its officers. Under these circumstances the appellee was something more than a mere licensee in going upon the premises to conduct this business, even though it was of

Trial-question
for jury—negli-
gence of one
entering bank.

—negligence of
bank toward
customer.

—one entering
bank on business
as licensee.

a dual character. The instruction complained of on this subject was proper and meets with our approval.

III. It is strenuously urged that the verdict returned by the jury of \$2,750 is excessive, and is the result of passion and prejudice on the part of the jury. The verdict is large for the injury sustained. The appellee's damages are not to be measured by the mere loss of time, but are also for pain and suffering, for which the amount to be awarded is peculiarly within the province of the jury. The plaintiff's injuries were somewhat serious and painful. We cannot say that the amount

awarded is so large as to be indicative of passion and prejudice on the part of the jury. Appeal—excess of verdict—when set aside.

We cannot substitute our judgment for that of the jury in a matter of this kind, where the verdict does not appear to be excessive, or to be the result of passion and prejudice. We find no errors urged by the appellant which would justify a reversal of the case.

It therefore follows that the judgment of the District Court must be affirmed.

Evans, Ch. J., and Stevens and Arthur, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Liability for injury to person on business premises in consequence of passing through wrong doorway.

I. Person entering or leaving store, office, or the like:

a. Generally, 1147.

b. Effect of contributory negligence, 1152.

II. Guest in hotel, 1154.

III. Passenger, 1155.

I. Person entering or leaving store, office, or the like.

a. Generally.

Where a store, office building, or similar business establishment to which the public is impliedly invited to resort has a door leading to a cellar, elevator shaft, or other dangerous place, which is left unfastened, and which from its location and appearance may be mistaken for a door which a member of the public on the premises is entitled to use, the proprietor is liable to a person who by mistake passes through that door and is injured. *Rhodus v. Johnson* (1900) 24 Ind. App. 401, 56 N. E. 942; *Foren v. Rodick* (1897) 90 Me. 276, 38 Atl. 175; *Gordon v. Cummings* (1890) 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; *Camp v. Wood* (1879) 76 N. Y. 92, 32 Am. Rep. 282; *McRickard v. Flint* (1889) 114 N. Y. 226, 21 N. E. 153; *Clopp v. Mear* (1890) 134 Pa. 203, 19 Atl. 504. And

see the reported case (*DOWNING v. MERCHANTS' NAT. BANK*, ante, 1138).

In *Schmidt v. Bauer* (1889) 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256, the court said: "The keeper of a public place of business is bound to keep his premises and the passageways to and from them in safe condition, and to use ordinary care to avoid accident or injury to those properly entering upon his premises on business."

However, a person who has received an injury in consequence of passing through a wrong doorway in a part of the building not designed for the use of unattended customers cannot recover unless he was induced to enter therein by the invitation or allurement of the keeper of the premises. *Ibid.*; *Menteer v. Scalzo Fruit Co.* (1912) 240 Mo. 177, 144 S. W. 833.

In *Schmidt v. Bauer* (Cal.) supra, the evidence showed substantially that the defendant was a keeper of a liquor saloon, and that his private residence was connected therewith, in the same building; that the plaintiff was in the saloon drinking beer; that he asked the defendant the way to the urinal; that the defendant pointed the way; that in the direction indi-

cated by him there was a stairway leading to the urinal in the basement of the building, and on the wall the word "Toilet" was painted in large letters to direct the way; that in the same general direction pointed out by the defendant there was a door leading out on to a porch, back of the defendant's dwelling or family rooms, from which a stairway led down into the back yard; that the plaintiff, instead of taking the stairway leading to the urinal connected with the saloon, passed through the door out on to the porch and down into the back yard, where there was a urinal for the use of the family; that the plaintiff attempted to return to the saloon, but instead of coming through the door through which he had passed out, he opened another door leading into another and private part of the house, where the floor had been taken up for the purpose of making repairs, and, stepping in, was precipitated into a cellar and injured; that the plaintiff did not know the condition of the building which caused his fall, and that he supposed that he was coming back through the door at which he had gone out. It also appeared that the plaintiff both denied and admitted that he knew what the word "Toilet" painted on the wall meant, but testified that he did not see it. Holding the plaintiff to be a bare licensee, and the defendant to be free from any actionable negligence, the court said: "Conceding that the respondent was not wrongfully in the place where the accident occurred, and giving the most liberal construction to his evidence, he was there by the mere license of the appellant, and for that reason the appellant owed him no duty, and he went there subject to all the risks attending his going."

It was alleged in *Menteer v. Scalzo Fruit Co.* (1912) 240 Mo. 177, 144 S. W. 833, that the plaintiff's intestate met his death as the result of mistaking the door of an elevator shaft, at the bottom of which he was found, for a passageway of some other nature in the defendant's store. There was no evidence that customers were permitted to, or did, visit that part

of the building unattended, nor was there any evidence that the intestate had ever been there. Affirming a nonsuit the court said: "A merchant's duty to use ordinary care to keep the premises to which he expressly or impliedly invites customers in such condition as to prevent injury to them . . . arises out of, and is coextensive both as to time and place with, the invitation extended. To create an obligation of this kind the invitation must proceed from the merchant to the customer as an individual, or as one of a class or of the public, and cannot be enlarged by the customer to include parts of the premises to which the invitation does not extend. When an invitee steps clearly beyond the bounds of his invitation, he then becomes a mere licensee, at most, and must take as he finds it the part of the premises he then enters. He may complain of wanton or intentional injury or active negligence, it is said, but not that the place into which he goes for his own purposes, and without invitation, was not made safe in anticipation of his unexpected and undesired presence."

In *Clopp v. Mear* (1890) 134 Pa. 203, 19 Atl. 504, the court stated the facts and its conclusion as follows: "It appears from the evidence that defendants' store, on the west side of Second, north of Arch street, had two entrances, which presented the same appearance when the outside doors were closed, as was the case on the day that plaintiff was injured. Between these doors or places of entrance was a bulk window, in which articles of chinaware, queen's ware, etc., were displayed. The northerly entrance was intended for purchasers, and when the outside door was open it revealed an inside door, on the side of which was an enameled plate with the word 'Push' painted on it; but, when all the outer doors were closed, as they were on the day plaintiff fell into the hatchway, both entrances were externally alike, as to size, shape, appearance, etc., and equally inviting to anyone, not familiar with the premises, wishing to enter the store. In front of both was

a marble slab, forming a step from the sidewalk. Immediately behind the southerly door or entrance, and within a few inches of the doorsill, was a hoistway 8 or 10 feet square. When not in use, a trapdoor flush with the floor covered the opening into the cellar, and those connected with the store used it as a passageway and entrance. When the hoistway was in use, the trapdoor was up—not across the entrance, but at right angles thereto. The front door was usually locked; but, on the day of the accident the hoistway had been used, and the men had gone to another part of the store, leaving it open and the front door unlocked. The plaintiff and her friend, passing the store, saw in the window an article which one of them wished to purchase. Mrs. Clopp opened the southerly door, and, taking the entering step to the store, plunged headlong into the cellar, about 12 feet in depth, and sustained injuries which, as the evidence tends to show, were of a very serious and permanent character. On the evidence, tending to prove the foregoing and other facts, the case was fairly submitted to the jury in a clear and comprehensive charge, in which the law applicable to the case was very fully and distinctly stated. The attention of the jury was specially directed to the questions of negligence and contributory negligence, upon which they were directed to pass in making up their verdict, and they were correctly instructed as to the law applicable thereto. . . . The case hinged solely upon questions of fact, which were carefully submitted to the jury, and which they appear to have disposed of according to the manifest weight of the evidence."

In *Rhodus v. Johnson* (1900) 24 Ind. App. 401, 56 N. E. 942, it appeared that the plaintiff entered the defendant's saloon to see her brother on business, and while going to a rest room, in which she had previously been, but with the location of which, at the time of the accident, she was unfamiliar, mistook the partly opened door of the elevator for that of the rest room, and fell, sustaining severe

injuries. It also appeared that the hall from which the elevator door opened was dimly lighted, sufficient to discern objects therein, but insufficient to shed any light into the elevator pit. The court sustained a recovery, saying that the plaintiff had a right to rely on the defendant's keeping their premises in a reasonably safe condition for those invited to use them, and was not required to look at every place where she stepped.

In the reported case (*Downing v. Merchants' Nat. Bank*, ante, 1138) a recovery is sustained, it appearing that the plaintiff attempted to enter the defendant's place of business through the front door, but, by mistake, opened and entered a door, in close proximity thereto, leading to the basement into which he fell and was injured.

In *Gordon v. Cummings* (1890) 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978, it appeared that the plaintiff, a letter carrier, was injured by falling into an elevator well which communicated directly with the street by an opening provided with a sliding door and a chain to guard it. Separated from the opening by a granite post a foot wide was an open doorway of about the same size and construction, and on the same level from the street, which led to the common entry of the building in the hall of which were mail boxes for the tenants. At the time of the accident the elevator opening was not protected by the chain, and the plaintiff mistook it for the doorway to the hall. The building was occupied by several work shops, but the owner retained control of the hall. In sustaining a recovery against the owner of the building the court said: "He [the plaintiff] had a right to suppose that, when seeking to enter where he had a right to go, he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and uninclosed by any barrier at a time when it was not in use."

The defendant in *Camp v. Wood* (1879) 76 N. Y. 92, 32 Am. Rep. 282,

owned a three-story building, on the third floor of which was a hall rented for dancing. The dance hall was reached by two stairways, one above the other. In front of the foot of the stairway on the second floor a hallway led to a door opening on an awning, in the same manner as the door on the first floor in front of the lower stairway led to the street. It appeared that the plaintiff, in an intoxicated condition, left the dance hall on the third floor, and mistook the door on the second floor for the street door, stepped out on the awning, walked along the side of the house on the awning, a distance of about 40 feet, until he reached the end, fell off, and was injured. It further appeared that the night was dark and there was no guard or rail around the awning; and also that two other persons, on the same evening, who were perfectly sober, mistook this door for the street door, but discovered the situation in time to avoid an injury. A verdict for the plaintiff was affirmed, the court saying: "The plaintiff was rightfully there, upon the invitation of the managers of the entertainment implied from the public character of the assembly, their accepting the entrance fee paid, and his admission to the hall. It is not the case of the owner of premises who gives a bare license or permission to another to enter. The licensee who enters under such a license takes the risk of the ordinary dangers resulting from the faulty construction or arrangement of the premises. In this case, the defendant, by letting the hall for public purposes, held out to the public that the hall was safe, and he was bound to exercise care to provide safe arrangements for the entrance and departure of people who came there upon his invitation. The question whether there was a breach of this duty was, upon the evidence, properly submitted to the jury. The question of the plaintiff's negligence was, we think, a question for the jury also. The fact that he had been drinking, and was, to some extent, affected thereby, was admitted. But the extent of his intoxication, and whether

it contributed to his injury, was a matter upon the evidence to be determined by the jury. It was a very important consideration bearing upon the point of contributory negligence, and it is quite probable that the jury did not give a sufficiently favorable construction to the evidence upon this question, in favor of the defendant. But this court does not sit to correct the mistakes of juries in weighing evidence."

It was held in *McRickard v. Flint* (1889) 114 N. Y. 226, 21 N. E. 153, that the failure of the defendant to comply with a statute requiring elevator wells to be guarded was prima facie evidence of negligence, and that the plaintiff, being in the building on business with one of the occupants, and walking through a door opening into an elevator shaft, by reason of which he fell and was injured, was not guilty of contributory negligence. In that case it appeared that the plaintiff went to the building to see one of the defendants on business, and entered at the easterly door, and, being informed that the defendant was not then there, but might be in the shipping department, which was adjacent and on the west of the building, went out of the westerly door onto the sidewalk, and thence to the place mentioned. Not finding the defendant there he proceeded to return to and into the building in which he first sought the defendant, and seeing a door partly open he entered there, believing it to be the main entrance, and stepped into the shaft. The court said: "If the plaintiff had stopped and looked about when he entered the door, he evidently could have seen the situation. . . . Because he failed to do this it is contended that he was necessarily chargeable with contributory negligence. The plaintiff probably did not stop after he proceeded to enter. . . . It was the duty of the plaintiff to exercise reasonable care, and to take observation of that which was apparent to view as he proceeded. But what is due care and diligence depends upon circumstances. The same precautionary

means requisite to relieve a party from the charge of negligence when he approaches known places of danger, or places where danger may be apprehended, may not be required of him when he has no occasion to suppose that danger may be encountered. It cannot be said that the plaintiff upon this occasion was required to apprehend that there might be an exposed elevator pit in the place where he entered. The fact that the door was partly opened enabled him to suppose it was a suitable place of entry. So that the question is whether not seeing it was necessarily negligence on his part. That is not so, unless he was required to stop and take careful observation of the place when he entered upon the threshold and before he proceeded to further enter the room. He says he looked, saw no hole, and one step took him into it. This question of contributory negligence may be considered in view of the influences which ordinarily control human action. That is to some extent governed by appearances, and is not always the consequence of failure to exercise the greatest prudence or to make use of the best judgment. Here the plaintiff in stepping into the room—the first step he took after his entry onto the threshold at a partially open door—received the injury from a cause which he had no apparent reason to expect, and which he failed to see until too late to avoid the calamity. And the fact that the difference in time between his entrance into the room and his fall was only momentary is a circumstance bearing upon his opportunity to see the danger, and probably may have had some consideration upon the question of contributory negligence. The conclusion of the jury that he was free from that imputation was permitted by the evidence."

It appeared in *Foren v. Rodick* (1897) 90 Me. 276, 38 Atl. 175, that the plaintiff desired to visit a physician whose office was on the second floor of a building. A sign bearing the physician's name was affixed to the outside of the building a few feet above the sidewalk, one end being

fastened to the casing on the right-hand side of the cellar door, and the other end to the casing on the left-hand side of the main entrance door. The two doors were 22½ inches apart. Supposing the entrance to the physician's offices to be the door on the left, the plaintiff entered without taking pains to see where she was stepping, and fell into the cellar. Affirming a verdict for the plaintiff, the court said: "Whether the plaintiff was in the exercise of due care and caution is a question involving more difficulty than that of the defendant's negligence. . . . The double doors of the main entrance were open, the street and sidewalk, and, to some extent, the landing at the entrance, were lighted by electric lights, and the cellar was well provided with windows. If she had observed the situation more attentively, and exercised greater caution, she undoubtedly might have discovered, on opening the cellar door, that there was no stairway there leading to the second floor, and that there was a cellarway, without stairs, below. In answer to the question by defendants' counsel, 'Did you take pains to know where you were stepping?' the plaintiff herself says, 'No, sir. If I had, I should not have gone down there.' In other words, if she had not felt satisfied that the door she opened led to the second floor, she would not have opened it; being so satisfied, she did not feel the necessity of further examination. She was confident that she would step onto the landing at the foot of the main stairway. Even if she had been upstairs before, she was not familiar with the premises or the approaches. She was not aware that the doors of the main entrance were usually open. She saw a door having the outward indication of a safe and regular entrance, opening directly from the sidewalk, with the doctor's sign on the casing apparently inviting her to enter. She turned the knob, and the door readily yielded 'about the same as any door.' She says it was dark when she opened the door. There was nothing to suggest a 'yawning abyss.' The existing condition was

not instantly manifest, but, suspecting no danger, she naturally stepped over the threshold simultaneously with the inward swing of the door. She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances. And while the question is not free from doubt, it is the opinion of the court, after carefully weighing all of the evidence, that there is a preponderance in support of the proposition that the plaintiff was not guilty of contributory negligence, but may fairly be deemed to have been in the exercise of ordinary care."

b. Effect of contributory negligence.

Where an injury results from the gross carelessness of a person in entering by mistake a strange doorway on business premises, his failure to take proper precautionary measures has been held to be contributory negligence. *Greenwell v. Washington Market Co.* (1892) 21 D. C. 298; *Gaffney v. Brown* (1890) 150 Mass. 479, 23 N. E. 233; *Hutchins v. Priestly Exp. Wagon & Sleigh Co.* (1886) 61 Mich. 252, 28 N. W. 85; *Donohue v. Braaf* (1907) 122 App. Div. 552, 107 N. Y. Supp. 377. Compare the cases set out in the preceding subdivision, in each of which the questions of negligence and contributory negligence were considered together.

Thus, in *Greenwell v. Washington Market Co.* (D. C.) *supra*, it appeared that the plaintiff, while in a public market, made inquiry as to the location of the toilet, and was directed by a person other than an employee or servant of the market to pass out through a door, but was given no direction where to go and no description of the place into which he was to go. It was held that his entering a small opening into a place that was dark, without any examination him-

self, or further inquiry in regard to the place he was desirous of visiting, which resulted in his falling into an elevator pit, was such gross negligence as to bar a recovery, irrespective of whether he was a licensee or an invitee. The court said: "There was no evidence in the case that there were any water-closets connected with this market, and no evidence that there was any water-closet in the vicinity of this place where the plaintiff fell. He was not directed to go there by any person connected with the defendant, or by any employee or servant of the market house company. It seems to us that the plaintiff was guilty of gross carelessness, according to his own statement, in going into this place where he did. It is an exceedingly unfortunate thing for him, but it would seem to be principally, at least, his own carelessness. He should not have gone or attempted to go into any place there under the circumstances which he states in his evidence. No prudent person would do so. It may be—indeed, for the purpose of passing upon this question, we assume—that the defendant was also guilty of carelessness. In reference to the plaintiff himself, as to whether he was a mere licensee or whether he had a right to go into the market house as a public place, and had a right to presume that the defendant would exercise the proper care as to protecting persons who might go there from falling into places of this character—assuming all that, yet, under the particular circumstances that the plaintiff in his own testimony develops, we think that it shows conclusively that he was guilty of gross negligence, but for which he would not have received this injury; or, at least, that it directly contributed to his receiving the injury. That being true, it is entirely proper that the court should instruct the jury to return a verdict for the defendant, and it is proper that we should sustain the motion to permit a verdict to be entered for the defendant."

So, in *Gaffney v. Brown* (1890) 150 Mass. 479, 23 N. E. 233, wherein

it appeared that the plaintiff, who had entered a public dining room by the usual door, to which she was accustomed, and who had dined at a table farther in the rear of the apartment than that at which she usually took her meals, opened a door in the side of the apartment for the purpose of retiring therefrom, which door was not in any way indicated as a mode of egress, and, without observing whither she was going, or paying any heed to her steps, walked directly over the threshold, and was thus precipitated down a flight of stairs leading to the cellar, to which the doorway directly led, her failure to investigate what lay behind the door was held to be contributory negligence. The court said: "While there was no sign indicating that this door was not to be used, and that no person was to enter or depart thereby, the plaintiff must have been aware that such an apartment would probably have doors leading to closets, or to upper or other apartments, or even to the cellar. She had been in the apartment before, and knew the usual egress therefrom. If she thought it possible that the door which she opened might lead to the hall or entry, and be intended as a mode of egress, it was certainly her duty to look where she was stepping before she advanced across the threshold. She had no right to act unreservedly upon the belief that the door would necessarily be locked unless intended for egress. According to common knowledge and experience, her conduct in this respect was careless."

Similarly, in *Hutchins v. Priestly Exp. Wagon & Sleigh Co.* (1886) 61 Mich. 252, 28 N. W. 85, wherein it appeared that the plaintiff, in attempting to leave a factory building, stepped down into a bed of shavings, supposing that that was the way out of doors, and was injured by a descending elevator, the court said: "The question is reduced to the simple inquiry whether he was negligent in stepping into the shaft, assuming, as he claims he did, that it was the outside door. He claims to have good sight and hearing. The time when

this occurred was in broad daylight, and the outer elevator door was open, so that he saw through it. The space between the doorway into the shaft and the outer one was the full width of the shaft, which was not a small one, being adapted to hoisting such lumber as was handled in the building. The top of the bed of shavings was about a foot below the doorway. When he entered the building, he entered directly by an ordinary door in the wall, and not through any such passage. No man with his wits about him could have mistaken these double doorways, divided by such a space, for an ordinary outside door, or have imagined such a pit to have been the way of exit. Whatever might have been the case in darkness, it could not be difficult to understand it in daylight. Plaintiff saw his horses through the opening, and if he had paid the slightest heed could not have failed to see what was between."

In *Donohue v. Braaf* (1907) 122 App. Div. 552, 107 N. Y. Supp. 377, the plaintiff's intestate, while being conducted out of a saloon by an employee of the defendant, opened a door other than that shown him by the employee as the exit, and fell down an elevator shaft. It appeared that both doors were plainly visible, and that, as he approached the elevator door and put his hand on it, the employee shouted: "Don't go out that way." The plaintiff's intestate, however, in some way, opened the elevator door, stepped into the elevator shaft, fell to the bottom, and was killed. An examination of this door disclosed that, although there was a hasp so constructed that if the hasp caught the door could be opened only from the inside of the elevator shaft, for some reason the hasp had not caught, and the door could be opened from the outside by pushing it to one side. The court submitted the question as to the defendant's negligence and the freedom of the deceased from contributory negligence to the jury, who found a verdict for the plaintiff. A new trial was ordered, the court saying: "I do not think there was evidence of the defendant's negligence.

The door was not open. There was not such an absence of light that a person walking through this room could not see the situation. There was no invitation by the defendant to open the door and walk into the elevator shaft, and, as the elevator shaft was lighted, as soon as the door had been opened the fact that this was not a means of exit to the street must have been apparent. The defendant could not have anticipated that a person walking through this room would open this elevator door and walk into the elevator shaft, which was lighted and the danger of which was apparent. But, whatever may be said as to the defendant's negligence, it is clear that the deceased was guilty of contributory negligence. He approached a door which had the appearance of being the door of an elevator, through which there was a light shining, opened the door with his head turned over his shoulder, so that he could not see where he was going, and stepped into a lighted elevator shaft without looking. The slightest attention to the door before he attempted to open it, or looking after he opened the door, and before he stepped in, would have apprised him of the situation and prevented the accident. Certainly nothing in the situation prevented the deceased from seeing where he was going, or distracted his attention in such a way as to excuse him from looking. If the deceased had shown the slightest care in examining the door he was about to enter, either before or after he had opened it, or had waited until he could have heard the warning of the barkeeper who was following him, the accident would have been avoided. The evidence of the witnesses for the plaintiff and defendant was that there was plenty of light to see the two doors, and certainly, under such circumstances, a person was not justified in opening a door and walking through it without taking the slightest care to see what was on the other side."

II. Guest in hotel.

It appeared in *Hayward v. Merrill*

(1880) 94 Ill. 349, 34 Am. Rep. 229, that the plaintiff was a guest at a hotel kept by the defendant. Adjoining the room assigned to him was a door, nearly or exactly like his room door, and only 2½ feet distant, that opened into an elevator opening. Gas was burning in the hall, but not very brightly. The rooms on either side of the hall were numbered with white figures about 1 inch in length, and could no doubt be read by the light in the hall by anyone intent on observing them. The plaintiff's room was numbered "38," and the door to the elevator opening was numbered "40." The doors had the same trimmings, and the knobs on them were exactly alike. Both doors had locks and keys, but neither of them seems to have been locked on the night of the accident. The plaintiff, having recently been a guest at the hotel, occupying room "38" which was now again assigned to him, and believing that he could find the room without assistance, discharged the bell boy, and proceeded, as he supposed, to room "38," being the last room on the left side of the hall, but by mistake opened door numbered "40," and, on stepping in to light a match, fell to the basement through the "elevator" opening, sustaining severe injuries. Affirming a recovery by the plaintiff, the court said: "That which caused the injury to plaintiff was a dangerous opening, and, if we accept as proven that which the testimony tends to establish, it was certainly not sufficiently protected. It was known to defendant to be dangerous, for one of the employees of the hotel had fallen there, and been injured in the same way, and the conclusion is fully warranted that the omission to better secure it was gross carelessness. Conceding that plaintiff was guilty of a want of some degree of care, still it was slight in comparison with the negligence of defendant, which we are, on authority from the findings of the lower courts, to believe was gross, in permitting the continued existence of such an opening in his house after it was known to him to be dangerous both to employees and guests. The

proprietor of a hotel, to which he invites the public to come that he may make gains thereby, has no right to permit the existence of such an opening as this one was, unless suitably guarded that the slightest mistake on the part of the guest might not prove fatal. Had plaintiff been intent on observing the number on the room door he might have discovered the room he wished to enter, but by the merest accident he opened the next door, and this slight inattention was the cause of his severe injuries. The opening ought to have been better protected than it was, and the omission to do so, under the circumstances proven, may well be attributed to defendant as gross negligence."

In *Mauzy v. Kinzel* (1886) 19 Ill. App. 571, it appeared that the plaintiff, a guest in the defendant's hotel, while searching in the darkness for the water-closet, found an opening to an elevator not under the defendant's control, and, mistaking it for the door leading to the water-closet, stepped into the opening, and fell down the elevator shaft, receiving severe injuries. It was held, following *Hayward v. Merrill* (Ill.) *supra*, that the defendant was liable, the court saying: "It was conceded that the defendant had the use and control of the hall on which the plaintiff's room opened, and from which the short hall on which the elevator shaft was situated led off. Granting that defendant had no control of the elevator shaft, or the small hall leading to it, it was his duty to have maintained a door or barrier at the entrance from the main hall to the small hall which led to the dangerous aperture. To leave the approach from his hall to another which conducted his guest to a pitfall, open and unguarded, was such negligence as would make him liable, in our opinion, and that he had no actual control of the small hall and the shaft itself would not relieve him. When the conditions are permitted to be such, in a hotel, that from slight want of attention, or from the confusion or misapprehension that naturally attends a stranger in feeling his way through a dark hall, one may be led up, without meeting door or barrier, to a well-

hole into which a plunge is taken, it may be to death, the hotel keeper cannot escape the charge of negligence on the plea that he had no right to close up the wellhole itself. He might bar or close up the entrance to a small hall, and thus prevent guests of his house, who were unacquainted with the location and the limits of his possession and control in the halls, from entering the passage, to tread which in the darkness was dangerous."

III. Passenger.

Where there is an open doorway leading to a place of danger on a passenger boat, it may be the duty of the carrier to keep it lighted so as to warn a passenger of his danger should he attempt to pass through. Thus, in *The Pilot Boy* (1885) 23 Fed. 103, 7 Am. Neg. Cas. 649, it appeared that the libellant was a passenger on an excursion boat on which there was an open doorway from which stairs descended to the hold, so located that it was likely to be mistaken for the stairs which ascended to the upper deck. The libellant, believing that the stairs ascended, passed through the doorway leading to the hold and fell. It also appeared that the door was fastened open and the doorway insufficiently lighted. Holding the passenger to be entitled to recover, the court said: "With respect to a boat used for night excursions, and particularly one which has a bar on board, and is intended for more or less merrymaking, the rules of law governing carriers of passengers should not be relaxed, and they should be required to guard against the natural and general ignorance and mistakes of those they invite as passengers. In this case, as the neglect for which I pronounce the steamboat in fault is not one of gross or wilful negligence, the recovery should be strictly confined to a reasonable compensation."

So, a carrier has been held to be liable for an injury resulting from the deceptive similarity of two doorways on its premises which were in close proximity to each other, one of which the person injured was invited

to use, and the other of which he entered by mistake. *View v. Metropolitan West Side Elev. R. Co.* (1911) 166 Ill. App. 154. In that case it appeared that the plaintiff was a passenger on one of the defendant's elevated trains, and undertook to make use of a toilet room maintained by the defendant on the ground floor of a station. The toilet room in question was about 3 feet from the passageway, and between the passageway and the toilet room there was another door opening into a steep stairway leading to the basement. The two doors were entirely similar in appearance, except that the toilet-room door had the word "Men" on it, and a door check or spring near its top, the knobs of the two doors being only about 12 inches apart. The declaration charged, in substance, that by reason of the similarity and the proximity of the door opening into the basement to the door opening into the toilet room, persons desiring to enter the toilet room were liable to enter by mistake the door opening into the basement, and that the defendant was guilty of negligence in permitting the basement door to remain unfastened and unlocked, and that by reason thereof the plaintiff was injured. Affirming a recovery the court said: "This injury occurred on the inside of a passenger station, a place where a person ordinarily has no reason to expect danger, or to anticipate that a very high degree of watchfulness is required on his part to discover and avoid danger. The appearances were that it was a place of rest and refreshment for passengers while waiting for, or retiring from, trains, and without hidden dangers of any character. There was no sign or designation of any kind on the basement door to warn or acquaint the public with the fact that there was a basement there, and the only way to learn such fact was either by opening the basement door, or specially inquiring as to what use was made of the door. It is true that the toilet door had on it in good-sized letters the word 'Men.' This was a sufficient designation for all ordinary persons to understand

that behind that door there was a toilet for men; but the two doors being in such close proximity, with the knobs only 10 or 12 inches apart, it was not entirely unreasonable for one looking at the doors so similar in appearance to conclude that they were both doors to the toilet. The very place they occupied and the general appearance would lend weight to this conclusion. The appearance, position, and surroundings of the doors were such also as to make it very probable that persons might by mistake open the wrong door. As appellee had no knowledge of it at all, there is little ground for saying that he ought to have been on the lookout for such a danger, or any danger at all, in that part of the building. . . . The basement door of appellant not being marked in any way, so as to disclose the danger behind it, it was very necessary to keep it locked, or otherwise secured, so that it could not be easily opened by patrons of the place, and we think the jury were warranted, under the evidence, in finding the appellant guilty of negligence in failing to so lock or secure it. The question of the contributory negligence of appellee was also a question of fact for the jury under the evidence, and we do not think that finding is manifestly against the weight of the evidence." The court further distinguished the case at bar from those cases holding to be negligent a plaintiff who fails to ascertain the nature of the passageway beyond the door, saying: "This is one of the instances in which knowledge of where the toilet was did not aid him in apprehending the danger. If he had had no knowledge at all as to what either door led to, he would have been very much less excusable for putting himself hastily through this door. The similarity and position of the doors, and his knowledge that there was a toilet there, and his lack of knowledge of the existence of the basement or any other danger, are the exact apparent reasons why this injury did so occur. Had he been entirely uninformed as to what either door led to, and had the stairway been dark,

these facts would furnish strong reasons and incentives for caution and investigation before entering into the door. As is said, in substance, in several cases cited by appellant: "There is no presumption that a person can walk through any door he comes to in a strange house without taking proper precautionary measures." In the case at bar, appellee knew where the toilet was, and had no knowledge or notice of danger at all, actual or constructive, had no occasion to look for a name on the door, knew nothing of the existence of two doors, and, relying on his knowledge, went hastily through the door and fell down the steps. This presents quite a different question to the one in the foregoing cases, in which the injuries were shown to have occurred in apartment houses or hotels, wherein cellars and cellar doors and elevator shafts may be expected to be found."

It has been held, however, that actionable negligence is not shown where it appears that the doorway through which the injured person entered by mistake, and the doorway he intended to enter, were both plainly marked, and the injury resulted from his failure to investigate what lay beyond the door. *McNaughton v. Illinois C. R. Co.* (1907) 136 Iowa, 177, 113 N. W. 844; *Toomey v. London, B. & S. C. R. Co.* (1857) 3 C. B. N. S. 146, 140 Eng. Reprint, 694, 27 L. J. C. P. N. S. 39, 6 Week. Rep. 44.

It appeared in *McNaughton v. Illinois C. R. Co.* (Iowa) supra, that a woman entered the waiting room of the defendant and immediately opened a door, supposing it to be the toilet room, stepped through, and fell to the bottom of a stairway. The doorway through which she entered was plainly marked "Basement," although it was obscured by the people gathered about it, and the door leading to the toilet was also plainly marked, although somewhat obscured from view by its location. It was contended that the company was bound to anticipate that persons unfamiliar with the premises, or in a hurry, as they are likely to be in taking a train, might unwittingly enter the basement

door, as the plaintiff did, under the erroneous supposition that it was a toilet room or the exit to some other apartment, and therefore that, in the exercise of due care, the door should have been kept locked. Affirming the direction of a verdict for the defendant, the court said: "In the maintenance of its station, ordinary care only was exacted of defendant. . . . And as the public is invited to the premises, this requires that they be kept free from traps and pitfalls such as are likely to cause injury to those having business with the company or persons attending them. . . . But it can hardly be said that a closed door to the stairway down to a basement, with door knob and catch, constitutes a trap or pitfall. Every precaution had been taken, save that of locking it, against its improper use. The heating apparatus was located in the basement, access to which was by this stairway, and leaving the door used by the employees fastened so as to open only upon turning the knob, though unlocked, especially in daylight, when anyone, upon opening it, could plainly see the stairway, was not a negligent act. The company was not bound to anticipate that passengers will assume that every door from the room opens into a toilet, or that without the ordinary use of their senses they will precipitately open the doors therefrom, and enter without thought as to where they lead. From such rooms usually there are several doors, and no one has the right to act unreservedly upon the belief that any door would be locked unless intended for some particular purpose. The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment, and a way up or down stairs, or to a baggage room, or to a closet; and no one has the right to assume, without knowledge or its equivalent, the character of the place to which it affords access. The door was maintained in a way convenient for the employees in caring for the furnace, and not dangerous to the public."

A similar situation was presented

in *Toomey v. London, B. & S. C. R. Co.* (Eng.) supra, wherein it appeared that the plaintiff, while waiting for a train, inquired of a person not a servant or employer of the defendant where he could find a urinal, and was directed to go to the right. He did so, and found two doors, on one of which was painted the words "For Gentlemen," and on the other "Lamp Room." Being in a hurry, and unable to read, he opened the wrong door, and fell down some steps. In delivering the opinion of the court, Williams, J., said: "All that appeared was that the plaintiff inquired of a stranger the way to the urinal, and being told to go in a particular direction, where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury." And Willes, J., added: "There was nothing to show that the door and the steps beyond were more than ordinarily dangerous, and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless people to meet with injury."

Likewise, it has been held that a railroad company is not liable, as a matter of law, for any injury resulting to a passenger in a station from opening a strange door, unlike the waiting-room and baggage-room doors, in broad daylight, and falling down a stairway, where the slightest exercise of the sense of sight would

have apprised him of the danger before he could have fallen. *Speck v. Northern P. R. Co.* (1909) 108 Minn. 435, 24 L.R.A.(N.S.) 249, 122 N. W. 497, 17 Ann. Cas. 460, wherein the court said: "Plaintiff's wife, who for present purposes will be assumed to have been within the rights of a passenger, stood talking to a companion for a time at this door, with her suit case in her hand and with her other hand upon the latch of the single door, turned, and, without making any investigation as to where the door led to, opened it, walked into the opening, lost her balance, fell to the bottom of the basement, and was injured. . . . On this occasion she had gone by the unmistakable baggage-room door, and approached the doors to the waiting room, which were equally well marked. No circumstances distracted her attention or caused haste. She stopped at the door in question, which was plainly differentiated in appearance from the door of the waiting room into which she intended to go, and bore no sign. The threshold of that door was a stone step above the level of the pavement on which she was standing. She opened the door by raising the latch. In broad daylight, without looking ahead, she fell into the open stairway. She failed to note that the door was not marked as a place for women or men, and to observe that the door did not resemble the doors marked as the places where passengers were to go in or to go out of the depot, through one of which she herself had previously passed into and out of the depot. She then walked ahead through the door without looking where she was going, at a time and place where the most casual observation would have revealed to her the open space above the stairway. The slightest exercise of the sense of sight would have apprised her of the danger before she could have fallen. Under these circumstances, defendant, as a matter of law, was not liable in damages."

A. S. M.

COLUMBIAN INSURANCE COMPANY OF INDIANA, Plff. in Err.,
v.
MODERN LAUNDRY.

United States Circuit Court of Appeals, Eighth Circuit — December 21, 1921.

(277 Fed. 355.)

Insurance — false statement of loss — avoidance of policy.

1. A voluntary overvaluation of the loss avoids a fire insurance policy providing that it shall be void if the insured make any attempt to defraud the insurer either before or after loss, although, because of examination of the salvage after the fire by agents of the insurer, it could not have been deceived by the overvaluation.

[See note on this question beginning on page 1164.]

—implication of intent to deceive.

2. When an insured wilfully and knowingly makes a false statement of or regarding a material fact in his proofs of loss or in his testimony re-

garding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as a natural consequence of such act.

ERROR to the District Court of the United States for the District of Minnesota (Morris, Dist. J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Sanborn and Stone, Circuit Judges, and Trieber, District Judge.

Mr. Nathan H. Chase, for plaintiff in error:

The trial court erred in its instructions to the jury in its interpretation of the law applicable to defendant's defense of "attempt to defraud."

Claffin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; Fidelity & C. Co. v. Bank of Timmonsville, 71 C. C. A. 299, 189 Fed. 101; National Bank v. Kershaw Oil Mill, 120 C. C. A. 362, 202 Fed. 90; Mutual L. Ins. Co. v. Hurni Packing Co. 171 C. C. A. 405, 260 Fed. 641; Meyer v. Home Ins. Co. 127 Wis. 293, 106 N. W. 1087; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 56, 71 N. W. 69; Dolloff v. German-American Ins. Co. 82 Me. 267, 17 Am. St. Rep. 482, 19 Atl. 396; Linscott v. Orient Ins. Co. 88 Me. 497, 51 Am. St. Rep. 435, 34 Atl. 405; Rovinsky v. Northern Assur. Co. 100 Me. 112, 60 Atl. 1025; Pottle v. Liverpool & L. & G. Ins. Co. 108 Me. 401, 81 Atl. 481; Fowler v. Phoenix Ins. Co. 35 Or. 559, 57 Pac. 421; Willis v. Horticultural Fire Relief, 69 Or. 293, 137 Pac. 761, Ann. Cas. 1916A, 449; Dumas v. Northwest-

ern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; Knop v. National F. Ins. Co. 101 Mich. 359, 59 N. W. 653; Follett v. Standard F. Ins. Co. 77 N. H. 457, 92 Atl. 956; Virginia F. & M. Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754; Vaughan v. Virginia F. & M. Ins. Co. 102 Va. 541, 46 S. E. 692; Hansen v. American Ins. Co. 57 Iowa, 741, 11 N. W. 670; Hodge v. Franklin Ins. Co. 111 Minn. 321, 126 N. W. 1098; Hamberg v. St. Paul F. & M. Ins. Co. 68 Minn. 335, 71 N. W. 388.

Messrs. M. H. Boutelle, A. H. David, and Le Roy Bowen, for defendant in error:

The instructions of the trial court correctly stated the law applicable to the facts in evidence.

1 Clement, Ins. p. 275; 7 Cooley, Briefs on Ins. § 2416; Alfred Hiller Co. v. Insurance Co. of N. A. 125 La. 988, 32 L.R.A.(N.S.) 453, 52 So. 104; Insurance Cos. v. Weide (Republic F. Ins. Co. v. Weide) 14 Wall. 375, 20 L. ed. 894; United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961; Maher v. Hibernia Ins. Co. 67 N. Y. 283; Shaw v. Scottish Commercial Ins. Co. 1 Fed. 761; Mack v. Lancashire Ins. Co. 2 McCrary, 211, 4 Fed. 59; Spring Garden Ins. Co. v.

Amusement Syndicate Co. 102 C. C. A. 29, 178 Fed. 519; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. 31 Fed. 200; Hodge v. Franklin Ins. Co. 111 Minn. 321, 126 N. W. 1098; Hamberg v. St. Paul F. & M. Ins. Co. 68 Minn. 335, 71 N. W. 388; National F. Ins. Co. v. Itasca Lumber Co. 148 Minn. 170, 181 N. W. 337; 4 Joyce, Ins. § 3339; 2 Wood, Ins. § 477; 13 Am. & Eng. Enc. Law, 2d ed. 342; 14 R. C. L. 1343; Rohrbach v. Aetna Ins. Co. 62 N. Y. 613; Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; Farmers Mut. F. Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 954; German Ins. Co. v. Lockett, 12 Tex. Civ. App. 139, 34 S. W. 173; Westchester F. Ins. Co. v. Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876; 2 May, Ins. 3d ed. p. 477, 1104; Clafin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507.

Sanborn, Circuit Judge, delivered the opinion of the court:

The plaintiff in error questions the correctness of a portion of the charge of the court to the jury in a trial of an action by the plaintiff, Modern Laundry, Incorporated, against the Columbian Insurance Company of Indiana, a corporation, to recover \$10,000 on a policy of insurance against fire for that amount issued to the plaintiff by the defendant on December 16, 1919. The property insured consisted of motors, belts, pulleys, and shafting, tables, chairs, typewriters, stationery, books of account, soaps, cleaning compounds, tools, and implements, and other articles customarily used in the conduct of a laundry. On January 29, 1920, a fire occurred which destroyed a part and injured other parts of the articles insured. On March 23, 1920, the president and secretary of the laundry company made oath to the correctness and truth of schedules of the value of the articles insured, and of the loss and damage on account of the fire thereto, and served these schedules and their affidavit to the correctness thereof upon the insurance company as a preliminary proof of loss. This verified notice of loss stated the value of the articles insured at the time of the fire to have

been \$20,131.20, and the damage and loss by the fire thereto to have been \$12,100. Upon this verified notice the plaintiff demanded the payment by the insurance company of \$10,000. The company refused to pay this amount. Thereupon the laundry company sued upon the policy; the insurance company in its answer denied that the property insured was of any such value as that stated in the verified statement of loss, denied that there had been any such loss or damage thereto caused by the fire as was stated therein, alleged that the policy of insurance provided that it should be void if the insured should make any attempt to defraud the insurer either before or after the loss, and that the laundry company, after the fire, had made such an attempt, in that it had knowingly and wilfully greatly overvalued the property insured, and the amount of the loss and damage, in its sworn notice of loss. These issues were tried to a jury, which found the loss to the laundry company, plus the interest on the amount of that loss from June 3, 1920, to December 6, 1920, to have been \$7,210, while the laundry company's verified notice made that loss \$12,100.

There was substantial evidence at the trial that the defendant in error, in its verified notice of the value of the insured property and of the loss and damage, knowingly and wilfully greatly overvalued that property, and greatly overstated the damage and loss thereto from the fire, although there was also evidence to the contrary. Evidence was introduced at the trial that before the verified statement was made the insurance company had sent men to the scene of the fire from time to time, and that they had been through a portion, but not all, of the laundry building, and that the adjuster of the insurance company had been through the entire building and had examined every piece of machinery.

In this state of the proof the court charged the jury that if they

believed from the evidence that the laundry company, by its officers, in the verified statement of loss, knowingly and intentionally made oath to substantial overvaluations of the insured property, or to substantial overstatements of the amount of the loss or damage by the fire, with intent to deceive the insurance company, that would constitute an attempt to defraud the company, and they should return a verdict for the defendant, unless they further found from the evidence that, before the verified notice was served on the insurance company, the latter had investigated and learned the actual value of and the real loss and damage to the insured property, or had had full opportunity so to do, so that the verified statement could not deceive it, but that in case they should find that, before the verified notice was delivered to the insurer, it had investigated and learned the true value of the property and the actual amount of the loss and damage to it from the fire, or had had full opportunity so to do, so that the verified notice could not deceive it, the facts that the laundry company, in that notice had, by its officers, with intent to deceive and defraud the insurance company, knowingly and wilfully falsely sworn that substantial overvaluations of the property were the actual values thereof, and that greatly excessive statements of the loss and damage to the property from the fire were the actual loss and damage, did not constitute an attempt to defraud, or any defense to this action under the contract in the policy that "the policy shall be void if the insured has made any attempt to defraud the company, either before or after the loss."

To this charge the insurance company excepted; and it insists that it was erroneous, because the service of the verified intentionally false statement of overvaluation and of the excessive amount of the loss and damage as clearly constituted, under the terms of this contract just quoted, an attempt to defraud, if it

did not and could not deceive the insurance company, as if it could have done so and had done so, and that it has clearly constituted an attempt to defraud if that attempt failed to defraud, as it would have done if it had succeeded.

Counsel for the assured met this contention with this argument: Proof of the avoidance of an insurance policy, under a contract therein that it shall be void if the insured attempts to defraud the insurance company, consists of the same indispensable elements as does proof of the avoidance of a policy under a contract that it shall be void if the insured is guilty of fraud or false swearing in his proof of loss or other evidence relating to the value of the insured property, or the loss of or damage thereto by the fire; proof of the deceit of the insurer and substantial injury to it by the fraud or false swearing is indispensable to an avoidance of the policy, under the contract that it shall be void for such fraud or false swearing, and the impossibility of such deceit is fatal to the attempt to avoid such a policy for fraud and false swearing; therefore the impossibility of the deceit of the insurer in this case by the knowingly and intentionally false overvaluations of the insured property, and the knowingly false statements of greatly excessive loss and damage by the fire, was fatal to the defense that this policy was avoided in this case by the laundry company's attempt to defraud the insurer.

To sustain this argument and its conclusions, counsel for the assured have cited some authorities which fairly support them: *Shaw v. Scottish Commercial Ins. Co.* (C. C.) 1 Fed. 761, 763; *Rohrbach v. Aetna Ins. Co.* 62 N. Y. 613; *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *German Ins. Co. v. Lockett*, 12 Tex. Civ. App. 139, 34 S. W. 173,—although the three cases last cited rest on the fact that the agent of the insurer knew the facts misrepresented when he took the policy. They have also cited

many authorities which do not directly rule the questions of law here presented, but which they claim tend to sustain their argument. On the other hand, counsel for the insurer have cited authorities which directly sustain a conclusion diametrically opposite to that which counsel for the assured deduce from their argument, and other authorities which do not directly rule the questions here under consideration, but which they claim tend to sustain the position they take. The authorities thus cited are too numerous to review in detail. The opinions of the courts to which counsel have referred and the briefs of counsel have been read, and these and the arguments at the hearing have received deliberate consideration, with the result that the more persuasive reasons and the weight of authority in the opinion of the court sustain, and it has reached, these conclusions:

The provision of the policy "that the policy shall be void if the insured has made any attempt to defraud the company, either before or after the loss," was a plain, unambiguous contract, binding upon each of the parties to it. That agreement was not that if the insured, before or after the loss, made any attempt to defraud the company, except in instances in which such an attempt could not and did not deceive the insurer, and, except in instances in which such attempt was unsuccessful, the policy should be void. No such exception is expressed or indicated by the clear and comprehensive terms of the agreement, or by the situation or circumstances of the parties when they made it. In

**Insurance—
false statement
of loss—avoid-
ance of policy.**

such a state of the facts, courts may not lawfully conceive and ingraft upon the contract such exceptions. The fact that the parties did not set them out in their written contract is conclusive that their minds never met upon them and they never intended to make them.

Proof of the avoidance of a policy, under a contract that it shall be void if the insured attempts to defraud the insurer, does not consist of the same indispensable elements as does proof of its avoidance under a contract that the policy shall be void if the insured is guilty of fraud or false swearing in its proof of loss, or other testimony as to the value of or damage or loss to the insured property.

Neither the deceit of the insurer, nor the possibility of such deceit by the attempt to defraud, is indispensable to plenary proof of avoidance of a policy by such an attempt under the contract here under consideration. An attempt is "an endeavor to do an act carried beyond mere preparation, but . . . short of execution." *People v. Moran*, 123 N. Y. 254, 10 L.R.A. 109, 20 Am. St. Rep. 732, 25 N. E. 412. And an attempt to defraud is not necessarily a fraud. The attempt may fail, and then the fraud is not perpetrated; it never exists, and the real object and purpose of the contract here under consideration was to protect the insurer against such futile attempts. Deceit and injury to the person deceived thereby are in some cases indispensable to proof of actionable fraud, but neither of them is indispensable to proof of an attempt to defraud. *Clafin v. Commonwealth Ins. Co.* 110 U. S. 81, 83, 84, 28 L. ed. 76, 80, 81, 3 Sup. Ct. Rep. 507; *Follett v. Standard F. Ins. Co.* 77 N. H. 457, 92 Atl. 957; *Sleeper v. New Hampshire F. Ins. Co.* 56 N. H. 401, 407, 408; *Dolloff v. Phoenix Ins. Co.* 82 Me. 267, 17 Am. St. Rep. 482, 19 Atl. 396; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.)* 31 Fed. 200, 206; *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754; *Vaughan v. Virginia F. & M. Ins. Co.* 102 Va. 541, 46 S. E. 692.

In *Clafin v. Commonwealth Ins. Co.*, just cited, the contract was: "All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under this policy."

The insurance company, pursuant to a provision of the policy, required the insured to submit to an examination under oath. In that examination he testified falsely as to the manner in which he paid his vendor for the insured property which he purchased. He did this without any intention to deceive or defraud the insurance company, for the purpose of making his testimony consistent with a statement he had made to R. G. Dun & Company in order to enable him to obtain credit. The supreme court, in delivering the opinion in the case, said, among other things: "A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. . . . No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and wilfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed." 110 U. S. 95.

It is further declared, speaking of the contract of avoidance of the policy: "By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing, which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance." 110 U. S. 97.

In *Follett v. Standard F. Ins. Co.* 77 N. H. 457, 92 Atl. 956, the supreme court of New Hampshire held that "false swearing to a state-

ment of loss furnished to the insurer was plainly an attempt to defraud; it was an act done in part execution of what, if carried to a successful issue, would be a completed fraud," and that false swearing by the insured to an overvaluation at the trial, when the insurer presumably was informed of the truth and could not be deceived by the false oath, was an "attempt to defraud the company . . . after the loss."

In *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754, the actual loss was \$2,000, and the policy only \$1,500; but the supreme court of Virginia held that wilfully false statements of a greater loss than the actual loss constituted an attempt to defraud, which avoided the policy, although they could not have deceived the insurance company to its injury.

In view of the conclusions at which we have arrived, there is no logical way of escape from the result that the court below was in error in charging the jury that, if the insurer knew the actual value of the insured property, and the amount of the loss and damage thereto by the fire, or had had full opportunity to know it, so that it could not be deceived by the verified overvaluations and statements of excessive amounts of loss made by the insured, the service of that notice did not constitute an attempt to defraud, although it contained knowingly and wilfully false excessive statements of the value of the property and of the loss and damage caused by the fire.

As this case must be tried again, attention is called to the rule that, where the insured knowingly and wilfully makes a false statement of or regarding a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as the natural conse-

implication of
intent to
deceive.

quence of such act. *Claffin v. Commonwealth Ins. Co.* 110 U. S. 81, 95, 28 L. ed. 76, 82, 3 Sup. Ct. Rep. 507; *Fidelity & C. Co. v. Bank of Timmonsville*, 71 C. C. A. 299, 139 Fed. 103; *Mutual L. Ins. Co. v.*

Hurni Packing Co. 171 C. C. A. 405, 260 Fed. 646.

Let the judgment below be reversed, and let this case be remanded to the court below, with directions to grant a new trial.

ANNOTATION.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy.

I. General rules:

- a. Overvaluation made through mistake or inadvertence, 1164.
- b. Overvaluation made knowingly and intentionally, 1168.
- c. Fraudulent intent as question for jury, 1172.

II. Illustrations:

- a. Overvaluation held fraudulent, 1175.
- b. Overvaluation held not fraudulent, 1176.

I. General rules.

a. Overvaluation made through mistake or inadvertence.

It is well settled that where an insured person, in making proof of loss by fire, overestimates through mistake or inadvertence, the value of the property destroyed, the overvaluation does not amount to fraud sufficient to avoid the policy.

United States. — *Howell v. Hartford F. Ins. Co.* (1874) Fed. Cas. No. 6,780; *Huchberger v. Merchants' F. Ins. Co.* (1868) 4 Biss. 265, Fed. Cas. No. 6,822; *Huchberger v. Providence Washington Ins. Co.* (1869) Fed. Cas. No. 6,823, affirmed in (1871) 12 Wall. 164, 20 L. ed. 364; *Wiede v. Insurance Co. of N. A.* (1871) Fed. Cas. No. 17,617; *Sibley v. St. Paul F. & M. Ins. Co.* (1878) 9 Biss. 31, Fed. Cas. No. 12,830; *Mack & Co. v. Lancashire Ins. Co.* (1880) 2 McCrary, 211, 4 Fed. 59; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (1887) 31 Fed. 200; *Spring Garden Ins. Co. v. Amusement Syndicate Co.* (1910) 102 C. C. A. 29, 178 Fed. 519; **COLUMBIA INS. Co. v. MODERN LAUNDRY** (reported herewith) ante, 1159. See also *Insurance Cos. v. Weide* (Republic F. Ins. Co.

v. Weide) (1872) 14 Wall. 375, 20 L. ed. 874; *Putnam v. Commonwealth Ins. Co.* (1880) 18 Blatchf. 368, 4 Fed. 753; *Miller v. Alliance Ins. Co.* (1881) 19 Blatchf. 308, 7 Fed. 649. **Alabama.** — *Tubb v. Liverpool & L. & G. Ins. Co.* (1894) 106 Ala. 651, 17 So. 615.

Arkansas. — *American Cent. Ins. Co. v. Ware* (1898) 65 Ark. 336, 46 S. W. 129; *German-American Ins. Co. v. Brown* (1905) 75 Ark. 251, 87 S. W. 135.

California. — *Helbing v. Svea Ins. Co.* (1880) 54 Cal. 156, 35 Am. Rep. 72.

Illinois. — *Commercial Ins. Co. v. Friedlander* (1895) 156 Ill. 595, 41 N. E. 183. See also *St. Onge v. Hartford F. Ins. Co.* (1917) 204 Ill. App. 127; *Rockford Ins. Co. v. Nelson* (1874) 75 Ill. 548.

Indiana. — *Franklin Ins. Co. v. Culver* (1855) 6 Ind. 137.

Iowa. — *Stone v. Hawkeye Ins. Co.* (1886) 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; *Erb v. German-American Ins. Co.* (1896) 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; *Goldstein v. St. Paul F. & M. Ins. Co.* (1904) 124 Iowa, 143, 99 N. W. 696; *Helm v. Anchor F. Ins. Co.* (1906) 132 Iowa, 177, 109 N. W. 605.

Kentucky. — *Western Assur. Co. v. Ray* (1899) 105 Ky. 523, 49 S. W. 326; *Connecticut F. Ins. Co. v. Union Mercantile Co.* (1914) 161 Ky. 718, 171 S. W. 407.

Louisiana. — *Daul v. Firemen's Ins. Co.* (1883) 35 La. Ann. 98; *Erman v. Sun Mut. Ins. Co.* (1883) 35 La. Ann. 1095; *Dunn v. Springfield F. & M. Ins. Co.* (1902) 109 La. 520, 33 So. 585. See also *Marchesseau v. Merchants' Ins. Co.* (1842) 1 Rob. 438;

Rafel v. Nashville M. & F. Ins. Co. (1852) 7 La. Ann. 244.

Maine. — Moore v. Protection Ins. Co. (1848) 29 Me. 97, 48 Am. Dec. 514; Williams v. Phoenix F. Ins. Co. (1871) 61 Me. 67; Hanscom v. Home Ins. Co. (1897) 90 Me. 333, 38 Atl. 324; Hilton v. Phoenix Assur. Co. (1898) 92 Me. 272, 42 Atl. 412; Archibald v. Granite State F. Ins. Co. (1918) 117 Me. 205, 103 Atl. 162.

Massachusetts. — Towne v. Springfield F. & M. Ins. Co. (1888) 145 Mass. 582, 15 N. E. 112.

Michigan. — See Johnston v. Farmers' F. Ins. Co. (1895) 106 Mich. 96, 64 N. W. 5.

Minnesota. — Hamberg v. St. Paul F. & M. Ins. Co. (1897) 68 Minn. 335, 71 N. W. 388; Hodge v. Franklin Ins. Co. (1910) 111 Minn. 321, 126 N. W. 1098.

Missouri. — Walker v. Phoenix Ins. Co. (1895) 62 Mo. App. 209.

Nebraska. — Citizens' Ins. Co. v. Herpolsheimer (1906) 77 Neb. 232, 109 N. W. 160.

Nevada. — Gerhauser v. North British & M. Ins. Co. (1870) 6 Nev. 15.

New Hampshire. — Compare Leach v. Republic F. Ins. Co. (1878) 58 N. H. 245.

New Jersey. — Carson v. Jersey City Ins. Co. (1881) 43 N. J. L. 300, 39 Am. Rep. 584, affirmed in (1882) 44 N. J. L. 210; Jersey City Ins. Co. v. Nichol (1882) 35 N. J. Eq. 291, 40 Am. Rep. 625.

New York. — Hickman v. Long Island Ins. Co. (1847) 1 Edm. Sel. Cas. 374; Unger v. People's F. Ins. Co. (1871) 4 Daly, 96; Gibbs v. Continental Ins. Co. (1878) 13 Hun, 611; O'Brien v. Prescott Ins. Co. (1890) 32 N. Y. S. R. 579, 11 N. Y. Supp. 125, reversed on other grounds in (1892) 134 N. Y. 28, 31 N. E. 265; Cheever v. Scottish Union & Nat. Ins. Co. (1903) 86 App. Div. 328, 83 N. Y. Supp. 730, affirmed without opinion in (1905) 180 N. Y. 551, 73 N. E. 1121; Nugent v. Rensselaer County Mut. F. Ins. Co. (1905) 106 App. Div. 308, 94 N. Y. Supp. 605; Hirschman v. Fireman's Fund Ins. Co. (1910) 123 N. Y. Supp. 781; Simon Cloak

& Suit Co. v. Aetna Ins. Co. (1912) 141 N. Y. Supp. 553. See also Titus v. Glens Falls Ins. Co. (1880) 81 N. Y. 410, 8 Abb. N. C. 315.

Ohio. — Merchants' Nat. Bank v. Insurance Co. of N. A. (1878) 4 Ohio Dec. Reprint, 340.

Tennessee. — Phoenix Ins. Co. v. Munday (1868) 5 Coldw. 547.

Texas. — Phoenix Ins. Co. v. Shearman (1897) 17 Tex. Civ. App. 456, 43 S. W. 930, 1063. See also Pelican Ins. Co. v. Schwartz (1892) — Tex. —, 19 S. W. 374.

Washington. — Rasmusson v. North Coast F. Ins. Co. (1915) 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610.

West Virginia. — Teter v. Franklin F. Ins. Co. (1914) 74 W. Va. 344, 82 S. E. 40.

Wisconsin. — Dogge v. Northwestern Nat. Ins. Co. (1880) 49 Wis. 501, 5 N. W. 889; Vergeront v. German Ins. Co. (1893) 86 Wis. 425, 56 N. W. 1096; Beyer v. St. Paul F. & M. Ins. Co. (1901) 112 Wis. 138, 88 N. W. 57.

England. — Chapman v. Pole (1870) 22 L. T. N. S. 306.

Canada. — Rice v. Provincial Ins. Co. (1857) 7 U. C. C. P. 548; Park v. Phoenix Ins. Co. (1859) 19 U. C. Q. B. 110; Parsons v. Citizens Ins. Co. (1878) 43 U. C. Q. B. 261; Steeves v. Sovereign F. Ins. Co. (1880) 20 N. B. 394; Doull v. Fire Ins. Co. (1886) 18 N. S. 511, 6 Can. L. T. Occ. N. 541; Harrison v. Western Assur. Co. (1903) 35 N. S. 488, reversed on other grounds in (1903) 33 Can. S. C. 473; Adams v. Glens Falls Ins. Co. (1916) 37 Ont. L. Rep. 1, 10 Ont. Week. N. 171, 31 D. L. R. 166.

"An overestimate which was made honestly, and in good faith, clearly would not have the effect to exclude the claimant from all benefits under the policy." Stone v. Hawkeye Ins. Co. (1886) 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47.

"The mere fact that the assured, in the proofs of loss, has made an overvaluation of the property destroyed, will not defeat a recovery on the policy for the actual loss sustained. If the assured, in making proofs of loss, acts in good faith, in the

honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such overvaluation cannot be held to be fraudulent, and it will not defeat a recovery." *Commercial Ins. Co. v. Friedlander* (1895) 156 Ill. 595, 41 N. E. 183.

So, in *Nugent v. Rensselaer County Mut. F. Ins. Co.* (1905) 106 App. Div. 308, 94 N. Y. Supp. 605, the court said: "It is provided in the policy that it shall be void in case of any fraud or false swearing by the assured, touching any matter relating to the insurance or the subject thereof, whether before or after a loss. The defendant insists that the plaintiff was guilty of false swearing in overestimating the quantity and value of the personal property which he claimed to have lost by reason of the fire. It is not the purpose of such provision in the policy to put every insurer in danger of losing the entire benefit of his insurance if, in an honest effort to determine and state the property lost by fire, and the value thereof, he inadvertently misstates the same or overestimates their values. A mere misstatement of the loss, based upon an erroneous estimate of values, . . . does not operate to avoid the policy." See to the same effect, *Cheever v. Scottish Union & Nat. Ins. Co.* (1903) 86 App. Div. 328, 83 N. Y. Supp. 730, affirmed in (1905) 180 N. Y. 551, 73 N. E. 1121.

"An overestimate of the amount of loss sustained, made honestly and in good faith, is neither fraud nor false swearing, within the meaning of the policy. The fraud or false swearing which would cause a forfeiture . . . must undoubtedly be actual and intentional." *Phoenix Ins. Co. v. Munday* (1868) 5 Coldw. (Tenn.) 547.

In *American Cent. Ins. Co. v. Ware* (1898) 65 Ark. 336, 46 S. W. 129, the court approved an instruction of the trial judge that an overvaluation did not avoid the policy, unless it was knowingly made, and that if it occurred through oversight or in-

advertence, it did not affect any right of the insured under the policy. The court said: "This instruction was correct. The provision of the policy . . . does not refer to an accidental omission or an innocent misrepresentation of fact on the part of the assured. To avoid the policy, the false statement must have been knowingly and wilfully made, thus showing an intention to deceive and to perpetrate a fraud upon the insurer."

Similarly, in *Hodge v. Franklin Ins. Co.* (1910) 111 Minn. 321, 126 N. W. 1098, the appellate court approved an instruction of the trial court to the effect that an incidental or unintentional overvaluation by the insured did not necessarily amount to fraud sufficient to avoid the policy.

Where an insured, in the proof of loss, gave merely an optimistic account of the value of the goods that had been destroyed, it was held not to be a fraud sufficient to avoid the policy. *St. Onge v. Hartford F. Ins. Co.* (1917) 204 Ill. App. 127.

In some of the cases it has been said that an overvaluation made by the insured through error of judgment or inadvertence is, in effect, merely an expression of opinion, which affords no ground for an avoidance of the policy, and will not cause a forfeiture thereof.

United States. — *Howell v. Hartford F. Ins. Co.* (1874) Fed. Cas. No. 6,780; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (1887) 31 Fed. 200.

Iowa. — *Helm v. Anchor F. Ins. Co.* (1906) 132 Iowa, 177, 109 N. W. 605.

New Jersey. — *Jersey City Ins. Co. v. Nichol* (1882) 35 N. J. Eq. 291, 40 Am. Rep. 625.

New York. — *Nugent v. Rensselaer County Mut. F. Ins. Co.* (1905) 106 App. Div. 308, 94 N. Y. Supp. 605.

West Virginia. — *Teter v. Franklin F. Ins. Co.* (1914) 74 W. Va. 344, 82 S. E. 40.

Wisconsin. — *Dogge v. Northwestern Nat. Ins. Co.* (1880) 49 Wis. 501, 5 N. W. 889; *Vergeront v. German Ins. Co.* (1893) 86 Wis. 425, 56 N. W. 1096.

Canada. — *Steeves v. Sovereign F. Ins. Co.* (1880) 20 N. B. 394.

"The value of property is, to a great extent, a matter of judgment or opinion. People may, and do, honestly differ widely on such a subject. . . . It is the fraud, and not the mistakes or errors in judgment, of an insured which will avoid his policy." *Steeves v. Sovereign F. Ins. Co.* (N. B.) *supra*.

"The mere fact . . . that a party who seeks to recover insurance has even largely overstated the value of the property destroyed will not, of itself and alone, relieve the company from liability. In order to prevail on this ground, the insurer must show that the insured knew it was worth much less than he swore it to be. There may be an honest difference of opinion as to the real value of property. Such a difference of opinion does often exist in the minds of men as to the value of property, because that question may rest largely in opinion. And if the jury find that, even though a valuation is largely excessive, yet if it was made by the insured in good faith, his statement in that respect cannot be held to amount to false swearing or fraud." *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (1887) 31 Fed. 200, *supra*.

"Nothing is more common in the affairs of life than for men to overvalue their property; and when . . . it is not done with any fraudulent purpose, it should not avoid the policy." *Dogge v. Northwestern Nat. Ins. Co.* (Wis.) *supra*.

In *Teter v. Franklin F. Ins. Co.* (W. Va.) *supra*, the court said: "It would be a very harsh rule that would forfeit his policy, if the insured happened, innocently, to make a mistake in estimating the value of his property, and should fix it at a little more than most other men would think it was actually worth. Men are prone to value their own possessions a little higher than other people would value them, and often do so in utmost good faith. The law allows a margin in such cases for honest differences of opinion."

Likewise, in *Ermann v. Sun Mut. Ins. Co.* (1883) 35 La. Ann. 1095, it was said: "A great difference of opinion upon values may well coexist with perfect honesty of all persons differing. The assured may have sworn to what he believed to be true, but which nevertheless was false, and his policy would not thereby be forfeited. He must knowingly and intentionally, and therefore fraudulently, have sworn, with the intent to deceive the insurer and get from him a value falsely put upon the property." See also *Dunn v. Springfield F. & M. Ins. Co.* (1902) 109 La. 520, 33 So. 585; *Daul v. Firemen's Ins. Co.* (1883) 35 La. Ann. 98.

So, where an insured, without any evil intent or purpose, but "yielding to that partiality with which, as is commonly known, most men estimate their own property," went to the extreme in giving expression to his opinion of values, it was held that the policy could not be avoided on the ground of fraud. *Helm v. Anchor F. Ins. Co.* (1906) 132 Iowa, 177, 109 N. W. 605.

Similarly, in *Simon Cloak & Suit Co. v. Aetna Ins. Co.* (1912) 141 N. Y. Supp. 553, wherein it appeared that the insured had no means by which it could possibly determine the value of the property destroyed, and was compelled to estimate its loss, the court held an overvaluation of more than 100 per cent to be merely an expression of an opinion, which did not operate to avoid the policy, since under the circumstances there was absent the essential element of fraud.

Where the value of the property destroyed is largely in excess of the insurance, so that an exaggeration cannot operate to defraud or injure the insurer, it is quite generally held that an overvaluation, if honestly made, will not avoid the policy. *Hanscom v. Home Ins. Co.* (1897) 90 Me. 333, 38 Atl. 324; *Springfield F. & M. Ins. Co. v. Winn* (1889) 27 Neb. 649, 5 L.R.A. 841, 43 N. W. 401; *Jensen v. Palatine Ins. Co.* (1908) 81 Neb. 523, 116 N. W. 286; *Phoenix Ins. Co. v. Shearman* (1897) 17 Tex. Civ. App. 456, 43 S. W. 930, 1063;

Camden F. Ins. Asso. v. Puett (1914) — Tex. Civ. App. —, 164 S. W. 418; Dogge v. Northwestern Nat. Ins. Co. (1880) 49 Wis. 501, 5 N. W. 889. Compare Capital F. Ins. Co. v. Beverly (1897) 14 Ohio C. C. 468, 8 Ohio C. D. 37.

"In determining whether an excessive valuation . . . was the result of wilfully false swearing, or of an error in judgment, misinformation, misrecollection, or mistake, it is obviously material and important to consider the amount of the actual loss in relation to the amount of insurance and to inquire whether the insured could have had any motive to swear falsely in order to swell the amount of the loss, when it was already conceded that the loss, honestly stated, would exceed the amount of insurance." *Hanscom v. Home Ins. Co. (Me.) supra.*

"It is well settled that the making of an affidavit fixing the value of goods insured at an excessive price will not forfeit the right of the assured to recover, where the value of the property actually exceeds the amount of the insurance, so that the same becomes immaterial to the risk." *Jensen v. Palatine Ins. Co. (1908) 81 Neb. 523, 116 N. W. 286, supra.*

And where the value placed on a stock of general merchandise was only \$1,600 above what the jury found it to be; and no motive appeared for the excessive valuation, as the value proven on the trial and fixed by the verdict was nearly \$2,000 in excess of the amount of the policy, it was held that there was no ground for a finding of fraud. *Phoenix Ins. Co. v. Shearman (1897) 17 Tex. Civ. App. 456, 43 S. W. 930, 1063.*

In like manner, in *Dogge v. Northwestern Nat. Ins. Co. (1880) 49 Wis. 501, 5 N. W. 889*, it was said: "The actual value of the property destroyed exceeded the amount of insurance upon it. Under these circumstances, if the plaintiff did honestly, or without any fraudulent intent, place an extravagant valuation upon the property, it would not prevent a recovery upon the policy."

b. Overvaluation made knowingly and intentionally.

Where an insured knowingly and wilfully overestimates in his proof of loss the value of the property destroyed, with the intention of deceiving the insurer, such overvaluation will avoid the policy and defeat any right of the insured to recover thereon.

United States. — *Huchberger v. Merchants' F. Ins. Co. (1868) 4 Biss. 265, Fed. Cas. No. 6,822; Huchberger v. Providence Washington Ins. Co. (1869) Fed. Cas. No. 6,823, affirmed in (1871) 12 Wall. 164, 20 L. ed. 364; Geib v. International Ins. Co. (1870) 1 Dill. 443, Fed. Cas. No. 5,298; Huchberger v. Home F. Ins. Co. (1870) 5 Biss. 106, Fed. Cas. No. 6,821; Weide v. Insurance Co. of N. A. (1871) Fed. Cas. No. 17,617; Howell v. Hartford F. Ins. Co. (1874) Fed. Cas. No. 6,780; Mack v. Lancashire Ins. Co. (1880) 2 McCrary 211, 4 Fed. 59; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (1887) 31 Fed. 200. Compare the reported case (COLUMBIAN INS. CO. v. MODERN LAUNDRY, ante, 1159).*

Arkansas. — *German-American Ins. Co. v. Brown (1905) 75 Ark. 251, 87 S. W. 135.*

Georgia. — *Goldberg v. Provident Washington Ins. Co. (1916) 144 Ga. 783, 87 S. E. 1077.*

Illinois. — *Kavooras v. Insurance Co. of Ill. (1912) 167 Ill. App. 220.*

Iowa. — *Stone v. Hawkeye Ins. Co. (1886) 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; Erb v. German-American Ins. Co. (1897) 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; Helm v. Anchor F. Ins. Co. (1906) 132 Iowa, 177, 109 N. W. 605.*

Kentucky. — *Compare Phoenix Ins. Co. v. Wintersmith (1907) 30 Ky. L. Rep. 369, 98 S. W. 987.*

Louisiana. — *Marchisseau v. Merchants' Ins. Co. (1842) 1 Rob. 438; Alfred Hiller Co. v. Insurance Co. of N. A. (1910) 125 La. 938, 32 L.R.A. (N.S.) 453, 52 So. 104.*

Maine. — *Wall v. Howard Ins. Co. (1862) 51 Me. 32; Hilton v. Phoenix Assur. Co. (1898) 92 Me. 272, 42 Atl. 412; Rovinsky v. Northern Assur. Co.*

(1905) 100 Me. 112, 60 Atl. 1025; *Pottle v. Liverpool & L. & G. Ins. Co.* (1911) 108 Me. 401, 81 Atl. 481; *Archibald v. Granite State F. Ins. Co.* (1918) 117 Me. 205, 103 Atl. 162.

Nebraska. — *Home Ins. Co. v. Winn* (1894) 42 Neb. 331, 60 N. W. 575.

New Hampshire. — *Sleeper v. New Hampshire F. Ins. Co.* (1876) 56 N. H. 401.

New York. — *Hickman v. Long Island Ins. Co.* (1847) 4 Edm. Sel. Cas. 374; *Sternfeld v. Park F. Ins. Co.* (1888) 50 Hun, 262, 2 N. Y. Supp. 766; *Furlong v. Agricultural Ins. Co.* (1892) 28 Abb. N. C. 444, 18 N. Y. Supp. 844; *Anibal v. Insurance Co. of N. A.* (1903) 84 App. Div. 634, 82 N. Y. Supp. 600; *Simon Cloak & Suit Co. v. Aetna Ins. Co.* (1912) 141 N. Y. Supp. 553; *Bas v. Williamsburgh City F. Ins. Co.* (1913) 141 N. Y. Supp. 555.

Oregon. — *Fire Asso. of Phila. v. Allesina* (1907) 49 Or. 316, 89 Pac. 960.

Texas. — *Fidelity Phoenix F. Ins. Co. v. Sadau* (1915) — Tex. Civ. App. —, 178 S. W. 559.

Washington. — *Rasmusson v. North Coast F. Ins. Co.* (1915) 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610.

Wisconsin. — *F. Dohmen Co. v. Niagara F. Ins. Co.* (1897) 96 Wis. 38, 71 N. W. 69.

England. — *Chapman v. Pole* (1870) 22 L. T. N. S. 306.

Canada. — *Grenier v. Monarch Fire & Life Assur. Co.* (1859) 3 Lower Can. Jur. 100; *Larocque v. Royal Ins. Co.* (1878) 23 Lower Can. Jur. 217.

"The law is well settled that if the assured intentionally overvalues his loss, . . . for the purpose of obtaining a sum greater than the value of the property destroyed, and the circumstances are such that such conduct is liable to effect such result, it is fraud, which avoids the policy under a clause making fraud or false swearing in respect to the loss have that effect." *F. Dohmen Co. v. Niagara F. Ins. Co.* (Wis.) *supra*.

"It is a firmly established legal doctrine that if a plaintiff, in an ac-

tion on a policy of fire insurance, falsely and knowingly inserts in his sworn proof of loss . . . such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover." *Pottle v. Liverpool & L. & G. Ins. Co.* (1911) 108 Me. 401, 81 Atl. 481.

"In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than anyone else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims, unless honestly made—is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm." *Huchberger v. Home F. Ins. Co.* (1870) 5 Biss. 106, Fed. Cas. No. 6,821.

The theory of the rule was well stated in *Howell v. Hartford F. Ins. Co.* (1874) Fed. Cas. No. 6,780, as follows: "The nature of the insurance business is such that companies cannot know at the time they issue their policies the exact value of the property insured, especially goods or personal property. A business man asks for a certain amount of insurance on his goods in his store, warehouse, or factory. The fact that he pays premiums in proportion to the amount insured is supposed, in the case of most men, to be a guaranty that he has property of the value insured; but in proofs of loss the amount to be paid is to be fixed at the value of the property destroyed, so that it is the amount on hand at the time of the fire that becomes material. This can only be known with any degree of certainty through the assured himself. He is therefore held to a strict and truthful statement as to the value of the property destroyed, and any intentional overvaluation, or any such valuation as displays a reckless and dishonest disregard of the truth, in

regard to the extent of the loss, is deemed fraudulent, and causes forfeiture of all claims under the policy."

The rule heretofore stated obtains when the purpose of the insured, in making an overvaluation, is to induce the insurer to make a speedy settlement, and to prevent controversy as to his right to the full amount of his insurance. *Sleeper v. New Hampshire F. Ins. Co.* (1876) 56 N. H. 401.

In *Springfield F. & M. Ins. Co. v. Winn* (1889) 27 Neb. 649, 5 L.R.A. 841, 43 N. W. 401, however, wherein the evidence showed that an overvaluation was not made with a design to defraud the insurer, but to secure, if possible, prompt payment, it was held that there was no ground on which to base a forfeiture of the policy.

And see *Dogge v. Northwestern Nat. Ins. Co.* (1880) 49 Wis. 501, 5 N. W. 889, holding that the evidence failed to show that the insured had overestimated the value of his property in order to induce the insurer to make a speedy settlement.

It has been held that to preclude a recovery on the ground of fraud, the overvaluation must be of a material character. A slight overestimate by the insured will not avoid the policy. *Hamberg v. St. Paul F. & M. Ins. Co.* (1897) 68 Minn. 335, 71 N. W. 388; *Hodge v. Franklin Ins. Co.* (1910) 111 Minn. 321, 126 N. W. 1098; *Riley v. Aetna Ins. Co.* (1917) 80 W. Va. 236, L.R.A.1917E, 983, 92 S. E. 417.

Thus, in *Hamberg v. St. Paul F. & M. Ins. Co.* (Minn.) *supra*, it was held that the trial court had properly refused a request to charge that the slightest possible exaggeration by the insured of the value of the property destroyed would, if made knowingly and intentionally, forfeit any right to a recovery under the policy. The court said: "According to this request, the slightest possible exaggeration of the amount or value of the property so destroyed or damaged would be sufficient to defeat plaintiff's claim. If plaintiff so exag-

gerated to the amount of a fraction of a cent, he cannot recover. Such is not the law."

The estimate must be "so extravagant as to lead necessarily to the conclusion that the excessiveness was due not to an error of judgment, but was motivated by an intention to defraud." *Adams v. Glens Falls Ins. Co.* (1916) 37 Ont. L. Rep. 1, 10 Ont. Week. N. 171, 31 D. L. R. 166. See also *Kibzcy v. Home Ins. Co.* (1918) 2 West. Week. Rep. (Can.) 541.

And, in order to work a forfeiture, the overvaluation must be so plain that it can be seen that it was made with the intent to work a gross fraud on the company. *Hirschman v. Fireman's Fund Ins. Co.* (1910) 123 N. Y. Supp. 781.

In the reported case (*COLUMBIAN INS. CO. v. MODERN LAUNDRY*, ante, 1159) it is held that if the insurer knew the actual value of the insured property, and the amount of the loss by the fire, or had had full opportunity to know it, so that it could not be deceived by an overvaluation in the proof of loss, the fact that an overvaluation was made wilfully and intentionally would not constitute an attempt to defraud sufficient to avoid the policy.

So, in *Helm v. Anchor F. Ins. Co.* (1906) 132 Iowa, 177, 109 N. W. 605, it was held that an overvaluation made knowingly and intentionally must have actually perpetrated a fraud on the insurer.

In *Leach v. Republic F. Ins. Co.* (1878) 58 N. H. 245, it was held that, although there was no positive intent on the part of the insured to defraud the insurer, an overvaluation in the proof of loss of the property destroyed, which was so grossly disproportioned to the actual value that it could not have been honestly made if any care or attention had been given to the subject, was designed for the insurer to act on as true, and tended to produce the same mischief that would result from actual fraud and wilful falsehood. The court said: "The affidavit in proof of the plaintiff's loss was made without any reasonable grounds for

belief in its truth. Having the means at hand for making a true estimate, the plaintiff wilfully ignored them and made a false one. He stated that to be true, in his belief, which he did not know to be true, and which he had no reasonable ground for believing to be true. Such a representation is fraudulent. . . . In an overvaluation, such as was made in this case, so grossly out of proportion to the actual value of the property, the plaintiff is not entitled to immunity from the charge of fraud."

In some cases it has been held that, where the actual loss exceeds the amount of the insurance, the policy will not be avoided by an overvaluation in the proofs of loss though the overvaluation is made knowingly and with fraudulent intent. *Home Ins. Co. v. Lowenthal* (1904) — *Miss.* —, 36 So. 1042; *Springfield F. & M. Ins. Co. v. Winn* (1889) 27 *Neb.* 649, 5 *L.R.A.* 841, 43 *N. W.* 401; *Home Ins. Co. v. Winn* (1894) 42 *Neb.* 331, 60 *N. W.* 575. In the case last cited the court said: "If the actual value of the stock was greater than the aggregate insurance, the overvaluation in the proofs, although wilfully made, could not operate to defraud the company, and would, therefore, not be material."

So, in *Home Ins. Co. v. Lowenthal* (*Miss.*) *supra*, it was said: "The loss was concededly total, . . . and the values concededly far in excess of the insurance, so that, even if the swearing . . . was designedly false, it is impossible that it could have been prejudicial or harmful in any way to the insurance company."

In *Camden F. Ins. Asso. v. Puett* (1914) — *Tex. Civ. App.* —, 164 *S. W.* 418, a statute was invoked, declaring that any provision in a policy of insurance invalidating the policy because of misrepresentations or false statements made in the proofs of loss should be of no effect, and should not constitute a defense to any suit brought on the contract or policy, unless it was shown on the trial of the suit that the false statement was fraudulently made, and misrepresented a fact material to the

question of the liability of the insurance company. It was held that the fact that the insured overvalued in the proof of loss one of the articles of personal property covered by the policy, where the total loss, exclusive of such article, was greatly in excess of the amount of the insurance, would not effect the liability of the insurer, even though fraud was conceded.

But in *Capital F. Ins. Co. v. Beverly* (1897) 14 *Ohio C. C.* 468, 8 *Ohio C. D.* 37, it was held to be reversible error for the trial court to charge the jury that when the actual value of the property destroyed exceeded the amount of the insurance, a wilfully false and fraudulent exaggeration in the proof of loss was immaterial, and would not constitute a defense to an action on the policy.

Where the loss is a total one under a valued policy, the fact that an overvaluation is made knowingly and with intent to defraud has been held to be immaterial, and no defense to an action on the policy. *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (1887) 31 *Fed.* 200; *Bammessel v. Brewers' F. Ins. Co.* (1877) 43 *Wis.* 463; *Cayon v. Dwelling House Ins. Co.* (1887) 68 *Wis.* 510, 32 *N. W.* 540. Thus, in the case last cited the court said: "It is plausibly argued . . . that knowingly and intentionally stating the amount of the loss greater than it actually was must have been with intent to deceive or defraud. . . . The policy covered the building and its contents, and the controversy is mainly concerning the building alone, which was totally destroyed by the fire. In such a case the actual amount of the loss was immaterial, by virtue of the statute (*Rev. Stat.* § 1943) which provides that the amount of insurance written in the policy on the real property destroyed 'shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed.' . . . It is not perceived how the company could have been influenced by any such overestimate

to settle or compromise, or not to settle or compromise, the claim for the insurance so fixed conclusively by the statute; for in no case could the company be compelled to pay more, nor could the insured be induced thereby to receive less, than the amount so fixed by law."

In one jurisdiction it has been held that an overvaluation, although intentionally and fraudulently made, will not operate to forfeit any rights of the insured under the policy, unless the instrument itself stipulates for such forfeiture. *Phoenix Ins. Co. v. Moog* (1884) 78 Ala. 284, 56 Am. Rep. 31.

So, it has been said that while false and material representations as to value, made to procure insurance and inducing the issuance of the policy, will avoid the policy, false and fraudulent representations as to the extent of the loss sustained, made to secure the proceeds of the policy, will not avoid the same, although they ought to prevent a recovery, at least to the extent that they are false or fraudulent. *Phoenix Ins. Co. v. Wintersmith* (1907) 30 Ky. L. Rep. 369, 98 S. W. 987.

c. Fraudulent intent as question for jury.

Many cases hold that where it appears from the evidence that there was an overestimate of value, it is a question of fact for the jury to determine whether the insured acted honestly and in good faith in making such valuation, or whether there was an intention on his part to defraud the insurer.

United States. — *Wiede v. Insurance Co. of N. A.* (1871) Fed. Cas. No. 17,617; *Insurance Co. v. Weide* (Republic F. Ins. Co. v. Weide) (1871) 14 Wall. 375, 20 L. ed. 894; *Mack v. Lancashire Ins. Co.* (1880) 2 McCrary, 211, 4 Fed. 59; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (1887) 31 Fed. 200. See also *Miller v. Alliance Ins. Co.* (1881) 19 Blatchf. 308, 7 Fed. 649.

Alabama. — See *Tubb v. Liverpool & L. & G. Ins. Co.* (1894) 106 Ala. 651, 17 So. 615.

California. — *Helbing v. Svea Ins. Co.* (1880) 54 Cal. 156, 35 Am. Rep. 72.

Illinois. — See *Commercial Ins. Co. v. Friedlander* (1895) 156 Ill. 595, 41 N. E. 183.

Indiana. — *Franklin Ins. Co. v. Culver* (1855) 6 Ind. 137.

Iowa. — *Stone v. Hawkeye Ins. Co.* (1886) 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; *Goldstein v. St. Paul F. & M. Ins. Co.* (1904) 124 Iowa, 143, 99 N. W. 696.

Kentucky. — *Western Assur. Co. v. Ray* (1899) 105 Ky. 523, 49 S. W. 326.

Maine. — *Archibald v. Granite State F. Ins. Co.* (1918) 117 Me. 205, 103 Atl. 162.

Massachusetts. — *Goldstein v. Franklin Mut. F. Ins. Co.* (1898) 170 Mass. 243, 49 N. E. 115.

Minnesota. — *Hodge v. Franklin Ins. Co.* (1910) 111 Minn. 321, 126 N. W. 1098.

Nebraska. — *Springfield F. & M. Ins. Co. v. Winn* (1889) 27 Neb. 649, 5 L.R.A. 841, 43 N. W. 401.

Nevada. — *Gerhauser v. North British & M. Ins. Co.* (1870) 6 Nev. 15.

New Jersey. — *Carson v. Jersey City Ins. Co.* (1881) 43 N. J. L. 300, 39 Am. Rep. 584, affirmed in (1882) 44 N. J. L. 210.

New York. — Compare *Sternfeld v. Park F. Ins. Co.* (1888) 50 Hun, 263, 2 N. Y. Supp. 766; *Hirschman v. Fireman's Fund Ins. Co.* (1910) 123 N. Y. Supp. 781; *Simon Cloak & Suit Co. v. Aetna Ins. Co.* (1912) 141 N. Y. Supp. 553.

West Virginia. — *Teter v. Franklin F. Ins. Co.* (1914) 74 W. Va. 344, 82 S. E. 40. Compare *Riley v. Aetna Ins. Co.* (1917) 80 W. Va. 236, L.R.A. 1917E, 983, 92 S. E. 417.

Canada. — *Rice v. Provincial Ins. Co.* (1857) 7 U. C. C. P. 548.

"So complicated a question is one peculiarly for the jury, the determination of which by that body can only be set aside when the court is clearly convinced, after full consideration of all the incidents made to appear at the trial, that the verdict is wrong." *Helbing v. Svea Ins. Co.* (Cal.) supra.

In *Franklin Ins. Co. v. Culver*

(Ind.) *supra*, the court said: "In the present case, no basis existed by which the amount destroyed could be ascertained with any degree of accuracy. The invoices having been consumed with the goods, and there being no other account of the stock on hand, the statement of the insured could be nothing more than the result of his own deliberate judgment, without the means of testing its correctness by numerical calculation. Whether, in the language of the instruction, 'he knowingly exaggerated his loss,' was for the jury to determine."

However, in *Simon Cloak & Suit Co. v. Aetna Ins. Co.* (N. Y.) *supra*, it was said that "unquestionably, where the loss is capable of more or less accurate ascertainment, a gross overvaluation of the goods destroyed compels the court to determine as a matter of law that intentional fraud was attempted." The court added: "In order to determine the existence of fraud because of overestimation, the evidence must be conclusive against mistake or misapprehension."

As was pointed out in the opinion of the court in *Sternfeld v. Park F. Ins. Co.* (N. Y.) *supra*, where no other conception of the misrepresentation of the loss obtains, but that it was made to deceive the insurer, it becomes incumbent on the court to find fraud and to decree judgment in favor of the insurer.

So, in *Riley v. Aetna Ins. Co.* (W. Va.) *supra*, it was held that where there is a disparity between the actual value of the property destroyed and the value stated by the insured in his proof of loss, so great as to show an intent to deceive and defraud the insurer, the question is not one of fact for the jury to determine, but one of law for the court, and the insurer is entitled to an instruction directing a verdict in its favor.

Similarly, where it appears by the insured's own showing that the statements of value were knowingly and intentionally exaggerated, the court should declare the policy forfeited; and where the discrepancy between a

representation of the insured and the finding of fact by the jury is very great, a limit will be reached where the court will intervene and decide as a matter of law that the amount of the error is consistent only with bad faith. *Hirschman v. Fireman's Fund Ins. Co.* (1910) 123 N. Y. Supp. 781.

The fact that the jury returns a verdict for less than the amount claimed by the insured is not proof of fraud such as will bar a recovery on the policy.

United States. — *Mack v. Lancashire Ins. Co.* (1880) 2 McCrary, 211, 4 Fed. 59.

California. — *Helbing v. Svea Ins. Co.* (1880) 54 Cal. 156, 35 Am. Rep. 72.

Illinois. — *Rockford Ins. Co. v. Nelson* (1874) 75 Ill. 548; *Commercial Ins. Co. v. Friedlander* (1895) 156 Ill. 595, 41 N. E. 183.

Iowa. — *Goldstein v. St. Paul F. & M. Ins. Co.* (1904) 124 Iowa, 143, 99 N. W. 696.

Louisiana. — *Dunn v. Springfield F. & M. Ins. Co.* (1902) 109 La. 520, 33 So. 585.

Maine. — *Moore v. Protection Ins. Co.* (1848) 29 Me. 97, 48 Am. Dec. 514. Compare *Wall v. Howard Ins. Co.* (1862) 51 Me. 32.

Minnesota. — *Hodge v. Franklin Ins. Co.* (1910) 111 Minn. 321, 126 N. W. 1098.

New York. — *Wolf v. Goodhue F. Ins. Co.* (1864) 43 Barb. 400, affirmed in (1869) 41 N. Y. 620; *Scheider v. Corby* (1878) 15 Hun, 493; *Unger v. People's F. Ins. Co.* (1871) 4 Daly, 96; *Hirschman v. Fireman's Fund Ins. Co.* (1910) 123 N. Y. Supp. 781. Compare *Sternfeld v. Park F. Ins. Co.* (1887) 50 Hun, 262, 2 N. Y. Supp. 766; *Furlong v. Agricultural Ins. Co.* (1892) 28 Abb. N. C. 444, 18 N. Y. Supp. 844.

Washington. — *Rasmusson v. North Coast F. Ins. Co.* (1915) 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610.

Wisconsin. — *Dogge v. Northwestern Nat. Ins. Co.* (1880) 49 Wis. 501, 5 N. W. 889.

England. — Compare *Levy v. Baillie* (1831) 7 Bing. 349, 131 Eng.

Reprint, 135, 5 Moore & P. 208, 9 L. J. C. P. 108.

"There are numerous cases found in the books where the recovery has been sustained although much less than the amount of loss as the same was estimated in the proofs of loss." *Commercial Ins. Co. v. Friedlander* (Ill.) *supra*, holding that where the insured estimated the value of a stock of leaf tobacco to be \$9,840, and the jury returned a verdict of \$1,277.80, the discrepancy was not such as would avoid the policy on the ground of fraudulent overvaluation.

In *Unger v. People's F. Ins. Co.* (1871) 4 Daly (N. Y.) 96, the court said: "The fact that the plaintiffs in their preliminary proofs, and in their testimony on the trial, swore that their loss was about \$3,489.03 more than the referees found it to be, is not even presumptive evidence of false swearing or of fraud. If it were, then it would be dangerous for the insured to make, in any case, a claim of loss, or to attempt to prove it in court, lest the referees or jury should find for them less than they claimed, and their policies be avoided. They have the right to testify to what they believe to be their loss, and no matter how much that may exceed their recovery, no fraud can be predicated of a result which is due to the judgment of the tribunal alone, unless two points be established against them, i. e., that there were no such goods of such value destroyed, and that the insured knew, or must have known, the fact when they swore to their preliminary proof of loss; otherwise it is the misfortune, and not the crime, of the claimants that the court or jury refused to award them the full sum they swore to. The report of referees or verdict of a jury for a lesser sum, when based on evidence sufficient to support it, is deemed conclusive for the purposes of the particular action as to the actual loss, whether the finding be attacked by the insured or the insurer, but it is not conclusive of false swearing or fraud, particularly where it is not based on positive

testimony as to that amount, and that only given in contradiction of the insured."

The fact that there is a difference between the value stated by the insured in his proof of loss and the value proved on the trial is not necessarily evidence of fraud sufficient to avoid the policy. *Beck v. Germania Ins. Co.* (1871) 23 La. Ann. 510, wherein the court said: "The difference between the amount sworn to by him and the value proven on the trial, is not necessarily evidence of fraud and false swearing on his part, and the circumstances of this case are not such as to impose on him any further explanation of the discrepancy than the record contains. It is often extremely difficult, if not impossible, to prove the exact value of goods insured in an open policy, and merchants may always be supposed to consider their goods worth more than they give for them." See also *Israel v. Teutonia Ins. Co.* (1876) 28 La. Ann. 689.

And it has been held that it does not inevitably follow from the fact that there is a material discrepancy between the statements as to value made by the insured in the proof of loss, and statements made when testifying on the trial, that the former are false, so as to justify the court in assuming it, and directing a verdict for the insurer. *Insurance Co. v. Weide* (Republic F. Ins. Co. v. Weide) (1871) 14 Wall. (U. S.) 375, 20 L. ed. 894, wherein the court said: "It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken."

Although the insured makes a sworn exhibit of his losses largely in excess of the value, as shown by the weight of evidence, yet if it results from a mere error of judgment in estimating values—is not done with the design and intent to deceive the insurer as to the extent of such losses—it will work no forfeiture of the policy. *Gerhauser v.*

North British & M. Ins. Co. (1870) 6 Nev. 15.

II. Illustrations.

a. Overvaluation held fraudulent.

In *Fire Asso. of Phila. v. Allesina* (1907) 49 Or. 316, 89 Pac. 960, wherein it appeared that the insured claimed the value of a stock of umbrellas, parasols, etc., to be \$13,002.55, when the actual value as found by the trial court did not exceed \$7,109.26, the court held on all the evidence that the overvaluation was with knowledge of its falsity, and would avoid the policy.

In *Anibal v. Insurance Co. of N. A.* (1903) 84 App. Div. 634, 82 N. Y. Supp. 600, it appeared that the insured claimed in his proof of loss the value of certain hotel property destroyed and injured by fire to be \$6,780.30, and the actual value was found by trial court to be only \$1,857. The court held that a finding of innocent overvaluation was not supported by the evidence, saying: "The purpose of *McClellan* . . . in grossly inflating the values stated in his proofs of loss was apparent, and that was to enhance his damages as nearly as possible to the aggregate of his entire insurance, so that when the loss was apportioned among the four companies each would be compelled to pay him practically the entire amount of their respective policies. Upon the evidence in this case I cannot resist the conclusion that *McClellan* was guilty of intentional and wilful false swearing in his proofs of loss, that he so swore for the purpose of defrauding the company, and that, therefore, the policy was, by its terms, rendered void."

Similarly, in *Kavooras v. Insurance Co. of Ill.* (1912) 167 Ill. App. 220, wherein it appeared that the insured placed a valuation of \$4,114.08 on a stock of groceries which the trial court found did not exceed in value the sum of \$1,163.94, it was held that the overvaluation justified the conclusion that the insured was guilty of wilful false swearing.

In *Bass v. Williamsburgh City F.*

Ins. Co. (1913) 141 N. Y. Supp. 555, the court affirmed a judgment of the trial court finding that an insured who claimed \$10,700 on a stock of goods and \$869 on certain fixtures destroyed and damaged by fire, which appraisers found to be worth about \$3,200 and \$326, respectively, was guilty of making a fraudulent overvaluation sufficient to avoid the policy.

In *Rovinsky v. Northern Assur. Co.* (1905) 100 Me. 112, 60 Atl. 1025, the court held that a valuation of \$2,076 placed by an insured on household and personal property, some items of which had been purchased for less than the insured claimed their value to be, was fraudulent, saying: "It clearly appears that the plaintiff did not prepare this schedule . . . under the embarrassment which the ordinary householder would experience in attempting to recall specifically a multitude of articles purchased separately, many years before, or to give his judgment or opinion in regard to the exact value of those not purchased by him. The exact prices were here readily accessible, if not actually before his eyes; and the conclusion is irresistible that he wilfully refused to avail himself of the information, and knowingly made false statements in regard to the values."

In *Sternfeld v. Park F. Ins. Co.* (1888) 50 Hun, 262, 2 N. Y. Supp. 766, it was held that the fact that a discrepancy of over \$18,000 existed between the valuation placed by the insured in his proof of loss on the property destroyed and the verdict of the jury was evidence that the overvaluation had been made with a view to defraud the insurer, and precluded the possibility that the loss had been overstated by mistake or inadvertence.

In *Furlong v. Agricultural Ins. Co.* (1892) 28 Abb. N. C. 444, 18 N. Y. Supp. 844, wherein it appeared that the insured, in his proof of loss, estimated the value of personal property at \$1,161, and the jury found the valuation to be less than \$100, it was held that the discrepancy showed fraud sufficient to avoid the policy.

In *Wall v. Howard Ins. Co.* (1862) 51 Me. 32, it appeared that the proofs of loss stated the value of a stock of clothing to be \$2,400, and the actual value was found by the jury to be only \$1,060. The court held that the inference could not be avoided that the insured had attempted to defraud the insurers, and that he had thereby forfeited all his rights under the policy, saying: "If the difference had been less, we might have supposed that it resulted from some mistake, or error of opinion, that would not necessarily involve the plaintiff in any fraud. But, when the jury have found that his claim was for nearly three times the actual amount, we are not at liberty to account for it on the ground of error or mistake. Assuming that the verdict is for the right amount, the inference cannot be avoided that the plaintiff, by rendering on oath a false account, attempted to defraud the insurers, and thereby forfeited all his rights under the policy." See also *Levy v. Baillie* (1831) 7 Bing. 349, 131 Eng. Reprint, 135, 5 Moore & P. 208, 9 L. J. C. P. 108.

In *Alfred Hiller Co. v. Insurance Co. of N. A.* (1910) 125 La. 938, 32 L.R.A.(N.S.) 453, 52 So. 104, it appeared that the insured had placed a valuation of \$31,718.82 on a stock of merchandise which the jury found to be of the value of only \$15,757.12, and the evidence showed that, besides errors in bookkeeping, certain items of goods set forth in the inventory on which the proof of loss was based did not truly represent stock on hand at the time of the fire. It was held that the case showed very clearly an attempt to defraud the insurer sufficient to avoid the policy, and to warrant a reversal of the verdict in favor of the insured.

In *Pottle v. Liverpool & L. & G. Ins. Co.* (1911) 108 Me. 401, 81 Atl. 481, wherein it appeared that the insured had placed a valuation of \$3,272.77 on a stock of merchandise which the jury found to be actually worth only \$1,293.75, the court held, in setting aside the verdict, that the overvaluation was fraudulent, and

would forfeit the right of the insured to recover on the policy.

b. Overvaluation held not fraudulent.

Building.

In *Helm v. Anchor F. Ins. Co.* (1906) 182 Iowa, 177, 109 N. W. 605, it appeared that the jury had found the actual value of a store building to be only \$1,200, while the insured had valued it in his proof of loss at \$2,000, but the jury returned a special finding to the effect that the overvaluation was innocently made. The court held that it should not disturb the verdict.

Similarly, in *Parsons v. Citizens' Ins. Co.* (1878) 43 U. C. Q. B. 261, wherein it appeared that while the jury had found the value of a general hardware store, which the insured estimated at \$4,600, to be only \$3,629, they also found that the overvaluation was made in good faith, the court held that it would not disturb the verdict.

In *Spring Garden Ins. Co. v. Amusement Syndicate Co.* (1910) 102 C. C. A. 29, 178 Fed. 519, it appeared that the insured had valued an opera house building and personal property therein at \$57,000, and the master appointed to hear and decide the case had found the value to be approximately \$22,000. It was held that the overvaluation was not made with any view to deceive the insurer, and did not avoid the policy.

Where the insured, preparatory to making his proof of loss, procured estimates from carpenters of what it would cost to replace the burned buildings with new ones, and made his proofs in accordance with those estimates, assuming that he was entitled to money enough to replace the buildings, so far, at least, as the insurance would do it, it was held to be error, but not so uncommon an error in the practical affairs of life as to justify the court in saying that the mere fact that the owner had committed such an error was sufficient evidence of intentional false swearing. *Hilton v. Phoenix Assur. Co.* (1898) 92 Me. 272, 42 Atl. 412.

General merchandise.

In *Stone v. Hawkeye Ins. Co.* (1886) 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47, wherein it appeared that the proofs of loss stated the value of a stock of general merchandise to be \$1,680.07 more than its actual value, the court held that whether the overestimate was fraudulently made was a question of fact for the jury, and a general verdict in favor of the insured would not be disturbed, saying: "Whether it was done with such intent was a question of fact which was properly submitted to the jury, and by their general verdict it was determined adversely to defendant. The overestimate, it is true, appears to have been quite large, but it may have been honestly made, and, if so, it will not defeat plaintiff's right to recover for the loss actually sustained. The court cannot say, as matter of law, that it was not so made."

In *Connecticut F. Ins. Co. v. Union Mercantile Co.* (1914) 161 Ky. 718, 171 S. W. 407, it appeared that an insured had placed the valuation of a stock of goods at approximately \$10,000, and the report of a commissioner had found the value to be only \$8,002.53. The court held that it was not shown by the evidence that a deliberate overestimate of value, sufficient to avoid the policy, had been made.

In *Pelican Ins. Co. v. Schwartz* (1892) — Tex. —, 19 S. W. 374, it appearing that the insured had estimated the value of a stock of goods to be \$8,683.52, when the actual value, as found by the trial court, was only \$4,500, the court held that the trial court was justified in finding that, notwithstanding the fact that an overvaluation was made, the insured did not intend to defraud the insurer, and the policy was not, therefore, avoided.

In *Goldstein v. St. Paul F. & M. Ins. Co.* (1904) 124 Iowa, 143, 99 N. W. 696, wherein it appeared that the insured had valued a stock of goods at nearly \$2,000, while the verdict in his favor was for but \$1,200, it was held that the discrepancy was not

evidence of fraud sufficient to avoid the policy. The court said: "It is . . . said that the verdict of the jury is inconsistent. The argument on this point is, in effect, that plaintiff claimed to have lost insured goods to the amount of nearly \$2,000, while the verdict in his favor is for but \$1,200, or \$300 less than the face of the policy. The verdict, being for so much less than he claims to have lost, and less than the face of his policy, is said to convict the plaintiff of fraud, upon which the defendant was entitled to a verdict; and yet the jury, notwithstanding such finding, and in violation of the court's instruction that such fraud would be fatal to his right to recover, nevertheless found in his favor. We think there is no rule of law which attaches a presumption of fraud to a claim because the full amount thereof is not recovered upon the trial."

In *Williams v. Phenix F. Ins. Co.* (1871) 61 Me. 67, it was held that a discrepancy of about \$1,400 between the value of the stock of goods destroyed and the amount claimed was not so great as to prove that there was a fraudulent overvaluation.

In *Moore v. Protection Ins. Co.* (1848) 29 Me. 97, 48 Am. Dec. 514, the court held that the fact that the insured had estimated the value of a stock of goods at \$2,800, where the jury had found it to be of the value of only \$1,853, was not proof of fraud, saying: "The defendants rely particularly upon this verdict as proof of false swearing on the part of the affiant, showing, as it is contended, that the jury disregarded the facts asserted and sworn to in the affidavit. The jury were properly instructed that if they found that there was false swearing on the part of the plaintiffs, they would not recover. It cannot be assumed that the instruction was disregarded without convincing evidence. The value of the goods in the store at the time of their destruction was only a matter of judgment by Moore, who made the estimation, and the affidavit founded thereon. No account of the stock had been taken previous to the fire,

and the books were consumed with the goods and the store. No basis existed by which the amount of the loss could be ascertained with any degree of accuracy. The judgment of Moore in his estimation of the value of the property lost was properly considered with all other evidence upon the same point. They might believe that his interest in the question would affect his judgment to some extent, though honestly exercised. The general knowledge of the jury in relation to the kind of property consumed, and its value, might also have had upon their minds a legitimate influence. Other facts and circumstances on the same question, coming from other sources, would have their proper effect; and when the whole was weighed, it might have produced the conviction that Moore had erred in opinion, without being guilty of any dishonest intention."

In *Erb v. German-American Ins. Co.* (1897) 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583, it appeared that the insured had estimated the value of a stock of drugs, patent medicines, etc., to be \$3,960 while the jury had found the value to be \$3,600. It was held that the discrepancy was merely the result of mistake or error, and did not defeat the right of the insured to recover on the policy.

In *Dunn v. Springfield F. & M. Ins. Co.* (1902) 109 La. 520, 33 So. 585, it appearing that the insured had placed a valuation of \$48,465.25 on a stock of stationers' bookbinders' and lithographers' merchandise which appraisers found to be worth the sum of \$10,924.87, the court held that the discrepancy would not avoid the policy in the absence of proof that the overvaluation was fraudulently made.

In a case where the insured stated in his proof of loss that the amount of his last inventory was \$4,711.47, when in fact the correct amount of the inventory was \$4,450, the evidence tending to show that the discrepancy was due to a bona fide mistake and was not intentional, it was held not to amount to fraud sufficient to avoid the policy. *American Cent. Ins. Co. v.*

Ware (1898) 65 Ark. 336, 46 S. W. 129.

In *Franklin Ins. Co. v. Culver* (1855) 6 Ind. 137, wherein it appeared that the valuation placed by the insured on a stock of goods and a storehouse exceeded the verdict of the jury by \$200, it was held that whether the overvaluation was made knowingly and with fraudulent intent was for the jury to determine, and the finding of the jury that it was not fraudulently made must be deemed a proper conclusion from the facts proved on the trial. The court said: "The value of the property, as estimated by the insured, it must be presumed, was properly considered with all the other evidence upon the same point. And though the jury, in view of all the facts, may have been convinced that he had erred in opinion, still they may have found such error to exist without any dishonest intention."

Groceries.

In *Rasmusson v. North Coast F. Ins. Co.* (1915) 83 Wash. 569, L.R.A. 1915C, 1179, 145 Pac. 610, it appeared that the insured had estimated the value of a stock of groceries at \$2,750.67, while the jury found the value to be \$2,100. It was held that, the question whether the overvaluation was fraudulently made having been submitted fairly to the jury and determined adversely to the insurer, the verdict could not be disturbed.

In *Wiede v. Insurance Co. of N. A.* (1871) Fed. Cas. No. 17,617, the court held that where the insured placed a valuation of \$54,000 on a stock of groceries the actual value of which was found by the jury to be only about \$30,000, the overvaluation was not fraudulent as a matter of law, and did not prevent a recovery on the policy.

In *Hirschman v. Fireman's Fund Ins. Co.* (1910) 123 N. Y. Supp. 781, it appeared that the insured had placed a valuation of \$953 on a stock of groceries, and the jury had found the value to be only \$600. The court held that the discrepancy did not establish fraud sufficient to avoid the policy.

Household goods.

In *Hodge v. Franklin Ins. Co.* (1910) 111 Minn. 321, 126 N. W. 1098, it appeared that the insured, after having filed a proof of loss in which several items of household goods were considerably overvalued, had corrected the same by filing another proof of loss. The court held that it was for the jury to determine whether the overvaluation made in the first proof of loss was done for the purpose of defrauding the insurer, and declined to disturb a verdict in favor of the insured.

In *Fidelity Phenix F. Ins. Co. v. Sadau* (1915) — Tex. Civ. App. —, 178 S. W. 559, it was held that where the insured valued certain household furniture destroyed by fire at \$1,000, and the actual value, as found by the jury, was only \$578.85, the discrepancy was not such as would require a peremptory instruction to the effect that, if the jury found the said furniture to have been excessively valued, they should find for the insurer.

In *Beyer v. St. Paul F. & M. Ins. Co.* (1901) 112 Wis. 138, 88 N. W. 57, it was held to be a question of fact for the jury to determine whether an illiterate woman, in making out her proofs of loss, was guilty of fraud in scheduling secondhand articles of furniture, clothing, and farming implements at their full original cost, the policy being capable of a construction demanding this, in that it required that "the cost of each article" should be inserted in the schedule.

Liquors.

In *Merchants' Nat. Bank v. Insurance Co. of N. A.* (1878) 4 Ohio Dec. Reprint, 340, wherein it appeared that the insured had placed a valuation of \$11,000 on a stock of liquors, the jury found the actual value to be only \$1,400, but did not find that the overvaluation had been fraudulently made.

Piano.

Although an insured has reason to know the market value of the property destroyed, an overvaluation, if honestly made, has been held not to occasion a forfeiture of the policy. *Gibbs v. Continental Ins. Co.* (1878) 13 Hun (N. Y.) 611, wherein the court said, in upholding a ruling of the trial judge: "We think the justice at the circuit was correct in holding that a fraudulent intent was a necessary ingredient in the false valuation, even though there might be evidence from which the jury might have come to the conclusion that the plaintiff knew, or had the means of knowing, or ought to have known, that the valuation in the proofs of loss was overstated." In that case a valuation of \$400 was placed by the insured on a piano purchased a considerable time before the fire for \$300. It was held not to be fraudulent in view of the fact that the insured had testified that she could not remember what the piano cost, but that a music dealer had offered her \$400 for it in exchange for another piano, and in view of the additional fact that it was proved by another witness, an expert, that he knew the piano in question, that it had been used very little, and that, in his judgment, it was worth \$300 at the time of the fire.

Tobacco.

In *Western Assur. Co. v. Ray* (1899) 105 Ky. 523, 49 S. W. 326, it was held that the question whether a corrected proof of loss submitted by the insured, which placed the value of a stock of tobacco at \$13,369.90, or \$5,000 less than the value stated in the proof of loss first filed, was fraudulent, having been properly submitted to the jury and determined adversely to the insurer, the court could not say as a matter of law that the overvaluation was fraudulently made. L. F. C.

H. C. SNOW, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals—October 26, 1921.

(— Tex. Crim. Rep. —, 237 S. W. 563.)

Appeal — prejudicial evidence in jury room — reversal.

1. Upon trial of a patron of a gambling house for killing an officer who was raiding the place, where the defense was that accused thought the officer was a robber, it is reversible error for a juror to state in the jury room that a raid was expected at the time it occurred, which fact was not established at the trial. (On rehearing.)

[See note on this question beginning on page 1187.]

Homicide — instructions — burden of proof.

2. An instruction in a prosecution for murder in killing an officer raiding a gambling house, that if the jury believed that defendant was not interested in keeping or running any of the tables, but was only a patron of the place, then his right of self-defense was not abridged by the fact that he was a participant in the game, does not place upon him the burden of proving that he was not the proprietor of the house, where it is immediately followed by the statement that the burden of proof is upon the state, that the innocence of the accused is presumed until established by legal evidence beyond a reasonable doubt, and directing an acquittal if a reasonable doubt exists, and that to qualify the right of self-defense the jury must believe beyond a reasonable doubt that accused was engaged in running a gambling table.

Arrest — excessive force — effect.

3. A police officer is in the wrong if, in attempting to arrest persons engaged in running a gambling table, he exercises such a wanton and menacing manner as to threaten patrons with serious bodily harm, and the latter have a right to protect themselves.

[See 13 R. C. L. 873.]

Homicide — protection from excessive force in attempted arrest.

4. The right of patrons of a gambling house to protect themselves against excessive force of police officers raiding the place is limited to the use of means appropriate to the necessities of the occasion as viewed from their standpoint.

[See 2 R. C. L. 474; 1 R. C. L. Supp. 550.]

Appeal — failure to instruct in homicide case.

5. Failure to give a special charge on the law of excessive force of officers in attempting an arrest of persons running a gambling house is not reversible error in a prosecution of a patron for killing an officer, where the room contained many armed patrons, and the officers merely exhibited weapons, with the command to those present to put up their hands, and the court told the jury that the right to arrest existed only in the event that the officers, in effecting it, used only such force as was, under all the circumstances, reasonably necessary.

New trial — affidavits to support motion — sufficiency.

6. Affidavits of misconduct of the jury in support of a motion for new trial are not sufficient when taken before an attorney for appellant.

— permitting proper verification of affidavit.

7. A convict who has filed an improperly verified affidavit for motion for new trial should be permitted properly to verify it upon application on the day the motion is to be heard.

— evidence of reputation of accused.

8. Evidence against the reputation of accused, introduced in the jury room, is within a statute making the receipt of new evidence of a material character by the jury, in the jury room, ground for new trial.

— burden of proof — introduction of evidence in jury room.

9. A convict applying for new trial because of the introduction of new evidence in the jury room has the burden of establishing that fact.

Appeal—introduction of new evidence in jury room—conclusiveness of decision of trial court.

10. The decision of the trial court,

on motion for new trial, upon the question whether or not new evidence was introduced in the jury room, is conclusive on appeal.

APPEAL by defendant from a judgment of the District Court for Wichita County (Martin, J.) convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs Heyser, Hicks, Wilson, & Williams, Bishop & Lantz, and E. H. Gipson for appellant.

Messrs Taylor, Allen, Muse, & Taylor, Charles L. Black, and R. H. Hamilton, Assistant Attorney General, for the State.

Morrow, P. J., delivered the opinion of the court:

Appellant is condemned to confinement in the penitentiary for a period of twenty years for the offense of murder.

At Kemp City, in Wichita county, there was in operation a gambling establishment. On the night of the tragedy, the deceased, Caples, and four other persons, went from Wichita Falls for the purpose of arresting the lawbreakers and bringing to an end the operation of the gambling house. On reaching the place, the house was found to be filled with people engaged in various gambling games. Some of the party stopped near the front entrance while Caples and his companion, Tony, went inside to the rear of the house. Each of them was armed with a pistol. A number of shots were fired, and Caples and Tony were killed by some of them. Caples and Tony presented their pistols, and ordered the persons in the house to put their hands up. The witnesses, attempting to quote them used the expressions, "Put them up and get to the wall;" and, "Stick them up and face the wall."

The theory of the defense is that there were others shooting; that there was no concert action or prearrangement; that the evidence does not exclude the theory that the fatal shots were fired by someone other than the accused; that the shots fired by him were fired because he believed the parties were robbers; and that he had no information or

knowledge that they were peace officers or the semblance thereof.

The state, on the contrary, presents the theory that the appellant knew that the party consisted of peace officers, and that the shots were fired to avoid arrest of himself or others, or out of resentment because of the interference with the gambling operation.

Various rulings of the trial court are urged as reasons for a reversal of the judgment. In appraising the merits of the criticisms to the charge, other parts of it must be considered. On the phase of manslaughter, the jury was told that if the deceased "was doing some act which, within itself or by words accompanying it, was reasonably calculated to produce, and did in fact produce, in the mind of the defendant, sudden passion," etc., no qualification adverse to the appellant was embraced. On self-defense, in one paragraph, the law of real and apparent danger growing out of the conduct of the deceased as it appeared to the appellant was embraced. In another, the right to kill the deceased if appellant believed his purpose was to rob, was made absolute. In another, the jury was informed that conducting a gambling house was a felony, and that those engaged in it might be arrested without warrant, and that "if the jury should believe from the evidence beyond a reasonable doubt that the defendant, Snow, and others, were engaged in exhibiting or running a gaming table," then there existed the legal right to arrest them, and that if the deceased attempted to arrest, using only the degree of force that was reasonably necessary under the circumstances, and was shot by the appellant to

prevent such arrest or to escape the consequences of the unlawful act, if any, in which he was engaged, his right of perfect self-defense would be abridged, and that his offense might be manslaughter or murder, as the jury might determine. In another subdivision, appellant's right to kill the deceased was affirmed, if, viewing his conduct from appellant's standpoint, it reasonably appeared that he was about to be robbed, or suffer bodily injury at the hands of the deceased or his companion. Following these, in the same paragraph, this instruction was given: "But, if you should find and believe from the evidence that the defendant was not interested or engaged in keeping, exhibiting, or running any of said gaming tables, but was only a patron or player in the place, then his right of self-defense would not be abridged by the fact that he was such a participant in the game, unless you should further find and believe that he shot and killed Marvin Caples in order to prevent said Caples from arresting the parties who were running or exhibiting such games."

This is assailed upon the assertion that it puts upon the appellant the burden of proving that he was not a keeper of the gaming house. The clause is immediately followed by a statement in the charge that the burden of proof was upon the state; that the innocence of the accused was presumed until established by legal evidence, beyond a reasonable doubt, and directing an acquittal if a reasonable doubt of appellant's guilt existed in the minds of the jury. In the same connection, the charge instructed the jury, in appropriate language, that if they believed the appellant guilty of an offense, but entertained a reasonable doubt as to its grade, that he must be given the benefit of the doubt. Fairly considered, as a whole, we think the charge was not subject to the objection made. So considered, it does not, in our judgment, place upon the appellant, as

said in the objection, "the burden to show that, at the time of the killing, he was not engaged in running a gambling house." In the same paragraph of the charge, as pointed out above, the jury was specifically told that to qualify appellant's right of self-defense on the theory of arrest, the jury was required to believe beyond a reasonable doubt that the appellant and others were engaged in running a gaming table. The language criticized and quoted above, considered in connection with that to which we have just adverted, amounted only to the statement that if they did not believe, beyond a reasonable doubt, that he was conducting a gaming table, his right of self-defense would not be qualified unless he fired to prevent the arrest of those who were so engaged. The right to convict is predicated upon the finding by the jury of the essential facts, beyond a reasonable doubt, and in the concluding paragraph of the charge to which we have adverted the law touching the burden of proof and the presumption of innocence is again stated.

Complaint is made of the refusal of the trial judge to give a special charge on the law of excessive force of the officers attempting the arrest. Though the appellant knew that the deceased was authorized to arrest those engaged in exhibiting a gaming table, and though he may have been so engaged, still the officer would have been in the wrong if, in making the arrest, he exercised such wanton and menacing manner as to threaten the appellant or his companions with serious bodily harm. If in such manner the arrest was attempted, the appellant had a right to protect himself. *Jones v. State*, 26 Tex. App. 12, 8 Am. St. Rep. 454, 9 S. W. 53. This right was not unlimited, but confined to the use of means proportionate to the necessities of the occasion, as viewed from appellant's standpoint. 2 R. C. L.

Homicide—
instructions—
burden of proof.

Arrest—excessive
force—effect.

Homicide—
protection from
excessive force
in attempted
arrest.

(— *Tes. Crim. Rep.* —, 337 S. W. 563.)

p. 474; *Condron v. State*, 69 Tex. Crim. Rep. 521, 155 S. W. 253; *Alford v. State*, 8 Tex. App. 545; *Keady v. People*, 66 L.R.A. 363, and note (32 Colo. 57, 74 Pac. 892); *Creighton v. Com.* 83 Ky. 142, 4 Am. St. Rep. 143; *id.* 84 Ky. 103, 4 Am. St. Rep. 193; *State v. Gum*, 33 L.R.A. (N.S.) 150, and note (68 W. Va. 105, 69 S. E. 463).

The theory that appellant killed the deceased, knowing that he was an officer, but defending against wanton conduct in making the arrest, is not presented as an affirmative defense. The defense presented, both by appellant and his witnesses, was that he fired without knowledge that the deceased was attempting to make an arrest, and under the belief that his purpose was robbery. As indicated above, imperfect self-defense and perfect self-defense were submitted, the former without qualification and the latter qualified by the theory of lawful arrest. The charge on the subject limited the right of the officers to arrest, and told the jury, in substance, that such right existed only in the event that, in effecting it, they used only such force as was, under all the circumstances, reasonably necessary.

Appellant said in his testimony that he entered the house in which the homicide took place in the evening, and was engaged in playing at a game of poker, and was facing the rear wall when he heard the words, "Get them up; stick them up damned quick, and face the wall;" that he heard this repeated one time by two men; that he looked and saw, about 12 or 15 feet from him, a man standing with a revolver. The people were turning tables over and getting up against the wall. He said: "I just jumped up, and the man that had the gun in his hand was looking at me, and I jerked my gun and shot him, or shot in that direction. I shot twice."

He claimed that there was confusion, and that after he fired he heard the announcement that the parties were officers, but had no

such knowledge before he shot. He had more than \$800 in his possession, and thought there was an attempt to rob.

In the presentation of all of the defensive testimony, the theory is urged and reiterated that appellant fired before there was any announcement that the parties were officers. The state's testimony was to the contrary. The arrest was attempted at nighttime. There were more than a half a hundred people present, and gambling by appellant and others was in progress in violation of the law. It was obvious from the equipment and the exhibition of gambling games that the keepers of the house and exhibitors of the games were engaged in committing a felony. Penal Code, arts. 551, 559. Many of the persons present were armed, as subsequent developments disclosed, and appellant and many others, if not committing a felony themselves, were aiding and abetting those who were. The officers had their pistols in their hands, but, so far as we discern from the evidence, none were fired by them, and there was no offer to do so before the appellant fired. Under these circumstances, we are of the opinion that the court was not guilty of reversible error in failing in a

Appeal—failure to instruct in homicide case.

more specific manner to instruct the jury upon the limitation which the law placed upon the officers, with reference to the use of excessive force in making the arrest. On the contrary, we regard the instructions given as sufficient to fully guard the appellant's rights. His affirmative defenses were well submitted, and all defensive theories arising from the evidence were embraced in the charge. The true issue in the case was not whether the officers used undue force in making the arrest, but whether their character as officers was known to the appellant at the time he fired. Around this issue the evidence crystallized. It was pertinently and fairly submitted to the jury.

The motion for new trial was filed some days before it was heard. In it, misconduct of the jury was claimed and supporting affidavits filed. These affidavits were taken before one of the attorneys for the appellant, and, under the previous rulings of this court, are not sufficient. On the day the motion was heard, however, appellant sought, by amendment, to properly verify them. This should

*New trial—
affidavits to
support motion—
sufficiency.*

have been permitted. Failure to do so is unimportant, however, inasmuch as evidence was fully developed upon the averments in the motion, and in effect the amendment was allowed. We have made a very careful examination of the evidence adduced upon the motion for new trial. The only part of it that impresses us as at all of importance is that touching the reputation of the appellant. Eight or nine of the jurors testified, one of them Farmer, declaring that in conversation with juror Golden he (Farmer) remarked that "he did not see how the appellant was guilty;" that Golden said: "You know what kind of reputation he has; you just as well go ahead and cast the vote;" and said: "He ought to be convicted on the reputation he has." Farmer was first for acquittal, and later consented to conviction.

*—permitting
proper verifica-
tion of affidavit.*

A vigorous and lengthy cross-examination of Farmer was conducted, in which it is brought out that he had had several conferences with the attorneys for the appellant; it being the effort to show that he had become biased in favor of the accused. Golden did not testify. Juror Reed said he could not say that he had heard references to the reputation of appellant, but it was very likely that something was said, but that he could not quote it, though he was sure that appellant was not referred to as a man of first-class character. He got the impression from the discussion that Snow

was a bad man. Juror Galbreath said that he heard Juror Golden make remarks about "matters that were used in argument, that Golden appeared to know the reputation of the appellant, and said it was bad." Galbreath first voted for acquittal and later for conviction.

Rouse testified that the only reference to the reputation of appellant he heard Golden make was to express the opinion that the appellant was a bad man. Several of the other jurors declared that they heard no conversation on the subject at all.

The law pertaining to the receipt of new evidence of a material character by the jury, either from its members or other source, is not difficult of ascertainment. The statute makes it a ground for new trial. Code Crim. Proc. art. 837. It has often been given effect. See *McDougal v. State*, 81 Tex. Crim. Rep. 179, 194 S. W. 944, L.R.A.1917E, 930, and cases there cited. No doubt evidence against the good reputation of the accused, introduced for the first

*—evidence of
reputation of
accused.*

time in the jury room, would be material. *Hargrove v. State*, 33 Tex. Crim. Rep. 431, 26 S. W. 993; *Rose's Notes on Texas Reports*, vol. 5, p. 694. Whether in the instant case such evidence was received was a question of fact. The burden of proving it rested upon the appellant, and if the evidence on the motion for new trial was such

*—burden of
proof—intro-
duction of
evidence in jury
room.*

as rendered the question a controverted one, it was within the province of the trial judge to settle the controversy; and, having done so, the decision would be conclusive. *Howe v. State*, 77 Tex. Crim. Rep. 108, 177 S. W. 500; *Shaw v. State*, 32 Tex. Crim. Rep. 155, 22 S. W. 588; *Potts v. State*, 56 Tex. Crim. Rep. 47, 118 S. W. 535.

*Appeal—intro-
duction of new
evidence in jury
room—con-
clusiveness of
decision of trial
court.*

It is difficult to determine wheth-

er the proper construction of the testimony of the jurors quoted is that Golden was advancing as new evidence his knowledge of the reputation of the accused, or whether he was commenting upon matters in the record which led him to the conclusion that the appellant was a man of bad reputation. The language used by him, as revealed by the witnesses on motion for new trial, seems more or less ambiguous. He said to Farmer: "You know what kind of a reputation he has. He ought to be convicted on his reputation."

From other jurors who testified, it appeared that Golden indicated the opinion that the appellant was a bad man. Golden was not called as a witness, and the appellant was content with the version of his declarations given by other jurors at the hearing. From the language used by them, it apparently would not be an unfair interpretation to infer that from the evidence adduced upon the trial Golden drew the conclusion that appellant was a bad man. This might not have been an unnatural deduction from the facts proven upon the trial. The bill of exceptions, which we are considering, contains no averment negating the idea that there may have been brought into the trial, either by proof or argument, matters forming a proper basis for the deductions imputed to the juror Golden.

The judgment is affirmed.

A motion for rehearing having been granted, Hawkins, J., on February 1, 1922, handed down the following opinion:

In the motion for rehearing our attention has been called to a very important and serious matter incident to the alleged misconduct of the jury. The bill of exception presenting this issue covers 39 pages in the record. In reading the evidence taken on the hearing of the motion for a new trial our minds became fixed upon that portion of the alleged misconduct which related to a discussion in the jury room of appellant's reputation, and

20 A.L.R.—75.

we disposed of the question on that issue alone, not appraising the effect of the other feature of such alleged misconduct as it related to the facts developed on the trial. We are now referred pertinently to another phase of the alleged misconduct; viz., a discussion in the jury room of a contemplated raid by the officers upon the gambling premises where the homicide occurred, which bears directly upon what we stated in our original opinion as being the pivotal point in the case, as follows: "The true issue in the case was not whether the officers used undue force in making the arrest, but whether their character as officers was known to appellant at the time he fired. Around this issue the evidence crystallized."

There is no testimony in the case to the effect that any previous raid had been made upon the premises in question by the officers from Iowa Park, or by any other officers; or that any such raid was contemplated. It being the contention throughout on the part of appellant that he had no knowledge whatever that deceased and his companions were officers until after the shooting was over, it cannot be questioned that if testimony had been available to the state, whereby it could have been shown that the officers had at a previous time made, or contemplated making, a raid upon the gambling house, or that a raid was still in contemplation, and that appellant and others engaged in gambling at the time of the homicide knew that the officers were likely to raid the premises, it would have been the most cogent testimony possible to controvert the truth of appellant's theory, to wit, want of knowledge that deceased and his companions were officers, and not "high-jackers" or robbers, as appellant asserts he believed they were.

The jury was bound to have known that one of the main issues in the case, if not the most important one, was whether appellant, at the time he fired, knew deceased was an officer. This issue was sub-

mitted to the jury by the court. The evidence taken on the motion for new trial discloses that the jury were not in accord as to the guilt of appellant during the first ballots taken, as they stood six and six upon that issue in the beginning of their deliberations. We find from the bill of exception that R. E. Golden was one of the jurors. The juror Farmer, testifying as to what occurred in the jury room, said that Golden, who lived in Iowa Park, said: "You know that Turkett and King was out there the night before, and he knew what was coming off." "That he understood from what Golden said that the gamblers knew that the officers from Wichita Falls were coming out there that night; that the boys at Kemp City [where the homicide occurred] knew that the raid was going to be made that night."

This was Farmer's version of what Golden said. The juror Reed testified that he heard Golden say something about Iowa Park officers, but just how he said it or what he was getting at he did not remember, as he was talking to the jury in general. J. C. Galbreath, who was foreman of the jury, testified that he not only heard Golden make the general statement testified to by other jurors, but that Golden, in substance, told Galbreath himself practically the same thing. His version of what it was is as follows: "The conversation that I heard in substance was that officers had been up to Kemp City to raid this particular gambling house either the day before the shooting occurred or a day just prior to that, and that these people had got knowledge of it and had left, and that they were looking for the officers."

This witness further testified that, as the foreman, he informed the other jurors that they should not consider such "outside matters." The juror Browkaw, upon being asked whether he recalled having heard any conversation of Golden similar to that testified to by other

jurors, replied: "I heard something similar to that, yes. I remember that something was said about the Iowa City officers."

The juror Rouse was asked: "Do you recall having heard a conversation similar to that testified to by them [that is, the other jurors]? Did you hear Golden make any statement along the line they testified to?" "I remember some statement, but do not remember what it was."

The further question asked him was, "Did he make any remark about those boys were expecting a raid out there?" to which he replied, "Well, he remarked that was his opinion—that is the way he remarked it—his opinion was they expected a raid." Some jurors testified that they heard no such conversation in the jury room, but it was established beyond question that such matter was discussed. Counsel for the state and the court, in examining the jurors, seemed to have conceded that some "outside matters" were discussed by the jury, because the jurors were asked if they permitted such "outside matters" to influence them. It is not a question, therefore, as to whether improper matters occurred in the jury room which might raise a question of fact to be determined by the trial judge upon a motion for new trial. It is not necessary for us to speculate upon the effect of this new matter being injected during the discussion of the jury.

Remembering that the contention of the defense from beginning to end was that when appellant began firing he thought deceased and his companions were "high-jackers," and not officers, it is apparent that these improper statements in the jury room were of

—prejudicial evidence in jury room—reversal.

a prejudicial character. If such testimony could have been produced by the state from the witness stand, it would have been of a highly vital and important nature.

The effect of testimony so received after the retirement of the

jury has been adverted to in *Gilbert v. State*, 85 *Tex. Crim. Rep.* 597, 215 S. W. 106; *McDougal v. State*, 81 *Tex. Crim. Rep.* 179, L.R.A. 1917E, 930, 194 S. W. 944; *Mitchell v. State* 26 *Tex. Crim. Rep.* 278, 33 S. W. 367, 36 S. W. 456; *Weaver v. State*, 85 *Tex. Crim. Rep.* 111, 210 S. W. 698; *Blocker v. State*, — *Tex. Crim. Rep.* —, 61 S. W. 392.

In view of another trial, we suggest such changes in the charges discussed in our original opinion as will relieve them of the criticism there reviewed.

The motion for rehearing must be granted. The judgment affirming the case will be set aside, and the judgment of the trial court reversed, and the cause remanded.

ANNOTATION.

Receipt of document or statement in jury room, constituting new evidence, as ground for reversal or new trial in criminal case.

I. Statement by juror:

a. General rule:

1. Rule stated, 1187.
2. Rule in Texas, 1188.

b. Application of rule:

1. Generally, 1190.
2. Statement affecting credibility of witnesses, 1198.

I. Statement by juror.

a. General rule.

1. Rule stated.

It is well settled that the reception of any evidence by the jury in a criminal case, outside of that produced at the trial, will vitiate the verdict whenever there is sufficient ground to suspect that the accused has been prejudiced thereby. See 16 R. C. L. p. 304. Accordingly, where a juror states to his fellows in the jury room material facts based on personal knowledge, which were not adduced in evidence, and the statements influence the jury in arriving at a verdict to the prejudice of the accused, a new trial will be granted.

Iowa.—*State v. Salmer* (1917) 181 *Iowa*, 280, 164 N. W. 620.

Kansas.—*State v. Woods* (1892) 49 *Kan.* 237, 30 *Pac.* 520; *State v. McCormick* (1896) 57 *Kan.* 440, 57 *Am. St. Rep.* 341, 46 *Pac.* 777; *State v. Burton* (1902) 65 *Kan.* 704, 70 *Pac.* 640, 14 *Am. Crim. Rep.* 688; *State v. Lowe* (1903) 67 *Kan.* 183, 72 *Pac.* 524, 14 *Am. Crim. Rep.* 693; *State v. Duncan* (1904) 70 *Kan.* 883, 78 *Pac.* 427; *State v. Farrar* (1918) 103 *Kan.* 774,

I. b—continued.

3. Statement reflecting on character of accused, 1195.
4. Statement concerning another conviction of accused, 1196.
5. Statement relating to other offenses of accused, 1199.

II. Document, 1202.

176 *Pac.* 987; *State v. Beam* (1895) 1 *Kan. App.* 688, 42 *Pac.* 394.

Mississippi.—Compare *Taylor v. State* (1876) 52 *Miss.* 84, 2 *Am. Crim. Rep.* 13.

Nebraska. — *Richards v. State* (1893) 36 *Neb.* 17, 53 N. W. 1027; *Koenigstein v. State* (1917) 101 *Neb.* 229, 162 N. W. 879.

Pennsylvania.—*Com. v. Kulp* (1895) 17 *Pa. Co. Ct.* 561, 5 *Pa. Dist. R.* 468.

Tennessee.—*Booby v. State* (1833) 4 *Yerg.* 111; *Donston v. State* (1845) 6 *Humph.* 275; *Sam v. State* (1851) 1 *Swan*, 61; *Morton v. State* (1878) 1 *Lea*, 498; *Nile v. State* (1883) 11 *Lea*, 694; *Irvine v. State* (1900) 104 *Tenn.* 132, 56 S. W. 845.

Washington. — *State v. Parker* (1901) 25 *Wash.* 405, 65 *Pac.* 776; *State v. Lorenzy* (1910) 59 *Wash.* 308, 109 *Pac.* 1064, *Ann. Cas.* 1912B, 153; *State v. McChesney* (1921) 114 *Wash.* 113, 194 *Pac.* 551.

"When jurors, in their zeal to secure a finding of guilty against the accused, bring before their fellows material statements and facts based on personal knowledge, which were not given in evidence, confidence in their verdict is necessarily shaken. If such matters

had been admitted in evidence in court, where the defendant had opportunity to meet and disprove them, it would have been material error; and where they are introduced before the jury when the defendant is absent, and without opportunity to challenge or meet them, they are still more hurtful and erroneous. In the nature of things, these extraneous statements . . . necessarily vitiate the verdict and require a new trial." *State v. Burton* (1902) 65 Kan. 704, 70 Pac. 640, 14 Am. Crim. Rep. 688.

So, in *State v. Farrar* (1918) 103 Kan. 774, 176 Pac. 987, it was said: "Evidential statements of a prejudicial nature, made by a juror on his personal knowledge, and which would naturally and probably influence the verdict, furnish ground for the granting of a new trial."

But a new trial will not be granted merely on account of statements made in the jury room, where it appears that such statements did not influence or prejudice the jury against the accused. *Moore v. People* (1899) 26 Colo. 213, 57 Pac. 857; *State v. Woodson* (1875) 41 Iowa, 425; *State v. Cowan* (1888) 74 Iowa, 53, 36 N. W. 886; *State v. Cross* (1895) 95 Iowa, 629, 64 N. W. 614; *State v. Wright* (1896) 98 Iowa, 702, 68 N. W. 440; *State v. Olds* (1898) 106 Iowa, 110, 76 N. W. 644; *Feddern v. State* (1907) 79 Neb. 651, 113 N. W. 127; *Irvine v. State* (Tenn.) *supra*. See also *State v. Burton* (Kan.) *supra*; *State v. Riley* (1911) 41 Utah, 225, 126 Pac. 294.

Thus, in *Irvine v. State* (Tenn.) *supra*, the court said: "While verdicts have been set aside, and properly, when a juror has communicated to his fellow jurors facts bearing on the issue which were not adduced on the trial, yet we know of no case where a mere suggestion of undisclosed knowledge was permitted to have such an effect. Such an assumption of superior knowledge on the part of a juror, however much it deserved rebuke from his fellow jurors as an exhibition of bad taste, cannot be held to vitiate a verdict, especially when the complaining jurors say they were influenced to agree to a verdict by another . . . consideration."

"Prejudice must be shown, or sufficient ground must appear for presuming prejudice, to authorize interference with the verdict on account of such matters." *State v. Woodson* (1875) 41 Iowa, 425.

It is not sufficient to authorize a new trial to show merely that improper statements were made by members of the jury while deliberating on their verdict, but it must appear that prejudice resulted from the statements, or that they were of a character to cause prejudice. *State v. Olds* (1898) 106 Iowa, 110, 76 N. W. 644.

So, where the statements bear no relation to the merits of the case, and are not such as would reasonably be supposed to have influenced any of the jurors in deciding on their verdict, there is no presumption of injury, and a new trial will not be granted. *State v. Cowan* (1888) 74 Iowa, 53, 36 N. W. 886.

Jurors who are alleged to have been influenced by the statements of another juror may submit affidavits that they were not prejudiced by such statements in arriving at their verdict. *State v. Wright* (1896) 98 Iowa, 702, 68 N. W. 440.

It has also been held that it would be erecting too high a standard, and would result in a defeat of justice, to set aside the verdicts of juries for the discussion, by jurymen, during deliberation, of matters outside the testimony, although such conduct is highly improper. *Taylor v. State* (1876) 52 Miss. 84, 2 Am. Crim. Rep. 13.

2. Rule in Texas.

In Texas, a statute provides that a new trial shall be granted where the jury have received new evidence after having retired to deliberate on a case. It is held that under this statute a new trial is mandatory where the new evidence is of a material character, and that the statute is especially applicable when the jurors receive statements from one of their number in the jury room. *Anschilds v. State* (1879) 6 Tex. App. 524; *McKissick v. State* (1886) 26 Tex. App. 673, 9 S. W. 269; *Mason v. State* (1891) — Tex. App. —, 16 S. W. 766; *McWilliams v. State* (1893) 32 Tex. Crim. Rep. 269, 22 S.

W. 970; *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993; *Ellis v. State* (1894) 33 Tex. Crim. Rep. 508, 27 S. W. 135; *Mitchell v. State* (1896) 36 Tex. Crim. Rep. 278, 33 S. W. 367; *Terry v. State* (1897) — Tex. Crim. Rep. —, 38 S. W. 986; *Tate v. State* (1897) 38 Tex. Crim. Rep. 261, 42 S. W. 595; *Holmes v. State* (1897) 38 Tex. Crim. Rep. 370, 42 S. W. 996; *Darter v. State* (1898) 39 Tex. Crim. Rep. 47, 44 S. W. 850; *Hardiman v. State* (1899) — Tex. Crim. Rep. —, 58 S. W. 121; *Ysaguirre v. State* (1900) 42 Tex. Crim. Rep. 253, 58 S. W. 1005; *Favro v. State* (1900) — Tex. Crim. Rep. —, 59 S. W. 885; *Blocker v. State* (1901) — Tex. Crim. Rep. —, 61 S. W. 391; *Blalock v. State* (1901) — Tex. Crim. Rep. —, 62 S. W. 571; *Buessing v. State* (1901) 43 Tex. Crim. Rep. 85, 63 S. W. 318; *Lankster v. State* (1901) 43 Tex. Crim. Rep. 298, 65 S. W. 373; *Hopkins v. State* (1902) — Tex. Crim. Rep. —, 68 S. W. 986; *Sims v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 90; *Hughes v. State* (1902) 44 Tex. Crim. Rep. 296, 70 S. W. 746; *Hefner v. State* (1903) 44 Tex. Crim. Rep. 441, 71 S. W. 964, 14 Am. Crim. Rep. 682; *McDaniel v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 802; *Dixon v. State* (1904) 46 Tex. Crim. Rep. 154, 79 S. W. 310; *Riley v. State* (1904) — Tex. Crim. Rep. —, 81 S. W. 711; *Crow v. State* (1904) 47 Tex. Crim. Rep. 225, 82 S. W. 1033; *Hambright v. State* (1905) 47 Tex. Crim. Rep. 518, 84 S. W. 597; *Morawitz v. State* (1906) 49 Tex. Crim. Rep. 366, 91 S. W. 227; *Tutt v. State* (1906) 49 Tex. Crim. Rep. 202, 91 S. W. 584; *Kegans v. State* (1906) — Tex. Crim. Rep. —, 96 S. W. 16; *Horn v. State* (1906) 50 Tex. Crim. Rep. 404, 97 S. W. 822; *Winslow v. State* (1906) — Tex. Crim. Rep. —, 98 S. W. 241; *Vanduran v. State* (1906) 50 Tex. Crim. Rep. 440, 98 S. W. 247; *Casey v. State* (1907) 51 Tex. Crim. Rep. 433, 102 S. W. 725; *Battles v. State* (1908) 53 Tex. Crim. Rep. 202, 109 S. W. 195; *Hill v. State* (1908) 54 Tex. Crim. Rep. 646, 114 S. W. 117; *Maples v. State* (1910) 60 Tex. Crim. Rep. 169, 131 S. W. 567; *Williamson v. State* (1911) 62 Tex. Crim. Rep. 132, 136 S. W. 1071; *Dunn v. State* (1913) 72 Tex. Crim. Rep. 170, 161 S. W. 467;

McDougal v. State (1917) 81 Tex. Crim. Rep. 179, L.R.A.1917E, 930, 194 S. W. 944; *Weaver v. State* (1919) 85 Tex. Crim. Rep. 111, 210 S. W. 698; *Cotton v. State* (1921) 88 Tex. Crim. Rep. 618, 228 S. W. 943; *Hallmark v. State* (1921) 89 Tex. Crim. Rep. 257, 230 S. W. 697; *Suddath v. State* (1921) — Tex. Crim. Rep. —, 235 S. W. 210. And see the reported case (*SNOW v. STATE*, ante, 1180).

"One of the grounds for granting a new trial provided by our statute is 'when the jury, after having retired to deliberate upon the case, have received other testimony.' Code Crim. Proc. art. 777, subd. 7. When a verdict was probably influenced by the statement of some of the jurors to his fellows as to other facts not testified to on the trial, a new trial should be granted." *Mason v. State* (1891) — Tex. App. —, 16 S. W. 766.

So, in *Dixon v. State* (1904) 46 Tex. Crim. Rep. 154, 79 S. W. 310, the court said: "The statute inhibits the receiving of evidence by the jury other than that adduced according to the rules of law; and wherever this evidence is of a character to injuriously affect the rights of the defendant, we will not hesitate to reverse the case."

The statute is intended to preserve to parties accused of crime the constitutional right of a public trial by an impartial jury, and the right to be confronted with the witnesses against him; and the inhibition against the receipt by the jury of testimony after its retirement is against legal evidence, as well as illegal evidence. *McDougal v. State* (1917) 81 Tex. Crim. Rep. 179, L.R.A.1917E, 930, 194 S. W. 944.

In *Ysaguirre v. State* (1900) 42 Tex. Crim. Rep. 253, 58 S. W. 1005, it was held that the statute does not mean that the testimony must be of a material character. It may be hearsay or otherwise illegal testimony, and if it has a material bearing on some issue in the case, and is calculated to injure the accused, the court will not speculate on whether it did injure, or whether the verdict could otherwise be sustained.

In several other cases from the same jurisdiction the general rule has been

held without reference to any statute. *Lucas v. State* (1889) 27 Tex. App. 322, 11 S. W. 443; *Burlesan v. State* (1890) — Tex. App. —, 15 S. W. 175; *Hughes v. State* (1902) 43 Tex. Crim. Rep. 511, 67 S. W. 104; *Williams v. State* (1903) 45 Tex. Crim. Rep. 240, 75 S. W. 509; *Mann v. State* (1904) 47 Tex. Crim. Rep. 250, 83 S. W. 195; *Robbins v. State* (1904) 47 Tex. Crim. Rep. 312, 122 Am. St. Rep. 694, 83 S. W. 690; *Warren v. State* (1909) 57 Tex. Crim. Rep. 518, 123 S. W. 1115; *Knight v. State* (1912) 66 Tex. Crim. Rep. 335, 147 S. W. 268; *Clements v. State* (1913) 69 Tex. Crim. Rep. 369, 153 S. W. 1137; *Weber v. State* (1915) 78 Tex. Crim. Rep. 253, 181 S. W. 459; *Mizell v. State* (1917) 81 Tex. Crim. Rep. 241, 197 S. W. 300; *Stevenson v. State* (1921) 89 Tex. Crim. Rep. 143, 230 S. W. 174.

In this jurisdiction, however, the general rule obtains that if it appears that the statement of a juror did not prejudice the jury, it is not ground for reversal. *Jack v. State* (1886) 20 Tex. App. 656; *Cox v. State* (1889) 23 Tex. App. 92, 12 S. W. 493; *Gonzales v. State* (1894) 32 Tex. Crim. Rep. 611, 25 S. W. 781; *Ray v. State* (1896) 35 Tex. Crim. Rep. 354, 33 S. W. 869; *Gallihar v. State* (1896) — Tex. Crim. Rep. —, 37 S. W. 329; *Angley v. State* (1896) 35 Tex. Crim. Rep. 427, 34 S. W. 116; *Richardson v. State* (1906) 49 Tex. Crim. Rep. 391, 94 S. W. 1016; *Foster v. State* (1907) 51 Tex. Crim. Rep. 77, 100 S. W. 1159; *Smith v. State* (1908) 52 Tex. Crim. Rep. 344, 106 S. W. 1161, 15 Ann. Cas. 357; *Arnwine v. State* (1908) 54 Tex. Crim. Rep. 213, 114 S. W. 796; *Railey v. State* (1909) 58 Tex. Crim. Rep. 1, 121 S. W. 1120, 125 S. W. 576; *Allen v. State* (1911) 62 Tex. Crim. Rep. 557, 138 S. W. 593; *Burge v. State* (1914) 73 Tex. Crim. Rep. 505, 167 S. W. 63; *Clark v. State* (1914) 74 Tex. Crim. Rep. 464, 169 S. W. 895.

b. Application of rule.

1. Generally.

Where a juror, in the discussion of a case after retirement, details to his fellow jurors circumstances which were not sworn to by any witnesses,

and impresses another juror with the belief that he has more information in regard to the case than the witnesses, and for that reason should have more influence with the jury than the others, a new trial will be granted. *McWilliams v. State* (1893) 32 Tex. Crim. Rep. 269, 22 S. W. 970.

So it has been held that a conviction for homicide would be set aside where one juror stated that a light penalty would be insufficient, since when the defendant should have served out the short term imposed, he would not be as old as his father when he got out of prison, and called attention to what the father had done on his release, having reference to a homicide thereafter committed by him; and it also appeared that jurors who had previously been in favor of a light sentence agreed to a term of twenty-five years. *McDaniel v. State* (1903) — Tex. Crim. Rep. —, 77 S. W. 802.

Where one charged with perjury concerning a certain occurrence defends on the ground that he was so drunk at the time of the occurrence that he could not remember what happened, and a juror, during the deliberation on the case, states that he met the defendant the day following the occurrence, and that his mind and general appearance seemed to be all right, a verdict of guilty will be reversed. *Hambright v. State* (1905) 47 Tex. Crim. Rep. 518, 84 S. W. 597.

Similarly, it has been held that where, in a prosecution for violation of the liquor law, it becomes material to determine whether the person alleged to have done the physical act of selling was the employee of the defendant, a statement by one juror to the others that such person was in the defendant's employ, and had been for some time, is sufficient to set aside the conviction, where, although there was some slight evidence tending to establish the fact, it is impossible to say, in view of the fact that the evidence was slight, that the jury were not governed by the juror's statement rather than by the evidence, in making up their verdict. *State v. Beam* (1895) 1 Kan. App. 683, 42 Pac. 394.

In the reported case (*SNOW v. STATE*, ante, 1180) a prosecution for the murder of an officer while he was raiding a gambling house, wherein one of the main issues was whether the accused knew the person killed to be an officer at the time of the killing, or thought him to be a robber, a statement of a juror during deliberation that the officers had been in the gambling house the night before, and that the gamblers, including the accused, knew a raid was to be instituted the following night, is held to be sufficiently prejudicial to warrant a new trial.

Where it appears, on an appeal from a conviction of carnally and unlawfully knowing a female under the age of eighteen years, that one of the jurors, during a discussion of the age of the prosecutrix, stated that "three years ago she was a small girl wearing short clothes, and that he saw her about three years ago at a baptism in short dresses," which caused one of the jurymen to remark, "If that's a fact, we will vote for a conviction," and a conviction resulted, a new trial will be granted. *State v. Woods* (1892) 49 Kan. 237, 30 Pac. 520.

A conviction for assault with intent to murder, alleged to have been committed on the defendant's wife, will be reversed, where it appears that some of the jurors stated that the defendant was not the father of the wife's child, as the child had been born at a certain time, and the defendant was in the penitentiary at that time and previously, and such statements were considered by the jury for the purpose of weighing the defense that the defendant did not call on his wife for the purpose of committing the assault, but for the purpose of seeing his child. *Favro v. State* (1900) — Tex. Crim. Rep. —, 59 S. W. 885.

Where a juror controverts the testimony of one on trial for burglary that he went in the room alleged to have been burglarized for the purpose of awaiting the arrival of a train, by stating that he knew the train did not stop at the place the accused said it did, because he lived in the locality, a new trial will be granted. *Dixon v.*

State (1904) 46 Tex. Crim. Rep. 154, 79 S. W. 310.

There is such misconduct as warrants a new trial where a juror who, on his voir dire examination, stated that he did not know the accused, that he had not heard of the case or the defendant, and that he was free from bias or prejudice, declares, after the retirement of the jury, that he knows the accused to be equally guilty with his codefendant, because both were members of a gang of toughs who had occupied a shack in which a man had been murdered, and that the defendants had been implicated in the killing. *State v. Parker* (1901) 25 Wash. 405, 65 Pac. 776.

In *Riley v. State* (1904) — Tex. Crim. Rep. —, 81 S. W. 711, wherein it appeared that, after the retirement of the jury, statements were made by some of the jurors to the effect that there had been too many killings in Houston, and too many men turned loose on charges of murder, and an example had to be made of somebody, the court granted a new trial.

Where it appears that a juror stated to his fellows that he knew that a restaurant at which the accused had testified he was employed did not exist, and the statement caused the jury to bring in a verdict of guilty, a new trial will be granted. *Winslow v. State* (1906) — Tex. Crim. Rep. —, 98 S. W. 241.

A conviction will be reversed where, in connection with the question whether certain footprints were those of the defendant or a third person who lived in the neighborhood, it appears that one or two jurors who were familiar with the location explained to the others the location of the third person's house with reference to the prosecutor's and the accused's, and drew a plat of the surroundings for the purpose of showing that the tracks could not have been made by the third person in the route he traveled, no evidence having been introduced with respect thereto. *Buessing v. State* (1901) 43 Tex. Crim. Rep. 85, 63 S. W. 318.

So, in *Sam v. State* (1851) 1 Swan (Tenn.) 61, wherein it appeared that

while the jury were deliberating on the question whether the offense had been committed within a certain county, one of the jurors stated that he had worked on the road in a part of the county, had seen the county line, and knew that it was a considerable distance beyond the place where the offense was said to have been committed, the court held that there was such misconduct as required a reversal of the verdict.

One convicted of conniving at the prostitution of his wife is entitled to a reversal where it appears that one of the jurymen, after retirement, stated to the rest of the jurors that a house which the accused had testified was not devoted to purposes of prostitution was in fact so used, and that if "they would go to Baker, they would find it to be a house of prostitution yet." *State v. Lorenzy* (1910) 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

A conviction of murder will be reversed where it appears that the foreman and other members of the jury made statements, while the question of punishment was being discussed by the jury, to the effect that the governor had wrongfully interfered and used the pardoning power to shorten the terms of imprisonment of condemned persons, and that the death penalty should therefore be assessed in the case at bar. *Weaver v. State* (1919) 85 Tex. Crim. Rep. 111, 210 S. W. 698.

And where it appears that the accused had proven an alibi, and that, during the deliberation of the jury, a juror stated to his fellows that he had seen the accused traveling toward the place where the crime was committed, a new trial will be granted. *Com. v. Kulp* (1895) 17 Pa. Co. Ct. 561.

A new trial of a prosecution for the illegal sale of liquor should be granted where it appears that, during the jury's deliberations, one juror stated that he knew it was beer which the accused was selling, because he drank some of it himself; and that he knew the accused sold intoxicating liquors, and that he had followed the business for

years. *State v. Duncan* (1905) 70 Kan. 883, 78 Pac. 427.

But it has been held that the act of a juror in a trial for maintaining a liquor nuisance, in stating to the other jurors that he knew that liquor had been sold at this place, as he had drunk it there himself, while highly reprehensible, was not ground for reversal, unless it appeared that the jury acted on the statement rather than on the evidence submitted to them. *State v. Wright* (1896) 98 Iowa, 702, 68 N. W. 440.

A conviction of larceny will not be set aside on an affidavit made on information and belief that, after the jury's retirement, one member said to the others that he had been told by one who claimed to have heard the statement from a third person that the defendant had keys to some buildings in the city, and that he (the third person) had good reason to believe that the defendant had entered his store by means of such keys. *State v. Sprague* (1899) 149 Mo. 409, 50 S. W. 901.

Likewise a reversal has been denied where it appeared that the drawing of a diagram by a juror who was personally acquainted with a building in which the shooting was alleged to have occurred did not prejudice the defendant. *Railey v. State* (1909) 58 Tex. Crim. Rep. 1, 121 S. W. 1120, 125 S. W. 576.

So, a conviction for homicide will not be reversed because of statements made by a juror that he knew the man who was killed to be a boastful young man, but innocent and quiet in his disposition, and that if he made threats against the accused he had no intention of carrying them out, in the absence of proof that the statements were prejudicial. *State v. Woodson* (1875) 41 Iowa, 425.

A new trial will be denied where it appears that a statement by a juror to the effect that he had once been robbed by a porter (the accused being a porter) was made after the verdict had been agreed on, and had no influence on the other jurors in assessing the punishment. *Jack v. State* (1886) 20 Tex. App. 656.

The fact that a juror remarks to one of his fellows during deliberation in a prosecution for sodomy that the accused had it in his mind to perform some sort of sexual act, and would have raped a white woman had one passed while he was committing the act charged, where the remark does not appear to have had any effect on the juror who heard it, has been held not to be sufficient ground on which to set aside the conviction. *Richardson v. State* (1906) 49 Tex. Crim. Rep. 391, 94 S. W. 1016.

It has been held that a discussion of the manner in which the accused had been raised from infancy was not ground for a reversal where it appeared that, on the evidence, the jury could hardly do otherwise than render a verdict of guilty. *Grayson v. State* (1899) 40 Tex. Crim. Rep. 573, 51 S. W. 246.

A reversal is not warranted where it appears that, after the jury had agreed on their verdict, one of the jurors stated that the case would have been tried at the last term of court if one of the accused's witnesses had not feigned sickness and remained away from court, in order to prevent a conviction at the last term. *Gallihar v. State* (1896) — Tex. Crim. Rep. —, 37 S. W. 329.

So, a statement by a juror, in a prosecution for assault with intent to rob, that the accused knew the prosecutrix had a sum of money, made after the jury have agreed on a verdict of guilty, and the lowest punishment has been awarded, is no ground for a reversal. *Angle v. State* (1896) 35 Tex. Crim. Rep. 427, 34 S. W. 116.

It is no ground for a reversal that a juror states to his fellows during deliberation that he knew all about the facts in the case before he was selected as a juror, without stating what those facts were. *Feddern v. State* (1907) 79 Neb. 651, 113 N. W. 127.

Of course, the accused is not prejudiced so as to warrant a reversal where a juror states, during deliberation, that he personally knows the prosecuting witness, whose credibility the accused has attacked, and that his reputation for veracity is bad, but

that, nevertheless, he (the juror) believes the accused to be guilty. *Lemons v. State* (1907) — Tex. Crim. Rep. —, 103 S. W. 896.

And a conviction will not be reversed on account of the statement of a juror to his fellows that the character of the prosecutrix was good, where the statement was made after the jury had determined the guilt of the accused unanimously, and it could not have had any possible effect on any juror in arriving at his verdict. *Gonzales v. State* (1894) 32 Tex. Crim. Rep. 611, 25 S. W. 781.

2. *Statement affecting credibility of witnesses.*

"The rule is settled . . . that a new trial will be granted where the jury, after being retired to deliberate on the case, has received other testimony; and when a juror testifies to his fellow jurors during their deliberations, and vouches for the credibility of a material state's witness, the jury has received other testimony." *Mizell v. State* (1917) 81 Tex. Crim. Rep. 241, 197 S. W. 300.

"It is ground for a new trial that, after the jury has retired for deliberation, a juror has stated to the other jurors, as of his own knowledge, facts material to the case . . . tending to discredit the losing party as a witness." *State v. Lorenzy* (1910) 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

When it appears that the verdict in a criminal case was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for the accused, a new trial should be granted. *Lucas v. State* (1889) 27 Tex. App. 322, 11 S. W. 443.

So, where the most important witness for the accused was impeached by the statement of a juror that he knew the witness to be unworthy of belief, it was held that a new trial would be granted. *McKissick v. State* (1886) 26 Tex. App. 673, 9 S. W. 269.

In *Anschicks v. State* (1879) 6 Tex. App. 525, it appeared that one of the jurors had made a statement, after the jury had retired, to the effect that he

had lived in the same county with one of the witnesses who testified for the defendant on the trial; that she was unworthy of credit; that she was kept by the defendant at the time; and that the whole of her testimony was concocted between herself and the accused. A new trial was granted, the court saying: "The opinion of one of the jurors, not testified to at the trial, and which was not evidence in any legal sense, did, agreeably to the affidavit of the juror, influence the verdict of the jury, to the prejudice of the appellant, and no effort was made to contradict or to neutralize the effects of the juror's affidavit. On this ground alone, under the circumstances, we are of opinion that the verdict was vicious, and should have been set aside."

It has been held that a new trial would be granted where a juror stated to his fellows during deliberation, that he had heard a witness for the prosecution, whose credibility was doubted by some members of the jury, examined before the grand jury, and that he then made the same statements that he made before the trial jury, and it appeared that the juror's statement produced a powerful effect on the minds of the other jurors, and very probably led to the conviction of the accused. *Donston v. State* (1845) 6 *Humph. (Tenn.)* 275.

In *Riley v. State* (1904) — *Tex. Crim. Rep.* —, 81 S. W. 711, it appeared that one of the members of the jury had stated to his fellows in the jury room that he knew a witness who gave material testimony for the accused, and that he was unworthy of belief; that the juror had been asked by another juror whether, if he should be called into court and put on the witness stand, he would be willing to swear that he would not believe the witness on oath, and he replied that he would so swear. The court held that this amounted to misconduct sufficient to require a reversal of the judgment of conviction.

So, a new trial will be granted where it appears that a juror told his fellows that he knew the principal witness for the prosecution to be

truthful and honest, and ten jurors who had previously been in favor of acquittal voted for conviction. *Battles v. State* (1908) 53 *Tex. Crim. Rep.* 202, 109 S. W. 195.

A conviction will be reversed where a juror states, after retirement, that he has known one of the state's witnesses all his life, as well as his father and mother before him, and he is a truthful man, and another juror states that one of the witnesses for the accused is under indictment for horse theft, and is unworthy of belief. *Blalock v. State* (1901) — *Tex. Crim. Rep.* —, 62 S. W. 571.

Similarly, where a juror states that the principal witness for the prosecution, whose testimony was attacked and whose inability to read was proved on the trial, has worked for him, and he knows said witness to be honest and truthful, and able to read, a new trial will be granted. *Tate v. State* (1897) 38 *Tex. Crim. Rep.* 261, 42 S. W. 595.

And it has been held that the statement of a juror that he knew one of the state's witnesses to be a truthful, straight, honest, and honorable man, who would not tell anything but the truth, which statement was agreed to by several other jurors, who knew said witness personally, was sufficient to warrant a reversal where two of the jurymen, who were for light punishment, testified that they were influenced by the statements to the extent of agreeing to more severe punishment. *Mizell v. State* (1917) 81 *Tex. Crim. Rep.* 241, 197 S. W. 300. See also *Williams v. State* (1903) 45 *Tex. Crim. Rep.* 240, 75 S. W. 509.

It is also error for a juror to state facts and circumstances tending to show that a witness for the accused, notwithstanding his acquittal of participating in the offense, was nevertheless guilty. *Williams v. State* (Tex.) *supra*.

But unless the verdict is probably influenced by the statement of a juror to his fellows as to the credibility of a witness for the accused, a new trial will not be granted. *Cox v. State* (1889) 28 *Tex. App.* 92, 12 S. W. 493.

So, where a statement by a juror in

the jury room that a witness for the prosecution is a good man and a Christian does not influence any of the jurors in arriving at a verdict, a new trial will not be granted. *Allen v. State* (1911) 62 Tex. Crim. Rep. 557, 188 S. W. 593.

The inference from the decision in *State v. Jones* (1888) 29 S. C. 201, 7 S. E. 296, is that jurors may use their personal knowledge of a witness in reaching a conclusion as to his credibility. The court stated that a charge that a juror can neither consider any facts which come within his personal knowledge, nor communicate them to the other jurors, without being in contempt and violating his solemn oath, does not prevent the jurors from using their personal knowledge of witnesses in reaching a conclusion as to their credibility, and is therefore unobjectionable.

3. Statement reflecting on character of accused.

Where there was no evidence concerning the character of the accused, but one of the jurors stated that he was a bad man, and had been on the county convict farm, and that he, the juror, had guarded on that farm, and it appears that the punishment was assessed at a greater period than the jury were inclined to impose before the statement was made,—the conviction will be set aside. *Vanduran v. State* (1906) 50 Tex. Crim. Rep. 440, 98 S. W. 247.

So, where a juror stated to his fellows that while he was deputy sheriff he became well acquainted with the accused, and knew she was a bad character, who gave the officers of the law lots of trouble, a new trial was granted. *Dunn v. State* (1913) 72 Tex. Crim. Rep. 170, 161 S. W. 467.

Similarly, a new trial was granted where the jury discussed the fact that the accused was a bad man, and had served a term in the penitentiary for cattle theft, and was a member of a family who died with their boots on, there having been no evidence concerning the character of the accused introduced on the trial. *Weber v.*

State (1915) 78 Tex. Crim. Rep. 253, 181 S. W. 459.

In *Gilford v. State* (1906) 49 Tex. Crim. Rep. 275, 92 S. W. 424, the court granted a new trial because it appeared that while the jury were deliberating, several of its members, in commenting on the fact that the accused was a negro, said that his character, as well as that of his family, was bad, and that all the negroes living in the same locality with the accused were leading immoral lives.

In *Koenigstein v. State* (1917) 101 Neb. 229, 162 N. W. 879, wherein a juror stated in the jury room that he had known the accused since boyhood, and that he knew his reputation to be bad, the court reversed a judgment of conviction.

A conviction for theft will be reversed where, before a verdict is reached, two of the jurors state that the defendant is the biggest rogue they have ever seen or heard of, that she ought to be hung, and that they would be willing to hang her if the law would permit it; and one of such jurors enumerates several instances of theft by the defendant, and both of such jurors alone stand for the maximum penalty for a considerable time. *Holmes v. State* (1897) 38 Tex. Crim. Rep. 370, 42 S. W. 996.

And where, during the jury's deliberation in a burglary case, one juror states that he does not like the defendant's morals, and intimates that he is connected with a gang of thieves, a conviction will be set aside; and especially so where it appears that before the statement, the jury stood seven for acquittal and five for conviction. *Crow v. State* (1904) 47 Tex. Crim. Rep. 225, 82 S. W. 1083.

In *State v. Lowe* (1903) 67 Kan. 183, 72 Pac. 524, 14 Am. Crim. Rep. 693, it appeared that a juror who had stated on his voir dire examination that he had no knowledge of the case or prejudice which would prevent him from giving the accused a fair trial made statements to other jurors in the jury room to the effect that the accused was a bad man, who should not be turned loose, but should be convicted, no evidence of character having

been introduced on the trial. The court reversed the judgment of conviction.

A conviction of manslaughter resulting from the negligent operation of an automobile while under the influence of intoxicants will be reversed where it appears that two members of the jury had stated repeatedly during deliberation that they knew the accused to have been a drunkard ever since his youth, and it is evident that these statements influenced other jurors in arriving at their verdict. *State v. Salmer* (1917) 181 Iowa, 280, 164 N. W. 620.

In *Hargrove v. State* (1894) 33 Tex. Crim. Rep. 431, 26 S. W. 993, wherein it appeared that, while the jury were deliberating, remarks were made that the accused was a hardened criminal with a bad reputation for peacefulness, as well as for truth and veracity, and that, as the result of these remarks, some of the jurors, who were in favor of acquittal or a short term of years, agreed to a verdict of guilty, and fixed the punishment at twenty-five years' imprisonment, the court granted a new trial.

A conviction of rape will be reversed where it appears that a juror stated to his fellows during deliberation, and while they were divided six for conviction to six for acquittal, that, three years before, the accused went into the bedroom of his neighbor's wife, and a unanimous verdict for conviction resulted from the making of the statement. *Ellis v. State* (1894) 33 Tex. Crim. Rep. 508, 27 S. W. 135.

Where a discussion of the reputation and character of the accused influences one of the jurors to the extent of causing him to agree to a verdict and a higher punishment than he otherwise would have given, a new trial will be granted. *Kegans v. State* (1906) — Tex. Crim. Rep. —, 96 S. W. 16.

In *Warren v. State* (1909) 57 Tex. Crim. Rep. 518, 128 S. W. 1115, one of the grounds on which the court granted a new trial was that several of the jurors stated that they knew all negroes shot craps, and that, if the

accused knew the game was being played, it would have been impossible to keep him away from it.

But it has been held that a mere statement made by one juror to another juror, or to all of his fellows, in reference to the character of the accused, is not per se ground for a new trial. *Austin v. State* (1875) 42 Tex. 355.

And unless it appears that prejudice resulted from statements regarding the character of the accused, a new trial should not be granted. *Hardiman v. State* (1899) — Tex. Crim. Rep. —, 53 S. W. 121.

Thus, it has been held that where the accused is not prejudiced by statements made by jurors in the jury room that he is a bad man and generally crooked, a reversal will not be granted. *State v. Olds* (1898) 106 Iowa, 110, 76 N. W. 644.

When evidence of the character of the accused has been given on the trial, it is not misconduct sufficient to authorize a new trial for the jury to discuss that subject. *Brice v. State* (1901) — Tex. Crim. Rep. —, 61 S. W. 121.

A new trial will not be granted merely on account of the statement of a juror that he had known people of the same name as the accused in a place where he had once lived, who were "the toughest set he about ever knew," and that, as he looked at the accused during the trial, he was impressed with his resemblance to that "set." *People v. Thompson* (1910) 198 N. Y. 396, 91 N. E. 838.

4. *Statement concerning another conviction of accused.*

It has been held that statements by a juror to his fellows concerning other convictions of the accused are calculated to disparage the accused in the minds of the jury, and the court cannot speculate as to possible injury that may have accrued to the accused, but must grant a new trial. *Ysaguirre v. State* (1900) 42 Tex. Crim. Rep. 253, 58 S. W. 1005; *Lankster v. State* (1901) 43 Tex. Crim. Rep. 298, 65 S. W. 373; *Hughes v. State* (1902) 43 Tex. Crim. Rep. 511, 67 S. W. 104.

As was said in *Lankster v. State*

(1901) 43 Tex. Crim. Rep. 298, 65 S. W. 373, *supra*: "We do not believe, in a matter of this sort, we are authorized to speculate as to possible injury that may have accrued to appellant. The jury were guilty of misconduct in referring to the former convictions, and the bare fact that this misconduct was of a character calculated to injuriously affect him is enough."

So, a conviction for homicide will be set aside, where it appears that jurors in favor of conviction stated that two former convictions had been reversed, and that the people were expecting a verdict corresponding with the former verdict, even where the jurors make affidavit that they were not influenced by such statements, and expressly refused to consider them, and although their affidavits find some support in the fact that the juries on the former trial assessed the punishment at twenty-five and twenty-one years, respectively, whereas the jury whose acts are complained of imposed a sentence of only three and one-half years. *Hughes v. State* (1902) 44 Tex. Crim. Rep. 296, 70 S. W. 746.

It is error for the court, on a motion for a new trial of one convicted of obtaining property by false pretenses, to refuse to hear evidence that, during the jury's deliberation, one juror stated that the accused had been convicted on a former trial. *State v. McCormick* (1896) 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

A conviction will be set aside, where, in assessing the punishment, one juror asks what sentence the defendant got on a former trial, and another answers that it was fifteen years, and then a similar verdict is rendered. *Hefner v. State* (1903) 44 Tex. Crim. Rep. 441, 71 S. W. 964, 14 Am. Crim. Rep. 682.

Reversal because of a statement by a juror as to the result of a previous trial has been put on the ground that evidence of the fact would not have been admissible on the trial. *Morawitz v. State* (1906) 49 Tex. Crim. Rep. 366, 91 S. W. 227, wherein the court said: "If the state had attempted, in the course of the trial, to prove that

defendant had been convicted, and five years' punishment assessed against him on the previous trial, and the same had been objected to by appellant, and the court had admitted the testimony, there could be no cavil or question as to the injurious effect of the testimony. This . . . is an accurate test in matters of this character."

Where a statement made by a juror to the effect that the accused has served a term of imprisonment influences another juror to agree to a verdict finding the accused guilty of a felony instead of a misdemeanor, the court should grant a new trial. *Burlesan v. State* (1890) — Tex. App. —, 15 S. W. 175.

A discussion of the penalty awarded on a former conviction will be ground for setting aside a conviction, even though it does not seem to have any influence, by reason of the fact that a less term of imprisonment is imposed than by the former verdict. The rule which inhibits any sort of discussion by members of the jury in the jury room of the former verdict should be rigidly adhered to, and it cannot be said absolutely that, notwithstanding the verdict for a lesser term than was imposed by the former verdict, the fact of the former conviction could not have had some influence with the members of the jury. *Casey v. State* (1907) 51 Tex. Crim. Rep. 433, 102 S. W. 725.

A fortiori a new trial will be granted where it appears that the jurors used a verdict in a prior trial as an actual predicate for their own verdict, after one juror had suggested that the previous verdict was twenty years, and another suggested that it would not do to make the verdict the same, whereupon they rendered a verdict of twenty-one years. *Hill v. State* (1908) 54 Tex. Crim. Rep. 646, 114 S. W. 117.

It has been held that the statement of a juror on a trial for bribery, that the defendant had been previously convicted of arson, when taken in connection with comments on the failure of the defendant to testify, was sufficient to warrant a reversal, where its probable effect was to influence the minds of the jurors, and there was no

evidence in the case as to the conviction for arson. *Maples v. State* (1910) 60 Tex. Crim. Rep. 169, 181 S. W. 567.

So, a conviction for rape will be set aside, where it appears that after the jury had retired, some of its members mentioned the fact that the accused had just been convicted of a similar offense, and, although the foreman suppressed any discussion of the matter, it was repeatedly brought up and alluded to by the members of the jury, there being no evidence in the case as to the prior offense. *Hopkins v. State* (1902) — Tex. Crim. Rep. —, 68 S. W. 986.

It has been held that the statement by two members of a jury in a burglary case, that the defendant had previously been in the penitentiary, when considered together with the fact that, before the statement was made, some of the jury were in favor of assessing a minimum penalty, whereas a longer sentence was afterwards agreed upon, could not be said not to have influenced the jury, and warrant the denial of a new trial. *Hardiman v. State* (1899) — Tex. Crim. Rep. —, 53 S. W. 121.

The considerations which forbid a discussion of a previous conviction and the extent of the penalty on a former trial of the accused make it reversible error for the jurors to consider the conviction and extent of the penalty against the accused's codefendant. *Horn v. State* (1906) 50 Tex. Crim. Rep. 404, 97 S. W. 822.

A new trial will be granted where it appears that, prior to a discussion of another conviction of the accused, and mention of the punishment imposed, a portion of the jury had been in favor of an acquittal, but, after being informed of the result of the former trial, one who had been voting for acquittal stated that he would agree to a conviction. *Clements v. State* (1913) 69 Tex. Crim. Rep. 369, 153 S. W. 1137.

A conviction will be set aside where it appears that, prior to the discussion by the jury of a former trial and conviction, ten jurors were in favor of fixing the punishment at nineteen years' imprisonment, and two were for

a less number of years, and that, after the discussion had taken place, the punishment was fixed at nineteen years, even though the jurors generally stated that they were not influenced by the discussion. *McDougal v. State* (1917) 81 Tex. Crim. Rep. 179, L.R.A.1917E, 930, 194 S. W. 944.

Likewise, where the discussion of a previous conviction of the accused influenced one of the jurors to the extent of causing him to agree to a verdict and a higher punishment than otherwise he would have given, it was held that a new trial would be granted. *Kegans v. State* (1906) — Tex. Crim. Rep. —, 96 S. W. 16.

In *Cotton v. State* (1921) 88 Tex. Crim. Rep. 618, 228 S. W. 943, wherein it appeared that, prior to the discussion of another conviction, the jury stood nine for conviction and three for acquittal, and that, after such discussion was had, a verdict of guilty was rendered, the court granted a new trial.

It has been held that a new trial would be granted where a juror remarked, while the jury was deliberating, that one who was indicted with the defendant had been convicted and sentenced to ten years' imprisonment, and suggested that the jury should not give the accused a smaller sentence, and it appeared that the jury followed the suggestion by rendering a verdict of guilty, and fixing the punishment at ten years. *Tull v. State* (1906) 49 Tex. Crim. Rep. 202, 91 S. W. 584.

Although members of the jury testify that they were not influenced by the discussion of a prior conviction, a reversal will nevertheless be granted for the obvious reason that jurors seeking to justify their conduct would not admit that they were unduly influenced. *Mitchell v. State* (1896) 36 Tex. Crim. Rep. 318, 33 S. W. 367; *Lankster v. State* (1901) 43 Tex. Crim. Rep. 298, 65 S. W. 373; *Hughes v. State* (1902) 44 Tex. Crim. Rep. 296, 70 S. W. 746; *McDougal v. State* (Tex.) *supra*.

Thus, in *Lankster v. State* (1901) 43 Tex. Crim. Rep. 298, 65 S. W. 373, *supra*, the court said: "The jury say that this discussion in no wise influenced them in arriving at their ver-

dict. The affidavits of jurors who are guilty of misconduct, to the effect that they were not prejudiced by what they did, is of little weight. As was said in *Mitchell's Case* (Tex.) supra: 'Such an affidavit is to be expected from jurors seeking to justify themselves for their own misconduct, and to escape a responsibility imposed upon them by their oaths, which an admission that they were otherwise influenced would entail.'"

But a mere casual reference or allusion by a juror to a former conviction, which does not influence or prejudice the jury against the accused, is not ground for a new trial. *Horn v. State* (1906) 50 Tex. Crim. Rep. 404, 97 S. W. 822; *Smith v. State* (1908) 52 Tex. Crim. Rep. 344, 106 S. W. 1161, 15 Ann. Cas. 357; *Arnwine v. State* (1908) 54 Tex. Crim. Rep. 213, 114 S. W. 796; *Oates v. State* (1909) 56 Tex. Crim. Rep. 571, 121 S. W. 370.

"The true rule is that where . . . the testimony supports the verdict, and the charge of the court properly submits the case to the jury, that a verdict ought not to be set aside for every incidental and casual mention of a former trial or a former conviction, and that in no case should it be set aside in a case tried according to law, where the conviction is supported by the testimony, unless the court may fairly and reasonably see, in the light of all the circumstances, that such reference and discussion did or might have prejudiced the appellant's case." *Smith v. State* (1908) 52 Tex. Crim. Rep. 344, 106 S. W. 1161, 15 Ann. Cas. 357, supra.

So, a new trial will not be granted where, although a former conviction may have been incidentally mentioned by a juror who was at once informed by the foreman that the matter must not be discussed or considered, all the jurors say that it was not discussed or considered. *Burge v. State* (1914) 73 Tex. Crim. Rep. 505, 167 S. W. 63.

And, in *Horn v. State* (1906) 50 Tex. Crim. Rep. 404, 97 S. W. 822, it was held that a reversal would not be granted for mere comment by a juror

on the fact of a former conviction, where the comment gave the jurors no information which they did not possess when they became jurors, and which knowledge they avowed before they were accepted as such.

Similarly, where it does not appear that any discussion was had in the jury room of a former conviction, and the most that could be said was that it was casually referred to, and did not seem to have made an impression on any member of the jury, there is no misconduct warranting a reversal of the verdict. *Moore v. State* (1907) 52 Tex. Crim. Rep. 336, 107 S. W. 540.

In one jurisdiction it has been held that a new trial will not be granted because of a statement made by a juror as to the nature of the verdict at a former trial, for the reason that the statement is not evidential within the rule that evidential statements of a prejudicial nature, made by a juror on his personal knowledge, which would naturally and probably influence the verdict, furnish ground for the granting of a new trial. *State v. Farrar* (1918) 103 Kan. 774, 176 Pac. 987.

5. *Statement relating to other offenses of accused.*

It is reprehensible conduct and generally deemed to be prejudicial to the accused for a juror to refer, during the deliberations of the jury, to other offenses committed by the accused, and the court should distinctly charge that only the evidence adduced on the trial is to be considered, and should not permit references to previous offenses to be made by the jury in the jury room. *Morton v. State* (1878) 1 Lea (Tenn.) 498.

So, where it appeared that, after the retirement of the jury in a prosecution for arson, statements were made by several of the jurors concerning the fact that the accused had been suspected of burning other buildings, and at least one of the other jurors was influenced thereby, it was held that a new trial would be granted. *Mason v. State* (1891) — Tex. App. —, 16 S. W. 766.

So, a conviction for violation of the

liquor law will be reversed, where it was stated in the jury room that the "defendant had been keeping his sister-in-law," and some of the jurors stated that the defendant had bought an interest in a certain drug store for the purpose of selling liquor, and that liquor was sold in such store every day, none of these things having any basis in the evidence adduced. *Williamson v. State* (1911) 62 Tex. Crim. Rep. 132, 136 S. W. 1071.

Similarly, a conviction for rape will be reversed where it appears that during the deliberation of the jury two of its members stated that the accused had ruined other girls, and was an improper person to run at large, and should be convicted on general principles, although one of the jurors denied that he made the statements complained of. *Richards v. State* (1893) 36 Neb. 17, 53 N. W. 1027.

A conviction of rape will be set aside, where, in assessing the punishment, a juror referred to certain acts and statements not in evidence, tending to show that the defendant was inclined to commit and did commit sexual improprieties. *Sims v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 90.

Likewise, a reversal will be granted where, in a prosecution for the stealing of a calf, a member of the jury states, after his retirement, that he knows the accused, and that he is in the habit of stealing calves. *Terry v. State* (1897) — Tex. Crim. Rep. —, 38 S. W. 986.

Where it appeared that, on the trial of one accused of receiving stolen goods, one of the jurors stated in the jury room that the defendant had at one time stolen a hog, it was held that a new trial would be granted. *Booby v. State* (1833) 4 Yerg. (Tenn.) 111.

A conviction for homicide will be reversed where one or two jurors stated, after the jury's retirement, that the accused had previously killed another man, and made other statements tending to show that the accused and other members of his family were dangerous characters,—and especially where it appears that after such statements were made the attitude of the jury changed from a majority in favor

of acquittal to a unanimous verdict of conviction. *Mitchell v. State* (1895) 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456.

Similarly, a conviction of homicide will be reversed where, after the jurors had determined the guilt of the accused, and while they were trying to fix the punishment, one of the jurors stated that this was not the first man the defendant had killed, and that, if the deceased's dying declarations had been admitted in evidence, the jurors would have known why the deceased had previously gone to the penitentiary, the latter remark having reference to a case in which the defendant and the deceased had previously been indicted for murder, and in which the former was acquitted and the latter convicted. *Blocker v. State* (1901) — Tex. Crim. Rep. —, 61 S. W. 391.

And in *Suddath v. State* (1921) — Tex. Crim. Rep. —, 235 S. W. 210, it was held that a conviction of murder would be reversed where it appeared that the fact that the accused had previously killed another man was discussed by the jury after retirement, and one of the jurors who at first favored a conviction of manslaughter testified that he was influenced by such discussion to the extent of agreeing to a conviction of murder.

It has been held to be reversible error for a juror to state to his fellows, in a prosecution for rape, that the accused had at one time been charged with theft, where it appeared that no conviction had ever resulted from that charge, and the prosecution had been dismissed. *Robbins v. State* (1904) 47 Tex. Crim. Rep. 312, 122 Am. St. Rep. 694, 83 S. W. 690.

A verdict of guilty will be set aside where it appears that a juror stated to his fellows that it was very common for the accused to be in court, or that he was in court frequently with some charge against him, as the statement was well calculated to prejudice the minds of the other jurors against the accused. *Nile v. State* (1883) 11 Lea (Tenn.) 694.

Where a juror who testified on his voir dire examination that he knew

nothing about the facts of the case stated in the jury room that the accused had shot two other men, and it appears that, as a result of the statement, the highest sentence provided by law for the offense of which the accused was convicted was passed on him, a new trial will be granted. *Knight v. State* (1912) 66 Tex. Crim. Rep. 335, 147 S. W. 268.

In *Warren v. State* (1909) 57 Tex. Crim. Rep. 518, 123 S. W. 1115, wherein it clearly appeared that the jury took the previous convictions of the accused for crap shooting, which were referred to and discussed by several of the jurors, as the basis of a conviction for perjury, a new trial was granted.

In *Mann v. State* (1904) 47 Tex. Crim. Rep. 250, 83 S. W. 195, wherein a juror stated in the jury room that the accused had hit the prosecutor on the head with an ax handle on a former occasion, the court granted a new trial.

In a prosecution for cattle theft, the statement by a juror in the jury room that he had lost some cattle, and had traced a wagon track to a place close to the residence of the accused, is misconduct sufficient to warrant a reversal of the verdict. *State v. McChesney* (1921) 114 Wash. 113, 194 Pac. 551.

But the discussion of other crimes than that charged against the accused, unless the discussion is shown to have influenced some of the jurors, is not ground for reversal. *Mason v. State* (1891) — Tex. App. —, 16 S. W. 766; *Williams v. State* (1894) 33 Tex. Crim. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958; *Parker v. State* (1895) — Tex. Crim. Rep. —, 30 S. W. 553; *Ray v. State* (1896) 35 Tex. Crim. Rep. 354, 33 S. W. 869.

And a reference by a juror to the fact that the accused, after his arrest, had attempted to commit suicide, which the foreman warned the jurors they must not consider, and all agreed that it should not be considered, is not sufficient to warrant a reversal of the conviction. *Williams v. State* (1894) 33 Tex. Crim. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958.

20 A.L.R.—76.

Likewise, where one on trial for forgery is not prejudiced by the statements of several jurors, made in the jury room, that the accused had been caught with a woman or women, suggesting that he had been guilty of immoral sexual relations, and that he had been in several "scrapes," a new trial will not be granted. *State v. Olds* (1898) 106 Iowa, 110, 76 N. W. 644.

It has been held that a statement by some of the jurors in a homicide case, after their retirement for deliberation, that the accused had killed another man, while highly improper, is not reversible error, where it appears that the matter was mentioned only once, and was then suppressed by the foreman, and that the jurors were not influenced by it. *Moore v. People* (1899) 26 Colo. 218, 57 Pac. 857.

Similarly, where it appears that one of the jurors merely inquired of another if the accused was the man who had had a row or fight with a deputy sheriff, or if it was a barber by the name of Charley, and the answer was made that the accused was the man instead of the barber, some of the jurors claiming to have heard the discussion, others stating that they did not hear anything said about the matter, a new trial will not be granted. *Clark v. State* (1914) 74 Tex. Crim. Rep. 464, 169 S. W. 895.

Where a discussion of other offenses imputed to the accused was but casual and incidental, and the jury agreed that, as they were concerned only with the charge on which the accused was on trial, they would not be influenced thereby, a new trial was denied. *Testard v. State* (1888) 26 Tex. App. 260, 9 S. W. 888.

Where the affidavits of the jurors showed that no discussion of another offense alleged to have been committed by the accused was had until after the verdict was rendered, a new trial was denied. *State v. Gay* (1896) 18 Mont. 51, 44 Pac. 411.

A new trial will not be granted merely on proof that some of the jurymen stated that the accused had been previously concerned in a transaction similar to that for which he was be-

ing tried, where no proof was made that the statements were believed, or that they influenced any of the jurors in reaching a verdict. *State v. Cross* (1895) 95 Iowa, 629, 64 N. W. 614.

In *Austin v. State* (1875) 42 Tex. 355, it was held that statements made by a juror to his fellows in the jury room, to the effect that the accused had committed other offenses, was not ground for a reversal under a statute authorizing a new trial where the jury receives new evidence during deliberation, even though the juror who heard the statements was prejudiced thereby.

II. Document.

Although the jury in the trial of a criminal case is sometimes entitled to have such documents as have been regularly received in evidence brought into the jury room, the examination by the jury of documents which are not in evidence is improper and is ground for a new trial if the nature of the document or the use made of it is prejudicial to the defendant. *Ogden v. United States* (1902) 50 C. C. A. 380, 112 Fed. 523; *Atkins v. State* (1855) 16 Ark. 568; *Waide v. State* (1917) 13 Okla. Crim. Rep. 165, 162 Pac. 1139; *Thomas v. State* (1917) 13 Okla. Crim. Rep. 414, 164 Pac. 995. See also *Pound v. State* (1871) 43 Ga. 88.

In *Ogden v. United States* (Fed.) supra, the fact that the jury, on retirement, took into the jury room the indictments on which the accused was tried, on the back of which was indorsed the verdict of a former jury, finding the accused guilty as charged therein, was held to be ground for a new trial.

Under an Oklahoma statute making it a ground for a new trial for the jury to receive out of court evidence other than that resulting from a view of the premises, and other statutes prescribing what documents may be taken into the jury room, it has been held that where the jury are allowed to take into the jury room a transcript of the evidence taken at the preliminary examination, and not introduced at the trial, a new trial should be

granted. *Thomas v. State* (1917) 13 Okla. Crim. Rep. 414, 164 Pac. 995. And see *Atkins v. State* (1855) 16 Ark. 568, holding to the same effect without reference to any statute.

But, in a prosecution for manslaughter, where evidence which was given at the coroner's inquest was inadvertently taken into the jury room, but did not appear to have been read by any juror, a new trial was refused. *State v. Harris* (1882) 34 La. Ann. 118.

So, in *Com. v. Nash* (1883) 135 Mass. 541, it was held that the defendant was not entitled to a new trial as of right because of the fact that a copy of the record of the lower court went to the jury by inadvertence, with the other papers in the case.

It has been held that a new trial would not be granted because city directories were furnished during deliberation by a court attendant to members of the jury, where the fact was made known to the court before the verdict, and the jurors were directed that they were to disregard any information obtained from the directories, and it did not appear that the accused had been prejudiced in any way. *United States v. Horn* (1862) 5 Blatchf. 102, Fed. Cas. No. 15,389.

It is no ground for a new trial that documents constituting new evidence were introduced into the jury room, in the absence of proof that the jury read their contents. *State v. Harris* (La.) supra; *State v. Tindall* (1856) 44 S. C. L. (10 Rich.) 212.

In Kansas a statute provides that "the court may grant a new trial when the jury has received any evidence, papers, or documents not authorized by the court." See *State v. Taylor* (1878) 20 Kan. 643; *State v. Lantz* (1880) 23 Kan. 728, 33 Am. Rep. 215; *State v. Keehn* (1911) 85 Kan. 765, 118 Pac. 851. Under that statute it has been held that where an atlas of the county where the crime was alleged to have been committed was brought into the jury room by a bailiff during the deliberations of the jury, and examined by the jurors, in the absence of proof that the accused was not injured thereby, a new trial should

be granted. *State v. Lantz* (1880) 23 Kan. 728, 33 Am. Rep. 215, *supra*. But in *State v. Keehn* (1911) 85 Kan. 765, 118 Pac. 851, a prosecution for homicide, it was held not to be such misconduct as would warrant a new trial under the statute for a juror to submit to his fellows in the jury room a sketch of the scene of the killing, made by him while the evidence was being presented. The court said: "The sketch complained of was not a foreign evidentiary document like the atlas which the bailiff gave the jury in the case of *State v. Lantz* (Kan.) *supra*. It represented nothing more than Cagwin's idea of what the testimony disclosed. This idea he could present to the jury without misconduct, and the fact that the sketch was not accurate does not indicate misconduct. The purpose of the

sketch, however, was to enable Cagwin to follow the testimony intelligently. This court was obliged to do just as Cagwin did, as it proceeded with a reading of the record. As soon as the jury entered upon its consideration of the case it immediately recognized the necessity for some kind of a drawing to visualize in a general way the scene of the tragedy. Deprived of the chart used on the trial, the jury set about to make one of its own, and Cagwin merely offered his as one that would serve their purpose. Under these circumstances no inference of prejudice could reasonably be drawn from the making and exhibition of the sketch; all possibility of prejudice from its use by the jury was disproved, and no misconduct of any kind appears." L. F. C.

WINIFRED STEELE

v.

JOSEPH C. ALLEN, Commissioner of Banks, et al.

SIMON ROSEN et al.

v.

SAME.

MYER T. ORNSTEEN

v.

SAME.

SAMUEL ORNSTEEN et al.

v.

SAME.

Massachusetts Supreme Judicial Court — March 10, 1922.

(— Mass. —, 134 N. E. 401.)

Bank — effect of simple insolvency.

1. Simple insolvency of a bank at the time of receiving deposits does not warrant rescission of the deposit if there are genuine and reasonable hope, expectation, and intention on the part of the officers to carry on the business and recover sound financial standing.

. [See note on this question beginning on page 1206.]

Definition — insolvency.

2. A trader or a bank is denominated as insolvent when not in a condition to pay its debts in the ordinary course, as persons carrying on trade or banking usually do.

[See 14 R. C. L. 628.]

Bank — taking deposits when insolvent — fraud.

3. Deposits accepted by a bank with knowledge on the part of its officers that it cannot meet its obligations is a fraudulent act.

— right to rescind deposit.

4. A deposit in an insolvent bank may be rescinded and the proceeds, if traced, recovered back in like manner as other trust funds.

[See 3 R. C. L. 557; 1 R. C. L. Supp. 855.]

— mere unsound condition — right to rescind.

5. The mere fact that a bank had been in a somewhat shaky condition for years, had not complied with the requirements of the statute as to its reserve, and had transferred funds from its savings to its commercial department, and was finally taken over by the bank commissioner, does not render fraudulent the acceptance of deposits during such time, so as to justify their rescission, where there is nothing to indicate that the action of the commissioner was anticipated by the bank officers, or that they had any reason to expect that the bank would not continue business for years as it had done in the past.

RESERVATION by the Supreme Judicial Court for Suffolk County for determination by the full court of questions arising in suits to recover the amounts of deposits made by plaintiffs in a certain bank alleged to have been insolvent at the time the deposits were made. *Bills dismissed..*

The facts are stated in the opinion of the court.

Messrs. Jacobs & Jacobs for plaintiffs.

Mr. John E. Hannigan for defendant Trust Company.

Rugg, Ch. J., delivered the opinion of the court:

These are suits in equity whereby the several plaintiffs seek to recover from the defendant as commissioner of banks, in possession of the property of the Prudential Trust Company, the amounts of deposits made by them in the trust company while it was insolvent, on the ground that the trust company was known by its managers to be insolvent at the time of the receipt of the deposits, and that hence the bank became a trustee ex maleficio of the moneys thus deposited. The facts as to the financial condition of the trust company and the knowledge and intention of the executive officers concerning its future were briefly these: The bank was organized and opened for business in June, 1915. During the months of July, August, and September, 1916, it had less than the required legal reserve every day (with three or four exceptions) by amounts rang-

ing from \$4,000 to \$56,000. From October, 1916, through July, 1917, it had the required reserve substantially all the time. From August, 1917, through January, 1918, it frequently had less than the legal reserve. From June, 1918, through September, 1919, there was a shortage in the reserve a good deal of the time. In October and November, 1919, conditions changed for the better. The largest deposit balance was \$2,572,000, and the actual reserve reached its highest point, with an excess in round figures of \$267,000. Shortly thereafter began a steady general decline of deposits, interrupted occasionally by temporary increases. The reserve almost never equaled the legal requirements. During September, 1920, the deposits were not quite so low as in February, 1919. In April, 1920, a serious condition was discovered, due to the misconduct of the treasurer, who resigned shortly afterward. He had made excessive loans to and suffered large overdrafts by a single depositor and borrower. Early in May the president of the trust company told the situation to

the commissioner of banks. In order to tide over, ten directors gave their notes to the bank, aggregating \$125,000, which was reported to have been acceptable to the bank commissioner. At about that time two offers, one for \$135 per share and the other for \$125 per share, were made for the outstanding stock of the trust company, although these offers did not develop into anything tangible. In August, 1920, the assistant treasurer bought twenty shares of stock at \$180 per share. The master finds that the treasurer of the trust company knew its condition all the time, that the president knew it in a general way up to the time of the treasurer's retirement, and in detail thereafter, and that the assistant treasurer knew it from the commencement of his service with the bank in March, 1918, until it was closed. All three of these officers knew of the steady shrinkage of deposits, that the commercial department was burdened by a large amount in slow and doubtful loans, and that there were constant transfers of cash from the savings department to the commercial department, without which the latter would possibly not have had enough cash for its necessities. In accepting all the deposits the president and assistant treasurer "acted under a hope" that the trust company "would in some way or other pull through its difficulties, and did not anticipate its closing. Though both these men knew the facts, . . . they never analyzed the situation." There was no evidence showing, on the part of either of these officers, any personal fraudulent intent to bring about any gain or advantage for themselves by continuing to run the trust company and accept deposits, although, knowing the facts as to its condition, they knew it was insolvent. The trust company was closed by the commissioner on September 10, 1920.

Doubtless the trust company was insolvent at all the times when deposits were made here sought to

be recovered. A trader or a bank commonly is insolvent when not in condition to pay his debts in the ordinary course, as persons carrying on trade or banking usually do. *Thompson v. Thompson*, 4 Cush. 134; *Lee v. Kilburn*, 3 Gray, 594, 600; *Vennard v. McConnell*, 11 Allen, 555, 561; *Peabody v. Knapp*, 153 Mass. 242, 26 N. E. 696; *Holbrook v. International Trust Co.* 220 Mass. 150, 155, 107 N. E. 665.

Acceptance of deposits by a bank is a representation of solvency. A bank hopelessly insolvent, receiving deposits from those who confide in its good reputation or in its representations, is held to knowledge that it cannot meet its obligations.

Taking deposits under such circumstances is the equivalent of a preconceived purpose not to pay, and is a fraudulent act. The contract of deposit may be rescinded by the depositor and the deposit, or its proceeds, if traced, may be recovered in like manner as other trust funds. On the other hand, simple insolvency, even of a bank, does not warrant the rescission of deposits if there are genuine and reasonable hope, expectation, and intention on the part of the officers of the bank to carry on its business and to recover sound financial standing. There must be the further fact that it is reasonably apparent to its officers that the concern will presently be unable to meet its obligations as they are likely to mature, and will be obliged to suspend its ordinary operation. The facts must establish the conclusion that the trust company accepted the deposit knowing, through its officers, that it would not and could not pay the money when demanded by the depositor. *Watson v. Silsby*, 166 Mass. 57, 59, 43 N. E. 1117; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 576-578, 33 L. ed. 683, 686, 687, 10 Sup. Ct. Rep. 390;

Definition—
insolvency.

Bank-taking
deposits when
insolvent—fraud.

—right to
rescind deposit.

—effect of simple
insolvency.

Williams v. Van Norden Trust Co. 104 App. Div. 257, 93 N. Y. Supp. 821; *Roberts v. Hill* (C. C.) 24 Fed. 571, 573. It was said in *Brennan v. Tillinghast*, 120 C. C. A. 37, 201 Fed. 609: "The mere fact that the bank is known to be insolvent at the time the deposit is received is not, in our opinion, sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed, and so circumstanced as to constitute its receipt of the deposit a fraud upon the depositor."

A more drastic statement is to be found in some decisions where warranted or required by particular facts, and where a comprehensive statement of a complete rule was not demanded. See, for example, *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209; *Richardson v. New Orleans Coffee Co.* 43 C. C. A. 583, 102 Fed. 785; *Williams v. Van Norden Trust Co.* 104 App. Div. 251, 93 N. Y. Supp. 821; *Western German Bank v. Norvell*, 69 C. C. A. 330, 134 Fed. 724.

In the case at bar it appears that the trust company, while not com-

plying with the requirements of the statute as to reserves, and while not keeping the assets in its savings department separate and distinct from its general assets, was yet continuing to meet its obligations as and when they arose. The exact state of its affairs or the precise extent of its insolvency is not disclosed on this record. It had been apparently in a somewhat shaky condition for several years and yet had been able to continue its business. The commission took possession of its assets and property under Gen. Laws, chap. 167, § 22. There is nothing to indicate that

—mere unsound condition—right to rescind.

such action was anticipated by the officers, or that they had any reason to expect that the institution might not continue for the next three or four years as it had during the past like period. Its deposits had been previously at a lower ebb than when closed by the commissioner, and had recovered. These suits in effect are claims against all the other creditors. This record discloses no equity in favor of these depositors against other depositors during this period of insolvency. In substance and effect the present plaintiffs are seeking a preference over other creditors which is not clearly established. A ratable distribution appears to be more likely to work out justice. The bill may be dismissed in each case, with one bill of costs to the defendant.

So ordered.

ANNOTATION.

Right of depositor to rescind, or to claim a trust in respect of a deposit because of insolvency of bank when it was made.

The general rule is to the effect that acceptance of general deposits by a bank which is hopelessly insolvent to the knowledge of its officers constitutes such a fraud as will entitle the unsuspecting depositor to rescind and recover back the money, or give him a preferential claim, or create a trust *ex maleficio*, provided other conditions sometimes held essential to a re-

covery, such as augmentation of assets, identification, etc., can be satisfied.

United States.—*St. Louis & S. F. R. Co. v. Johnston* (1890) 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390, reversing (1886) 23 Blatchf. 489, 27 Fed. 246; *Somerville v. Beal* (1892) 49 Fed. 790, affirmed in (1892) 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App.

14, 50 Fed. 647; *Richardson v. Denegre* (1899) 35 C. C. A. 452, 98 Fed. 572; *Richardson v. New Orleans Debenture Redemption Co.* (1900) 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; *Richardson v. New Orleans Coffee Co.* (1900) 43 C. C. A. 583, 102 Fed. 785; *Richardson v. Olivier* (1900) 53 L.R.A. 113, 44 C. C. A. 468, 105 Fed. 277; *Western German Bank v. Norvell* (1905) 69 C. C. A. 330, 134 Fed. 724; *Brennan v. Tillinghast* (1913) 120 C. C. A. 37, 201 Fed. 609; *Furber v. Stephens* (1888) 35 Fed. 17; *Peck v. First Nat. Bank* (1890) 43 Fed. 357; *Wasson v. Hawkins* (1894) 59 Fed. 233; *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank* (1895) 65 Fed. 690; *Quin v. Earle* (1899) 95 Fed. 728; *Re Silver* (1912) 208 Fed. 797.

Alabama.—*St. Louis Brewing Asso. v. Austin* (1893) 100 Ala. 313, 13 So. 908. And see *Hutchinson v. National Bank* (1906) 145 Ala. 196, 41 So. 143.

Illinois.—*American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227, affirming (1894) 51 Ill. App. 349; *Chicago Title & T. Co. v. Household Guest Co.* (1900) 88 Ill. App. 126. See also *Lantermann v. Travous* (1898) 174 Ill. 459, 51 N. E. 805.

Maryland.—*Pott v. Schumucker* (1897) 84 Md. 535, 35 L.R.A. 392, 57 Am. St. Rep. 415, 36 Atl. 592.

Massachusetts.—*Furber v. Dane* (1910) 204 Mass. 412, 27 L.R.A.(N.S.) 808, 90 N. E. 859; **STEELE v. ALLEN** (reported herewith) ante, 1203.

Mississippi.—*First Nat. Bank v. Strauss* (1889) 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232.

Missouri.—*Fisse v. Dietrich* (1877) 3 Mo. App. 584.

Nebraska.—*Wilson v. Coburn* (1892) 35 Neb. 530, 53 N. W. 466; *Higgins v. Hayden* (1897) 53 Neb. 61, 73 N. W. 230.

New Jersey.—*Perth Amboy Gas-light Co. v. Middlesex County Bank* (1900) 60 N. J. Eq. 84, 45 Atl. 704.

New York.—*Cragie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Atkinson v. Rochester Printing Co.* (1889) 114 N. Y. 163, 21 N. E. 178; *Grant v. Walsh* (1895) 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209;

Spring Brook Chemical Co. v. Dunn (1889) 39 App. Div. 130, 57 N. Y. Supp. 100; *Williams v. Van Norden Trust Co.* (1905) 104 App. Div. 251, 93 N. Y. Supp. 821; *Chaffee v. Fort* (1870) 2 Lans. 81; *Craigie v. Smith* (1884) 14 Abb. N. C. 409; *National Citizen's Bank v. Howard* (1886) 3 How. Pr. N. S. 511; *Rochester Printing Co. v. Loomis* (1887) 45 Hun, 93, 9 N. Y. S. R. 592, affirmed without opinion in (1890) 120 N. Y. 659, 24 N. E. 1103; *Importers & Traders Bank v. Everett Bros.* (1889) 21 N. Y. S. R. 98, 4 N. Y. Supp. 599; *Syracuse Bank v. Wisconsin M. & F. Ins. Co. Bank* (1891) 59 Hun, 620, 12 N. Y. Supp. 952; *New York Breweries Co. v. Higgins* (1894) 79 Hun, 250, 29 N. Y. Supp. 416; *Stapleton v. Odell* (1897) 21 Misc. 94, 47 N. Y. Supp. 13. And see *Importers & Traders Nat. Bank v. Peters* (1890) 123 N. Y. 272, 25 N. E. 319, and *Re North River Bank* (1891) 60 Hun, 91, 14 N. Y. Supp. 261.

Ohio.—*Orme v. Baker* (1906) 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439, affirming (1905) 27 Ohio C. C. 465; *Re Commercial Bank* (1895) 1 Ohio N. P. 358, 2 Ohio Dec. 304; *Re Commercial Bank* (1895) 2 Ohio N. P. 170. And see *Howe v. Akron Sav. Bank Co.* (1913) 16 Ohio C. C. N. S. 320.

Oklahoma.—*Willoughby v. Weinberger* (1905) 15 Okla. 226, 79 Pac. 777; *Cherry v. Territory* (1906) 17 Okla. 213, 89 Pac. 190; *Cherry v. Territory* (1906) 17 Okla. 221, 8 L.R.A.(N.S.) 1254, 89 Pac. 192.

Pennsylvania.—*Corn Exch. Nat. Bank v. Solicitors' Loan & T. Co.* (1898) 188 Pa. 330, 68 Am. St. Rep. 872, 41 Atl. 536.

Tennessee.—*Bruner v. First Nat. Bank* (1896) 97 Tenn. 540, 34 L.R.A. 532, 37 S. W. 286; *Freiberg v. Cox* (1896) 97 Tenn. 550, 37 S. W. 283; *Harris v. First Nat. Bank* (1897) — Tenn. —, 41 S. W. 1084; *Williams v. Cox* (1897) 99 Tenn. 403, 42 S. W. 3; *Knaffl v. Knoxville Bkg. & T. Co.* (1914) 130 Tenn. 336, L.R.A.1915D, 402, 170 S. W. 476.

Virginia.—*Pennington v. Third Nat. Bank* (1913) 114 Va. 674, 45 L.R.A. (N.S.) 781, 77 S. E. 455.

Washington.—See *Blake v. State Sav. Bank* (1895) 12 Wash. 619, 41 Pac. 909.

Wisconsin.—*Hyland v. Roe* (1901) 111 Wis. 361, 87 Am. St. Rep. 873, 87 S. W. 252.

Canada.—*Re Central Bank* (1888) 15 Ont. Rep. 611; *Exchange Bank v. Montreal Coffee House Asso.* (1886) Montreal L. Rep. 2 S. C. 141.

Where a banker is, to his own knowledge, hopelessly insolvent, he cannot honestly continue his business and receive the money of his customers, and if he does so, even though he has no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, which are to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business. *St. Louis & S. F. R. Co. v. Johnston* (1890) 133 U. S. 566, 38 L. ed. 683, 10 Sup. Ct. Rep. 390; *Richardson v. New Orleans Coffee Co.* (1900) 43 C. C. A. 583, 102 Fed. 785; *Rochester Printing Co. v. Loomis* (1887) 45 Hun, 93, 9 N. Y. S. R. 592, affirmed without opinion in (1890) 120 N. Y. 659, 24 N. E. 1103; *Re Commercial Bank* (1895) 2 Ohio N. J. 170; *Hyland v. Roe* (Wis.) *supra*. In *Rochester Printing Co. v. Loomis* (N. Y.) *supra*, an action by one not a bona fide holder on a draft deposited by the drawers (defendants) with an insolvent bank, where the issue turned upon the question whether or not the act of the bank in receiving the draft was fraudulent, the trial court refused to charge that the depositors of the draft, to establish their defense, must show that the bank made false representations with intent to deceive, and that representations made to the world were not sufficient, but must be made to the defendants. It did substantially charge that a banker, by proclaiming himself as such, and ready to receive deposits of his customers, holds himself out as a man of sufficient means to meet the obligations he, in that manner, assumes; and if his condition was such, and he knew it, when he received a deposit in the course of business with his cus-

tomers, that he was likely to be incapable of meeting the demand for it, he was bound to disclose that situation before he received the deposit; that men assuming that relation cannot be permitted to take the money of their customers when they know that they are unable to repay and likely to be compelled to suspend; that mere insolvency does not necessarily render the receipt of money by a banker fraudulent; but insolvency which is hopeless and irremediable, and renders him liable to shut his doors at any moment, makes it improper for him to continue the business of taking deposits, without notice of his situation to customers; that the fact to be found is whether this deposit was received by Moore (the banker) in good faith, under circumstances which render it honest on his part to receive it, or whether it was dishonest and fraudulent towards his customers, the defendants, to receive it; that if a man is doing banking business fraudulently all the time it is not necessary that he should entertain a particular fraudulent intent in each particular instance in which he receives deposits; that if this transaction was fraudulent on the part of Moore, the defense is established, and that if it were honest on his part the plaintiff is entitled to recover. The appellate court, in upholding the trial court, said: "The charge as made covered the ground and stated fairly, we think, the proposition of fact which was for the consideration of the jury, and to be determined by them to reach a result. The relation between a banker and his customers is in some degree confidential, and he, it must be assumed, understands that they make with him deposits upon the faith and reliance that he is financially able to pay their drafts upon him for an amount equal to their deposits. And the relation that he assumes, in view of the nature of his business as such banker, is, in practical effect, a representation on his part that he is able to do so. And if he is in an irretrievable condition of insolvency, so that he knows or has reason to suppose that he cannot meet the engagements

he assumes when he takes the funds of his customers deposited to be placed to their credit, the transaction may involve an implied representation or concealment which characterizes it as fraudulent on the part of the banker. . . . The defendants had been customers of Moore in his relation of banker for several months. And their defense did not necessarily depend upon representations expressly made by him to them in respect to his financial condition and ability, but might be implied from the relation he assumed as a banker, by means of which invitation was extended alike to them and others to open an account and deposit their moneys with him. It is true that deception was necessary to fraud, and unless the defendants were deceived they had no defense, but there is no evidence that they had any knowledge or information when they made this deposit that Moore was insolvent or was not responsible for all the obligations he assumed. And, therefore, in view of the charge as made, the court was not required to further charge specifically that they must have been in fact deceived to constitute a defense. It may have been otherwise if the jury had been permitted to find that the defendant had any notice of the financial embarrassment of Moore at the time the deposit in question was made with him." And in *Wasson v. Hawkins* (1894) 59 Fed. 233, in holding that the reception of deposits after known hopeless insolvency was a fraud, the court said: "The reception of the money and checks, under such circumstances, was a fraud upon the plaintiff, and entitled him to rescind the transaction, and recover back his deposit from the bank. The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had the right to rely; and, if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to make a deposit would constitute a fraud upon him. The title ac-

quired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who could bring suit to recover his deposit without any previous demand. The bank would become a trustee *ex maleficio*, and would hold the deposit for the use of the depositor, and subject to his right of reclamation." And in *Furber v. Dane* (1910) 204 Mass. 412, 27 L.R.A. (N.S.) 808, 90 N. E. 859, in discussing the right of an innocent depositor in a bank known by its officers to be insolvent, the court said: "The right of such a depositor springs from the fraud which has been practised upon him by means of the false representation practically made to him that the bank is conducting its business in the ordinary way and is solvent, while in reality it is insolvent and known by its managers to be so. The effect of this fraud is to make the bank a trustee *ex maleficio*. But the depositor must show that a real fraud has been practised upon him, and to do this he must show affirmatively both that the bank was actually insolvent when it received his deposit, and that its managing officers then knew this to be the fact." In some jurisdictions the question of fraud has been made the subject of statutory regulation. For instance, in Illinois receipt by a bank within thirty days of failure, suspension, or involuntary liquidation has, by statute (Laws 1879, p. 113; 1 Starr & C. Stat. 776), been declared "prima facie evidence of an intent to defraud on the part of such banker." See *American Trust & Sav. Bank v. Guelder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227, holding that the statute applies to a civil suit to recover back such a deposit. And see *Lanterman v. Travous* (1898) 174 Ill. 459, 51 N. E. 805, and *Chicago Title & T. Co. v. Household Guest Co.* (1900) 88 Ill. App. 126, both of which apply the provisions of this statute to a civil action to recover deposits made in an insolvent bank.

In a number of cases which have passed upon the question under consideration in this annotation, the courts have adopted the theory that

the receipt of deposits by a bank which is hopelessly insolvent to the knowledge of its officials creates a fraud which will entitle the depositor to rescind the contract of deposit and recover back the amount thereof. To this effect are the following cases:

United States.—*Breman v. Tillinghast* (1913) 120 C. C. A. 37, 201 Fed. 609; *Wasson v. Hawkins* (1894) 59 Fed. 233; *Quin v. Earle* (1899) 95 Fed. 728.

Illinois.—*American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (Ill.) *supra*.

Maryland. — *Pott v. Schmucker* (1897) 84 Md. 535, 35 L.R.A. 392, 36 Atl. 592.

Massachusetts.—*STEELE v. ALLEN* (reported herewith) ante, 1203.

Mississippi.—*First Nat. Bank v. Strauss* (1889) 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232.

Nebraska. — *Higgins v. Hayden* (1897) 53 Neb. 61, 73 N. W. 280.

New Jersey.—*Perth Amboy Gas-light Co. v. Middlesex County Bank* (1900) 60 N. J. Eq. 84, 45 Atl. 704.

New York.—*Cragie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Grant v. Walsh* (1895) 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209; *Williams v. Van Norden Trust Co.* (1905) 104 App. Div. 251, 93 N. Y. Supp. 821; *Craigie v. Smith* (1884) 14 Abb. N. C. 409; *National Citizens Bank v. Howard* (1886) 3 How. Pr. N. S. 511; *Importers & Traders Bank v. Everett Bros.* (1889) 21 N. Y. S. R. 98, 4 N. Y. Supp. 599; *New York Breweries Co. v. Higgins* (1894) 79 Hun, 250, 29 N. Y. Supp. 416; *Stapleton v. Odell* (1897) 21 Misc. 94, 47 N. Y. Supp. 13.

Ohio.—*Orme v. Baker* (1906) 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439.

Tennessee.—See *Knaff v. Knoxville Bkg. & T. Co.* (1914) 130 Tenn. 336, L.R.A.1915D, 402, 170 S. W. 476.

Washington.—See *Blake v. State Sav. Bank* (1895) 12 Wash. 619, 41 Pac. 909.

Wisconsin.—*Hyland v. Roe* (1901) 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252.

Canada.—*Re Central Bank* (1888) 15 Ont. Rep. 611.

Provided they rescind the contract of debtor and creditor created by the deposit, on the ground of fraud, and have not elected to affirm the same by proving their claim in insolvency proceedings. *Pott v. Schmucker* (Md.) *supra*, holding that where depositors have proved their claim in insolvency they have elected their remedy, and that, consequently, they cannot rescind the contract of deposit and recover the same.

And the doctrine governing the right to recover deposits innocently made in an insolvent bank has been said to be that where deposits are received by a hopelessly insolvent bank, of which insolvency the officers know or should have known, the deposits, because of the fraud, do not become the property of the bank, but remain that of the depositors, who have the right to recover the same. *Richardson v. Denegre* (1899) 35 C. C. A. 452, 93 Fed. 572; *Richardson v. Olivier* (1900) 53 L.R.A. 113, 44 C. C. A. 468, 105 Fed. 277; *Western German Bank v. Norwell* (1905) 69 C. C. A. 330, 134 Fed. 724; *Peck v. First Nat. Bank* (1890) 43 Fed. 357; *Fisse v. Dietrich* (1877) 3 Mo. App. 584; *Syracuse Bank v. Wisconsin M. & F. Ins. Co. Bank* (1891) 59 Hun, 620, 12 N. Y. Supp. 952; *Orme v. Baker* (1906) 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439. And see *Corn Exch. Nat. Bank v. Solicitors' Loan & T. Co.* (1898) 188 Pa. 330, 68 Am. St. Rep. 872, 41 Atl. 536. And this is also true where the deposit consists of a check which has not been placed to the customer's credit at the time the bank closes. *Showalter v. Cox* (1896) 97 Tenn. 547, 37 S. W. 286. And in *Sadler v. Belcher* (1843) 2 Moody & R. (Eng.) 489, a similar conclusion was reached where money was deposited after banking hours, and, according to custom, was kept in a separate account to be carried to the customer's account the following day, the banker having previously resolved not to open again. And to the same effect is *Threlfal v. Giles*, apparently unreported, which is set out in the opinion in the *Sadler Case* at page 492. But compare *Ex parte Clutton* (1850) 1 Fonbl. N. R.

(Eng.) 167, wherein, as set out in 1 *Mews*, Eng. Case Law Dig. col. 1049, it was held that money paid in after banking hours passed to the bank and its assignee, although the bank never opened again.

And in some of the cases the rights of the parties have been settled upon the theory that the fraud of the bank creates a trust *ex maleficio*, entitling the depositor to a preference, provided other necessary conditions are met. Thus in the following cases it has been expressly held that there was a trust in the deposits:

United States.—*Richardson v. New Orleans Debenture Redemption Co.* (1900) 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; *Richardson v. New Orleans Coffee Co.* (1900) 43 C. C. A. 583, 102 Fed. 785; *Wasson v. Hawkins* (1894) 59 Fed. 233; *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank* (1895) 65 Fed. 690; *Re Silver* (1912) 208 Fed. 797.

Alabama.—*St. Louis Brewing Asso. v. Austin* (1893) 100 Ala. 313, 13 So. 908.

Massachusetts.—*Furber v. Dane* (1910) 204 Mass. 412, 27 L.R.A.(N.S.) 808, 90 N. E. 859; *STEELE v. ALLEN* (reported herewith) ante, 1203.

Nebraska.—*Wilson v. Coburn* (1892) 35 Neb. 530, 53 N. W. 466.

New York.—*Atkinson v. Rochester Printing Co.* (1889) 114 N. Y. 168, 21 N. E. 178. And see *Importers & Traders Bank v. Everett Bros.* (1889) 21 N. Y. S. R. 98, 4 N. Y. Supp. 599.

Ohio.—See *Orme v. Baker* (1906) 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439.

Oklahoma.—See *Willoughby v. Weinberger* (1905) 15 Okla. 226, 79 Pac. 777; *Cherry v. Territory* (1906) 17 Okla. 213, 89 Pac. 190; and *Cherry v. Territory* (1906) 17 Okla. 221, 8 L.R.A.(N.S.) 1254, 89 Pac. 192.

Tennessee.—*Bruner v. First Nat. Bank* (1896) 97 Tenn. 540, 34 L.R.A. 532, 37 S. W. 286; *Williams v. Cox* (1897) 99 Tenn. 403, 42 S. W. 3; *Knaffl v. Knoxville Bkg. & T. Co.* (1914) 130 Tenn. 336, L.R.A.1915D, 402, 170 S. W. 476.

Virginia.—*Pennington v. Third Nat.*

Bank (1918) 114 Va. 674, 45 L.R.A.(N.S.) 781, 77 S. E. 455.

Washington.—See *Blake v. State Sav. Bank* (1895) 12 Wash. 619, 41 Pac. 909.

Canada.—See *Ontario Bank v. Chaplin* (1889) Montreal L. Rep. 5 Q. B. 407, affirmed in (1890) 20 Can. S. C. 152, wherein a preference was allowed as to cash, but not as to checks.

In *Richardson v. New Orleans Debenture Redemption Co.* (Fed.) supra, the court said: "Ordinarily, when funds are deposited in a bank, the relation of debtor and creditor immediately arises between the banker and the depositor. The money deposited becomes the property of the banker. He has the right to use it, but must pay the debt to the depositor by cashing his checks. When the banker obtains the deposit by committing a fraud, as by receiving it after hopeless insolvency, the relation between the parties is very different. The fraud avoids the implied contract between the parties that would arise in its absence, and, having barred contract, a trust is the equitable result. The fraud itself gives no lien. The fraud prevents the money deposited from becoming the property of the banker, and thereby prevents the relation of debtor and creditor arising between the parties. As the money does not become the property of the banker, it, of course, remains the property of the depositor. In the banker's hands, therefore, it is a trust fund,—as much so as if it had been a special deposit. The money which the banker has received in due course of honorable business before insolvency has become his property, and he the debtor of those who deposited it. Now, if the banker, having money in his bank, fraudulently receives other money, and mingles it with the moneys on hand, can the defrauded depositor reclaim his money? . . . So we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution."

The general rule that if a bank re-

ceives a general deposit when it is insolvent and its insolvency is known to the officers of the bank but unknown to the depositor, the depositor may reclaim his deposit on account of the fraud perpetrated upon him, has been limited in Georgia by holding that the mere silence of the officers of the bank as to its condition at the time of the deposit is insufficient either to authorize a depositor to reclaim his money on account of a fraud, or to give him any superior lien over other creditors, and as a matter of fact such a depositor is in no better position than any other depositor unless, when intending to become a depositor, he made inquiry as to its solvency and was induced to make the deposit as a result of a statement made by the officers of the bank that it was solvent. *McGregor v. Battle* (1907) 128 Ga. 577, 13 L.R.A.(N.S.) 185, 58 S. E. 28. If this rule be adhered to it would seem that a depositor, in order to protect himself, would always have to inquire as to the solvency of a bank before making a deposit.

And in Mississippi it has been held that in order to sustain an attachment for receiving a deposit with intent to defraud, the actual intent must be proved, and that it is not sufficient that the deposit was received when the bank was insolvent, which the statute made fraudulent. *Hughes v. Lake* (1886) 63 Miss. 552.

And there is considerable authority to the effect that the mere fact that a bank, at the time it receives a deposit, is known by its officers to be insolvent, is not necessarily sufficient of itself, without more, to confer the right of recovery upon the depositor. Thus it has been held that the right of recovery does not arise when the bank, at the time of receiving the deposit, although embarrassed and insolvent, has, in the honest opinion of its officers, a reasonable chance to recover sound financial standing by continuing in business, since in such a case the acceptance of a deposit does not constitute a fraud upon the depositor. *St. Louis & S. F. R. Co. v. Johnston* (1890) 133 U. S. 566, 38 L. ed. 683, 10 Sup. Ct. Rep. 390 (rule

recognized); *Brennan v. Tillinghast* (1913) 120 C. C. A. 37, 201 Fed. 609 (quoted in the reported case (*STEELE v. ALLEN*, ante, 1203); *Quin v. Earle* (1899) 95 Fed. 728; *STEELE v. ALLEN* (reported herewith); *Williams v. Van Norden Trust Co.* (1905) 104 App. Div. 251, 93 N. Y. Supp. 821. The mere fact that a bank is in an embarrassed condition is not sufficient of itself to constitute the necessary fraud, especially where it is continuing with "an honest hope of weathering the financial storm and of being eventually solvent," and deposits received by such banks "in the ordinary course of business . . . become honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions." *Quin v. Earle* (1899) 95 Fed. 728, supra. And in the reported case (*STEELE v. ALLEN*) the court stated the rule to be that simple insolvency of a bank does not warrant rescission of deposits if there are genuine and reasonable hope, expectation, and intention on the part of the officers of the bank to carry on its business and to recover sound financial standing, and, applying the rule, held that deposits made in a bank which had off and on for a period of years been below its statutory reserve and in a shaky condition, but able to continue and meet its obligations, and the officers of which did not anticipate that the commissioner of banks would take over the same, could not be rescinded. And in *Williams v. Van Norden Trust Co.* (N. Y.) supra, the court said: "The mere fact of insolvency at the time the deposit was received is not sufficient to justify a finding of fraud, but the insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations; and that fact must have been known to the bankers, so as to justify the conclusion that the bankers accepted the depositor's money knowing that they would not, and could not, respond when the depositor demanded it. It is fraud that must be proved. An honest mistake

as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend." And that mere insolvency does not necessarily render the receipt of deposits by a banker fraudulent, see *Rochester Printing Co. v. Loomis* (1887) 45 Hun, 93, 9 N. Y. S. R. 592, affirmed without opinion in (1890) 120 N. Y. 659, 24 N. E. 1103, as quoted, *supra*; and *Stapleton v. Odell* (1897) 21 Misc. 94, 47 N. Y. Supp. 13.

Nor will the mere fact that the bank fails soon after receiving a deposit, in the absence of fraud, entitle the depositor to rescind the contract of deposit. *Metropolitan Nat. Bank v. Lloyd* (1881) 25 Hun (N. Y.) 101, affirmed in (1882) 90 N. Y. 530; *People v. St. Nicholas Bank* (1894) 77 Hun, 159, 28 N. Y. Supp. 407; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 421; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 421; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 421; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 422; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 422; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 423.

And where a bank is as a matter of fact insolvent at the time a deposit is received, but such fact is not actually known to its officers, and the circumstances are not such as to charge them with constructive notice thereof, the receipt of the deposit does not work a fraud, and the depositor cannot reclaim the deposit, but must stand with other depositors. *Goshorn v. Murray* (1912) 197 Fed. 407, reversed on other grounds in (1914) 127 C. C. A. 464, 210 Fed. 880; *Balbach v. Frelinghuysen* (1883) 15 Fed. 675; *Terhune v. Bank of Bergen County* (1881) 34 N. J. Eq. 367; *Perth Amboy Gaslight Co. v. Middlesex County Bank* (1900) 60 N. J. Eq. 84, 45 Atl. 704; *People v. St. Nicholas Bank* (1894) 77 Hun, 159, 28 N. Y. Supp. 407; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 421; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y.

Supp. 421; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 422; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 422; *People v. St. Nicholas Bank* (1894) 77 Hun, 611, 28 N. Y. Supp. 423; *Stapleton v. Odell* (1897) 21 Misc. 94, 47 N. Y. Supp. 13; *Williams v. Cox* (1896) 97 Tenn. 555, 37 S. W. 282 (on rehearing in (1897) 99 Tenn. 403, 42 S. W. 3).

And it has been held that the knowledge of insolvency which is sufficient to avoid transactions between a bank and its customers, on the ground of fraud, must have been that of the directors, who represent and have control of the bank, and that knowledge upon the part of an officer, such as a cashier, is not sufficient. *Balbach v. Frelinghuysen* (1883) 15 Fed. 675; *Perth Amboy Gaslight Co. v. Middlesex County Bank* (1900) 60 N. J. Eq. 84, 45 Atl. 704 (to the contrary, see *Pennington v. Third Nat. Bank* (1913) 114 Va. 674, 45 L.R.A.(N.S.) 781, 77 S. E. 455).

And it has been expressly held that to sustain a charge of fraud it is not sufficient that the bank officials knew, or, by the exercise of ordinary care and diligence might have known, of the insolvency of the bank. *Howe v. Akron Sav. Bank Co.* (1913) 16 Ohio C. C. N. S. 320. The court said that the fact that the officials might have known was not sufficient, and approved the rule that they must know or believe.

But there is authority to the effect that the facts may be such that the necessary knowledge of insolvency upon the part of the bank will be presumed, so that it is not necessary to specifically allege knowledge to bring the case within the rule respecting fraud. Thus, in *Somerville v. Beal* (1892) 49 Fed. 790, affirmed in (1892) 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647, where it was alleged that the bank was "irretrievably insolvent, and made so by the operations of the president and two others of the directors," it was held that it must be presumed that the officers knew the condition of affairs and the consequences of their own acts, so that

it was not necessary to aver specifically that the officers had knowledge of the insolvency. And an express showing of actual knowledge is not necessary. See *Re Silver* (1912) 208 Fed. 797, holding that a private banker who was so hopelessly insolvent on the day of closing that his estate would pay but 1 per cent must be presumed to have had knowledge of his insolvency on the preceding day, so as to make acceptance of deposits by him on that day fraudulent within the meaning of the rule as to recovery thereof.

And it has been held that a mere belief or expectation that the bank is actually solvent, and will be able to meet liabilities and continue in business, is not sufficient to avoid the receipt of a deposit being fraudulent, where the facts are such that the officers had reason to know that the concern was not solvent and could not survive. *Chicago Title & T. Co. v. Household Guest Co.* (1900) 88 Ill. App. 126.

It has been held that the promise of a third party to see the bank through its difficulties does not justify an insolvent bank in continuing to receive deposits, if there is no security for the performance of the promise. Thus, in *Rochester Printing Co. v. Loomis* (1887) 45 Hun, 93, 9 N. Y. S. R. 592, affirmed without opinion in (1890) 120 N. Y. 659, 24 N. E. 1103, the court said: "A man cannot honestly carry on banking business upon a mere promise of another to carry him, without some security for the performance of the promise. It will be observed that no legal duty had been assumed by Upton to provide Moore

with currency to do his business. Good faith toward his customers required something more for its support than mere expectation that funds would be supplied to enable him to meet his obligations to his depositors. The expectation must be founded upon some right of property, or in some legal duty furnishing in a reasonable degree the right to suppose that his wants would be supplied, or that his demand for the purpose could be in some manner enforced. If A should, without capital, open a banking office, and announce to the public by appearances that he is a banker, and proceed to receive the people's money on deposit, which he cannot and does not repay, it can hardly, in the legal sense, or necessarily, be regarded as an honest enterprise on his part, merely because B had given him assurance, unsupported by liability, that he would furnish him money as he should from time to time need it. The situation represented by the banker is that of ability founded upon capital under his control to meet his engagements, and if he has it not, his customers are deceived and misled by the appearance he gives to his invitation for patronage. And this deception he has no right to produce, whatever may be his hopes founded, neither on capital of his own, or upon any personal obligation of another which he has any power to command or enforce. At all events, whatever may be his hope or expectation under such circumstances, he would not necessarily be relieved from the charge of fraud in obtaining moneys which he has failed and is unable to repay." G. J. C.

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plff. in Err.,

v.

CLARENCE GRAMBO, SR., Admr., etc., of Clarence Grambo, Jr., Deceased.

Ohio Supreme Court—November 22, 1921.

(— Ohio St. —, 134 N. E. 648.)

Municipal corporation — ordinance limiting speed of trains — validity.

1. An ordinance regulating the speed of trains through a municipality,

Headnotes by the COURT.

enacted under the exercise of police power, which conforms to the limitations prescribed by the legislature, is presumptively reasonable and valid, and not in conflict with the state or Federal Constitutions. But the presumption may be rebutted, and in order to overcome such presumption a railway company must affirmatively show its unreasonableness.

[See note on this question beginning on page 1222.]

Negligence — of child.

2. Children are not chargeable with the same care as persons of mature years. Although children are required to exercise ordinary care to avoid the injuries of which they complain, such care, as applied to them, is that degree of care which children of the same age, education, and experience, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

[See 20 R. C. L. 125; 3 R. C. L. Supp. 1034.]

— contributory negligence of parent.

3. In the negligence action for the death of a boy ten years of age, the defense of contributory negligence is available against the father and mother as beneficiaries, and is a question for the jury, under proper instructions. In case the issue is resolved

against such beneficiaries, the right of recovery is not affected, but only the amount of recovery, when there are other beneficiaries not charged with negligence.

[See 20 R. C. L. 128; 3 R. C. L. Supp. 1036.]

Pleading — striking — unreasonableness of ordinance.

4. Where a city speed ordinance is pleaded as an element of negligence charged in a personal-injury case, and the defendant, by way of defense, admits the existence of the ordinance, but denies its validity, setting out facts which, if true, would tend to show the ordinance to be unreasonable in its application to the facts of the case, the action of the court in sustaining a motion to strike out such matters is error.

ERROR to the Court of Appeals for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the death of his decedent, alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Hough, J.:

The submission in the above case was for the purpose of reviewing the judgments of the two lower courts for errors appearing on the face of the record.

It was an action for personal injury, which resulted in the death of plaintiff's decedent, a boy ten years of age, the killing of the horse which he was driving, and the destruction of the vehicle, by defendant's passenger train at a grade crossing in the city of Columbus, Ohio, near the west corporation line.

The accident took place on the 17th day of October, 1917. The jury returned a verdict against the railway company, on which judgment was entered. Motion for a new trial was overruled, and error was prosecuted to the court of appeals, where the judgment was affirmed.

The petition is based on the following charge of negligence: That the grade crossing, by reason of its location and grade, the general situation in the immediate vicinity, the arrangement of the tracks, together with the natural obstructions in that vicinity, and because the crossing was without protection of flagman, gate, or barrier, was of a highly dangerous character; that no warning was given or preventions taken; that the train was traveling at an excessive rate of speed, to wit, 45 miles per hour; and that the act of striking and killing plaintiff's decedent was wanton and wilful.

A further allegation is then made that on the 4th day of July, 1889, the city of Columbus duly passed an ordinance which makes it unlawful to operate locomotives and trains over crossings at grade within the

municipality at a rate of speed in excess of 6 miles per hour.

To this petition an amended answer was filed, alleging, among other things, that the ordinance of the city of Columbus mentioned in the petition prescribes an unreasonable regulation of interstate commerce and is a direct and unconstitutional interference with interstate commerce, and is therefore unconstitutional in the various particulars therein enumerated.

Other averments are then made, setting out in detail why the ordinance prescribes unreasonable regulations, including an exhibit showing on its face that 22.2 per cent of the distance between the Cleveland and Cincinnati termini of the railway company's line is within municipal corporations, and that from 6 to 7 miles of this right of way are within the limits of the city of Columbus, and setting out other facts to the effect that the crossing where the collision occurred is not of a particularly dangerous character. The answer further avers that about one half of the crossings within the city of Columbus are elevated, and not at grade, and that the tracks of the company within the corporation are upon the property of the company.

On motion these averments of the amended answer were stricken out by the court of common pleas, and exceptions thereto were noted.

A second amended answer was then filed, including four defenses. The first defense admits certain formal matters, including the killing of the young lad and the horse, and the destruction of the vehicle, again avers that the ordinance prescribes an unreasonable regulation of interstate commerce, and otherwise denies each and every allegation not specifically admitted.

The second defense and the third defense are directed to the contributory negligence of the plaintiff's decedent, and the fourth defense charges knowledge on the part of the plaintiff, who is the father of the boy killed, as well as adminis-

trator of his estate, and on the part of the boy's mother, of the youth's inexperience, and charges them with contributory negligence in permitting and directing the boy to drive the horse on the highway.

The reply denies that the ordinance mentioned in the petition prescribes an unreasonable regulation of interstate commerce, but admits that the railway company is engaged in interstate commerce; that many trains are operated daily over its tracks; that the train that collided with and killed the decedent was en route from Cincinnati to Cleveland; and that, if said train and said company complied with the ordinance mentioned, the speed thereof would be limited to 6 miles per hour over grade crossings.

The petition in error raises all questions which may be fairly raised by the record.

Messrs. Wilson & Rector for plaintiff in error.

Messrs. Fred W. Postle and Harley E. Peters, for defendant in error:

The 6-mile speed ordinance was valid.

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Whitson v. Franklin*, 34 Ind. 392; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 21 S. W. 1094; *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87, 81 S. W. 123; *Washington Southern R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834, 2 Am. Neg. Rep. 266; *Larkin v. Burlington, C. R. & N. R. Co.* 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514; *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; *Meek v. Pennsylvania Co.* 38 Ohio St. 638; *Schweinfurth v. Cleveland, C. C. & St. L. R. Co.* 60 Ohio St. 216, 54 N. E. 89; *New York, C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130, 12 Am. Neg. Rep. 343.

Hough, J., delivered the opinion of the court:

The errors of law complained of

in oral argument and the briefs of counsel may be reduced to four, namely:

(1) That the rule followed by the trial court in reference to contributory negligence of a person of tender years was incorrect.

(2) That if the decedent was a boy ten years of age, and, because of that age, could not be charged with negligence to the same degree as a person of mature years, then contributory negligence was chargeable to the father and mother, who permitted and directed him to drive the horse on the highway, from which act the injury and death occurred.

(3) That the court charged on matters not covered by the proof.

(4) That the ordinance which was pleaded and admitted in proof prescribed an unreasonable regulation of interstate commerce.

The general charge of the court is challenged on all the above questions.

1. Contributory negligence becomes generally a question to be solved by the jury, and this is true for the reason that in the vast majority of personal-injury cases there is a dispute and contradiction in the declarations and actions of the plaintiff. The instant case is no exception to that majority. The standard governing such negligence on the part of a youth is not the same as that of an adult. *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 3 L.R.A. 385, 15 Am. St. Rep. 596, 20 N. E. 466, and *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 641, 41 N. E. 980. But, while the standard may differ, the question, when facts are contradictory or disputed, remains one for the consideration and disposition of the jury under the facts and circumstances of the case, with proper safeguards in the charge fixing that standard. The court did not overlook this rule or go astray in this respect, when it said: "Plaintiff's decedent, because of his tender years, is not chargeable with the

20 A.L.R.—77.

same standard of care and caution as would be expected of a person of mature years. The degree of care and caution which said decedent child was required to exercise was that degree of care and caution which would ordinarily be exercised <sup>Negligence—
of child.</sup> under similar circumstances by a child of the same age, education, and experience; not by any child of the same age, but by a child of the same age, education, and experience, of ordinary care and prudence for said age, education, and experience."

2. The third defense of the second amended answer charges the decedent with contributory negligence, and the fourth defense alleges that because he was a youth of tender years he was incapacitated for performing the task he was engaged in, and that his parents, who permitted and directed him, were guilty of contributory negligence.

The fourth is, in a sense, inconsistent with the third defense. If the boy, by reason of age, education, and experience, was capable of contributory negligence, the parents must be vindicated of that primary contributory negligence that might be claimed by reason of the accident. In fact, the trial court, in submitting the question of contributory negligence of the boy to the jury, did so, and properly, on the theory that the boy's own negligence was an essential, primary factor to be determined by the jury. That is to say, where the proof shows that the boy is of that age, education, and experience to justify the submission of the question of his contributory negligence to the jury, as appeared in this case, the determination of that question by the jury, where no special finding is required or returned, establishing the conclusion of the jury that the boy, because of his age, education, and experience, was not capable of guilt of contributory negligence, effectually covers the element of contributory negligence applied to the particular accident of the particular

case, and contributory negligence of the father or mother, or both, as the question is raised in the record, has no relevancy except as it may affect their right of recovery as beneficiaries. The court very properly instructed the jury when it said: "In the event you find that the defendant was liable (that is to say, in the event that the jury resolved the contributory negligence of the boy in the boy's favor, and against the company, and found the company guilty of actionable negligence), if you find that the decedent's father or mother, or either or both, were negligent in placing the decedent in a dangerous position, and that the negligence contributed directly and proximately to the injury and death, you should not allow damages or compensation to the one you find so negligent, or to either if you find both so negligent, but you should only allow damages or compensation to those next of kin not found so negligent."

When the jury have arrived at that stage in their deliberations, if they do so arrive, where the company is guilty of actionable negligence, and the boy is acquitted of negligence, then it is necessary for them to determine whether or not the father or mother, or both of them, were negligent in a manner that contributed directly or proximately to the injury or death. If

it is determined that they were, they may not recover as beneficiaries; if determined that they were not, they may so recover. *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 517, 36 L.R.A. 812, 45 N. E. 708, and *Cleveland, A. & C. R. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582, 12 Am. Neg. Rep. 162.

The jury will be presumed to have determined this question under the instructions given, and, if they found either one thus guilty, to have eliminated in the general verdict any amount to that one as beneficiary, especially in the absence

of a request for and the return of special findings thereon.

3. We find nothing that can be fairly construed to be prejudicial error under this head.

4. The petition sets forth the following allegations in reference to an ordinance of the city of Columbus: "On the 4th day of February, 1889, the said city of Columbus duly passed an ordinance which makes it unlawful to operate locomotives and trains over crossings at grade within said municipality at a rate of speed in excess of 6 miles per hour. Said ordinance . . . was in full force and effect on the said 17th day of October, 1917."

The second amended answer concedes the existence of the ordinance, and alleges that it prescribes an unreasonable regulation of interstate commerce. The ordinance itself, which was admitted in evidence, reads as follows: "It shall be unlawful for any railroad company or corporation, by or through its employees or agents, to run or move any locomotive, car, cars or train, upon or along any railroad track within the corporate limits of the city of Columbus, at a rate of speed greater than 6 miles an hour."

The amended answer, which was superseded by the second amended answer, set out much broader allegations in this particular, for the purpose, probably, of accommodating proof tending to show that a compliance with the ordinance would be an impossibility, under the contention that the unreasonableness of carrying out the provisions of the regulation amounted to unconstitutionality in the ordinance. As has been stated above, these matters, upon motion, were expunged from the pleadings by action of the court.

The defendant company asked the court before argument to charge the jury that the ordinance was invalid, and the plaintiff at the same time requested instructions that it was valid. The court refused the request of the former, and granted

that of the latter, and in the general charge used the following language:

"An ordinance of the city of Columbus regulating the speed of trains and providing that no train shall be run at a greater speed than 6 miles per hour at grade crossings within the municipality has been introduced, and testimony has been introduced tending to show the violation of this ordinance by the defendant.

"The court charges you that the violation of a municipal ordinance passed in the proper exercise of police power in the interest of public safety, and not in conflict with the general laws, is negligence per se,—that is, is negligence of itself,—and where such acts of negligence by the defendant are the direct and proximate cause of an injury not directly contributed to by want of due care on the part of the injured person the defendant is liable.

"In other words, before recovery can be had against the defendant on account of the negligent act committed by the violation of the ordinance, if you find that such ordinance was violated, it must be shown that that negligent act was the direct and proximate cause of the injury, and that that injury was not directly contributed to by the plaintiff's decedent."

The validity of the ordinance is therefore raised in a number of ways. If the ordinance was valid, the court correctly charged, following the rule of law announced in the case of *Schell v. Du Bois*, 94 *Ohio St.* 93, *L.R.A.* 1917A, 710, 113 *N. E.* 664, 13 *N. C. C. A.* 982. And further, if valid, the action of the court in sustaining the motion to strike out was properly taken. But, if the ordinance was invalid, or if the defense tendered thereto in the amended answer was good, then the charge of the court as given was improper, and the disposition of the motion was also improper, and would be the basis of error.

The reply admits that the company is engaged in interstate commerce, operating many trains daily over its tracks, that the train figur-

ing in the accident was so engaged, and at the time en route from Cincinnati to Cleveland, through Columbus, and that the speed, according to the ordinance, could not exceed 6 miles per hour over grade crossings. And here it ought to be noted that the terms of the ordinance itself would permit of a broader admission on the part of the plaintiff below, relying, as he does, upon the ordinance, because, by its terms that speed could not exceed 6 miles per hour, not only at grade crossings, but at all other crossings as well; and, in fact, at all points within the corporate limits of the city of Columbus, a distance of several miles; and it is the claim of the railroad company that the observance of the speed limitation of 6 miles per hour through the city would materially affect time schedules, particularly of the fast mail and other trains carrying interstate passengers and commerce.

That an ordinance regulating speed, passed in the proper exercise of the police power, in the interest of the safety and for the protection of the public, is competent evidence in a personal-injury case, under the settled law of Ohio, cannot be doubted. Back in the '80's Judge Johnson, speaking for this court in a case from the city of Bellaire against a railway company, laid down the rule which was followed for many years, in *Meek v. Pennsylvania Co.* 38 *Ohio St.* 632; and again, more than thirty years later, this court, in another Bellaire case, reported by Judge Johnson (another Judge Johnson, of course), in *Schell v. Du Bois*, *supra*, announced a like rule so far as competency is concerned, where it is said in ¶ 2 of the syllabus: "The violation of a municipal ordinance passed in the proper exercise of the police power, in the interest of the public safety, and not in conflict with general laws, is negligence per se; and where such act of negligence by a defendant is the direct and proximate cause of an injury, not directly contributed to by the want of due care on the part

of the injured person, the defendant is liable."

We come, then, to the reasonableness of existing ordinances as that reasonableness reflects upon constitutional provision and limitation, because it must be conceded that the ordinance is based upon statutory authority, and, of course, in making the test, it must be made under the circumstances and conditions of the case at the present time, and not contemporaneous with the passage of the original ordinance or amendment.

Transportation problems and transportation mediums have undergone an amazing change and development since 1889. It is well to keep in mind that the public transportation agencies owe complex duties and obligations to the whole public,—the passengers whom they carry and the shippers for whom they carry, and the remaining body of the general public,—to the end that their operation may be conducted in such a way as to preserve the highest degree of safety and accommodation to all. Railroads have developed with the time, and with the growth and development of the country, from short-line independent service, with slow schedules and long transfer waits, to the consolidated fast through service of the transcontinental lines of to-day. All these improvements were necessary to keep pace with the times and the demands of the public; and since the period above mentioned other transportation agencies have been created and made efficient by the master minds and industry of the nation. Electric and gasoline motor vehicles for public as well as private transportation have come into vogue, and have fixed themselves permanently in the business and affairs of the country.

In invoking the police power for the safety of the public in this state the legislature has regulated the use of motor vehicles, both public and private, and has imposed speed limits. In other than business or closely built up sections of a municipality

a maximum speed of 20 miles per hour is permitted, and although commercial motor cars have been further legislated upon, the maximum speed for the greater majority of classes has not been reduced, but, in some cases, increased.

The scene of this accident was near the corporate limits of the city, so that the 20-mile limit would apply to the speed allowed the majority of motor vehicles at this point.

Rail transportation on fixed steel tracks is conceded and normally a faster method of transportation than that of motor vehicles upon highways, with no fixed or stationary traction; yet the regulatory laws applying to these two methods of transportation differ materially, with an apparent discrimination against the rail type. There is no dearth of authority on this question, as the question has been raised in many ways and passed upon by the Federal and state courts in many instances. And it would appear from a casual survey that there existed a lack of harmony in the conclusions reached. Upon careful analysis much of the inconsistency disappears. The older decisions almost uniformly hold that properly delegated police power may be exercised without limitation, so long as it is not invoked unreasonably and arbitrarily, and just as uniformly sustain the regulatory acts of the legislative bodies, for the reason, we think, that the exigencies of the cases in those earlier times were not persuasive of an unreasonable or discriminatory situation or application.

The rule of law is in no wise different to-day. It is the application of the old rule to a set of facts based upon modern development of the transportation business, with the corresponding needs and demands of the public, reducing the situation surrounding the later-day cases to an unreasonable absurdity, that has led to conclusions of a different and opposite effect, arrived at in the more recent decisions.

An extremely well considered case on the subject is that of *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730, where this question is fully discussed, and a great number of the older decisions are collated and analyzed. While the holding in that case sustains the ordinance under consideration, yet the law announced is pertinent to the instant case. Proposition 5 of the syllabus reads as follows: "The enactment of an ordinance regulating the speed off trains is an exercise of police power, and before a court can hold such an ordinance unreasonable, the want of necessity for such a measure for the public safety must be clearly made to appear."

And, further, proposition 3 announces the following rule: "An ordinance regulating the speed of trains, which conforms to the limitation prescribed by the statute, is presumed to be reasonable, and it is incumbent upon the railroad company seeking to avoid it to show affirmatively its unreasonableness."

Municipal corporation—ordinance limiting speed of trains—validity.

The defendant below attempted to bring itself within these rules of law by the allegations of the amended answer, in such a way as to accommodate proof tending to show the impossibility of observing the regulation and at the same time fulfilling its duties as a carrier, and to further show that the specific crossing had no peculiar elements of danger.

The United States Federal court in 1915 announced substantially the same rule as laid down in the Illinois case, *supra*. This appears in the case of *Lusk v. Dora* (D. C.) 224 Fed. 650, where it is said in proposition 2 of the syllabus: "An ordinance regulating the speed of trains, enacted as an exercise of the police power of the municipality, delegated to it by its charter, is presumptively reasonable and valid, and not in conflict with the Federal

Constitution, but the presumption may be rebutted."

And in proposition 3 of the syllabus: "The reasonableness of a municipal ordinance, while a question of law, depends on the particular facts in each case."

It was held in this case that the ordinance, under the peculiar facts adduced, imposed an unreasonable burden on interstate commerce.

A decision of the United States Supreme Court, rendered in 1917, very well illustrates the trend of modern decisions upon the question under consideration. In *Seaboard Air Line R. Co. v. Blackwell*, 244 U. S. 310, 61 L. ed. 1160, L.R.A. 1917F, 1184, 37 Sup. Ct. Rep. 640, under the peculiar facts put before the court in that case, the following announcement of the law was made: "That provision of the 'Blow-Post Law' of Georgia (Civ. Code 1910, §§ 2675-2677) which requires railroad companies to check the speed of trains before public road crossings so that trains may be stopped in time should any person or thing be crossing the track there is a direct and unconstitutional interference with interstate commerce as applied to the state of facts specifically pleaded by the defendant interstate carrier in this case, whereby it appears that, to comply with the requirement, the interstate train in question would have been obliged to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia, extending from Atlanta to the South Carolina line, and that more than six hours would thus have been added to the schedule time of four hours and thirty minutes. *Southern R. Co. v. King*, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594, distinguished."

We are persuaded that if, in the trial of the case before us, the defendant had been permitted to develop the issuable facts set out in the amended answer, there would have been presented for solution of court and jury a different situation; and, following the line of decisions above

mentioned, we reach the conclusion that the trial court erred in its ruling on the motion to strike out the matters appearing in the amended answer, and that the charge of the court in respect to the validity of the ordinance, as that validity is reflected by its reasonableness or unreasonableness in this case, while consistent, of course, with its holding on the motion, nevertheless constituted prejudicial error. Nor does the conclusion here arrived at in any wise violate the rule of law announced by this court in the first proposition of the syllabus in the case of *Blancke v. New York C. R. Co.* 103 Ohio St. 178, 133 N. E. 484, nor is it inconsistent with the language used by the judge of this court announcing the opinion in that case, where it is said, at page 184 of 103 Ohio St., at page 486 of 133 N. E.: "The presumption of law obtains that such regulation is

**Pleading—
striking—un-
reasonableness
of ordinance.**

necessary and reasonable, and before the court will interfere with the discretion committed to the public authorities it must clearly appear that the exercise of such power upon the part of the municipality is unreasonable or unnecessary for the public safety. And only where it is shown clearly to the court that the exercise of this power is unreasonable and arbitrary, unduly restricting the speed of trains within the corporate limits, or where it unreasonably limits the speed of the trains in open or outlying sections of the municipality where the public safety is not affected, may the court declare such regulatory ordinance unconstitutional and void."

The case is therefore reversed, and remanded to the Court of Common Pleas for a new trial in accordance with this opinion.

Marshall, Ch. J., and Johnson, Robinson, Jones, and Matthias, JJ., concur.

ANNOTATION.

Reasonableness of regulation of speed of railroad train.

- I. Generally, 1222.
- II. Particular speeds, 1225.
- III. Regulation covering sparsely settled district, 1225.
- IV. Regulation covering switch yard or railroad grounds, 1230.
- V. Interference with business of railroad, 1230.
- VI. Discrimination, 1231.

I. Generally.

This annotation is confined to a discussion of the reasonableness of railroad speed regulations designed to prevent accident. Cases dealing with speed regulations designed to expedite the shipment of live stock are excluded.

While the annotation makes no attempt to deal with the existence of a power to regulate the speed of railroad trains, that power being assumed for the purpose of the present discussion, it may be said by way of introduction that it is well settled that the

legislature may empower municipal authorities to pass ordinances to regulate the speed of cars through cities; and it is equally well settled that the municipal authorities of cities and large towns have the right to adopt such ordinances without any special legislative sanction, by virtue of their general police power as to matters within their respective jurisdictions. The cases cited throughout this annotation either uphold the power or take its existence for granted.

Where an ordinance regulating the speed of trains is passed in pursuance of power expressly conferred by the legislature, and the details of the municipal legislation are prescribed by the legislature, the ordinance will not be held invalid by the courts as being unreasonable. See *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730.

But when the details of the legislation are not prescribed, it is generally held that an ordinance passed in pursuance of a general power to regulate speed must be a reasonable exercise thereof, or it will be pronounced invalid. *Lake View v. Tate* (1889) 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791, affirming (1889) 33 Ill. App. 78; *Chicago & A. R. Co. v. Carlinville* (Ill.) supra; *Soucie v. Payne* (1921) 299 Ill. 552, 132 N. E. 779; *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Zumault v. Kansas City & I. Air Line* (1897) 71 Mo. App. 670; *Plattsburg v. Hagenbush* (1903) 98 Mo. App. 669, 73 S. W. 725.

In *Chicago & A. R. Co. v. Carlinville* (Ill.) supra, the court said: "The legislature did not distinctly say what may be done by municipalities in regulating the speed of trains passing through their limits. It only said that the speed of trains should not be limited below a certain rate per hour, and with that exception left the matter wholly within the discretion of the municipal authorities; and we think it clear the legislature did not prescribe the details to be observed in the passage of an ordinance regulating the speed of trains in their passage through incorporated cities and villages, and that the court has the power to decide such an ordinance as this invalid if it clearly appear that it be an unreasonable exercise of such power."

The Indiana court, however, reached the conclusion in *Cleveland, C. C. & I. R. Co. v. Harrington* (1891) 131 Ind. 426, 30 N. E. 37, that no error was committed in refusing to hear evidence as to the unreasonableness of an ordinance, enacted under express statutory authority, limiting the speed of railroad trains to 4 miles per hour. The court said: "The ordinance in question was passed in the year 1866. There was a statute in force, at the time, which expressly conferred the power to pass such an ordinance. 1 Gavin & H. 226. In the case above referred to it was said by this court: 'The power of a court to declare an ordinance unreasonable,

and, therefore, void, is practically restricted to cases in which the legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely.' As this ordinance was enacted by express statutory authority, the court did not err in taking it as the standard of duty by which the appellant was bound, and in refusing to hear evidence that it was unreasonable."

An ordinance regulating the speed of a railroad train, enacted in the exercise of the police power, will be sustained unless it clearly appears to be unreasonable and unnecessary for the safety of the public, and for the protection of life and property.

Alabama.—See *Louisville & N. R. Co. v. Loyd* (1914) 186 Ala. 119, 65 So. 153.

Florida.—See *Seaboard Air Line R. Co. v. Smith* (1907) 53 Fla. 375, 43 So. 235.

Georgia.—*Central R. & Bkg. Co. v. Brunswick & W. R. Co.* (1891) 87 Ga. 392, 13 S. E. 520; *Atlantic Coast Line R. Co. v. Adams* (1909) 7 Ga. App. 146, 66 S. E. 494; *Nashville, C. & St. L. R. Co. v. Peavler* (1910) 134 Ga. 618, 68 S. E. 432; *Western & A. R. Co. v. Watkins* (1913) 14 Ga. App. 388, 80 S. E. 916.

Iowa.—*Meyers v. Chicago, R. I. & P. R. Co.* (1881) 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *Larkin v. Burlington, C. R. & N. R. Co.* (1892) 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514.

Kansas.—*Erb v. Morasch* (1898) 8 Kan. App. 61, 54 Pac. 323, petition dismissed in (1899) 60 Kan. 251, 56 Pac. 133, which is affirmed in (1899) 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819.

Minnesota.—*Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* (1889) 40 Minn. 350, 42 N. W. 24; *Evison v. Chicago, St. P. M. & O. R. Co.* (1891) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6.

Missouri.—*Robertson v. Wabash, St. L. & P. R. Co.* (1884) 84 Mo. 121;

Gratiot v. Missouri P. R. Co. (1893) 116 Mo. 450, 21 S. W. 1094; *Murrell v. Kansas City, St. L. & C. R. Co.* (1919) 279 Mo. 92, 213 S. W. 964; *White v. St. Louis & S. F. R. Co.* (1891) 44 Mo. App. 540.

North Dakota.—*Edwards v. Great Northern R. Co.* (1919) 42 N. D. 154, 171 N. W. 873.

Ohio.—See the reported case (*CLEVELAND, C. C. & St. L. R. Co. v. GRAMBO*, ante, 1214).

South Carolina. — See *Rowe v. Southern R. Co.* (1911) 89 S. C. 217, 71 S. E. 833.

South Dakota.—*Sioux Falls Traction System v. Great Northern R. Co.* (1917) 39 S. D. 17, 162 N. W. 740.

Tennessee.—*Hines v. Partridge* (1921) 144 Tenn. 219, 231 S. W. 16.

Texas.—*St. Louis Southwestern R. Co. v. Bolton* (1904) 36 Tex. Civ. App. 87, 81 S. W. 123; *Houston & T. C. R. Co. v. Dillard* (1906) — Tex. Civ. App. —, 94 S. W. 426.

Utah.—*Shortino v. Salt Lake & U. R. Co.* (1918) 52 Utah, 476, 174 Pac. 860.

Virginia.—*Washington Southern R. Co. v. Lacey* (1897) 94 Va. 460, 26 S. E. 834, 2 Am. Neg. Rep. 266.

Wisconsin.—*State v. Wisconsin C. R. Co.* (1906) 128 Wis. 79, 107 N. W. 295.

It will be presumed that a speed ordinance enacted pursuant to the exercise of the police power is reasonable. *Lusk v. Dora* (1915) 224 Fed. 650; *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* (1889) 40 Minn. 350, 42 N. W. 24; *Evison v. Chicago, St. P. M. & O. R. Co.* (1891) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6. And see the reported case (*CLEVELAND, C. C. & St. L. R. Co. v. GRAMBO*, ante, 1214). The presumption arises especially where the record is silent as to the material facts. *Larkin v. Burlington, C. R. & N. R. Co.* (1892) 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514.

So, a presumption of reasonableness exists where the ordinance is passed in pursuance of express statutory authority. *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60

L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Zumault v. Kansas City & I. Air Line* (1897) 71 Mo. App. 670; *Plattsburg v. Hagenbush* (1903) 98 Mo. App. 669, 73 S. W. 725.

Generally it has been held that the reasonableness of a municipal ordinance regulating the speed of trains is a question of law for the court to decide, unless it depends on the existence of particular facts which are disputed. *Lusk v. Dora* (1915) 224 Fed. 650; *Nashville, C. & St. L. R. Co. v. Peavler* (1910) 134 Ga. 618, 68 S. E. 432; *Atlantic Coast Line R. Co. v. Adams* (1909) 7 Ga. App. 146, 66 S. E. 494; *Lake View v. Tate* (1889) 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791, affirming (1889) 33 Ill. App. 78; *Meyers v. Chicago, R. I. & P. R. Co.* (1881) 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896.

In *Evison v. Chicago, St. P. M. & O. R. Co.* (1918) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6, the court said: "If the invalidity is apparent on the face of a statute or ordinance, it has always been held a question of law for the court, and we cannot perceive why the rule should be different where the invalidity is made to appear from extrinsic facts. Any other rule would lead to the embarrassing result that, upon the same state of facts, one jury might hold an ordinance valid, and another jury hold it invalid."

But to justify a court in declaring void an ordinance limiting the speed of trains within a city, its unreasonableness or want of necessity as a police regulation for the protection of life and property must be clear, manifest, and undoubted. *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* (1891) 87 Ga. 386, 13 S. E. 520; *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* (1889) 40 Minn. 350, 42 N. W. 24; *Evison v. Chicago, St. P. M. & O. R. Co.* (1891) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6; *Gratiot v. Missouri P. R. Co.* (1893) 116 Mo. 450, 21 S. W. 1094; *Plattsburg v. Hagenbush* (1903) 98

Mo. App. 669, 73 S. W. 725; Hines v. Partridge (1921) 144 Tenn. 219, 231 S. W. 16.

"Ordinances of this kind are passed for the purpose of affording protection to persons and property while on the streets at grade crossings and other places on the line of a railroad where they customarily have a right to go. And a clear case must be made out to authorize an interference by the court on the ground of unreasonableness." *Plattsburg v. Hagenbush* (1903) 98 Mo. App. 669, 73 S. W. 725.

II. Particular speeds.

Ordinances have been sustained which limited railroad trains within the municipal limits to the following rates of speed:

Four miles per hour: *Cleveland, C. C. & I. R. Co. v. Harrington* (1891) 131 Ind. 426, 30 N. E. 37; *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* (1889) 40 Minn. 350, 42 N. W. 24; *Hines v. Partridge* (1921) 144 Tenn. 219, 231 S. W. 16.

Five miles per hour: *Washington Southern R. Co. v. Lacey* (1897) 94 Va. 460, 26 S. E. 834, 2 Am. Neg. Rep. 266.

Six miles per hour: *Western & A. R. Co. v. Watkins* (1913) 14 Ga. App. 388, 80 S. E. 916; *Crowley v. Burlington, C. R. & N. R. Co.* (1885) 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Robertson v. Wabash, St. L. & P. R. Co.* (1884) 84 Mo. 121; *Merz v. Missouri P. R. Co.* (1886) 88 Mo. 672, 1 S. W. 382, affirming (1883) 14 Mo. App. 459; *Grube v. Missouri P. R. Co.* (1889) 98 Mo. 330, 4 L.R.A. 776, 11 S. W. 736; *Bluedorn v. Missouri P. R. Co.* (1891) 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; *Gratiot v. Missouri P. R. Co.* (1893) 116 Mo. 450, 21 S. W. 1094; *Murrell v. Kansas City, St. L. & C. R. Co.* (1919) 279 Mo. 92, 213 S. W. 964; *Edwards v. Great Northern R. Co.* (1919) 42 N. D. 154, 171 N. W. 873; *Sioux Falls Traction System v. Great Northern R. Co.* (1917) 39 S. D. 17, 162 N. W. 740; *St. Louis Southwestern R. Co. v. Bolton* (1904) 36 Tex. Civ. App. 87, 81 S. W. 123; *State v. Wisconsin*

C. R. Co. (1906) 128 Wis. 79, 107 N. W. 295. And see the reported case (*CLEVELAND, C. C. & St. L. R. Co. v. GRAMBO*, ante, 1214).

Ten miles per hour: *Atlantic Coast Line R. Co. v. Adams* (1909) 7 Ga. App. 146, 66 S. E. 494; *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Soucie v. Payne* (1921) 299 Ill. 552, 132 N. E. 779; *Larkin v. Burlington, C. R. & N. R. Co.* (1892) 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514.

Twelve miles per hour: *Shortino v. Salt Lake & U. R. Co.* (1918) 52 Utah, 476, 174 Pac. 860.

On the other hand, the courts have held to be unreasonable ordinances limiting the rate of speed of railroad trains as follows:

Four miles per hour: *Meyers v. Chicago, R. I. & P. R. Co.* (1881) 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *Evison v. Chicago, St. P. M. & O. R. Co.* (1891) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6; *White v. St. Louis & S. F. R. Co.* (1891) 44 Mo. App. 540.

Six miles per hour: *Lusk v. Dora* (1915; D. C.) 224 Fed. 650; *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Zumault v. Kansas City & I. Air Line* (1897) 71 Mo. App. 670; *Plattsburg v. Hagenbush* (1903) 98 Mo. App. 669, 73 S. W. 725.

III. Regulation covering sparsely settled district.

Municipal speed regulations are usually upheld even as applied to sparsely settled territory at the outskirts of the municipality, if the extent of sparsely settled territory included is not too great. *Larkin v. Burlington, C. R. & N. R. Co.* (1892) 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514; *Erb v. Morasch* (1898) 8 Kan. App. 61, 54 Pac. 323; *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Houston & T. C. R. Co. v. Dillard* (1906) — Tex. Civ. App. —, 94 S. W. 426.

Thus, in *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106, *supra*, an action for damages, the court held an ordinance limiting the

speed of trains within the city of St. Paul to 4 miles an hour not to be unreasonable, although the accident took place at a crossing in a sparsely settled portion of the city. The court said: "At this time, when it is much the fashion to include within the corporate limits of cities large tracts of surrounding country, there will undoubtedly be portions in which a restriction of the speed of trains to 4 miles an hour may be so manifestly unnecessary and unreasonable that a court may declare it void. . . . The portion of the city in question here is different. It appears to be laid out in streets. Within a short distance of the crossing in question there appears to be a considerable and rapidly increasing city population, and the street making the crossing is a good deal traveled. . . . While it may be true that a higher rate of speed through the portion of the city in question would be consistent with the public safety, we cannot say it is so clearly and manifestly the case that we can hold the passage of the ordinance an abuse of discretion on the part of the common council. If the ordinance be unreasonable, and unnecessarily oppressive to commerce, the best way to prove that and secure its modification is to obey it."

So, in *Erb v. Morasch* (1898) 8 Kan. App. 61, 54 Pac. 323, wherein it was objected that a speed ordinance was unreasonable because of the fact that the part of the city where the accident occurred was uninhabited, and therefore there was no reason to impose restraints on commerce such as existed in the more populous parts of the city, the court said that "had the track of the railroad company been fenced, as in some of the cases referred to by counsel in the brief, and had the country where the accident occurred been agricultural grounds, the objection might have been tenable; but the evidence in the record discloses the fact that that portion of the city where the accident occurred is not thinly populated and is not agricultural lands; that the track of the company was not fenced; and that all the damages to which the inhabitants

of the city were subjected existed in that part of the city as well as in any other part, though probably not to so great a degree—but it was simply a matter of degree."

In *Larkin v. Burlington, C. R. & N. R. Co.* (Iowa) *supra*, an ordinance was held to be reasonable which required the defendant to operate its trains at a rate of speed not exceeding 10 miles an hour for a distance of $\frac{1}{2}$ of a mile from its station, although the evidence tended to show that the right of way was fenced on each side, and that there was only a private crossing between the place where the accident happened and the station.

If an ordinance regulating the speed of trains embraces in its language the whole area of a city, and is reasonable in itself, the court may submit to the jury the question whether, on account of the special local conditions and surroundings, it is reasonable as applied to a particular locality just inside the city limits. *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* (1891) 87 Ga. 386, 13 S. E. 520; *Nashville, C. & St. L. R. Co. v. Peavler* (1910) 134 Ga. 618, 68 S. E. 432. In *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* (Ga.) *supra*, the court said: "It was contended by counsel for plaintiff in error that the city ordinance was unreasonable in its application to the particular locality where this accident occurred; and the assignment of error upon the charge given in reference to this subject implies that the court ought to have so declared. Instead of doing so, the court left the jury to determine, in view of all the facts and circumstances of the case, whether there was a necessity for the ordinance in this particular locality, and whether or not the operation of it at this place was reasonable. This was a very fair and proper method of disposing of this question. The jury, with all the facts before them, were competent to decide it fairly. The charge submitted to them impartially the contentions of both sides as to the necessity and reasonableness of the ordinance, and they were, perhaps, better qualified to reach a just conclusion on the subject than the judge

himself. At any rate, he saw proper to submit this question to them, and we are unable to see that in so doing he committed any error."

But a speed ordinance will be declared invalid if made applicable to any considerable extent of sparsely settled territory. In such a case it has no reasonable relation to the public safety. *Meyers v. Chicago, R. I. & P. R. Co.* (1881) 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *White v. St. Louis & S. F. R. Co.* (1891) 44 Mo. App. 540; *Zumault v. Kansas City & I. Air Line* (1897) 71 Mo. App. 670; *Plattsburg v. Hagenbush* (1903) 98 Mo. App. 669, 73 S. W. 725.

Thus, in *Meyers v. Chicago, R. I. & P. R. Co.* (Iowa) *supra*, an ordinance which prohibited the running of a railway train at a higher rate of speed than 4 miles an hour for a distance of 3 miles through agricultural lands outside the inhabited portions of a city, on a track fenced on both sides, was declared to be unreasonable and void. The court said: "Under the ordinance in question in this case it would take three quarters of an hour, after entering the corporate limits of Council Bluffs, to pass over 3 miles of railroad, through agricultural lands, fenced on both sides, and reach the inhabited portion of the city, and it would take over one hour and a quarter to reach the terminus of the railroad at the Union Pacific depot. One of the objects of railroads is to secure quick transportation for freight and passengers. The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole traveling public. No necessity has been shown, and none certainly exists, for limiting railways to a speed of 4 miles an hour, for 3 miles before they enter the inhabited portion of a city, and whilst passing through agricultural lands fenced upon both sides. If all the cities situated along the line of the defendants' road between Council Bluffs and Chicago should enact and

enforce a like ordinance, it is apparent that the time between the two cities would be greatly increased. The ordinance operates as a restraint upon commerce, and, in our opinion, ought not to be sustained."

And in *Burg v. Chicago, R. I. & P. R. Co.* (1894) 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680, an ordinance limiting the speed of railroad trains to 6 miles per hour was declared to be unreasonable and void as applied to that part of the city added to, and included in, its boundaries after the ordinance was passed, and at a point where no platted streets were open across the track, and where the right of way was fenced on both sides. The court said: "It is not to be understood that the ordinances of the city do not apply to it as enlarged; but, in determining the question whether or not the ordinance is so unreasonable as to be of no validity at the point in question, importance may be given to the fact of whether or not the act, at the time of its passage, was designed or intended as having force there; for, if not, the legislative sanction comes from the fact that the ordinance stands unrepealed after the territorial change in the city, rather than from legislative action based upon known conditions. How far such a fact should, or might, properly influence a judicial determination of the question of the unreasonableness of an ordinance, as bearing on its validity, is not, perhaps, to be definitely stated, nor would it likely be the same in all cases. At the place where the accident occurred, there was no greater necessity for such a limit on the speed of the train than in very many places outside the city or station limits. East of the point some 2,800 feet are brickyards, where there is an opening for men and teams to cross the track. From this point west, some 2 miles beyond the place of the accident, the defendant's right of way is fenced. It is also fenced through West End addition to the city of Des Moines, which is over 1,200 feet east of the place of the accident, and in this addition the platted streets do not cross the railway track. Along where

the accident happened, on both sides of the track, there are no residences, except that of Burg, it being about a fourth of a mile from any other, and the land is wooded and uncultivated on both sides of the road, except a small piece near the house of Burg. This case comes clearly within the rule and reasoning of *Meyers v. Chicago, R. I. & P. R. Co. (Iowa) supra*. Some importance is attached to the facts of the platted West End addition and the brickyards crossing just east of it. They are not of such importance as to change the rule. In the addition, there are but a few buildings,—seven in all,—and, as we have said, the streets, as opened, do not cross the right of way, which is fully protected by its fences. The brickyards crossing is some 2,800 feet east of the point of the accident, and could not in any way affect the reasonableness of the rate of speed at that point. After leaving the brickyards crossing, if not before, the train had passed the conditions as to settlement and the business of the city which demanded the limit upon train speed that is imposed by the ordinance. The city, as enlarged, is 9 miles in width, requiring, under the limitations of the ordinance as to rate of speed, one hour and thirty-five minutes to make the distance, when, without any opportunity for dispute, for a part of the distance the limit is absolutely unnecessary."

Likewise, in *White v. St. Louis & S. F. R. Co. (1891) 44 Mo. App. 540*, a speed ordinance permitting only 4 miles an hour through the outlying districts of a small town was held to be unreasonable, the court saying: "The uncontroverted facts show that the city has a population not exceeding fifteen hundred inhabitants, and that only about one third of its area is platted, the residue consisting of farming lands. The restriction, if valid at all, extends over this entire area. As far as the farm lands are concerned, the necessity of any restriction whatever is not obvious, and as far as the residue of the town is concerned, the necessity of a restriction to 4 miles an hour, which, as we know, is less than the maximum speed

permitted in the most populous cities in this state, is equally not apparent. In the absence of any necessity shown, the restriction is clearly unreasonable. If one city may adopt it, they all may, and thereby make rapid transit, in which the people of the entire state are interested, an impossibility."

In *Zumault v. Kansas City & I. Air Line (1897) 71 Mo. App. 670*, it was said: "No reason has been shown, nor has any been seen by us, why the speed of the defendant's trains should be reduced on that part of its road situate between the eastern city limits and the crossing of the Missouri Pacific Railway. The defendant's track, for the most of the way, is on a high embankment, on the north side of which there is nothing but the unused river shore, and on the south side there are only agricultural lands. There are no street intersections and only one or two public traveled roads crossing its track. People do not habitually go along or over its track. What, then, is the necessity for the restriction? It seems to us that it is so manifestly unnecessary for the protection of life and property that no two reasoning minds could differ as to it. It is well known that a great number of people, who are engaged in commercial and other pursuits in Kansas City, reside at Independence, Fairmount park, and near other stations along the line of defendant railway, and to successfully carry on their business must have the advantage of rapid transit to and from the city. Why oblige the trains of defendant, while engaged in carrying them to and from the city, to take twenty to twenty-five minutes in running the 2 miles or less between the eastern limits of the city and the Missouri Pacific crossing, which could, and no doubt would, be accomplished in five minutes or less, but for the restriction imposed by said ordinance? This needless interference with rapid transit on defendant's railway injuriously affects the traveling public and the defendant alike. There appears to be no greater necessity for imposing the restriction on defendant in running its trains in the city between the points already in-

licated than there is between the eastern limits of the city of Independence, where no rate of speed would be negligence per se. By imposing the restriction the defendant is placed at a disadvantage with other and competing lines between the two cities, and it is, therefore, oppressive and discriminating in its character. Within the populous parts of the city the ordinance is perhaps well enough, but in the sparsely settled parts thereof it is unreasonable and in restraint of suburban travel, and cannot be upheld."

So, in *Evison v. Chicago, St. P. M. & O. R. Co.* (1891) 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6, it was said: "It is self-evident that a limitation of the rate of speed might be reasonable in the thickly populated and crowded portions of a city, where continuous buildings obstruct the view of approaching trains, and where the noise and bustle of travel and business are apt to prevent people from hearing the approach of a train, which would be wholly unnecessary and unreasonable in the large tracts of sparsely populated territory of a merely rural character, now so often included within the corporate limits of cities. Without going into details, the undisputed evidence in this case is that the distance between Phalen street and the eastern boundary of the city is nearly 2 miles; that in the whole of this district there was only one street or highway crossing over defendant's road, viz., at Hazel park (a mile east of Phalen street), which was protected by cattle guards; that the railroad was fenced on both sides the entire distance from Phalen street to and beyond the city limits, so that, with the exception of the crossing at Hazel park, there was not a place where either persons or animals could get upon the track except by breaking down or jumping over the fence. Substantially the same condition of things existed from Phalen street westward to Seventh street station, a distance of over half a mile, according to the scale of the map in evidence, the only street crossing at that time between these points being, as we understand

the evidence, at Duluth avenue, which is four blocks west of Phalen street. It is also very clear that the country on both sides of the railroad from Phalen street eastward to the city limits was very sparsely settled, being largely in a state of nature, and covered with brush and trees, and what was improved was mainly used for farms or gardens. Phalen street itself was a well-traveled street, being a leading thoroughfare to reach Stillwater avenue to the north, and thence out into the country on the road to Stillwater. But this fact was of little importance so far as the speed of trains was concerned, as the railroad did not cross this street at grade, but on a bridge 14 feet above. Confining ourselves to the country from Phalen street east to the city limits, we have defendant's railroad running for 2 miles on the company's own right of way, and securely fenced on both sides, through a sparsely settled and comparatively unimproved country, essentially rural in its character, with but one road or street crossing on the whole distance, and an ordinance limiting the rate of speed to 4 miles an hour (about the rate at which an active man would walk), at which rate it would take a train half an hour to run the 2 miles. A mere statement of these facts ought to be conclusive that, as applied to this part of defendant's road, the ordinance is so manifestly unnecessary to the protection of life and property that no two minds could reasonably differ as to the fact. According to the map, which is made part of the record, the limits of the city must be about 9 miles in length by 7 in breadth, embracing much land that is not even platted, and hence presumably either unimproved or else devoted to purely agricultural purposes; and it is undoubtedly true that much of that which is platted on paper is in the same condition. To apply a uniform iron-clad rule to the whole of this territory, that no train shall run over 4 miles an hour, is unnecessarily oppressive, and, if obeyed or enforced, would deprive the public of anything

like reasonable suburban transportation."

IV. Regulation covering switch yard or railroad grounds.

An ordinance limiting the speed of trains is not unreasonable because it applies to unclosed switch yards in the exclusive use of the railroad company. *Crowley v. Burlington, C. R. & N. R. Co.* (1885) 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Grube v. Missouri R. Co.* (1889) 98 Mo. 330, 4 L.R.A. 776, 14 Am. St. Rep. 645, 11 S. W. 736; *Bluedorn v. Missouri P. R. Co.* (1891) 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

Nor is a speed ordinance unreasonable because it is applicable to tracks located on the unclosed private property of the railroad company. *Merz v. Missouri P. R. Co.* (1886) 88 Mo. 672, 1 S. W. 382, affirming (1883) 14 Mo. App. 459.

V. Interference with business of railroad.

The mere fact that a speed ordinance may operate to restrain trade or retard rapid transportation will not justify a court in holding it to be invalid when the speed limit is not below that prescribed by the legislature, and when it does not clearly appear that the ordinance is unreasonable and unnecessary for the safety of the public and for the protection of life and property. *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Knobloch v. Chicago, M. & St. P. R. Co.* (1884) 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* (1889) 40 Minn. 350, 42 N. W. 24. In the case last cited, the court sustained an ordinance prohibiting a greater rate of speed than 4 miles an hour, saying: "It is not so palpably and manifestly unreasonable and oppressive, such an abuse of discretion and arbitrary exercise of the power of the city council, upon its face, as would justify the court in setting it aside. An ordinance of this character may restrain trade, and yet be necessary and reasonable as a police regulation. The rapid transaction of business by the railway company may be

hindered and trammelled by an ordinance controlling and regulating the rate of speed with which railway trains may be sent over and through the streets and populous portions of our towns and cities, but, when necessary for the proper protection of life and property, the celerity and despatch with which business may be accomplished is but secondary."

But it appearing that indisputable injury would result to the railroad, both in the matter of maintaining schedules and the physical injury likely to happen to trains, when operated at 6 miles an hour, due in part to the grade and curvature of the land, it was held in *Lusk v. Dora* (1915) 224 Fed. 650, that an injunction would issue to restrain the enforcement of an ordinance so limiting the speed. The court said: "The reasonableness of an ordinance, while a question of law, is dependent upon the particular facts in each case, and decisions in other cases are to be distinguished for this reason, though persuasive where the facts are similar. In this case it cannot be said that the railroad passes through a densely populated territory in passing through Dora. The use of the track by citizens, owing to the topography of the land, is largely confined to the street crossings, of which four cross the track at grade, and only one is very considerably traveled. The track is not laid in a public street, within the corporate limits, but on the privately owned right of way of the railroad, and is not left fit for passage of pedestrians or vehicles along the line longitudinally. The only considerable points of danger are the grade crossings. The operation of trains through the town is made difficult by the grade and curvature of the railroad. These difficulties of operation are intensified when trains are limited to as low a speed as 6 miles an hour. When this low speed is required to be maintained for as great a distance as 1½ miles, the effect of the restriction upon the schedules of fast trains is disastrous; especially when it is considered that other incorporated towns have and may exercise the same right, if the defend-

ant has it. Under modern conditions of transportation, a speed of much in excess of 6 miles an hour cannot be said to be a dangerous rate of speed, except through densely populated territory. It is an inadequate rate of speed. . . . In view of the undisputed injury that will result to the plaintiffs in their operation of the railroad, both in the matter of maintaining schedules and the physical injury likely to happen to trains when operated at so low a speed as 6 miles an hour, under the unfavorable conditions such as the evidence shows exist in passing through Dora, it is clear that, if there is a method of reasonable avoidance of or minimizing the dangers incident to the passage of trains through the corporate limits of Dora, which does not necessitate the maintenance of such a low rate of speed, it should be adopted in lieu of the reduced speed requirement of the ordinance. In view of the fact that the railroad, owing to the conformation of its right of way as compared with the level of the town and its general character, cannot well be used for travel throughout its length, but only at the points of crossing of the streets and the railroad, it would seem that a method which conserved the safety of the public in crossing the railroad at the street crossings would answer the exigency, and if this could be accomplished, without requiring the railroad to reduce the speed of its trains to as low a rate as 6 miles an hour, it would be an unreasonable burden on interstate commerce to exact of it such a maximum speed requirement. It seems to me clear that the grade crossings, even if they are four in number, as contended by the defendant, can be adequately protected by flagmen against the passage of the plaintiffs' trains over the crossings at a very much greater speed than 6 miles an hour. There is now a flagman at the principal crossing. The present record is not convincing as to whether flagmen are required at the other crossings, or whether the present arrangement affords adequate protection. The court is not authorized to determine what would be a

reasonable maximum speed limit for the railroad to operate under, but is limited to a declaration that the present ordinance, fixing a maximum speed of 6 miles an hour, is an unreasonable burden on interstate commerce, and unenforceable against plaintiffs for that reason. This finding is predicated upon the idea that the danger to be apprehended can be adequately guarded against by properly protecting the crossing or crossings that need protection, by flagmen, without unnecessarily impeding the plaintiffs' operation of the railroad by so stringent a speed limit. The injunction prayed for will be granted, upon condition that the plaintiffs, during the period of its operation, maintain, within the corporate limits of Dora, adequate protection against the hazards arising from the operation of trains across the town streets, at grade, to those using such streets."

See also the cases cited *supra*, III.

VI. Discrimination.

Where a speed ordinance discriminates between two competing lines, its validity depends on whether the special circumstances are such that, in the interest of public safety, the discrimination is necessary and therefore warranted. *Lake View v. Tate* (1889) 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791, affirming (1889) 33 Ill. App. 78. In that case the ordinance in question established two districts, based on the density of population, and limited the speed of railroad trains in the more thickly settled district to 10 miles an hour. In the more sparsely settled district the trains of a competing railroad were permitted to run at a much higher rate of speed. The contention that the ordinance was unreasonable because it constituted a special and unwarranted discrimination between two rival and competing lines of railway was sustained, the court saying: "In suburban transportation speed is a matter of prime importance, and the railway company that is able to offer to the public the speediest transportation thereby acquires a very important and manifest advantage over its competitors. That said ordinance consti-

tutes an important discrimination between said lines of railway does not admit of serious question. Its validity then, must depend upon whether the special circumstances, as shown by the evidence, are such that, in the interest of public safety, such discrimination is necessary and therefore warranted. Undoubtedly the circumstances of two lines of railway running through the same city may be such as to justify or even necessitate the imposition of different measures of restraint upon the speed of their trains. One may run through a portion of the city which is densely populated and where a high rate of speed would be extremely dangerous to persons and property, while the other may run through a portion of the same municipality where there are but few inhabitants, and where it is extremely improbable that injury will happen to any person who is in the exercise of ordinary care. In such case a discrimination could hardly be said to be unreasonable. In the case before us, no such disparity of circumstances seems to be shown. Part of the lines of both railways is through thickly settled portions of the city, and part through sections where there are but few inhabitants. It may be fairly inferred from the evidence that

the number of persons and vehicles ordinarily crossing the track of the Chicago & Evanston Railway at the street crossings of the city within a given time is somewhat greater than the number of those crossing the track of the Chicago & Northwestern Railway during the same time; but it appears that the number crossing the tracks of both railways is very large, and that the disparity is not so great as to necessitate or even justify different regulations as to the speed of trains. We are of the opinion, then, that no justification for the discrimination is shown, and that the ordinance, therefore, must be held to be invalid."

An ordinance limiting the speed of trains at street crossings is not unreasonable because it excepts from its operation the street car lines (*Erb v. Morasch* (1898) 8 Kan. App. 61, 54 Pac. 323), or a belt line which, under statute, can charge only 5 cents for each passenger (*Buffalo v. New York, L. E. & W. R. Co.* (1897) 152 N. Y. 276, 46 N. E. 497); or because, after its adoption, an electric street car line is established, and the city fails to limit the speed of the cars (*Indianapolis Union R. Co. v. Waddington* (1907) 169 Ind. 448, 82 N. E. 1030).

A. S. M.

J. RALPH HARPER et al., Copartners Doing Business as Ralph Harper & Company, Plffs. in Err.,

v.

ADOLPH HOCHSTIM et al., Copartners Doing Business as Hochstim & Bossak.

United States Circuit Court of Appeals, Second Circuit — December 14, 1921.

(278 Fed. 102.)

Sale — c. i. f. — how executed.

1. A sale c. i. f. is to be accomplished or executed by a delivery of documents by vendor to vendee, and not by the physical delivery of the actual goods for which the documents are the evidence of title.

[See note on this question beginning on page 1236.]

— what documents necessary.

2. The documents necessary to execute a sale c. i. f. are a bill of lading and policy of insurance.

[See 23 R. C. L. 1336; see note in 10 A.L.R. 701.]

— effect of Sales Act.

3. C. i. f. contracts are not affected by the uniform Sales Act.

[See note in 10 A.L.R. 701.]

Contract — repugnancy — effect.

4. Only when parts of a written agreement are so radically repugnant that there is no rational interpretation that will render them effective and accordant must any part perish.

[See 6 R. C. L. 847; 2 R. C. L. Supp. 226.]

— effect of provision for insurance by seller.

5. A provision for insurance in the name of the seller is not so repugnant to a c. i. f. contract as to permit

tender of the goods rather than the documents, since the seller may be regarded as the buyer's agent to contract and settle with the insurer.

— construction — conflict between written and printed parts.

6. The written portions of a document will, in the absence of proof to the contrary, prevail over the printed parts.

[See 6 R. C. L. 847, 848; 2 R. C. L. Supp. 226.]

Sale — c. i. f. — tender of commodity — effect.

7. A contract by one in China to sell a specified quantity of skins c. i. f. New York requires the seller to ship the skins and send the documents ahead by mail for the buyer's use as desired, and is not satisfied by a tender of the actual skins in New York.

ERROR to the District Court of the United States for the Southern District of New York (Mayer, J.) to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages for alleged breach of a contract by defendants to accept certain skins from plaintiffs. *Affirmed.*

Statement by Hough, Circuit J.:

The parties hereto entered into a contract evidenced by a document, whereof the material parts are as follows (the italicized portion being written, and the rest a printed form):

"New York, February 16, 1920. According to this convention, written and signed in duplicate, the seller, *Ralph Harper & Company, of Tientsin, in China, sells to Hochstim & Bossak* the quantity of about 30,000 *Shantung weasels with tails*. Shipments from China per steamer direct or indirect to *New York during March and/or April*. Price: \$2.45 each C. I. F. New York. Import duty, if any, to be paid by the buyer. Payment: *Four m/s confirmed banker's letter of credit \$73,500 to be opened by the buyer in favor of and to be approved by the seller. Letter of credit to be telegraphed within two days after confirmation.* . . . In case of a c. i. f. sale and the goods are damaged while in transit, the buyer agrees 20 A.L.R.—78.

to accept in settlement thereof the same percentage of allowance as the seller may secure from the insurers by way of settlement of recovery."

The sellers were in China; the above contract was signed on their behalf by an agent, and the printed form used was the agent's form.

Plaintiffs (the sellers) never shipped any weasel skins under this contract, but on June 25, 1920, they obtained in New York 10,000 weasel skins of the kind contracted for and tendered them to the buyers, who refused the same. The sellers then brought this action, alleging that the weasel skins tendered had been shipped from China (though not by them) to New York, via Seattle, and further asserting that they "would and could have obtained and delivered to defendants" the remaining weasel skins "within the reasonable time for delivery in New York of March or April shipments by steamer from China."

The complaint further asserted that the weasel skins actually ten-

dered "were insured in the amount and against the risks usual in an ordinary c. i. f. contract under a policy payable to the plaintiffs," and finally, alleged a "general custom and usage among the dealers in furs in New York city" to the effect that shipments such as above contracted for permitted "shipments from China by steamer to San Francisco and Seattle and thence overland by freight to New York." This custom is said in the pleadings to have been "well understood by both parties" to the above contract.

The breach alleged is the refusal of the buyers to accept the weasel skins tendered, and their refusal to accept any skins so obtained in New York and tendered as were the 10,000 above mentioned.

To this complaint defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer prevailed, and to judgment accordingly plaintiffs brought this writ.

Argued before Rogers, Hough, and Manton, Circuit Judges.

Messrs. Stockton & Stockton, for plaintiffs in error:

The manner of making the tender was sufficiently alleged.

Arnhold, Karberg & Co. v. Blythe, G. J. & Co. [1916] 1 K. B. 495, 7 B. R. C. 934, 85 L. J. K. B. N. S. 665, 114 L. T. N. S. 152, 32 Times L. R. 186, 60 Sol. Jo. 156, 21 Com. Cas. 174, 13 Asp. Mar. L. Cas. 235; Mee v. McNider, 39 Hun, 345; 1 Abbott, Forms of Pl. p. 720.

The complaint alleges a proper tender within the time permitted under the contract.

Cunningham v. Judson, 100 N. Y. 179, 2 N. E. 915; Sharpe & Co. v. Nosawa & Co. [1917] 2 K. B. 814, 22 Com. Cas. 286; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; Ward v. Whitney, 8 N. Y. 442; Produce Brokers Co. v. Weiss, 118 L. T. N. S. 111, 87 L. J. K. B. N. S. 472; Williston, Sales, § 280; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100; Tanners Nat. Bank v. Lacs, 136 App. Div. 92, 120 N. Y. Supp. 669; Klots Throwing Co. v. Manufacturers' Commercial Co. 30

L.R.A. (N.S.) 40, 103 C. C. A. 305, 179 Fed. 813; Law & Bonar v. British American Tobacco Co. [1916] 2 K. B. 605, 85 L. J. K. B. N. S. 1715, 115 L. T. N. S. 612; Poel v. Brunswick-Balke Collender Co. 216 N. Y. 310, 110 N. E. 619; Barhydt v. Ellis, 45 N. Y. 107; Miller v. Hannibal & St. J. R. 90 N. Y. 430, 43 Am. Rep. 179; Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; Hardie-Tynes Foundry & Mach. Co. v. Glen Allen Oil Mill, 84 Miss. 259, 36 So. 262; Eager v. Mathewson, 27 Nev. 220, 74 Pac. 404; Divorkwitz v. New York C. Co. 230 N. Y. 188, 129 N. E. 650; Re Berkovitz, 193 App. Div. 424, 183 N. Y. Supp. 304.

Messrs. Jacob Newhouse and Sidney Rosenbaum for defendants in error.

Hough, Circuit Judge, delivered the opinion of the court:

The allegation of custom, or, properly speaking, of usage (Eames v. H. B. Claflin Co. 152 C. C. A. 465, 239 Fed. 631), need not be considered; for, if plaintiff did not tender what he agreed to sell, the manner of his shipment is of no importance. The only question in the case is as to the nature of the contract admittedly made.

If that contract is for what is now widely known as a "sale c. i. f.," such sale was by specific agreement to be accomplished or executed by the delivery of documents by vendor to vendee, and not by the physical delivery of the actual goods for which the documents are the evidence of title. The bargain must be kept as made; the buyer can no more refuse the documents and ask for the goods than can the seller withhold the documents and tender the goods; and the documents necessary are a bill of lading and policy of insurance, although additional papers, especially an invoice, are usual. The foregoing is now too well settled to need more than reference to Thames & M. M. Ins. Co. v. United States, 237 U. S. 19, 26, 59 L. ed. 821, 824, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087, and cases there cited; Landauer v. Craven [1912]

Sale—c. i. f.—how executed.

—what documents necessary.

2 K. B. 94, 81 L. J. K. B. N. S. 650, 106 L. T. N. S. 298, 56 Sol. Jo. 274, 17 Com. Cas. 193; *Manbree Saccharine Co. v. Corn Products Co.* [1919] 1 K. B. 198, 88 L. J. K. B. N. S. 402, 120 L. T. N. S. 113, 35 Times L. R. 94, 24 Com. Cas. 89; *Setton v. Eberle-Albrecht Flour Co.* 169 C. C. A. 625, 258 Fed. 905; *Klipstein v. Dilsizian (C. C. A.)* 273 Fed. 473; *Smith Co. v. Moscahlades*, 193 App. Div. 128, 183 N. Y. Supp. 500, and cases there cited.

This question of construction is one of general law, if not general commercial law, and unaffected by any statute of New York, especially the Sales of Goods Act (Consol. Laws, chap. 41, §§ 82-158), even assuming that the place of execution of agreement furnishes the law of the contract. That the Sales Act left c. i. f. contracts "as before" was specifically held in *Smith Co. v. Moscahlades*, supra.

We are thus required to construe or interpret a commercial or mercantile agreement partly written and partly printed, wherein at the very beginning it is written that the price is to be "c. i. f. New York," and the shipment from China; but later follow printed words plainly implying that the seller is not only to procure insurance, but collect from the insurers, and therefore suggesting that such insurance would naturally be in the seller's name. It is urged that this latter proviso is so repugnant to the nature of a c. i. f. contract as to transform it into something else, and justify a tender of goods in New York, instead of a delivery of documents by mailing in China.

It cannot be doubted that it is only when parts of a written agreement are so radically repugnant that "there is no rational interpretation that will render them effective and accordant that any part must perish." *Rushing v. Manhattan L. Ins. Co.* 139 C. C. A. 520, 224 Fed. 74. Applying

this rule, it must be admitted that for the seller under a c. i. f. contract to insure in his own name is an apparent departure from the theory of such a sale; for the goods are the buyer's from and after delivery of documents; yet it is perfectly possible for the seller or anyone else to act as buyer's agent and validly insure for his principal's benefit (*Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219), and the whole of this agreement may be consistently regarded as containing an authorization from buyer to seller to get the insurance, and, in case of loss, settle for the buyer with the underwriters. As the case cited shows, and it is matter of common knowledge, insurance for "account of whom it may concern" was known to be procurable, and it might run to seller, yet inure to buyer.

There is no radical repugnancy here presented, and the reconciliation above suggested is far less difficult than in many reported cases, of which *Harding v. 4,698 Tons of New Rivers Steam Coal (D. C.)* 147 Fed. 971, is a fair example.

But, if inconsistency be still insisted upon, the equally settled rule that the written portions of a document, in the absence of proof to the contrary, will prevail over the printed parts, may be appealed to. *Lipschitz v. Napa Fruit Co.* 139 C. C. A. 228, 223 Fed. 704; *Thomas v. Taggart*, 209 U. S. 385, 389, 52 L. ed. 845, 848, 28 Sup. Ct. Rep. 519. The reason for this rule has never been better stated than by Lord Halsbury in *Glynn v. Margetson* [1893] A. C. at page 357, 62 L. J. Q. B. N. S. 466, 1 Reports, 193, 69 L. T. N. S. 1, 7 Asp. Mar. L. Cas. 366, quoting largely from Lord Ellenborough's rulings of 1803. This rule plainly gives decision as it was given below.

A still older rule in the construction of instruments inter vivos is that the earlier of two supposedly

—effect of
Sales Act.

place of execution
of agreement fur-

—effect of pro-
vision for
insurance by
seller.

—construction
—conflict be-
tween written
and printed
parts.

Contract—
repugnancy—
effect.

that "there is no
rational interpreta-
tion that will ren-

inconsistent clauses prevails over the later; and this canon of interpretation has lately been insisted on by high authority. *Vickers v. Electrozone Commercial Co.* 67 N. J. L. 665, 675, 52 Atl. 467. It also supports defendant's demurrer.

But a dependence upon rules which, detached from the circumstances surrounding and justifying their formulation, often seem arbitrary, is unsatisfactory; every rule should be one of reason. Here the first and reasonable inquiry is: What is the dominant or leading thought revealed by this writing, read with the eye of experience?

Plainly, that seller was to ship the furs and send the documents ahead by mail, so that buyer could, if he wanted, sell the goods again "to arrive." That is a c. i. f. contract. Therefore the parties intended to make that sort of agreement, and the "rules" are resorted to to effect

Sale—c. i. f.—
tender of
commodity—
effect.

their intent. This is the fundamental guide in construction; it is well put (with an extreme application thereof) in *Morrill & W. Constr. Co. v. Boston*, 186 Mass. 217, 71 N. E. 550, by saying that, where "a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other, which tends to defeat a full performance; and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument."

The evident purpose of this agreement was to give buyer substantially what a c. i. f. sale would have given him; the seller never even attempted to put buyer in that desired and agreed-upon position, and the decision below was right, because the contract was of the kind known as c. i. f.

Judgment affirmed, with costs.

ANNOTATION.

What constitutes delivery of goods sold under "c. i. f." contract.

This note, dealing with the question What constitutes delivery of goods sold under a "c. i. f." contract, is supplementary to that in 10 A.L.R., at page 701.

The general rule stated in the original note, that "when goods are sold under a c. i. f. contract, delivery thereof to the purchaser is complete when the goods have been actually delivered to the carrier for transportation, and the shipping documents, consisting of the bill of lading, the invoice, and the policy of insurance, are delivered or tendered to the purchaser," was upheld in *Andersen, M. & Co. v. American Trading Co.* (1921) 115 Wash. 37, 196 Pac. 630, the court holding that the shipper was not liable for delay of the voyage, caused by war conditions.

So, in *Northern Grain Warehouse Co. v. Northwest Trading Co.* (1921) — Wash. —, 201 Pac. 903, affirmed on

reargument in (1922) — Wash. —, 204 Pac. 202, the court, after quoting from several of the cases cited in the original annotation, said: "These contracts, being so generally used, have received a uniform interpretation, and it will not do to introduce confusion into commercial activities by establishing a rule which is inharmonious with the general custom of merchants throughout the trading world." Applying the rule stated it was said further in the case last cited: "Delivery of the shipping documents and the insurance policies, in order to complete the transaction, need not be made until a reasonable time has elapsed. In this case documents which entitled the appellant to physical possession of the property, though other than the bill of lading, were delivered to the appellant, which entitled it to physical possession of the property, and it is in no position

to complain that the bill of lading was not delivered.”

Similarly, the reported case (*HARPER v. HOCHSTIM*, ante, 1232) states the rule as follows: “If that contract is for what is now widely known as a ‘sale c. i. f.’ such sale was by specific agreement to be accomplished or executed by the delivery of documents by vendor to vendee, and not by the physical delivery of the actual goods for which the documents are the evidence of title. The bargain must be kept as made; the buyer can no more refuse the documents and ask for the goods than can the seller withhold the documents and tender the goods; and the documents necessary are a bill of lading and policy of insurance, although additional papers, especially an invoice, are usual.”

In *Warner, B. & Co. v. Warner Sugar Ref. Co.* (1921) 117 Misc. 247, 192 N. Y. Supp. 151, the court said: “The contract, as pointed out above, calls for payment of a price which includes cost, insurance, and freight; and such contracts, popularly described as ‘c. i. f.’ contracts, ordinarily require the seller merely to make shipment, and the property in the goods and risk of loss pass upon such shipment to the buyer, for the seller has done everything he is called upon to do under his contract.” The contract under construction contained the following clauses: “Damaged, if any, to be taken at a fair allowance. . . . In the event of total loss, buyers to collect insurance and effect settlement with sellers for the full amount of invoice.” The court reformed the contract by striking out the clause first quoted, as having been inserted by mutual mistake, and said: “It seems to me that in the present case, if the contract is reformed as prayed for in the complaint, the reformed contract is susceptible of the reasonable construction that, though the seller was required to deliver the goods at a customary wharf in New York, and the price could not be finally determined until the goods were landed, yet that the property in the goods and the risk of loss were in-

tended to pass when the full shipping documents were presented, including an insurance policy. If the goods were totally lost, then, by the express terms of the contract, the buyers were to pay the full amount of invoice, and if the goods were partially lost, then it is fairly inferable that, while payment was to be made according to landed weights, the seller should not be deprived of the right to show that these landed weights were diminished by loss or damage due to the risk of the voyage. Any other construction of the contract would require the seller to provide insurance for the buyer for a loss which falls not on the buyer, but on the seller.”

In two recent cases the general rule heretofore stated has been approved, but the court has declared that the contract of the parties took the case out of its operation. Thus, the general rule was stated in *Seaver v. Lindsay Light Co.* (1922) 233 N. Y. 273, 135 N. E. 329, reversing (1921) 196 App. Div. 397, 187 N. Y. Supp. 622, and reinstating judgment (1920) 111 Misc. 553, 182 N. Y. Supp. 30, as follows: “Unless there is something in a c. i. f. contract to indicate to the contrary, the seller completes his contract when he delivers the merchandise called for to the shipper, pays the freight thereon to point of destination, and forwards to the buyer bill of lading, invoice, insurance policy, and receipt showing payment of freight.” In that case, however, it was held that the correspondence of the parties showed an intention that the delivery should be at the residence of the buyer, in Chicago, and not at the residence of the seller, in London.

So, in *Klipstein v. Dilsizian* (1921) 273 Fed. 473, it was said: “The c. i. f. contract is an expression which indicates that the price fixed covers the cost of the goods and insurance and freight on them to the place of destination. Under such a contract, the seller must ship the goods, arrange the contract of affreightment to the place of destination, pay its cost and allow it from the purchase price, and procure insurance for the

buyer's benefit for the safe arrival of the goods, and pay therefor. When the seller has done this, and forwarded the papers to the buyer, he has fulfilled his contract, and delivery is complete. There is no obligation by the seller to deliver the goods at the place of destination." But in that case the contract in suit, "provided for the sale of 50 long tons of gum arabic, 1918 crop, freight average at 25 cents per pound net, c. i. f. New York. Payment was to be made by letter of credit at a bank in New York, on which the seller was at liberty to draw a sight draft with invoice, bill of lading, and insurance certificates attached. Under the clause 'Shipment' it provided: 'From Red sea to New York on vessel Phyllis, which is now on her way to Red sea,' and under the term 'Remarks,' 'Sellers not responsible if shipment of merchandise or sailing of vessel prevented by any government regulations in country of export or destination, by act of God, perils of the sea, or by any other circumstances beyond the seller's control.' " The court, holding that title did not pass until delivery of the goods in New York, said: "The entire contract contemplates a delivery of the gum arabic on the vessel Phyllis in a port of the United States. Delivery and payment therefor were to be simultaneous acts, and until delivery title remained in the seller. Where goods are delivered on board vessel, to be carried, and a bill of lading is taken, a delivery by the seller is not a delivery to the buyer. The ship is a bailee for the delivery to the person indicated in the bill of lading as the one for whom they are to be carried, and this applies even in cases where bills of lading show that the goods are free of freight because they are the owner's property. *Shepherd v. Harrison* (1871) L. R. 5 H. L. 116, 40 L. J. Q. B. N. S. 148, 24 L. T. N. S. 857, 20 Week. Rep. 1, 1 Asp. Mar. L. Cas. 66, 23 Eng. Rul. Cas. 349. The contract provides for shipment on a particular vessel from the Red sea to New York, which was specifically identified as to name and location when the contract was made."

In *J. Aron & Co. v. Comptoir-Wegimont* [1921] 3 K. B. (Eng.) 435, the contract in suit provided as follows: "Price, 150s. per cwt. c. i. f. Antwerp; Shipment: by steamer and/or steamers direct and/or indirect from U. S. A. ports during October, advised as already shipped on S. S. Idaho (no sale if steamer lost)." The goods were delivered at dock in New York in October, the agent of the shipping line giving a receipt stating that they were for a named vessel. Owing to a strike they were not put on that vessel and did not leave New York in October. It was held that there was not a good delivery and title did not pass.

In *Diamond Alkali Export Corp. v. Fl. Bourgeois* [1921] 3 K. B. (Eng.) 443, the court construed a contract calling for shipment c. i. f. from American seaboard in September or October. Instead of an insurance policy, an instrument described as a "certificate of insurance" was tendered. The bill of lading read as follows: "Received in apparent good order and condition from D. A. Horan to be transported by the S. S. Anglia now lying in the port of Philadelphia and bound for Gothenburg, Sweden, with liberty to call at any port or ports in or out of the customary route, or, failing shipment by said steamer, in and upon a following steamer, 280 bags dense soda." It was held that the bill of lading was insufficient because it did not acknowledge "actual shipment on board," and that the certificate of insurance was not the equivalent of the policy of insurance required under a c. i. f. contract. A similar holding as to a bill of lading was made in *Hansson v. Hamel & Horley* (1921) 91 L. J. K. B. N. S. (Eng.) 65.

In the case of *Re Denbigh Cowan & Co.* (1921) 90 L. J. K. B. N. S. (Eng.) 836, it was held that a contract for the sale of goods "to be taken c. i. f. terms" imported all the conditions of a c. i. f. contract, and that the failure to tender a policy of insurance avoided an attempted delivery.

W. A. S.

DEWEY ROBISON, by Next Friend, Resp't.,
v.
FLOESCH CONSTRUCTION COMPANY, Appt.

Missouri Supreme Court (Division No. 1)—December 19, 1921.

(— Mo. —, 236 S. W. 332.)

Judgment — entered without hearing — invalid.

1. A judgment in favor of an infant for compensation for personal injuries is not binding on him, where it is entered by a justice of the peace, upon papers prepared by defendant's attorney; the justice being taken to the sick room of the plaintiff for the purpose, and acting without any judicial hearing or determination.

[See note on this question beginning on page 1249.]

— against infant — impeachment.

2. An infant cannot avoid a judgment or decree against him merely on the ground of infancy.

[See 15 R. C. L. 734; 3 R. C. L. Supp. 490.]

— when binding on infant.

3. A judgment against an infant is not binding on him, although entered with his consent, unless it is based upon facts judicially ascertained upon a real, and not a perfunctory, hearing.

[See 15 R. C. L. 645; 3 R. C. L. Supp. 481; see also note in 15 A.L.R. 667.]

Rescission — restoration of money received — what sufficient.

4. In an equitable suit to rescind a compromise, where a tender of money received is proper, it is sufficient for

plaintiff to offer, in his petition, to restore what he has received.

[See 26 R. C. L. 625, 626; see also note in 12 A.L.R. 938.]

Trial — question for jury — negligence of minor.

5. The jury must determine the question of negligence of a minor unfamiliar with his surroundings, who, while at work on a dark night on an excavator, the body of which is 12 feet from the ground, with high-power uninsulated wires lying about, in attempting to reach the ground in the performance of his duties, goes where he thinks the ladder is, and not finding it, and seeing the boom coming towards him, dives down inside the framework; instead of outside, so that his leg is caught and crushed by the boom.

[See 20 R. C. L. 166; 3 R. C. L. Supp. 1040.]

APPEAL by defendant from a judgment of the Cape Girardeau Court of Common Pleas (Snider, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Oliver & Oliver, for appellant:

The judgment of the justice court, having been made in open court in the presence of both parties, will not be vacated or declared void except upon the most positive, clear, and satisfactory proof of fraud in its procurement, and that it was a fraud upon the court as well as upon the other party to the suit.

Lieber v. Lieber, 239 Mo. 31, 143 S. W. 458; McDonald v. McDaniel, 242 Mo. 172, 145 S. W. 452; Payne v.

O'Shea, 84 Mo. 129; 23 Cyc. 726; Obermeyer v. Einstein, 62 Mo. 341; F. G. Oxley Stave Co. v. Butler County, 121 Mo. 614, 26 S. W. 367; Murphy v. De France, 101 Mo. 151, 13 S. W. 756; Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205; Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; Wolf v. Brooks, — Mo. —, 177 S. W. 337.

Plaintiff neither pleaded nor proved any material facts represented to plaintiff by defendant, false or otherwise.

Morgan County Coal Co. v. Halder-

man, 254 Mo. 596, 163 S. W. 828; Southern Development Co. v. Silva, 125 U. S. 250, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435.

There is no allegation of diligence on the part of plaintiff, nor that he was prevented or hindered by any act of defendant in exercising such diligence.

Carolus v. Koch, 72 Mo. 645; Wabash R. Co. v. Mirrielees, 182 Mo. 126, 81 S. W. 437; Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; 23 Cyc. 1042.

There is no averment of any artifice, trick, promise, or concealment of any fact whereby plaintiff was deceived.

Wabash R. Co. v. Mirrielees, 182 Mo. 126, 81 S. W. 437; Springfield Traction Co. v. Dent, 159 Mo. App. 220, 140 S. W. 606.

The mere expression of an opinion is no ground for setting aside any instrument, whether the opinion is correct or not.

Magnuson v. Continental Casualty Co. 125 Mo. App. 206, 101 S. W. 1125; Carroll v. United R. Co. 157 Mo. App. 247, 137 S. W. 303.

When a money judgment is paid, the judgment is performed and that is the end of it. It will not be reopened by that or a higher court, whether obtained by fraud or not.

Davis v. Blair, 88 Mo. App. 372; Weston v. Clark, 37 Mo. 568; 23 Cyc. 893.

Neither coverture nor infancy are grounds for equitable interference with a judgment, the defect not being jurisdictional.

Wyman v. Hardwick, 52 Mo. App. 621; 23 Cyc. 993.

Equity will not entertain a bill for relief against a judgment founded on matters which were tried and determined in the action at law, or which were there so put in issue that they might have been adjudicated, however unjust the judgment may appear to be.

23 Cyc. 1017; Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; Summer v. Whitley, 1 Mo. 708; Matson v. Field, 10 Mo. 100.

The plaintiff was so plainly guilty of contributory negligence that it was the duty of the trial court to have directed a verdict for defendant.

Woods v. St. Louis & S. F. R. Co. — Mo. —, 187 S. W. 11; Boesel v. Wells, F. & Co. 260 Mo. 463, 169 S. W. 110; Henry v. Missouri P. R. Co. 141 Mo. App. 351, 125 S. W. 794; Carson

v. Chicago, R. I. & P. R. Co. 96 Iowa, 583, 65 N. W. 831.

Where there is an obviously safe and an obviously unsafe way to do a thing, both open to the plaintiff, and he chooses the obviously unsafe and is injured, he cannot recover.

Wolff v. Scullin Steel Co. — Mo. App. —, 217 S. W. 571; McCarty v. Rood Hotel Co. 144 Mo. 397, 46 S. W. 172, 4 Am. Neg. Rep. 169.

The master is not an insurer against either accident or injury.

Trainer v. Sphalerite Min. Co. 243 Mo. 359, 148 S. W. 70, Ann. Cas. 1913C, 949; Miller v. Missouri P. R. Co. 175 Mo. App. 349, 162 S. W. 290; Pulley v. Standard Oil Co. 136 Mo. App. 172, 116 S. W. 430; Lowe v. St. Louis & S. F. R. Co. 165 Mo. App. 523, 148 S. W. 956; Coin v. John H. Talge Lounge Co. 222 Mo. 488, 25 L.R.A.(N.S.) 1179, 121 S. W. 1, 17 Ann. Cas. 888.

An employee does not assume risks caused by his employer's negligence, but he does assume the risks which are liable to happen on account of the nature of the employment, when the employer has used reasonable care to avoid that result.

Powers v. Loose-Wiles Co. 195 Mo. App. 430, 192 S. W. 1045; Whelan v. United Zinc & Chemical Co. 188 Mo. App. 603, 176 S. W. 704; Oxford v. Dudley, 204 Mo. App. 614, 217 S. W. 607; Kaemmerer v. St. Louis Axle Co. — Mo. App. —, 196 S. W. 439; Roberts v. Missouri & K. Teleph. Co. 166 Mo. 370, 66 S. W. 155.

Messrs. Hardesty & Limbaugh, for respondent:

Equity will set aside judgments rendered in violation of the law of procedure by or against infants.

Thornton v. Thornton, 27 Mo. 302, 72 Am. Dec. 266; Scott v. Royston, 223 Mo. 568, 123 S. W. 454; Neenan v. St. Joseph, 126 Mo. 89, 28 S. W. 963; State ex rel. Flentge v. Gawronski, 110 Mo. App. 414, 85 S. W. 126; Weiss v. Coudrey, 102 Mo. App. 65, 76 S. W. 730; McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902.

Neither an infant nor anyone for him can consent to a judgment.

Revely v. Skinner, 33 Mo. 98; Litchfield v. Burwell, 5 How. Pr. 341; McClure v. Farthing, 51 Mo. 109; Collins v. Trotter, 81 Mo. 275; Tyler, Infancy & Coverture, p. 175; Tuttle v. Garrett, 16 Ill. 354; Holden v. Hearn, 1 Beav. 445, 48 Eng. Reprint, 1012, 8

(— Mo. —, 236 S. W. 332.)

L. J. Ch. N. S. 260, 3 Jur. 428; Le Bourgeoise v. McNamara, 82 Mo. 189.

In practically all jurisdictions, equity uniformly sets aside judgments rendered in violation of said rule and of the substantial rights of an infant.

Missouri P. R. Co. v. Lasca, 79 Kan. 311, 21 L.R.A.(N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605; Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162; Tripp v. Gifford, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208; Ewing v. Ferguson, 33 Gratt. 563; Cralle v. Meem, 8 Gratt. 530; Bank of Alexandria v. Patton, 1 Rob. (Va.) 535; 1 Minor, Inst. 520; 1 Dan. Ch. Pl. & Pr. 189; Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599; Ferrell v. Broadway, 126 N. C. 258, 35 S. E. 467; Crapster v. Taylor, 74 Kan. 771, 87 Pac. 1138; Pittsburg, C. C. & St. L. R. Co. v. Haley, 170 Ill. 610, 48 N. E. 920; Long v. Mulfurd, 17 Ohio St. 484, 93 Am. Dec. 638; Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; Gooch v. Green, 102 Ill. 507; Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; Leslie v. Procter & G. Mfg. Co. 102 Kan. 159, L.R.A.1918C, 55, 169 Pac. 193; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98; Burke v. Northern P. R. Co. 86 Wash. 37, 149 Pac. 335, Ann. Cas. 1917B, 919; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; Rankin v. Schofield, 70 Ark. 83, 100 Am. St. Rep. 59, 66 S. W. 197; Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426; Knight v. Waggoner, — Tex. Civ. App. —, 214 S. W. 690.

The infant's tender of the check prior to suit was unnecessary, defendant having failed to make legal delivery of the same to him, and he being powerless to make a legal tender except through the regular court procedure for infants.

Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; Craig v. Van Bebbler, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; 22 Cyc. 557-559; Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196; Missouri P. R. Co. v. Lasca, 79 Kan. 311, 21 L.R.A.(N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98; Leslie v. Procter & G. Mfg. Co. 102

Kan. 159, L.R.A.1918C, 55, 169 Pac. 193; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Carroll v. United R. Co. 157 Mo. App. 247, 137 S. W. 303.

This action to set aside the judgment of the justice was brought in the proper court.

Leslie v. Procter & G. Mfg. Co. 102 Kan. 159, L.R.A.1918C, 55, 169 Pac. 193; 1 Black, Judgm. ¶ 297; Leith v. Shingleton, 42 Mo. App. 449; Langford v. Doniphan, 61 Mo. App. 288; Weiss v. Coudrey, 102 Mo. App. 65, 76 S. W. 730; Lillibridge v. Ross, 59 Mo. 217; Neenan v. St. Joseph, 126 Mo. 89, 28 S. W. 963.

The court could not declare plaintiff guilty of contributory negligence, as a matter of law.

Dowling v. Gerard B. Allen & Co. 74 Mo. 13, 41 Am. Rep. 298; Vanesler v. Moser Cigar & Paper Box Co. 108 Mo. App. 621, 84 S. W. 201; 26 Cyc. 1176; Ransom v. Union Depot Co. 142 Mo. App. 361, 126 S. W. 785; Hull v. Thomson Transfer Co. 135 Mo. App. 119, 115 S. W. 1054; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; Boyce v. Chicago & A. R. Co. 120 Mo. App. 168, 96 S. W. 670; Lang v. Missouri P. R. Co. 115 Mo. App. 489, 91 S. W. 1012; Brown v. Atchison, T. & S. F. R. Co. 104 Kan. 505, 180 Pac. 211; Interstate Coal Co. v. Love, 153 Ky. 323, 155 S. W. 746.

The court could not declare defendant free of negligence, as a matter of law.

Nash v. Kansas City Hydraulic Press Brick Co. 109 Mo. App. 600, 83 S. W. 90; Vanesler v. Moser Cigar & Paper Box Co. 108 Mo. App. 621, 84 S. W. 201; Dowling v. Gerard B. Allen & Co. 75 Mo. 13, 41 Am. Rep. 298; 26 Cyc. 1176; Wellman v. Metropolitan Street R. Co. 219 Mo. 126, 118 S. W. 31; O'Connell v. St. Louis Cable & W. R. Co. 106 Mo. 482, 17 S. W. 494, 4 Am. Neg. Cas. 650.

Ragland, C., filed the following opinion:

Plaintiff, a minor, brought this suit by his next friend November 4, 1914, to recover for personal injuries. He recovered judgment for \$10,000, and defendant appeals.

There is but little conflict in the evidence. Where, however, it is not in accord, the facts will be stated from the standpoint of plaintiff's evidence, because appellant's only

contention with respect to the trial on the merits is that the evidence discloses that plaintiff was guilty of contributory negligence as a matter of law.

In September, 1918, the defendant, a New York corporation, was engaged in the construction of ditches and levees in southeast Missouri, and maintained offices for the management of its business in Cape Girardeau. It used in this work large machines called dragline excavators. At the time just mentioned one of these machines was operating day and night near Greenbrier, in Bollinger county. This machine consisted of two parts, the base and the cabin. The base was a steel framework 24 feet square and 10 feet high, which stood on wheels similar to those of a railroad box car, and which ran on a steel track. On the top of the framework was a circular track upon which rested the cabin. This cabin was of rectangular shape, and looked very much like a railroad freight car. It housed the principal part of the machinery used to operate the excavator. A steel boom 100 feet in length extended from one end of the cabin, and from the extreme end of the boom there swung a bucket or dipper. When the machine was in operation the dipper was lowered to the ground, where it scooped up a dipper of earth. The loaded dipper was then raised from the ground, and the upper part or the cabin of the machine, together with the boom carrying the loaded dipper, was made to turn, at the time of the operation in question, in approximately a half circle, while the base of the machine remained stationary. By this means the earth was carried away from the ditch that was being dug and deposited in a different place, forming a levee. The machine was operated by electric power generated in the city of Cape Girardeau, and carried over high-tension wires. This electric current passed through a transformer and then to the machine. The operator's position was in the

cabin near the front end. In order to move the end of the boom from a position over the ditch to a position over the levee, he pulled a lever, and the entire cabin part of the machine turned to the required distance. Just underneath the bottom of the boom, where it was attached to the cabin, there was a pulley around which the cable controlling the bucket passed before going to the drum inside the cabin. Just outside the door of the cabin, and down a step lower, was a small semicircular platform, called the apron or porch. It was another step from this apron down to the top of the framework. There were large steel I-beams or girders inside of the top of the framework which ran diagonally across the square of the frame. Just before they reached a corner they divided, so that, instead of running directly to the corner, one half of the beam went to one side of the corner and the other half to the other side, leaving a space of something like 2 feet in width between the two parts of the beam at the corner. There was a ladder made of iron or steel which hooked over the outside edge of the framework and was always kept at or near one corner of the framework. It was shifted from one corner to another as the convenience of the men using it required.

The machine was lighted with some thirty-odd incandescent electric lights; four clusters of four each on the boom, some six or eight in the cabin, and eight underneath, two at each corner of the framework. The clusters of lights on the boom had reflectors behind them which caused their rays to be thrown downward. The cabin had two doors and three windows on each side, and there was a large opening in front.

On the night of September 9, 1918, the machine in question was being run by a crew of five men, the operator, the oiler, and three pitmen. The operator manipulated the levers in operating the machine; the oiler kept the machinery in the cab-

in oiled and greased; and the three pitmen, a foreman, and two laborers, took up the track in the rear of the machine and put it down in front when necessary for the machine to move forward. These latter also oiled the bucket, removed obstacles in the way of the advance of the machine, and performed such other work as was required to be done on the ground. All the oil and grease were kept in the cabin, and the pitmen working on a night shift customarily ate their midnight lunch there. The operator was the foreman in charge of both machine and crew.

On the night just mentioned plaintiff was one of defendant's crew, working as a pitman. He was nineteen years of age and had worked on a farm all of his life. Between cropping seasons he had done other kinds of work, such as cutting logs and clearing land. On one occasion he worked a month and a half at a sawmill. He had had no experience whatever in working around or about defendant's excavator, and had no previous knowledge of the manner of its operation, except such as he gained from passing it occasionally during the time it had been operating in the vicinity of his home. He had worked but one night previously, and then the machine was not run at all because out of order. The workmen spent the entire night repairing it. Plaintiff began work at 7 o'clock in the evening. At midnight the machine was stopped for a few minutes while the operator ate his lunch. During this interval the pitmen oiled the bucket bearings. When they had finished the pit foreman directed the plaintiff to take the oil back to the cabin, where it was regularly kept. Plaintiff took the oil to the cabin, and stayed to eat his lunch. After finishing he was told by the operator, who had again started the machine, to tighten the jacks that steadied the framework. In order for plaintiff to do that it was necessary for him to go from the cabin to the ground. In the meantime the machine was kept running.

In getting up and down from the cabin the workmen sometimes used the ladder; at other times they climbed the framework or let themselves down by the same means. Plaintiff had been up and down twice before he ate his lunch that night, but not when the machine was running. The first time he went up on a ladder, and the next time he "went up on a corner." On one of these occasions, in getting down, he got down on the inside of the framework, and the pit foreman said to him: "I always get down on the outside." Prior to his injury plaintiff had never received any other instruction or warning with respect to getting down from the cabin, except that he had been cautioned in a general way not to come into contact with the electric cables on the ground and up in the machine. The top of the framework was about 12 feet above the general level of the ground.

When plaintiff started down from the cabin to tighten the jacks, he stepped out of the door down onto the apron or porch. It was a dark night, and there was not sufficient light thrown from the cabin or from the lights on the other parts of the machine to enable him to discover the location of the ladder. He waited until the dipper picked up its load of earth and started with it, then stepped down on the frame and walked toward the corner where he thought the ladder was. The boom was then moving away from him. When he got to the corner of the frame he let himself down and felt along the side with his feet for the ladder. Not finding it, he got around on the other side of the corner and felt there, but there was no ladder. He then looked around and saw the boom coming toward him; he climbed back upon the framework, intending to get back on the apron. While still on his knees, and before he could get in a standing position, it appeared to him that he would not have sufficient time to get up and onto the apron before the boom reached him. The opening between the prongs of the diag-

onal I-beam just inside the corner of the frame was right in front of him, and seemed the only safe avenue of escape, and into that he went headforemost. He succeeded in getting all of his body through except his left leg, which the pulley underneath the lower end of the boom caught and crushed against the upper part of the framework. On cross-examination he said in part: "When I started down in there I went headfirst. I was on top of these girders. If I had slid down on the outside of the framework instead of trying to conceal myself on the inside of this prong, I would have had to have dropped about 12 feet to the ground, and besides there were some live wires there at that time. The wires were insulated, but worn. . . . I chose that side of the machine to climb down. I don't remember whether that was the same side I climbed up or not. The ladder was not at the corner. I had gone up the ladder that same night; I didn't have time to choose any other corner only that one. . . . When the dipper got its load and started I stepped off there where I thought the ladder was. . . . The boom was not coming toward me when I stepped off; it was going the other way. When it came back it hit my leg. It takes a minute for it to do that. I was on that girder during that time, right there at the corner. I got down and felt for the ladder, but it was not there, and I went to the other corner, and by that time it was coming back. I did not wait for it to come back; it just came back. I was still there."

Asked why he did not look for the ladder instead of getting down and feeling for it with his feet, he said: "No use to look; you couldn't see it." In reply to a further question, he said: "I tried to go down on the ladder. I was not trying to go down off the machine by going down on the inside, when I was injured." As a matter of fact, the ladder was at the same place when plaintiff was hurt that it was when he went up on it that same night.

Plaintiff's injury consisted of a compound fracture of the left leg, the femur being broken about 8 inches below the hip. He was taken to a hospital at Cape Girardeau, where the fracture was reduced, and his leg put in a swing splint. Some six weeks later it was discovered that the parts of the bone were not uniting; an incision was made, and a plate was put on the bone to assist in bringing about a union. Still later infection set up, and it became necessary to amputate the leg.

On October 7, 1918, while plaintiff was still in the hospital, and before there was any indication that he was not making a normal recovery from his injury, he was visited by Mr. L. W. Mees, an attorney representing the defendant. Mees introduced himself, and stated that he had come to make a settlement. Plaintiff told him that he was not of age, and that a settlement would have to be made with his father. Mees said that it was not necessary to have his father; that as he was over fourteen years of age he could have a next friend appointed, and through him a settlement could be effected by means of a friendly suit. He then asked plaintiff how much he wanted, and the latter said he thought he ought to have \$350. Mees, after questioning the plaintiff at some length as to how the accident occurred, told him that he did not think the company at fault, but that he would pay him \$250 and his hospital fees and doctor bills anyway. Plaintiff made no immediate response, and Mees started to go, when plaintiff said: "Well, mister, I will take that \$250." He was then asked whom he wanted appointed next friend, but plaintiff knew no one in Cape Girardeau. Mees suggested Mr. S. M. Carter, secretary of a trust company there, and plaintiff made no objection,—in fact, said nothing.

Mees then went away and prepared what he deemed the necessary papers,—a petition for the appointment of a next friend, statement of the cause of action laying plaintiff's damages at the sum of \$250, the

consent of Carter to act as next friend, a waiver of service of process and entry of appearance by defendant, a stipulation that the cause be set down for trial and tried on that day, and a judgment entry. He then, in company with defendant's local manager, went to Mr. Carter's place of business and requested him to act as next friend for a young man nineteen or twenty years old, who had been injured on one of their dragline machines. They told Carter "a little bit how the young man got hurt;" that they were going to pay him \$250 and his hospital fees and doctor bills; that they did not think there was any liability, but that the company would rather pay the \$250 than be annoyed with a lawsuit. Carter accepted their statement, and, after reading the papers, signed such of them as Mees requested, without further investigation.

Mees next went to a justice of the peace and told him that he wanted him to go to the hospital and take up a friendly suit. The justice consented, and they went at once to the hospital. On arriving there the justice was introduced to the plaintiff. He asked plaintiff where he came from, and how he got hurt. In answer to the latter question, plaintiff told him that he got hurt on a dragline machine. Mees asked plaintiff if he still wanted the \$250 in compromise, and he replied that he did. Mees then said, "You must sign these papers." After plaintiff had signed the paper or papers presented to him, the justice asked, "Is this your free act?" and plaintiff said, "Yes." Mees then handed plaintiff a check for \$250, and told him that the company would pay all of his expenses at the hospital, and that he need not leave until he got well. He and the justice then left.

The judgment entry written in the justice's docket recited the appearance of the parties, the waiver of a jury, hearing and submission on the evidence, and "the receipts and releases of the parties," a finding and judgment for plaintiff in

the sum of \$250, and an acknowledgment of satisfaction thereof in open court. Immediately under the judgment entry are the words "approved by," followed by the purported signatures of plaintiff and Carter as his next friend.

There is no contention that Mees, during the negotiation of the settlement, made any misstatement of fact to plaintiff, to Carter, or to the justice.

The petition is in two counts. The first is in equity, and seeks to have the judgment of the justice of the peace set aside. The grounds on which the right to such relief is predicated are set forth in the petition as follows:

"On October 7, 1918, the defendant, by fraudulent representations made to plaintiff, induced him to acquiesce in the defendant's proposal to settle his claim for \$250; that the defendant, through its own initiative and without the consent or approval of the plaintiff, secured the appointment of a next friend and caused to be instituted a suit by such next friend against the defendant and in behalf of the plaintiff for damages for the aforesaid injury; that said next friend was unknown to plaintiff, and plaintiff never had an opportunity to see him or consult with him about said suit; that defendant prepared all the papers, pleadings, and orders in said proceeding, and filed the same with F. A. Kage, a justice of the peace within and for Cape Girardeau township and county, Missouri, and fraudulently represented to the said F. A. Kage that plaintiff had agreed that judgment in said case be rendered in favor of the plaintiff and against the defendant in the sum of \$250, and requested that such judgment be entered; that by reason of said fraudulent representations of the defendant the said F. A. Kage did enter judgment in said case in favor of plaintiff for \$250, and the defendant thereupon issued and delivered to plaintiff a check for \$250.

"Plaintiff states that the judgment aforesaid was rendered with-

out a trial upon the pleadings or statement before the court; that there was no evidence offered or proofs made before the court upon the merits of the case, the extent of the plaintiff's injury, or on the question as to whether such judgment was for the best interest of the plaintiff; that such proceeding was made without the knowledge or consent of J. C. Robison, father of Dewey Robison, and against his wishes, as the defendant well knew that said proceeding was all taken while the plaintiff was in the hospital, where he had no chance to consult anyone as to the best means to protect his interests, and before he was fully cognizant of the extent of his injury; and that the said judgment thus rendered was produced and obtained by the defendant for the purpose of defrauding the plaintiff by barring a cause of action for damages for the injuries he received.

"Plaintiff states that the amount of said judgment is entirely inadequate to compensate the plaintiff for his injuries, and that if said judgment is allowed to stand it will bar further attempts of the plaintiff to prosecute his claim for damages for said injuries.

"Wherefore the plaintiff brings herewith the check given him by the defendant in payment of said judgment, and files the same with the clerk of this court, and prays the court to declare the judgment as aforesaid void, and order it to be set aside, and said check returned to the defendant."

The second count is an ordinary suit for personal injuries. Its allegations are sufficiently broad to include the acts and omissions submitted to the jury for their determination as to whether they constituted negligence, viz., the continued operation of the machine after plaintiff was directed to go from the cabin to the ground, failure to have a regular place for the ladder, failure to have a guide light for indicating the location of the ladder, failure to furnish sufficient light,

and failure to instruct plaintiff as to the manner of descending from the upper part of the machine to the ground and warn him of the danger incident thereto.

As to the first count, the answer admits the rendition of the judgment by the justice of the peace, and pleads the judgment in bar. With respect to the second count it is a general denial and a plea of contributory negligence.

A trial of the issues under the count in equity was first had, resulting in a finding for plaintiff. The second count was then tried to a jury. Appellant seeks a reversal of the judgment on two principal grounds: First, that plaintiff wholly failed to make out a case under his pleading, entitling him to have the judgment of the justice of the peace set aside; and, second, that plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law.

1. It is the generally accepted doctrine that an infant cannot avoid a judgment or decree Judgment—
against infant—
impeachment. against him merely on the ground of infancy, and that he cannot impeach such a judgment or decree by an original bill except upon grounds that would be available to an adult, such as fraud. In this case the bill alleges, among other things, that the judgment entered by the justice of the peace was caused to be so entered through and by means of fraudulent representations. As ordinarily understood, a fraudulent representation is a false statement relating to a matter of fact, made with intent to deceive. The evidence wholly fails to show that any untrue statement of fact was made by defendant's agent, either in negotiating the settlement with plaintiff, or in procuring the entry of a formal judgment by the justice of the peace, and for that reason appellant insists that plaintiff failed to make a case entitling him to the relief prayed under the first count of his petition. But plaintiff does not predicate his right to such re-

lief solely on the ground of fraudulent representation. There are other allegations of fact in the petition, and they are amply supported by the proof. It is to be determined whether these constitute such fraud as warranted the court below in canceling the so-called judgment.

There is no question but that plaintiff and defendant's agent, Mees, agreed upon a settlement, whereby, in consideration of the payment of \$250, together with his hospital fees and doctor bills, plaintiff was to release defendant from further liability for the injuries he had sustained on account of its negligence. Such contract of settlement, even after it became executed, the plaintiff, being a minor, would have had the right to disaffirm and repudiate at any time during his minority, and within a reasonable time after coming of age. In order to cut off this right and make the contract absolute and final on the part of the plaintiff, Mees proceeded to cloak the transaction in the guise of a legal proceeding. This much the evidence clearly shows.

There can be no doubt, of course, but that in a suit instituted by a minor by his next friend a judgment may be rendered that will be valid and binding upon him. Such judgment, however, cannot be based merely on the consent of the minor, for he is without discretion, or on that of the next friend, because he is not invested with either the power or the duty so to do. *Ewing v. Ferguson*, 33 Gratt. 563; *Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 So. 98; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638. The court in such case is charged with the duty of protecting the minor's interest, and it is only when its

judgment is based upon facts judicially ascertained, upon a real, and not a perfunctory, hearing, that its judgment is binding upon him. *Missouri P. R. Co. v. Lasca*, 79 Kan. 311, 21 L.R.A. (N.S.) 338, 99 Pac. 616, 17 Ann.

Cas. 605; *Ferrell v. Broadway*, 126 N. C. 258, 261, 35 S. E. 467; *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208.

The judgment under consideration had no such basis. The proceeding, if it may be so called, was colorable merely from beginning to end; it did not possess a single element of a judicial hearing and determination. Its entire record was the handiwork of Mees; he prepared all of the papers, and the next friend and the justice did nothing but complaisantly sign their names "on the dotted lines" pointed out by him. It should be said, however, that the two gentlemen who so obligingly signed the papers for Mees were given to understand, and they considered, that their acts in the matter were purely formal. And so they were. The "friendly suit" was not a suit in fact; it was merely a screen contrived to conceal the real transaction, the contract of settlement and release between plaintiff and defendant, and having for its purpose the foreclosure of plaintiff's right to disaffirm and repudiate his folly, upon reaching the age of discretion, or upon the receipt of mature counsel. It is considered fraudulent to take advantage of the incompetency of an infant to protect his own interests (*Ralston v. Lahee*, 8 Iowa, 17, 25, 74 Am. Dec. 291; *Leslie v. Proctor & G. Mfg. Co.* 102 Kan. 159, L.R.A. 1918C, 55, 169 Pac. 193), and, as the alleged proceeding before the justice of the peace was designed for no other purpose, it should be so treated. On this ground the court was warranted, under the pleadings and evidence, in setting aside the pretended judgment.

—entered without hearing—
invalid.

2. Appellant makes the further contention that plaintiff was not entitled to recover under the first count of his petition, because it was neither alleged nor shown that, before instituting the suit, he had offered to restore to defendant what he had received under the settle-

—when binding on infant.

ment. Plaintiff brought the check, the only thing that he had received from defendant, into court, filed it with his petition, and asked the court to direct its return to the defendant. In an equitable action to rescind a compromise, where a tender back of moneys received is

**Rescission—
restoration of
money received
—what sufficient.**

proper, it is sufficient for the plaintiff to offer in his petition to restore what he has received. After such offer the rights of the parties will be regulated and protected in the final judgment. Such is the rule in this state, and the one that prevails generally. *Whelan v. Reilly*, 61 Mo. 565; *Paquin v. Milliken*, 163 Mo. 79, 105, 63 S. W. 417, 1092; *Carroll v. United R. Co.* 157 Mo. App. 247, 293, 137 S. W. 303; 18 Enc. Pl. & Pr. 836.

3. Appellant strenuously insists that the evidence convicts plaintiff of contributory negligence as a matter of law. The facts having a bearing on this phase of the case have been very fully set out in the preceding statement, and need not be repeated here. The particulars in which it is claimed that plaintiff was negligent are: (1) In going down on the framework of the machine instead of on the ladder provided for that purpose; and (2) in going down on the inside of the frame after he had been warned not to do so, and when the outside was obviously the safer way. As to the first, plaintiff testified directly and positively that he was trying to go down on the ladder, and not the frame. He says that when he stepped out of the cabin down onto the porch it was so dark about the lower part of the machine that the ladder could not be seen. He did not say that he looked for it, but that it was so dark that there was no use to look. He had come up on the ladder, and it was at the same corner. He was to a certain extent unfamiliar with his surroundings and the movements of the machine. He stepped down on the frame as

and started to where he thought the ladder was. Certainly it cannot be said as a matter of law that he was negligent because he was mistaken as to the corner.

Even if the statement of the pit foreman to the plaintiff that he (the foreman) always went down on the outside of the frame could be construed as a warning to plaintiff not to go down on the inside, the warning was not wilfully disregarded. Plaintiff was not attempting, in the first instance, to go down on the frame, either on the inside or the outside. He was hunting the ladder. He suddenly became aware that he was in a position of peril. It now seems true, as appellant contends, that plaintiff could, in all probability, while holding to the upper plate of the framework, have let himself down on the outside, and then dropped 2 or 3 feet to the ground without injury. But plaintiff was not in a condition to reason calmly about his situation. He was controlled by the instinct of preservation, and not by the dictates of care and reason. He pictured himself coming into contact with highly charged electric wires with broken insulation, if he dropped down on the outside; to him that was not an obviously safe way. On the other hand, he had once before gone down between the prongs of one of the I-beams safely and easily, and he thought that he had the time to do so again. It seems clear that whether in so doing he failed to exercise that degree of care that an ordinarily prudent

**Trial—question
for jury—negligence of minor.**

man of his experience would have exercised under the same circumstances was a question for the jury.

Appellant's counsel earnestly insist that the cases of *Boesel v. Wells, F. & Co.* 260 Mo. 463, 169 S. W. 110, and *Henry v. Missouri P. R. Co.* 141 Mo. App. 351, 125 S. W. 794, are controlling on the facts of this with respect to the question of contributory negligence. But those cases are wholly unlike the one at bar on the facts, unless one isolated bit of

evidence in the latter, inconsistent with the other evidence in the case, be held to portray the real facts. One of defendant's witnesses testified that plaintiff stated that he believed the pulley on the lower end of the boom would clear his leg,—pass over it,—and that he would therefore be safe with one leg over the I-beam, and plaintiff did not, in rebuttal, expressly deny having made the statement. But the substance of the statement was in effect contradicted by all of plaintiff's testimony touching that phase of the case; and it was for the jury to

say, from all the evidence, what the true facts were.

We concur in the trial court's finding under the first count, and, as no reversible error in connection with the trial to the jury under the second count has been pointed out, the judgment should be affirmed.

It is so ordered.

Small, C., concurs.

Brown, C., absent.

Per Curiam:

The foregoing opinion of Ragland, C., is adopted as the opinion of the court.

All the Judges concur.

ANNOTATION.

Right of infant to set aside consent judgment in action for personal injuries.

(Supplementing annotation in 15 A.L.R. 667.)

The cases on the point fully support the doctrine of the reported case (ROBISON v. FLOESCH CONSTR. Co. ante, 1239) that an infant may avoid a judgment entered in his favor in compromise and settlement of a claim upon his part of damages for personal injuries ascribable to the tort or negligence of the defendant, when the judgment is entered in a merely for-

mal proceeding, instituted for the purpose of carrying out the settlement, there being in fact no judicial investigation or inquiry into the merits, and the judgment being a mere device to bind the infant by the compromise. The cases upon the subject are referred to in an annotation appended to the case of Carroll v. Atlantic Steel Co. 15 A.L.R. 660. With the exception of the reported case, no later case on the point has been found.

A. G. S.

FRANK RICHARDSON, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals—January 11, 1922.

(— Tex. Crim. Rep. —, 239 S. W. 218.)

Appeal — refusal of instructions on reasonable doubt as applied to grades of homicide.

1. Refusal to give an instruction on the law of reasonable doubt as between the grades of homicide is reversible error, where the attention of the court is specially called to it, although no special request is submitted and the law of reasonable doubt is in an instruction, applied to the whole case. (On rehearing.)

[See note on this question beginning on page 1258.]

20 A.L.R.—79.

Evidence — statement tending to show state of mind.

2. Evidence of a statement by a man shortly before he killed his brother, that he did not see what the brother was doing on the place which accused claimed to own, is admissible on his trial for the homicide as tending to show his state of mind towards the deceased.

— showing bias of witness.

3. Where a witness for accused in a murder case denies having made a statement that deceased was in hell, where he ought to be, evidence is admissible that he made such statement as tending to show bias or prejudice.

[See 28 R. C. L. 615, 620; 3 R. C. L. Supp. 1586.]

— evidence of conviction — remoteness.

4. That several years had elapsed since the conviction of witness for bigamy does not prevent the introduction of evidence of the fact to affect his credibility.

[See 28 R. C. L. 627.]

Homicide — justifiable — defense of property.

5. To justify homicide in defense of property the possession must be actual, and not merely constructive, and

every effort must be made by the possessor to repel the aggression before he is justified in killing.

[See 13 R. C. L. 842, 843.]

— when killing not in defense of property.

6. A homicide is not in defense of property where a son, claiming to have bought the interests of all children except one in the home farm and of his mother who resided there, upon going to the property, found there and killed the child whose interest he had not purchased, who had instituted legal proceedings to oust accused from possession, which were pending.

Appeal — omission of instructions — absence of error.

7. Refusal to give one accused of murder the benefit of an instruction as to presumption of law from the use of a deadly weapon by deceased is not reversible error, where the attention of the trial court was not called to the omission, and the statute requires the submission of prepared instructions to counsel, who must in writing present objections, specifying grounds, in the absence of which there shall be no reversal because of errors in the charge. (On rehearing.)

[See 14 R. C. L. 795; 3 R. C. L. Supp. 287.]

APPEAL by defendant from a judgment of the District Court for Van Zandt County (Bond, J.) convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Stanford, Sanders, & West, Charles L. Hubbard, and Gentry & Gentry, for appellant:

The defendant being charged with murder, and there being evidence that at the time he fired the fatal shot the deceased was advancing on him with a drawn pistol in his hand, the court erred in not charging the jury the presumption arising from the use of a deadly weapon on the part of deceased at the time of the homicide. And this is reversible error, although there was no exception to the charge of the court on this ground, and no special charge was requested on the subject.

Kendall v. State, 8 Tex. App. 569; Jones v. State, 11 Tex. App. 412; Bishop v. State, 43 Tex. 390; Jackson v. State, 22 Tex. App. 445, 3 S. W. 111.

On a charge of murder, where the evidence raises the issue of manslaughter, the jury should be charged the law of both murder and manslaughter, and the law of reasonable

doubt should be given in charge to the jury, not only upon the general question of the guilt or innocence of accused, but also as between the different degrees of culpable homicide, so as to afford the accused the benefit of such doubt as between the greater or less degree.

Murray v. State, 1 Tex. App. 417; Lister v. State, 1 Tex. App. 744; Eanes v. State, 10 Tex. App. 452; Tinsley v. State, 52 Tex. Crim. Rep. 91, 106 S. W. 347; Cockerell v. State, 32 Tex. Crim. Rep. 592, 25 S. W. 421; Hall v. State, 28 Tex. App. 147, 12 S. W. 739; Wallace v. State, — Tex. Crim. Rep. —, 97 S. W. 1051.

The evidence, with the exception of one witness, shows that the deceased, at the time he was killed, had a pistol drawn on defendant and was driving him from the room. If this be true then the law of resorting to all other means did not apply.

Sims v. State, 36 Tex. Crim. Rep.

(— *Tex. Crim. Rep.* —, 239 S. W. 218.)

154, 36 S. W. 256; Carr v. State, 41 Tex. Crim. Rep. 380, 55 S. W. 51.

Messrs. R. G. Storey, Assistant Attorney General, and Butler, Price, & Maynor, for the State:

The court did not err in the main charge to the jury, in failing to give in charge to the jury article 1106 of Vernon's Criminal Statutes of the State of Texas, in substance, that it was presumed that by the use of a pistol the deceased designed to inflict death or serious bodily injury upon defendant.

Furr v. State, — Tex. Crim. Rep. —, 194 S. W. 395; Debth v. State, 80 Tex. Crim. Rep. 4, 187 S. W. 341; Ross v. State, 75 Tex. Crim. Rep. 59, 170 S. W. 305; Galan v. State, 76 Tex. Crim. Rep. 619, 177 S. W. 124; Crossett v. State, 74 Tex. Crim. Rep. 440, 168 S. W. 552; Stanley v. State, — Tex. Crim. Rep. —, 44 S. W. 519; Ward v. State, 70 Tex. Crim. Rep. 393, 159 S. W. 272; Mason v. State, 83 Tex. Crim. Rep. 642, 228 S. W. 952.

The court did not err in its main charge to the jury, in failing to charge the jury that if they found from the evidence that the defendant was guilty of some degree of homicide, but had a reasonable doubt as to whether he was guilty of murder, they should resolve the doubt in favor of the defendant, and find him guilty of no higher degree of homicide than manslaughter.

Frizzell v. State, 30 Tex. App. 42; Furr v. State, — Tex. Crim. Rep. —, 194 S. W. 395; Wysong v. State, 66 Tex. Crim. Rep. 201, 146 S. W. 941; Conger v. State, 63 Tex. Crim. Rep. 312, 140 S. W. 1112; Farris v. State, 55 Tex. Crim. Rep. 481, 131 Am. St. Rep. 824, 117 S. W. 798; Little v. State, 39 Tex. Crim. Rep. 654, 47 S. W. 984; Cockerell v. State, 32 Tex. Crim. Rep. 585, 25 S. W. 421; Ardry v. State, — Tex. Crim. Rep. —, 233 S. W. 839; Howard v. State, — Tex. Crim. Rep. —, 233 S. W. 847.

When a part of the evidence is admissible and a part is inadmissible, but an objection is made to the whole without singling out the part which is inadmissible and objecting thereto, no error is committed by the court in overruling the objection.

Davis v. State, 83 Tex. Crim. Rep. 539, 204 S. W. 652.

The testimony of the witness, Leard Smith, was admissible for the purpose

of showing the motive of the appellant for the killing of Jones Richardson.

Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823; Givens v. State, 35 Tex. Crim. Rep. 563, 34 S. W. 626.

Morrow, P. J., delivered the opinion of the court:

Appellant was convicted of murder; punishment fixed at confinement in the penitentiary for a period of twenty-five years.

Jones Richardson was shot and killed by the appellant. They were brothers, both being of mature years. They were, at the time, in the house upon the farm known as the "old Richardson home place." It had been owned by appellant's father and mother; had been their home prior to his death, and her home thereafter. Appellant also resided there for twelve years immediately preceding the homicide. His mother, for a short time, had been away, leaving her personal belongings. The daughter and son-in-law of appellant also resided on the farm. They, however, were moving away from it, and appellant was in the act of moving to the city of Tyler, where he was in business. The deceased resided with his family in the state of Oklahoma, and had done so for about twelve years.

The appellant had purchased the interest in the farm of all the children save the deceased, and his mother had made to him a deed to her interest. Shortly preceding the homicide, the deceased came to the vicinity, and, acting on behalf of his mother and in her name, brought against the appellant a forcible entry and detainer suit for the possession of the farm, and upon the trial the judgment was in her favor, and from it appellant appealed.

Evidence of threats against the deceased, and conduct indicating ill feeling, and expressions of such sentiments was introduced.

Appellant's mother testified that she made the deed to the appellant without understanding the nature of the document that she executed.

Appellant denied the threats and expressions of bad feeling, though

he did not think the deceased had treated him right. He explained his possession of the pistol on the occasion of the homicide, by stating that he had had difficulty with another person and was expecting trouble with him; that he had no knowledge of his brother being at the place when he went there; that on arrival he learned from his mother that his brother was there, and he walked up and said: "Hello, Jones; what are you doing here?" and he said, "I will show you," and jumped up, and got his gun out of his grip, and cocked it; and the appellant said to him, three or four times, "Take it out of my face." He then retreated a couple of steps. The deceased advanced. His mother sought to interfere. Appellant said, "He must take that gun out of my face." That Jones said to his mother: "Step aside! I am going to shoot." Whereupon the appellant shot. Appellant fired one shot, which killed the deceased.

There was sharp conflict in the testimony touching the possession of the pistol by the deceased at the time of the homicide.

Complaint is made in bill No. 2 of the receipt of evidence to the effect that the appellant stated that he had appealed the forcible entry and detainer case. In qualifying the bill, the court said that the testimony given by the witnesses was this: "I heard defendant say that he had appealed the case that his mother had won against him, and that he didn't see what Jones, his brother, was doing there on the place."

This testimony, coming, as it did, shortly preceding the homicide, related such a declaration by the appellant as was, in our opinion, available to the state upon the issue of

**Evidence—
statement tend-
ing to show
state of mind.**

motive. The declaration of the appellant was competent and relevant to show his state of mind towards the deceased. *McKinney v. State*, 8 Tex. App. 627; *Branch's Anno. Penal Code (Tex.)* § 1881, and cases listed.

A witness who had given material testimony in favor of the appellant was asked, on cross-examination, if he had not stated with reference to the deceased: "The son of a bitch is dead in hell, where he ought to be." Upon the denial by the witness, proof was made, for the purpose of impeachment, that he did make the statement. This testimony, in our opinion, was admissible under the rule which permits the opposing party to break the force of the testimony of an adverse witness by proof of ^{—showing bias of witness.}

his bias or prejudice. *Watts v. State*, 18 Tex. App. 384; *Brownlee v. State*, 48 Tex. Crim. Rep. 410, 87 S. W. 1153; *Gelber v. State*, 56 Tex. Crim. Rep. 462, 120 S. W. 863; *Tow v. State*, 22 Tex. App. 184, 2 S. W. 582; *Branch's Anno. Penal Code (Tex.)* § 163, and cases listed.

While upon the witness stand, state's counsel directed to the appellant this question: "Isn't it true that some five or six years ago, in Parker county, you were tried, indicted, and convicted of the offense of bigamy, and sent to the penitentiary for that offense?"

Objection was made, as stated in the bill, upon the ground that, before the witness was placed upon the stand, his counsel asked the court to instruct the state's counsel to refrain from making inquiry, for the reason that the conviction had taken place in the year 1912. The court required an answer, which was: "Yes, sir; that is correct." In approving the bill, the court disallows the part thereof stating that he was requested to prevent the inquiry on account of the date of the offense. He calls attention to the fact, in his qualification, that the question did not indicate that the inquiry related to a remote offense, and adds that it was on redirect examination; that it developed that the conviction took place in October, 1912; that, prior to this development on redirect examination, the court had no information as to the date other than indicated by the question. The propriety of making proof of the convic-

tion of other felonies to affect the credibility of the accused when testifying as a witness is well established. *Lights v. State*, 21 Tex. App. 313, 17 S. W. 428, and other cases listed in Branch's Anno. Penal Code (Tex.) § 167. We are not advised of any rule that would have

—evidence of
conviction—
remoteness.

excluded the testimony as too remote, even if there had

been a request to do so. Instances are available in which such testimony has been received over the objection that it was too remote, when the prior offense had occurred at a time more distant than in the instant case. *Scoville v. State*, — Tex. Crim. Rep. —, 77 S. W. 792. Even, however, if the time of the prior offense was too remote to render proof of it available to the state, the matter, as presented, does not authorize a reversal upon that ground. The question, as framed, fixing the time at five or six years, gave no indication that it called for testimony too remote (*Davis v. State*, 52 Tex. Crim. Rep. 630, 108 S. W. 667), and the bill, as qualified, shows that the trial court had no knowledge that the conviction had occurred prior to the time indicated by the question. After the date was revealed upon redirect examination, no request was made to exclude the testimony.

Three special charges bearing upon the possession of property were requested. One of them reads thus: "You are charged that in law the defendant was in possession of the home where the killing occurred, and that he had a right there, and that the deceased did not have the right to forcibly eject him; and if you find from the evidence that, when the defendant returned to the place of the homicide, the deceased undertook to eject him, then the defendant had the right, under the law, to defend his possession of the property, and, if you find from the evidence that he shot and killed the deceased in defense of his home, you will acquit the defendant, or, if you have a reasonable doubt as to this, you will acquit."

Another charge in substantially

the same language was given, and the third was in these words: "You are further charged that the defendant had a legal right to the possession of the premises where the homicide occurred, and that he had the further legal right to inquire into and demand an explanation of the presence of any other person whom he might find in possession of or on said premises."

The third special charge was given, the others were refused, and the refusal is complained of. We do not regard the complaint as meritorious.

Touching the homicide in defense of property, our statute is as follows: "Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and, in such cases, all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack; and any person interfering in such case in behalf of the party about to be injured is not justifiable in killing the aggressor, unless the life or person of the injured party is in peril by reason of such attack upon his property." Penal Code, art. 1107.

Also, the possession must be of corporeal property, and not a mere right, and the possession must be actual, and not merely constructive. The

Homicide—
justifiable—
defense of
property.

possession must be legal, though the right to the property may not be in the possessor. Every effort in his power must have been made by the possessor to repel the aggression before he would be justified in the killing.

We have given above a synopsis of the testimony as we comprehend it. That pointed out by the appellant as raising the issue is that of appellant stating his age, forty-four years of age; that the deceased was younger; that appellant and his family had resided there for a num-

ber of years; that his mother had also lived there; that he had bought from, or contracted for all the interest of, all the heirs except the deceased, and had received the deed to the land from his mother in 1915, and had claimed the place since that time; that the deceased had an interest in it, but that it was only a short time before the homicide that appellant learned that the deceased had anything to do with the possession; that deceased had never come to him with reference to his interest in the land; that his mother had left home on the 8th day of January, while the appellant was in Tyler; that he heard that the deceased came on the 23d of December, but did not know of his own knowledge when he came. Appellant's daughter testified that she had heard the deceased remark: "We have got possession now, and that is what I have been working for, and that is all I want." It is not clear that this was communicated to the appellant.

The facts do not impress us as presenting the issue that the homicide was in defense of property, but the true issue was whether it was in defense of appellant's person. If the issue existed, we think the special charges requested were not pertinent to present it. They ignored the essential elements of the law of homicide in defense of property, namely, that of resorting to other means before taking life. In the case of *Wells v. State*, 63 Tex. Crim. Rep. 622, 141 S. W. 98, Presiding Judge Davidson, speaking for the court, said: "They were some feet apart; the distance is made uncertain by the varying testimony of the witnesses, the defendant's evidence putting him at the door, the state witnesses putting him back from the door. Appellant was in the room and deceased upon a gallery. The law requires, before killing, the possessor of the house must use every other reasonable effort in his power to repel intrusion in order to be justified in taking human life. Where a party is an intruder

or trespasser upon the habitation of another, or, being his guest, puts himself wrong by his conduct in the house, the owner has a right to put him out, provided he uses no more force or greater or more dangerous means than are necessary to effect the expulsion of the party. *Turner v. State*, 16 Tex. App. 378; *Stanley v. State*, 16 Tex. App. 392; *Hinton v. State*, 24 Tex. 454. Reasonable force must be used. *McCray v. State*, 38 Tex. Crim. Rep. 609, 44 S. W. 170. And it was held in *Sargent v. State*, 35 Tex. Crim. Rep. 325, 33 S. W. 364, that on a trial for murder, where the evidence presented the issue of an unlawful intrusion into the home, the defendant would have no right to complain of a charge which authorized him to slay deceased for such intrusion after he had resorted to all other means, except retreating, to get rid of him."

In the instant case, on the facts viewed in their strongest light in favor of the appellant, the house in which the homicide took place was the home of the mother of appellant and deceased. The deceased was there with the consent of the mother. His presence cannot be given the color of an attempt to eject the appellant by physical force. Admittedly, the means to which he had resorted to oust the appellant were those provided by law. There was litigation pending. The mother, admittedly entitled to possession coinciding with that of appellant, was also claiming title. The deceased was the owner of an interest in the property, and, to settle the differences, resort was had by the courts. The fact that the homicide took place upon the premises in controversy did not characterize it as a homicide in defense of the property. Such a construction of it would have been manifestly against the rights of the appellant. From his standpoint, he was attacked by the deceased and fired to save his life. His right to defend his person was far broader than his

—when killing
not in defense
of property.

right to defend his property. In Ruling Case Law, vol. 13, p. 839, it is said: "It is not true, as a general rule, that an invasion of property rights constitutes an excuse for homicide. On the contrary, it is only when the element of danger to the person is present that the law countenances the taking of human life. The fact that the slayer is on his own land at the time of the killing, and the further fact that the deceased was engaged in acts of aggression or violence, are of great—oftentimes conclusive—probative force in establishing self-defense; but it is a defense of the person that is in issue, not the element of protection of property dissociated from protection of persons."

In *Hill v. State*, 43 Tex. Crim. Rep. 585, 67 S. W. 506, the court said: "The difficulty here arose as to the right of appellant to pasture his horse on the lands of the prosecutor, and this involved the right to the possession of said land. The difficulty itself, however, did not occur in the defense of property. Possession was a disputed question. It appears that the land had been awarded to appellant, and prosecutor had been living on that section for some time, and was still living on it. The fact that the altercation grew out of adverse claims to the possession of property would not require a charge involving the right of appellant to protect his claim to the property against an intrusion of the prosecutor."

On the subject under discussion, we think the rights of the appellant were fully conserved in giving to the jury the special charge which we have quoted above.

The court, in separate paragraphs, charged on the law of murder, manslaughter, and self-defense. In one of the concluding paragraphs of the charge, the court instructed on the law of reasonable doubt as applied to the whole case. An exception was reserved to the failure of the court to charge on the law of reasonable doubt as between the grades of homicide. We think this

would have been the better practice, and it is conceivable that a case might arise in which the refusal to do so would be harmful error. *McCall v. State*, 14 Tex. App. 353; *Murray v. State*, 1 Tex. App. 417; *Blake v. State*, 3 Tex. App. 581. The general rule, however, seems not to imperatively demand that the trial court give such an instruction where, as in the instant case, the law of reasonable doubt is, in the charge, applied to the whole case. In *Cockerell's Case*, 32 Tex. Crim. Rep. 592, 25 S. W. 422, Judge Davidson, on the subject, used the following language: "Even had the court failed to instruct the jury to apply the reasonable doubt between the degrees of culpable homicide charged upon, such omission would not have been error where the court applies such doubt to the whole case"—citing *Hall v. State*, 28 Tex. App. 146, 12 S. W. 739, wherein it is said: "The charge of the court is made the subject of several objections, which are claimed for error. It is objected that the court did not instruct the jury to apply the reasonable doubt as between the several degrees charged upon. Such omission has never been held reversible error, where the court applies the reasonable doubt to the whole case, except in those cases where such an additional instruction has been specially requested and refused by the court."

Other cases directly in point are found, among them being *Little v. State*, 39 Tex. Crim. Rep. 655, 47 S. W. 984; *Wallace v. State*, — Tex. Crim. Rep. —, 97 S. W. 1051; *Furr v. State*, — Tex. Crim. Rep. —, 194 S. W. 398.

There are other bills of exceptions which we have carefully examined. They, in our opinion, present no doubtful question or matter which we deem it necessary to discuss.

We find no error in the record, and therefore order the judgment affirmed.

A petition for rehearing having been granted, *Hawkins, J.*, on March

22, 1922, handed down the following opinion:

In the original submission of his case appellant raised the question that the court below committed error in not giving him the benefit of a charge as to the presumption of the law from the use of a deadly weapon by deceased under article 1106, Vernon's P. C. Complaint is made because such assignment was not discussed in our original opinion.

No exception was taken to the failure of the court to embrace said article in his charge, neither was any special charge requested upon the subject. In no way was the lower court's attention called to such omission. Notwithstanding this, appellant insists that it was fundamental error to omit to charge thereon, and that the provisions of article 743, Vernon's C. C. P., if properly construed, require this court to pass upon the question, in the absence of a special charge requested or exception taken at the time of trial. Said article, in connection with the preceding ones, has been so frequently construed since the amendment of the legislature in 1913 (chap. 138), we do not think it necessary to again review the matter. One of the clearest statements of the construction of the court under the present Practice Act will be found in *Williamson v. State*, 74 Tex. Crim. Rep. at page 293, 167 S. W. 362. Referring to the article in question and the acts of the thirty-third legislature, the court used this language: "It was provided in that act that the charge, before being read to the jury, should be submitted to counsel, and they must at that time present in writing any objections to the charge, distinctly specifying each ground of objection, and if no objection is made at that time, the case shall not be reversed because of errors in the charge, and if such objections are made we shall not reverse unless such errors were calculated to injure the rights of defendant, or un-

less it appears he has not had a fair and impartial trial."

We believe the foregoing to be a correct interpretation of article 743 under the acts of the legislature referred to, and have been unable to agree with the construction thereof urged by appellant.

The omission to charge article 1106 was not such fundamental error as would require reversal in the absence of proper exceptions.

Appeal—omission of instructions—absence of error.

The court charged on the issues of murder and manslaughter. Nowhere in his charge is the doctrine of reasonable doubt as between degrees presented. Counsel by timely and pertinent exception pointed out this omission. In our original opinion we held that, the law of reasonable doubt having been applied to the whole case, the omission to charge the same as between the degrees was not reversible error. It is urged in the motion for rehearing that in this portion of our opinion we were in error, especially so as the omission was called to the attention of the trial judge by timely exception, presented in writing before the charge was read.

We have had occasion to review many decisions in our consideration of this question on rehearing. In *Guagando's Case*, 41 Tex. 634, the jury was charged to acquit if there was reasonable doubt of guilt, but there was omission to instruct reasonable doubt between degrees of murder; held, error. In *Murray v. State*, 1 Tex. App. 423, Judge White says: "This question is as to the propriety and necessity of a charge upon the reasonable doubt between the different degrees in cases of murder, especially when such a charge is asked by defendant. There are, as it appears to us, many good reasons why this rule should be adopted. Oftentimes it is of as great and vital importance to a defendant to have the benefit of whatever reasonable doubt may arise in determining the grade and degree of his

crime as in adjudging the general measure of his guilt."

In *Lister's Case*, 1 Tex. App. 744, no special charge on the subject was requested; the reasonable doubt between the degrees was approved, and commended to the trial courts. In *Eanes v. State*, 10 Tex. App. 452, reasonable doubt was charged generally, and then was added, "and the rule of reasonable doubt applies to the grade of offense." It was held not sufficiently definite as applied to degrees. *McCall* (*McCall v. State*, 14 Tex. App. 353) was charged with theft, but Judge Willson says: "Where an offense consists of different degrees, a charge giving the defendant the benefit of a reasonable doubt between the degrees would be proper, and it would be error ordinarily in such case to refuse such a charge when requested."

In *Hall v. State*, 28 Tex. App. 146, 12 S. W. 739, it is said: "It is objected that the court did not instruct the jury to apply the reasonable doubt as between the several degrees charged upon. Such omission has never been held reversible error, where the court applies the reasonable doubt to the whole case, except in those cases where such an additional instruction has been specially requested and refused by the court. *McCall v. State*, supra."

In *Frizzell v. State*, 30 Tex. App. 56, 16 S. W. 751, is found this language: "To the objection that the charge of the court omitted to instruct the jury to apply the reasonable doubt as between the several degrees charged on, we reply such omission is not error when the court has applied the reasonable doubt to the whole case, except in this, where the court has refused special instructions, covering the omission."

In *Cockerell's Case*, 32 Tex. Crim. Rep. 592, 25 S. W. 421, Judge Davidson says: "Exception was reserved to the charge, because it failed to charge the 'reasonable doubt' between manslaughter and self-defense. The court gave this charge as between murder in the

first and second degrees, also between murder in the second degree and manslaughter, and further instructed, if there was a reasonable doubt of defendant's guilt, he should be acquitted. This was sufficient." The foregoing quotation disposed of the question, but this clause is added: "Even had the court failed to instruct the jury to apply the reasonable doubt between the degrees of culpable homicide charged upon, such omission would not have been error where the court applies such doubt to the whole case."

The *Hall* and *McCall* Cases, supra, are here then cited, both of which were to the effect that it would be error if request was made for such instruction and refused. In *Little v. State*, 39 Tex. Crim. Rep. 661, 47 S. W. 984, will be found the following language, used by Judge Henderson: "Appellant objected . . . because [the court] failed to instruct the jury as to a reasonable doubt between the degrees of murder. . . . The court . . . instructed the jury, if they had a reasonable doubt as to the guilt of the defendant, to acquit him. This applied to all the degrees, and it was not necessary for the court to give a specific charge as to a reasonable doubt between the degrees. The charge in question, as given, authorized the jury to acquit of any degree, if they had a reasonable doubt of the guilt of defendant of that particular degree."

No authorities are cited in support of the proposition as announced in the *Little Case*, and no reference whatever is made in that opinion to the cases reviewed by us announcing a contrary doctrine. Upon a more thorough examination, we find that the case of *Wallace v. State*, — Tex. Crim. Rep. —, 97 S. W. 1051, cited by us in our original opinion, does not support the exact proposition under discussion. The question there before the court was the failure to charge upon reasonable doubt directly in connection with the charge on self-defense, and the holding in the *Wallace Case* was to the

effect that, having charged the doctrine of reasonable doubt as applied to the whole case, it was sufficient. The same is true with reference to the case of *Furr v. State*, — Tex. Crim. Rep. —, 194 S. W. 398, cited in the original opinion. That was a seduction case and the decision turned largely upon the same point presented in the *Wallace Case*. We find in the examination of the authorities much confusion arising at this point. A great many cases cited by the state, in their brief in reply to appellant's motion for rehearing throw no light upon the direct question before us, but are in support of the proposition that it is not necessary for the trial judge to charge the law of reasonable doubt in connection with each separate defensive issue. There is no lack of authorities to support the latter proposition, and many of them may be found collated in Mr. Branch's *Anno. Penal Code*, under § 11, on page 5. We may have overlooked some authorities; but, so far as we have examined those to which our attention has been directed, or which have been discovered by us, the *Little Case*, *supra*, is the only one which holds unqualifiedly that it is not error for the court to refuse to charge on reasonable doubt as between the degrees, in the face of a request for such instruction. The failure of the opinion in that case to cite any authority, or make any reference to the immediately preceding decisions announcing a contrary doctrine, caused us to make the research, and we have been unable to reconcile that opinion with the many others cited by us.

As we understand the construction placed upon the present Practice Act, the trial judge is still expected to write the law applicable to the case in his charge to the jury, and if he has inadvertently omitted some phase of the law, or if he thinks some phase of the law inapplicable where counsel for appellant entertains the contrary view, and the omission is specifically and pertinently pointed out by written objection to the charge as prepared, it is not necessary in a felony case, that a special charge be submitted to supply the omission, but appellant may stand upon his objection filed, if it is sufficiently specific to call the court's attention to the matter complained of. Of course, a different rule obtains in misdemeanor cases.

—refusal of instructions on reasonable doubt as applied to grades of homicide.

We have reached the conclusion that we were in error in holding that the law of reasonable doubt, as charged by the court as applicable to the question of guilt, cured the failure to charge upon the same subject as between degrees. The jury might entertain no reasonable doubt as to the guilt of one upon trial, and yet be confused in reaching a conclusion as to the degree of the offense. The omission in the charge having been directed to the court's attention in a timely manner, the same should have been supplied.

For a failure to do so, we have reached the conclusion that the judgment of affirmance must be set aside, and the judgment of the trial court reversed and the cause remanded.

ANNOTATION.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses.

For the purposes of the present discussion it is assumed to be the law that on the trial of an indictment for a crime which is divided into degrees, or which includes other crimes, if the jury have a reasonable doubt as to

the crime, or degree of crime, of which the accused is guilty, the benefit of that doubt must be given to him. Starting with that assumption, the precise question considered herein is whether it is the duty of the trial

judge to instruct the jury specifically as to that rule of law. The sufficiency of such an instruction is not discussed.

The weight of authority is to the effect that if the evidence admits of a conviction of a lower degree than that charged, or of an included offense, the jury should be instructed that, in case of a reasonable doubt between two degrees or offenses, they are to convict of the lesser only, and a general instruction that the guilt of the accused must be shown beyond a reasonable doubt is not sufficient.

Alabama.—*Compton v. State* (1895) 110 Ala. 24, 20 So. 119; *Stoneking v. State* (1897) 118 Ala. 68, 24 So. 47.

Georgia. — Compare *Ramsey v. State* (1898) 92 Ga. 53, 17 S. E. 613.

Indiana. — *Coolman v. State* (1904) 163 Ind. 503, 72 N. E. 568.

Iowa. — *State v. Walters* (1877) 45 Iowa, 389; *State v. Jay* (1881) 57 Iowa, 164, 10 N. W. 343; *State v. Neis* (1886) 68 Iowa, 469, 27 N. W. 460; *State v. Asbury* (1915) 172 Iowa, 606, 154 N. W. 915, Ann. Cas. 1918A, 856.

Kentucky.—*Shelton v. Com.* (1911) 145 Ky. 543, 140 S. W. 670; *McCandless v. Com.* (1916) 170 Ky. 301, 185 S. W. 1100; *Bennyfield v. Com.* (1893) 15 Ky. L. Rep. 321, 22 S. W. 1020; *Mullins v. Com.* (1902) 23 Ky. L. Rep. 2433, 67 S. W. 824; *Arnold v. Com.* (1903) 24 Ky. L. Rep. 1921, 72 S. W. 753; *Demaree v. Com.* (1904) 26 Ky. L. Rep. 507, 82 S. W. 231; *Williams v. Com.* (1882) 80 Ky. 313; *Fields v. Com.* (1884) 5 Ky. L. Rep. 861. See also *Ireland v. Com.* (1900) 22 Ky. L. Rep. 478, 57 S. W. 616.

Missouri. — Compare *State v. May* (1903) 172 Mo. 630, 72 S. W. 918.

New York. — Compare *Abbott v. People* (1881) 86 N. Y. 460.

Texas. — *Guagando v. State* (1874) 41 Tex. 626; *Murray v. State* (1876) 1 Tex. App. 423; *Eanes v. State* (1881) 10 Tex. App. 421; *Childress v. State* (1909) 55 Tex. Crim. Rep. 186, 115 S. W. 582. See also *Tinsley v. State* (1907) 52 Tex. Crim. Rep. 91, 106 S. W. 347; *Bryant v. State* (1908) 54 Tex. Crim. Rep. 65, 111 S. W. 1009. And see the reported case (*RICHARDSON v. STATE*, ante, 1249) wherein the

Texas cases are reviewed in detail. Compare *Little v. State* (1898) 39 Tex. Crim. Rep. 654, 47 S. W. 984; *Smith v. State* (1904) — Tex. Crim. Rep. —, 78 S. W. 517.

Wisconsin. — Compare *Miller v. State* (1909) 139 Wis. 57, 119 N. W. 850.

In *Coolman v. State* (Ind.) supra, the court said: "Instruction numbered five, tendered by appellant, was a statement of the law concerning reasonable doubt—a subject which had been fully and carefully considered in other instructions given by the court. It did contain the additional statement that, 'when there is a reasonable doubt in which of two or more degrees of an offense he is guilty, he must be convicted of the lowest degree only.' The sentence just quoted was stricken out by the court, and the instruction was given as so modified. The clause above set out was a correct declaration of a statutory rule of law. Burns's Rev. Stat. 1901, § 1893; *Newport v. State* (1895) 140 Ind. 299, 39 N. E. 926. In other instructions the court had clearly advised the jury in regard to the three degrees of homicide included in the charge of murder in the first degree, and had told them what proof was necessary to establish each degree of the felony. But it had not, in terms, instructed them concerning their duty in case they were satisfied of the guilt of the defendant of some degree of homicide, but were in doubt as to which degree. Under the circumstances, we are of the opinion that the instruction should have been given without modification."

So, in *McCandless v. Com.* (1916) 170 Ky. 301, 185 S. W. 1100, it was said in an opinion reversing a conviction on other grounds: "The court should, also, upon another trial, give the instruction provided for by § 239 of the Criminal Code, which directs the jury to find the accused guilty of the lesser offense, if entertaining a reasonable doubt of which offense he is proven to be guilty."

In Texas it is held that, in the absence of a request, it is not error to fail to charge specially as to reason-

able doubt as between the degrees of the crime charged. *Powell v. State* (1890) 28 Tex. App. 393, 13 S. W. 599; *Frizzell v. State* (1891) 30 Tex. App. 42, 16 S. W. 751; *McCall v. State* (1883) 14 Tex. App. 353; *Hall v. State* (1889) 28 Tex. App. 146, 12 S. W. 739; *Cockerell v. State* (1894) 32 Tex. Crim. Rep. 592, 25 S. W. 421; *Simpson v. State* (1913) 69 Tex. Crim. Rep. 376, 154 S. W. 999. In *McKinney v. State* (1900) — Tex. Crim. Rep. —, 55 S. W. 175, it was said: "The court gave a charge on reasonable doubt applicable to the whole case, and, in the absence of some special showing why a charge on reasonable doubt between the degrees should have been given, this was sufficient."

In at least two jurisdictions the rule seems to be that, where the court has charged that the guilt of the accused must be established beyond a reasonable doubt, it is not error to refuse to charge that he is to be given the benefit of a reasonable doubt as to the degree of the crime of which he is guilty. *Ramsey v. State* (1893) 92 Ga. 53, 17 S. E. 613; *State v. May* (1903) 172 Mo. 630, 72 S. W. 918. See also *Abbott v. People* (1881) 86 N. Y. 460; *Miller v. State* (1909) 139 Wis. 57, 119 N. W. 850.

In *State v. May* (1903) 172 Mo. 630, 72 S. W. 918, *supra*, it was said: "It is illogical to say that a person may be guilty of two grades of an offense in the same case, where the ingredients of the grades are so different as in murder in the first and second degrees, in the first of which the killing must be done with deliberation, in the other without deliberation, but with malice and premeditation. Then, if the jury believe him guilty beyond a reasonable doubt, and are authorized under the instructions to find him guilty of either degree of which the evidence shows him to be guilty (and they cannot convict unless they so find), it does seem to us that there is no reason for an instruction telling them that, if they have a reasonable doubt as to which of two degrees of the offense the defendant is guilty, they will give him the benefit of the doubt and find him guilty of the low-

er grade, for the very obvious reason that, if they have a reasonable doubt as to his guilt of either grade of the offense, they are bound to find him not guilty of that grade, and to find him guilty of the other grade if satisfied of his guilt as to that. A verdict of guilty upon one grade of the offense is, in effect, a finding that he is not guilty of the other. In short, a person cannot be guilty beyond a reasonable doubt of two grades of the same offense,—for instance, murder in the first and second degrees,—for the line of demarcation between the two grades is well defined, as by the instructions in this case; that is, the homicide, in order to constitute murder in the first degree, must be committed with deliberation; in the second degree without deliberation, but with malice and premeditation. There is, therefore, under such circumstances, no necessity for an instruction, and no error in the refusal of one, to the effect that if the jury believe the defendant guilty, but entertain a reasonable doubt as to which of two grades of the offense he is guilty of, they will give him the benefit of the doubt and find him guilty of the lower grade of the offense; for they can only convict him of that grade, if either, of which they may believe him guilty beyond a reasonable doubt, which is inconsistent with the idea of the existence in the minds of the jury of a reasonable doubt with respect to the grade of offense of which defendant is guilty, for it must follow that if the defendant is guilty of one grade of the offense, he is not of the other, and if they entertain a reasonable doubt of his guilt of either grade, they cannot convict of that grade."

In *Abbott v. State* (1881) 86 N. Y. 460, the court said: "The request to charge that it was the duty of the jury, if a reasonable doubt existed in their minds from the evidence as to what degree of crime the prisoner was guilty of, to convict of the lesser degree, was sufficiently answered by the judge. He said that he had told the jury that the prisoner was entitled to the benefit of all reasonable doubt.

No exception was taken to this, and no claim made that it was not satisfactory. It must, therefore, be assumed that it was acquiesced in as covering the request, as it really did."

In *Miller v. State* (1909) 139 Wis. 57, 119 N. W. 850, it was said: "Error is assigned because the court did not give an instruction requested, to the effect that, if the jury were satisfied that any one of the accused was guilty of some offense of criminal homicide beyond a reasonable doubt, but yet entertained a reasonable doubt as to whether it was of a particular or lower degree, the lower offense should be found. Counsel made an attempt to draft an instruction like the one in *Ryan v. State* (1902) 115 Wis. 488, 92 N. W. 271, which was held permissible by construction. The model before counsel was to the effect that, in the contingency mentioned, the jury should 'return a verdict of guilty of the lower offense, rather than of the

higher.' It was supposed the instruction, taken in connection with others given, meant not that, if the jury entertained a reasonable doubt as to whether the accused was guilty of either of two grades of offenses, he should be convicted of the lower, but if they believed he was guilty, at least, of one of them, but there was yet a reasonable doubt as between the two, the verdict should be for the lowest the evidence established with the requisite degree of certainty. We hardly think the requested instruction would have given the jury any better guidance than the general instructions, which seem fairly to have covered the point. By them the jury were, in effect, told that, in rendering a verdict of guilty, it should be for no greater offense of criminal homicide than they believed, with the degree of certainty pointed out, the person convicted was guilty of."

W. A. S.

SUNNYSIDE LAND & INVESTMENT COMPANY, Appt.,
v.

JOHN D. BERNIER and Wife, Respts.

Washington Supreme Court (Dept. No. 1)—April 3, 1922.

(— Wash. —, 205 Pac. 1041.)

Broker — exclusive right to sell — sale by owner — right to commission.

1. Giving to a broker the exclusive right to sell real estate does not deprive the owner of the right to sell it himself without liability for a commission.

[See note on this question beginning on page 1268.]

Appeal — conclusiveness of verdict.

2. A verdict on conflicting evidence is conclusive on appeal.

[See 2 R. C. L. 194; 1 R. C. L. Supp. 432.]

APPEAL by plaintiff from a judgment of the Superior Court for Yakima County in favor of defendants in an action brought to recover a broker's commission. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Stephen E. Chaffee and R. John Lichty, for appellant:

It was the intention of the parties that it should make no difference who actually made a sale within the stipu-

lated time; if the sale was actually made, the commission would be paid; and it is also provided that in case no sale is made, but in the event the appellant is instrumental in finding a

purchaser, then it is entitled to the commission.

Popplewell v. Buchanan, — Tex. Civ. App. —, 204 S. W. 874; **Metcalf v. Kent**, 104 Iowa, 487, 73 N. W. 1037; **Murphy v. Sawyer**, 152 Ky. 645, 153 S. W. 991; **Green v. Cole**, 127 Mo. 587, 30 S. W. 135; **Mercantile Trust Co. v. Johnson**, 177 Mo. App. 503, 160 S. W. 535; **Mercantile Trust Co. v. Lamar**, 148 Mo. App. 343, 128 S. W. 20; **Novakovich v. Union Trust Co.** 89 Ark. 412, 117 S. W. 246; **Dain v. Loeffler**, 256 Pa. 319, 100 Atl. 888; **Hunter v. Wenatchee Land Co.** 50 Wash. 438, 97 Pac. 494; **Hammond v. Mau**, 69 Wash. 206, 40 L.R.A.(N.S.) 1142, 124 Pac. 377.

Messrs. Richards, Fontaine, & Gilbert, for respondents:

If the plaintiff can recover at all, it is because the contract denied or negatived the right of the owners to sell their property to a buyer who was not procured through the agency of the plaintiff.

6 R. C. L. 854, § 242; 13 C. J. 544, § 516; 1 Am. & Eng. Enc. Law, 2d ed. 1217; **Mechem, Agency**, § 207; **Turner v. Baker**, 225 Pa. 359, 74 Atl. 173; **Ingold v. Symonds**, 125 Iowa, 82, 99 N. W. 713, affirmed on rehearing in 134 Iowa, 206, 111 N. W. 802; **Waterman v. Boltinghouse**, 82 Cal. 659, 23 Pac. 195; **Brownell v. Hanson**, 109 Wash. 447, 186 Pac. 873; **Keith v. Peart**, 115 Wash. 552, 197 Pac. 928.

Fullerton, J., delivered the opinion of the court:

On October 2, 1920, the respondents Bernier owned a tract of land situated near Sunnyside, in this state. On the date given they listed the same for sale with the appellant, Sunnyside Land & Investment Company, a real estate broker. The listing agreement was in writing and was to the following effect:

"This agreement made and entered into this 2d day of October, 1920, by and between John D. Bernier, of Outlook, Washington, party of the first part, and the Sunnyside Land & Investment Company, a corporation having its principal office and place of business at Sunnyside, Washington, party of the second part, witnesseth:

"That the said party of the first part for and in consideration of the

sum of one dollar (\$1) to him in hand paid by the second party, the receipt whereof is hereby acknowledged, and of the services to be performed by the second party as hereinafter stated, does hereby give and grant to the second party for a period of three months from date hereof, and thereafter until withdrawn by fifteen days' written notice, exclusive right to sell the following described real property situated in the county of Yakima, state of Washington, to wit: N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ lying east of 29.68 govern. lateral, in section 17, township 10 north, range 22 east W. M.—containing 44 acres, subject to the contract entered into with the Sunnyside Water Users' Association, a corporation, for water right for said land on which there has been paid \$—— per acre, and also subject to contract for an additional water right with the United States of America on which there has been paid \$10 per acre, on the following terms, to wit:

"Purchaser assumes drainage.

"The purchase price of said property to be \$300 per acre, on which the sum of equity is to be paid when abstract of title is furnished showing marketable title except as herein stated, and balance to be paid as follows: ———, with interest at the rate of 6 per cent per annum, payable annually. The purchaser to assume the balance due on water right for said premises in addition to said payments.

"There is a mortgage for \$7,000, \$1,000 per year, against said property, which the purchaser shall assume and agree to pay as part of the purchase price.

"Contract for deed to be given, and the purchaser may at his option, when one half of the purchase price has been paid, demand a deed and give back notes secured by first mortgage for balance of purchase price. Contract to be executed by first party, on above terms as soon as purchaser is found.

"The second party, in considera-

tion of the premises, hereby agrees that it will endeavor to sell said premises, and the first party, in consideration of said agreement and the payment of one dollar (\$1), does hereby agree to and with the second party that he will in case of sale, or, if said second party is instrumental in finding a purchaser, pay said second party a commission on the selling price of 5 per cent."

Prior to the expiration of the agreement, the respondents sold the land to one James Robinson. They refused to pay the broker the commission provided for in the listing contract, and this action was instituted to recover the same. The case was tried by the court, sitting with a jury, and resulted in a verdict and judgment in favor of the respondents.

It was a question in the court below whether Robinson, to whom the appellant sold the property, was a customer procured by the appellant; and the appellant in this court argues that he was, but the evidence on the question is conflicting and was resolved by the jury in favor of the respondents. This concludes the question here.

The remaining question is: Was the listing contract of such an exclusive nature as to entitle the appellant, on a sale of the property during the life of the contract, to the commission named therein, regardless of the fact whether it was or was not the procuring cause of the sale?

It is a general rule supported by practically unanimous authority that, where an owner of property does nothing more than list his property with a broker for sale on commission at a stated price, the broker is entitled to his commission only when he is the procuring cause of the sale; that such a listing does not prevent the owner from selling the property to a purchaser of his own procuring, or render the owner liable to the listing broker for a commission if he does so sell.

When the owner gives to the broker the exclusive agency to sell, the authorities are not so unanimous as to the liability of the owner. The weight of authority is, perhaps, that the owner is liable for the commission when he sells the property during the life of the contract, even though to a purchaser of his own procuring. There are, however, authorities which have adopted the contrary rule, and we have heretofore aligned ourselves with them. In *Hammond v. Mau*, 69 Wash. 204, 40 L.R.A. (N.S.) 1142, 124 Pac. 377, we used this language: "If a contract is silent as to the character of the agency, the owner is entitled to sell without making himself liable for the payment of commissions, and many cases go so far as to hold that, if the contract provides that the broker shall have an exclusive right to sell, but does not in terms inhibit the principal from selling, the contract is not violated if the principal sell to one who is not a customer of the broker. It is only where an exclusive agency is granted upon sufficient consideration, or it is plainly the intent of the parties that the agency shall be exclusive, that the principal is liable when he makes the sale on his own account."

In *Brownell v. Hanson*, 109 Wash. 447, 186 Pac. 873, the contract appointed the brokers "sole agents for the sale" of the property for a named period. The case was determined upon other grounds, but we again said: "We would be inclined to hold, in accordance with the minority of the courts, that a contract giving the broker exclusive authority to find a purchaser for property, but not negating the right of the principal to sell the property himself, is not violated by a sale by the principal, and in the event of such a sale the agent is not entitled to a commission."

In *Keith v. Peart*, 115 Wash. 552, 197 Pac. 928, the brokerage contract gave the broker the "exclusive agency" for the sale of the property, but did not negative the right of the

Appeal—conclusiveness of verdict.

owner to sell during the life of the contract. The owner made a sale of the property during such time, and the broker brought the action to recover commissions. In the complaint he alleged that he was the procuring cause of the sale. The answer denied the allegation, and on the trial the court held this question to be immaterial, construing the contract as one entitling the broker to his commission if the property was sold by the owner during the life of the contract regardless of the procuring cause, and directed a judgment in his favor. This we held error, using this language: "The written authority given the respondent [the broker] made him an exclusive agent, but did not negative the right of the principals to sell the property themselves. . . . This is the test in this case. It is a question as to whether or not the respondent was the efficient procuring cause of the sale to Shook."

There is, however, a difference in the wording of the contracts in the cases to which we have referred and the wording of the contract in the present case. In the second of the cited cases the brokers were appointed as "sole agents" for the sale of the property, and in the third they were given an "exclusive agency" for the sale, while in the present case they are given the "exclusive right" to sell. Based upon this difference in language, the appellant contends for a difference in rule, arguing that the phrase "exclusive agency" has not the same meaning as the phrase "exclusive right," and that, where the broker has a contract giving him the exclusive right to sell the property of his principal, he has the right to his commission, even though he might be denied the right if the contract was only one of

exclusive agency. But we cannot think there is any essential difference in the contract, no matter which of the phraseologies is used. Primarily the contract is, in each instance, one agreeing to pay a commission in case the broker procures a purchaser for the listed property able, ready, and willing to take it on the terms the owner offers it for sale; and if the grant of an exclusive agency for that purpose means, as the rule adopted by us presupposes, that the owner will not list the property with another agent during the life of the agency, the grant of an exclusive right can mean no more.

The concluding clause of the contract, it will be observed, provides that the broker will endeavor to sell the premises, and that the owner agrees to and with him "that he will in case of sale, or if the second party is instrumental in finding a purchaser," pay the broker a stipulated commission. It is argued that the language quoted from this clause of the contract renders the owner liable in the case of a sale, regardless of who was the procuring cause of the sale. But it is manifest, we think, that the language means a sale to a customer procured by the broker, and is without reference to a sale with which the broker has nothing to do.

The judgment is affirmed.

Parker, Ch. J., and Mitchell, Tolman, and Bridges, JJ., concur.

. Petition for rehearing denied.

NOTE.

The question whether an ordinary broker's contract excludes the right of sale by owner is the subject of an annotation in 10 A.L.R. 814, which is supplemented by the annotation following *ETTINGER v. LOUX*, post, 1268.

Broker—exclusive right to sell—sale by owner—right to commission.

PHILIP ETTINGER
v.
HENRY A. LOUX, Appt.

New Jersey Court of Errors and Appeals—November 14, 1921.

(— N. J. —, 115 Atl. 384.)

Broker — exclusiveness of authority.

1. By an authorization in writing by an owner of real estate, to a broker, to sell the same within thirty days, the owner does not relinquish his right to sell the property himself, independently of the broker; in such a case, the owner is not liable to the broker for commissions.

[See note on this question beginning on page 1268.]

— effect of authorization.

2. The authorization is not a contract, either express or implied. It is simply a naked, revocable power, an

offer to pay for services when rendered, if performed before revocation.

[See 4 R. C. L. 818; see also note in 10 A.L.R. 814.]

Headnotes by BLACK, J.

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of the First District Court of the City of Newark in favor of plaintiff in an action brought to recover commissions alleged to have been earned by him as a real estate broker. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John V. Laddey, for appellant:

The authorization in question does not constitute an exclusive agency.

19 Cyc. 223; Hinds v. Henry, 36 N. J. L. 328; Payne v. Twitchell, 81 N. J. L. 193, 81 Atl. 350; Dresser v. Gilbert, 81 N. J. L. 358, 79 Atl. 1043; MacBride v. Rogers, 83 N. J. L. 407, 85 Atl. 202; Ritch v. Robertson, 93 Conn. 459, 7 A.L.R. 81, 106 Atl. 509; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Cadigan v. Crabtree, 179 Mass. 474, 55 L.R.A. 77, 88 Am. St. Rep. 397, 61 N. E. 37; Moran v. Standard Oil Co. 211 N. Y. 187, 105 N. E. 217.

Even if authorization constituted an exclusive agency, the owner always has the right to revoke, for the purpose of making a sale himself, without liability for agent's commissions, before a sale by the agent.

Smith v. Sharpe, 162 Ala. 433, 136 Am. St. Rep. 52, 50 So. 381; Kimball v. Hayes, 199 Mass. 516, 85 N. E. 875; Wright v. Waite, 126 Minn. 115, 148 N. W. 50; Ettinghoff v. Horowitz, 115 App. Div. 571, 100 N. Y. Supp. 1002; Schusterman v. Kraus, 148 App. Div. 727, 132 N. Y. Supp. 758; Massey v. Southern Land Co. 117 Ark. 655, 174 S. W. 531; McCombs v. Moss, 121 Ark. 20 A.L.R.—80.

533, 181 S. W. 907; Cissel, T. & Co. v. Hayden, 41 App. D. C. 477; Bryant v. Palmer, 171 Ill. App. 213; English v. William George Realty Co. 55 Tex. Civ. App. 137, 117 S. W. 996; Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820; Johnson & Moran v. Buchanan, 54 Tex. Civ. App. 328, 116 S. W. 875; Clark v. Asbury, — Tex. Civ. App. —, 134 S. W. 286; Turner v. Baker, 225 Pa. 359, 74 Atl. 172; Bomar v. Munn, — Tex. Civ. App. —, 158 S. W. 1186; Starks v. Springgate, 39 N. D. 228, L.R.A.1918D, 728, 167 N. W. 221; Harris & White v. Stone, 137 Ark. 23, 207 S. W. 443; Roberts v. Harrington, 168 Wis. 217, 10 A.L.R. 810, 169 N. W. 603; Burch v. Hester, — Tex. Civ. App. —, 109 S. W. 399; Faith v. Meisetschlager, — Cal. App. —, 187 Pac. 61; Davis v. Van Tassel, 107 N. Y. Supp. 910; Beck v. Howard, 43 S. D. 179, 178 N. W. 579; Alley v. Griffin, — Tex. Civ. App. —, 215 S. W. 479; Hammond v. Mau, 69 Wash. 204, 40 L.R.A.(N.S.) 1142, 124 Pac. 377; Staats v. Mangelsen, 105 Neb. 282, 180 N. W. 78; California Land Security Co. v. Ritchie, 40 Cal. App. 246, 180 Pac. 625; Greene v. American Malting Co. 153 Wis. 216, 140 N. W. 1130; Dreyfus v. Richard-

son, 20 Cal. App. 800, 180 Pac. 161; *McPike v. Siver*, 168 Iowa, 149, 150 N. W. 52; *Leschziner v. Bauman*, 83 N. J. L. 743, 85 Atl. 205; *Payne v. Twitchell*, 81 N. J. L. 193, 81 Atl. 350; *Stevenson Co. v. Oppenheimer*, 91 N. J. L. 479, 104 Atl. 88; *Courter v. Lydecker*, 71 N. J. L. 511, 58 Atl. 1093; *Volker v. Fisk*, 75 N. J. Eq. 498, 72 Atl. 1011; *Parkhurst v. Tryon*, 184 App. Div. 843, 119 N. Y. Supp. 184; *Wright v. Beach*, 82 Mich. 469, 46 N. W. 673; *Learned v. McCoy*, 4 Ind. App. 238, 30 N. E. 717; *Morgan v. Harper*, — Tex. Civ. App. —, 219 S. W. 888.

Messrs. Stein, Stein, & Hannoeh, for appellee:

Plaintiff earned his commission by producing a ready, able, and willing purchaser during the period provided for by the contract.

Hinds v. Henry, 36 N. J. L. 328; *Freeman v. Van Wagenen*, 90 N. J. L. 358, 101 Atl. 55; *Homan v. Griffin*, 94 N. J. L. 845, 110 Atl. 825; *Payne v. Twitchell*, 81 N. J. L. 193, 81 Atl. 350; *Dresser v. Gilbert*, 81 N. J. L. 358, 79 Atl. 1043; *MacBride v. Rogers*, 83 N. J. L. 407, 85 Atl. 202; *Kruse v. Ferber*, 91 N. J. L. 470, 103 Atl. 409; *Stevenson Co. v. Oppenheimer*, 91 N. J. L. 479, 104 Atl. 88; *Blumenthal v. Bridges*, 91 Ark. 212, 24 L.R.A.(N.S.) 279, 120 S. W. 974.

Plaintiff was employed by defendant for thirty days to render services set forth in the written authorization; he was wrongfully discharged during that period, and is therefore entitled to recover the commissions he would have been able to earn had his employment continued the full period.

Payne v. Twitchell, 81 N. J. L. 193, 81 Atl. 350; *Kruse v. Ferber*, 91 N. J. L. 470, 103 Atl. 409; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Cavanagh v. Ridgefield*, 94 N. J. L. 147, 109 Atl. 515; *Blumenthal v. Bridges*, 91 Ark. 212, 24 L.R.A.(N.S.) 279, 120 S. W. 974; 4 R. C. L. 253; *Walker v. John Hancock Mutual L. Ins. Co.* 80 N. J. L. 342, 35 L.R.A.(N.S.) 153, 79 Atl. 354, Ann. Cas. 1912A, 526; 2 C. J. 527.

Black, J., delivered the opinion of the court:

In this case the plaintiff obtained a judgment in the trial court against the defendant. The judgment was for commissions alleged to have been earned as a real estate

broker. This judgment was affirmed on appeal in the supreme court. From the affirmation of the judgment an appeal was taken to this court. The facts from which the cause of action arose are brief. They are not in essentials controverted. The defendant on September 8, 1919, owned the premises No. 189 Sixteenth avenue in the city of Newark, New Jersey. On that day, he signed and delivered to the plaintiff a writing, of which the following is a copy:

Philip Ettinger, Agent: I hereby authorize the above to sell my property at 189 16th ave. at a 3½ per cent rate, for \$11,000, or any price above \$11,000; provided said property is sold by Mr. Philip Ettinger within (30) thirty days from this date in accordance with my provisions of sale mortgage 4,000.

Henry A. Loux.

Dated 9/8/1919.

On September 13, 1919, the owner of the property sold the same to a buyer unknown to and not procured by the plaintiff. Immediately thereafter, the plaintiff was notified that the owner had sold the property, revoking the authorization of the plaintiff to sell.

However, on September 19, 1919, the plaintiff produced one David Alpert to the defendant, as a purchaser for the property, who was then, in the language of the stipulated facts, ready, able, and willing to purchase the property in accordance with the terms of the authorization. The defendant then declined to sell the property to him, on the ground that it had been sold. The problem therefore for solution is: Did the real estate broker earn a commission? Was the owner by the above writing precluded from selling his own property within the thirty-day period, and so depriving the broker of an opportunity to earn a commission, within the limited period? We think the answer to these questions must be no. The

broker did not earn a commission.

Broker-exclusiveness of authority. The owner did not preclude himself from making a sale

within thirty days to a purchaser not procured by the broker. The authorization was not an exclusive

—effect of authorization. one, either expressly or by implication. It was said

in the case of *Vreeland v. Vetterlein*, 33 N. J. L. 250, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions. An examination of the writing shows that in form it is that of an offer, and not that of a contract. There is no consideration, which is essential to a contract. It is in essence simply a revocable, naked power,—an offer to pay for services, when rendered, if performed within the limited period and before revocation. An examination of our reports does not reveal any case in which this precise point has been considered.

It is an accepted rule of construction that a contract of employment does not give the broker an exclusive agency, unless it is so specified, either expressly or by implication. 19 Cyc. 265; 9 C. J. p. 623.

A general rule which is supported by the weight of authority is to the effect that when the owner of real estate places it in the hands of a real estate broker for sale, he does not thereby relinquish his right to sell the property himself, independently of the broker. 4 R. C. L. p. 318, ¶ 56; 9 C. J. p. 622. So, it is said that when the broker is given an exclusive agency, as distinguished from an exclusive right, to sell, it merely precludes the owner from employing another broker, and does not preclude the owner from making a sale himself, without the broker's aid, and in such a case the owner will not be liable to the broker for commissions (9 C. J. p. 622), unless there is a special contract giving a right to commissions regardless of who makes the sale, as in *Kruse v. Ferber*, 91 N. J. L. 470, 103 Atl. 409, and *Stevenson Co. v.*

Oppenheimer, 91 N. J. L. 479, 104 Atl. 88, or unless the owner does not notify the broker of the sale, as in *Payne v. Twitchell*, 81 N. J. L. 195, 81 Atl. 350.

The authorities, however, on this vexed question, in the various jurisdictions, are not altogether in harmony. They will be found collected and compared in the notes in 19 L.R.A. (N.S.) 599; 24 L.R.A. (N.S.) 280; 38 L.R.A. (N.S.) 370; and 49 L.R.A. (N.S.) 999.

The conflict may, perhaps, be more apparent than real, when the different wordings in the broker's written authorization to sell in the reported cases are compared and considered.

Those cases which make the owner liable for a broker's commissions when the sale is made by himself within the time limit are put upon the ground that the written authorization is a contract, that it implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency, unless there is a reservation to the contrary, as in *Blumenthal v. Bridges*, 91 Ark. 212, 215, 24 L.R.A. (N.S.) 282, 120 S. W. 974.

The revocation of the agent, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby.

On the other hand, that class of cases which maintain the opposite doctrine hold that, as the broker paid nothing, incurred no expense or loss, and entered into no obligation on his part, the broker was at liberty to act or not, as he pleased; and would incur no liability by failing to do anything, as the court said, in *Goward v. Waters*, 98 Mass. 598. The authorization to sell is simply a naked, revocable power. It is not a contract, either express or implied.

There is no mutual obligation to constitute a contract. Nor is there a consideration. So, the writing in this case is simply a naked, revoca-

ble power. It did not preclude the owner from making a sale of the property himself, without the broker's aid, and did not subject the owner to liability to the broker for commissions. In this case, there is no suggestion that the owner did not act in good faith toward the broker by selling his own property to a buyer independently of the broker.

The conclusion we have reached in this case, and the principle on which it is based, find support and

illustration in the following cases: *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 385, 38 Am. Rep. 441; *Cadigan v. Crabtree*, 179 Mass. 474, 55 L.R.A. 77, 88 Am. St. Rep. 397, 61 N. E. 37; *id.* 186 Mass. 7, 66 L.R.A. 982, 104 Am. St. Rep. 543, 70 N. E. 1033; *Cronin v. American Securities Co.* 163 Ala. 533, 539, 136 Am. St. Rep. 88, 50 So. 915; *Hammond v. Mau*, 69 Wash. 204, 40 L.R.A. (N.S.) 1142, 124 Pac. 377.

The judgment of the Supreme Court is reversed.

ANNOTATION.

Does ordinary broker's contract exclude right of sale by owner.

- I. Introductory, 1268.
- II. Mere listing of property or creation of agency to sell, 1268.
- III. Creation of exclusive agency, 1270.
- IV. Specification of time for action, 1271.

I. Introductory.

(Supplementing annotation in 10 A.L.R. 814.)

In the annotation in 10 A.L.R. 814, it is stated that if the property is merely placed in the broker's hands for sale, or the broker is given a mere right to sell, the owner himself may make a sale without liability to the broker for commissions, provided the broker has not done the work required to earn his commissions, and the owner's sale does not directly interfere with his efforts or appropriate the fruits of his labors. Also that the mere fact that the agency of the broker is made exclusive does not prevent a sale by the owner without liability for commissions. With respect to contracts in which a period of time is specified during which the broker shall have the exclusive right, it is stated that there is a conflict of authority, with the weight of the authority in favor of the rule that an exclusive agency for a specified time prevents a sale by the owner without liability to the broker either for commissions or for damages for breach of the contract. But, to bind the owner, there must have been some consideration for the contract; for the

mere naming of a period of time during which the broker can act gives him no right to have the period so continued. The cases which have been decided since the former annotation was published have not changed the rules as there laid down.

II. Mere listing of property or creation of agency to sell.

(Supplementing annotation in 10 A.L.R. 814.)

The mere employment of the broker, without giving him the exclusive right of sale, does not preclude a sale by the owner. *Peters v. Ruebenhagen* (1921) — Minn. —, 184 N. W. 16; *Cook v. Salisbury* (1920) — Mo. App. —, 225 S. W. 112; *Buck v. Hogeboom* (1902) 2 Neb. (Unof.) 853, 90 N. W. 635; *English v. William George Realty Co.* (1909) 55 Tex. Civ. App. 137, 117 S. W. 996.

In *Hartig v. Schrader* (1921) 190 Ky. 511, 227 S. W. 815, in which the defense failed because the owner was held not to have effected a sale before receiving notice of a sale by the broker, the court says: Undeniably the rule is that the owner of property, who has placed it in the hands of a real estate agent, but not by a contract of exclusive agency, retains the right to sell the same himself before such agent shall have produced a purchaser ready, willing, and able to buy same upon the terms named.

"When land is listed with a broker,

who is to receive a commission for making a sale, or find a purchaser, and no period is stipulated in the contract within which he is to have the exclusive privilege of making a sale of it, the party listing the land may revoke the contract at any time, and a sale of the land by him is treated as a revocation; and although an exclusive agency is given the broker, if there is no specified time fixed in the contract, within which he has to exercise his agency, and no exclusive privilege of sale is given him, it is held that such a condition in a contract does not prohibit the owner of the land from making a sale and terminating it, and that such a condition in it only prohibits the owner from effecting a sale through some other agent; but when the exclusive privilege is given the broker to sell the land within a time fixed in the contract for that purpose, the owner thereby contracts that he will not sell the land himself, or through any other person, during the continuance of the period fixed in the contract; and hence, then having no right to sell it himself, or to sell it through any other person than the broker, if he does make a sale of it himself, or sells it through any other broker or person, he violates the contract and is liable for the consequences." *Carter v. Hall* (1921) 191 Ky. 75, 229 S. W. 132.

In *McCombs v. Moss* (1916) 121 Ark. 533, 181 S. W. 907, where the agency had been transferred from one broker to another, and the former assisted the latter in making the sale, the question was as to who was liable for the commissions; but the court says it is held that where real estate is placed in the hands of a broker for sale in the ordinary way, without stipulation, express or implied, that the agent shall have the exclusive right to sell the property, the principal is not deprived of the right, in good faith, to make the sale himself, free from liability to the agent for commissions.

But the sale by the owner, although lawful, does not necessarily absolve him from liability for services per-

formed and expenses incurred by the broker in his efforts to sell the property. *Staats v. Mangelsen* (1920) 105 Neb. 282, 180 N. W. 78.

In *Payne v. Twitchell* (1911) 81 N. J. L. 193, 81 Atl. 350, the contract recited that property had been listed by the broker, and that he was entitled to commissions in case he found a satisfactory purchaser. But, before he found the purchaser, the owner had sold to another, notwithstanding which he was held liable for a commission when, without notice of the prior sale, the broker produced a customer who fulfilled the requirements of the contract. The court held that ability to convey was not a necessary element of liability for commission, and therefore the conveyance of the land by the owner had, of itself, no tendency to rescind the agreement to pay for the stipulated service; the revocation could be effected only by notice to the broker. The court continues: "As soon as we get rid of the notion that the ownership or control of the land is an essential part of the agreement by one person to pay another for performing a specified service, we see at once that such employments are in law assimilated not with agreements touching interests in land, or even, strictly speaking, with the relation of principal and agent, but rather with those special employments by which one is engaged to seek out a particular person, or a person answering to a particular description, and bring such person into communication with his employer. A person who has been injured in a collision may desire to be put into communication with those who witnessed the accident. A solicitor may be seeking the heir to an estate; a mother may wish to have her child adopted; and a host of such cases may be imagined, in all of which the character of the employment is not legally distinguishable from that of one who desires to be put in touch with a person who will pay a certain price for a certain piece of land. Yet I apprehend that no one would think of saying that the price stipulated for the service when rendered need not be paid if the plain-

tiff had settled his damage suit, or the solicitor had retired from the case, or the mother had decided to keep her child. . . . 'A bargain is a bargain;' and a bargain, once made, remains such until a change of mind by one party, known only to him, has been communicated to the other party."

This case seems to be at variance with the reported case (*ETTINGER v. LOUX*, ante, 1265).

As shown in the former annotation, the Georgia Code provides that the fact that the property is placed in the hands of the broker to sell does not prevent the owner from selling unless otherwise agreed; and that rule was recognized in *Hawks v. Moore* (1921) — Ga. App. —, 109 S. E. 807.

But the owner cannot sell to the broker's customer, so as to deprive the broker of his commissions. *Washington v. Jordan* (1921) — Ga. App. —, 109 S. E. 923; *Crawford v. English* (1921) 26 Ga. App. 563, 106 S. E. 621.

III. Creation of exclusive agency.

(Supplementing annotation in 10 A.L.R. 816.)

As shown in the former annotation, a distinction has been made between an exclusive agency and an exclusive right to sell, the owner having a right to sell where the broker is merely given the exclusive agency, but not where he is given the exclusive right to sell. This distinction has been maintained.

Giving a broker an exclusive agency does not, of itself, preclude the owner from making a sale. *Clark v. Asbury* (1911) — Tex. Civ. App. —, 134 S. W. 286.

In *Harris v. McPherson* (1922) — Conn. —, — A.L.R. —, 115 Atl. 723, the court recognizes and applies the distinction between an exclusive agency to sell and an exclusive right to sell, saying: A contract of the owner, giving the broker the exclusive sale of property, is an agreement by the property owner that he will not sell the property during the life of the contract to any purchaser not procured by the broker.

In *Erswell v. Ford* (1921) 205 Ala. 494, 88 So. 429, where the owner of

the property had by letter given the broker "the exclusive right to handle the sale," the court states that, as a general rule, a broker who is given an exclusive right to sell property is entitled to a commission on any sale made by the owner, but that he must act within a reasonable time. And it was held that a delay of over nine years was too long. The court says the exclusive right to handle the sale terminates if no sale is made within a reasonable time after giving the authority.

In *Bomar v. Munn* (1913) — Tex. Civ. App. —, 158 S. W. 1186, which was an action for commissions where the sale had been effected by the owner, the court says: "While it is alleged in the petition that plaintiffs were employed by the defendants as their agents and brokers for the purpose of selling the property, and that plaintiffs were given 'the exclusive right, for the period of one year thereafter, to sell said land, and upon a sale thereof plaintiffs should receive 5 per cent of the selling price as commission,' yet, in subsequent portions of the petition, the contract of employment is designated as one of 'exclusive agency' to sell said lands. If the contract of employment was that of exclusive agency only, then, in the absence of special contract to the contrary, the defendants would have the right, under the law, to sell the property themselves, without incurring any liability to plaintiffs for commissions. Of course, if defendants agreed with plaintiffs not only to give them the exclusive agency for the sale of the land, but also to pay them a commission upon any sale, by whomsoever made, then such a contract would render the defendants liable even though the efforts of the plaintiffs were not the procuring cause of the sale."

The case of *SUNNYSIDE LAND & INVESTMENT COMPANY v. BERNIER* (reported herewith) ante, 1261, fails to observe the distinction above noted, and holds that giving the exclusive right to sell does not deprive the owner of the right.

IV. Specification of time for action.

(Supplementing annotation in 10 A.L.R. 818.)

The mere specification of a time in which the agent is permitted to act does not prevent the sale by the owner unless some consideration has been given by the contract, or the agent has performed services which will be regarded as a consideration.

Under a contract to pay a commission "in case of the sale or conveyance of" the described property "at any time within one year," the owner himself may sell without paying the commission. *Parkhurst v. Tryon* (1909) 134 App. Div. 843, 119 N. Y. Supp. 184.

Where the broker was given authority to sell lands, which should continue until ten days' notice of their withdrawal was given, the court held that the owner did not thereby disable himself from revoking the agency, and that he had the right to sell the land by his own efforts, and the sale would, by operation of law, revoke the broker's authority. *Hallstead v. Perrigo* (1910) 87 Neb. 128, 126 N. W. 1078.

In *Beck v. Howard* (1920) 43 S. D. 179, 178 N. W. 579, it appeared that land was placed with brokers for sale, and the contract provided that they should have the exclusive sale until a date specified. On the succeeding day the owner sold the property himself, and the question was as to his liability for the commissions. The court says that a broker's agency is not made irrevocable by the fact that his right to sell is exclusive; that a sale by the owner operates as a revocation of the broker's agency; and if the broker has not complied with his undertaking at the time of the sale by the owner, he will not be entitled to a commission.

Where the broker was constituted the exclusive agent to sell the property, and the authorization was to continue for the period of ninety days, and the owner expressly contracted to convey to a customer produced by the broker, the court held that the owner had no right to sell within the time stipulated without being liable

for a commission. *Houston v. Williams* (1921) — Cal. App. —, 200 Pac. 55.

Without, apparently, considering the question of the necessity of a consideration to make the contract binding, the court, in *Miller v. Brown* (1921) — Wash. —, 196 Pac. 573, held that if a broker is given the exclusive sale for a definite period, the owner will be liable for a commission if he himself makes a sale within the time specified.

The expiration of the time specified in the contract terminates the agent's authority so that the owner is privileged to make the sale without liability to the broker after that time. *Learned v. McCoy* (1891) 4 Ind. App. 238, 30 N. E. 717.

If the contract is for subdivision and sale of a tract of land, with a specified time in which to effect the sale, the owner cannot, after the broker has incurred expenses and performed services in carrying out the contract, sell the property himself without liability in damages for breach of the contract. *Green v. Cole* (1895) 127 Mo. 587, 30 S. W. 135.

Where a broker has secured the right to sell a tract of land for a definite period by undertaking to expend money in its improvement and subdivision, the owner cannot himself sell the property within the time specified without being liable in damages for revocation of the contract. The contract being founded on a valuable consideration, neither party could violate it without being liable to the other for the breach. And the court concluded that a principal cannot, after having made a valid contract with an agent for the exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of contract by claiming that the agent might not have made the sale. *Atlantic Coast Realty Co. v. Townsend* (1919) 124 Va. 490, 98 S. E. 684.

And that ruling was recognized as sound on the subsequent appeal in *Robertson v. Atlantic Coast Realty Co.* (1921) 129 Va. 494, 106 S. E. 521.

H. P. F.

SAMUEL M. STEWART

v.

SAMUEL W. TODD et al., Appts.

Iowa Supreme Court—July 10, 1919.

(190 Iowa, 283, 178 N. W. 619.)

Partnership — between husband and wife — validity.

1. A partnership contract between husband and wife is valid.

*[See note on this question beginning on page 1304.]***Contract — between husband and wife — survivorship of property.**

2. Where under the statute a married woman may contract freely as to her own property, a contract between husband and wife founded on good consideration that the survivor shall have the entire property is valid inter sese.

*[See 13 R. C. L. 1364.]***Evidence — communications to attorney — privilege.**

3. Communications by a wife to an attorney, when consulted by herself and her husband as to their property rights, are not privileged, in an action by the husband to establish rights under agreements then entered into.

*[See 28 R. C. L. 565.]***Contract — to leave property to another — testamentary character.**

4. An agreement by a wife founded on good consideration, to leave her property to her husband, is not unenforceable because not executed as a testamentary instrument.

*[See 28 R. C. L. 65.]***Specific performance — contract to make will.**

5. An agreement on good consideration to make a particular disposition of property by will is enforceable after the death of the promisor, against his heirs, devisees, or personal representatives.

*[See 25 R. C. L. 306, 311.]***Trust — devisee of property promised to another.**

6. Where, after making a will to carry out an agreement to devise property, testator revokes the will by executing a new will, the devisees under the new will take the property impressed with a trust in favor of the person to whom the promise was originally made.

*[See 25 R. C. L. 311.]***Contract — revocation — mutual will.**

7. A contract between husband and wife to make reciprocal wills, followed by the actual execution of the wills, can be revoked only by mutual consent of the parties.

*[See 28 R. C. L. 172.]***— promise on consideration — binding effect.**

8. A promise made upon a consideration binds both promisor and promisee.

*[See 6 R. C. L. 586, 649; 1 R. C. L. Supp. 157.]***Partnership — dissolution — title to property.**

9. Partnership property, upon dissolution of the firm, becomes the joint property of the partners.

Contract — revocation — survivorship of property — consideration.

10. A contract between husband and wife that the survivor shall take all their property, which consists of partnership business, which contract is supplemented by mutual wills, cannot be revoked by the wife after the husband has labored for many years in increasing the property by building up the business.

Specific performance — when enforced.

11. Equity may enforce a contract a breach of which might be the foundation of a civil action for damages.

*[See 25 R. C. L. 206.]***— parol evidence — contents of writing.**

12. Specific performance of a written contract is not defeated by the fact that the contract has been lost and is proved only by parol evidence of its contents, if the evidence satisfactorily accounts for the loss, and establishes its existence and contents.

Will — conferring rights in property not owned by testator.

13. A will confers no rights in property not owned by testator at the time of his death.

Estoppel — probate of will — setting up contract for estate.

14. A man who is, by statute, required to file his wife's will for probate, and who has no power to contest the instrument, does not, by probating the will and electing not to take under it, estop himself from setting up a contract by which he was to be entitled to her entire estate.

(Salinger and Evans, JJ., dissent.)

On Rehearing.

Evidence — contents of lost paper — sufficiency.

15. A general and approximate recollection by a witness of a writing purporting to be a partnership agreement between husband and wife, which he had seen once, twenty years before, and had not thought of for many years, is not sufficient to sustain a finding that it contained words which would pass to the husband, upon the wife's death, separate property which she acquired from her parents.

[See 17 R. C. L. 1197.]

APPEAL by defendants from a judgment of the District Court for Van Buren County (Hunter, J.) in favor of plaintiff in an action brought to compel specific performance of an alleged contract between him and his wife to convey property to survivor. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sloan & Sloan, W. D. McCormick, J. C. Calhoun, and W. L. Burkheimer, for appellants:

A will is an instrument of writing by which a person makes a disposition of his property to take effect after his death, and which is ambulating and revocable during his life.

Jarman, Wills, p. 16; Underhill, Wills, § 4, p. 7; Burlington University v. Barrett, 22 Iowa, 60, 92 Am. Dec. 376; Mullong v. Schneider, 155 Iowa, p. 12, 134 N. W. 957; Crispin v. Winkleman, 57 Iowa, 523, 10 N. W. 919.

Mutual wills, whether joint or several, are revocable by either testator during the lifetime of the other so far as his disposition of property is concerned, without notice to or consent of the other, unless the making of the will is the result of a valid contract by which each has agreed to devise his property to the other.

1 Underhill, Wills, p. 19, § 13; Robertson v. Robertson, 136 Am. St. Rep. 604, note; 30 Am. & Eng. Enc. Law, 2d ed. 621; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; McClanahan v. McClanahan, Ann. Cas. 1915A, 463, note, 77 Wash. 138, 137 Pac. 479.

The fact that mutual wills are made by parties in favor of each other, or a mutual will by two parties in each other's favor, creates no presumption that it is made pursuant to contract. Such a contract must be proven by

legal evidence, and by clear, satisfactory, and convincing evidence.

Robertson v. Robertson, 136 Am. St. Rep. 596, note; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265.

It appearing that a will conceded to have been executed cannot be found after the death of the testator, the presumption arises that the same was destroyed by him *animo revocandi*.

Thomas v. Thomas, 129 Iowa, 159, 105 N. W. 403; Re Thorman, 162 Iowa, 237, 144 N. W. 7, Ann. Cas. 1916B, 484.

Where a husband and wife verbally contracted each to bequeath his or her property to the other, and executed wills pursuant thereto, the execution of a new will by the husband invalidated the oral contract and precluded its specific performance.

McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461.

The execution of a will is not such part performance of an oral contract to bequeath property as will take the contract out of the Statute of Frauds.

Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; McClanahan v. McClanahan, Ann. Cas. 1915A, 463, note.

If the writing is intended to operate both as a will and a contract, that part of it which is wholly testamentary cannot be regarded as entitled to specific performance.

1 Underhill, Wills, p. 19, § 13; Hazle-

ton v. Reed, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450.

Proof of a parol contract to convey land must be clear, satisfactory, and convincing to warrant specific performance.

Ross v. Ross, 148 Iowa, 729, 127 N. W. 1034; Wills v. Westendorf, 140 Iowa, 293, 118 N. W. 376.

Any language indicative of an intent to make a testamentary disposition is sufficient.

Re Stumpenhousen, 108 Iowa, 555, 79 N. W. 376; Longer's Estate, 108 Iowa, 34, 75 Am. St. Rep. 206, 78 N. W. 834; Schouler, Wills, 2d ed. § 262.

An agreement for the disposition of property intended to take effect or continue after the death of the owner cannot be given testamentary force and allowed to have operation, unless in such form as to be valid as a will.

Crispin v. Winkleman, 57 Iowa, 523, 10 N. W. 919; Wilson v. Carter, 132 Iowa, 442, 109 N. W. 886.

Where title is conveyed for the purpose of defrauding creditors, equity will not restore it.

De France v. Reeves, 148 Iowa, 351, 125 N. W. 655; Mellen, Crawford & Co. v. Ames, 39 Iowa, 283; Briggs v. Coffin, 91 Iowa, 329, 59 N. W. 259; Baldwin v. Davis, 118 Iowa, 36, 91 N. W. 778; Cloud v. Malvin, 108 Iowa, 52, 45 L.R.A. 209, 75 N. W. 645, 78 N. W. 791.

A sale which practically includes all the property used by a firm in carrying on its business, whether made by the firm or a member thereof, operates as a dissolution thereof.

Patterson v. Hare, 4 App. Div. 319, 38 N. Y. Supp. 565; Pennville Natural Gas & Oil Co. v. Thomas, 21 Ind. App. 1, 51 N. E. 351; Whitton v. Smith, Freeman. Ch. (Miss.) 231; Smith v. Vanderburg, 46 Ill. 34; Thompson v. Bowman, 6 Wall. 316, 18 L. ed. 736; Blaker v. Sands, 29 Kan. 551; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727.

To establish a lost will or prove its contents, the evidence must be of a very clear and satisfactory character.

Re Thorman, 162 Iowa, 239, 144 N. W. 7, Ann. Cas. 1916B, 484; McCarn v. Rundall, 111 Iowa, 406, 82 N. W. 924; Thomas v. Thomas, 129 Iowa, 159, 105 N. W. 403; Re Brown, 143 Iowa, 649, 120 N. W. 667; 1 Underhill, Wills, p. 375, § 275; Thornton, Lost Wills, p. 130, §§ 92, 93.

Section 3154 of the Code forbids

that the interest of either husband or wife in the property of the other shall become the subject of contract between them.

Berry v. Donald, 168 Iowa, 744, 150 N. W. 1050; Garner v. Fry, 104 Iowa, 515, 73 N. W. 1079; Miller v. Miller, 104 Iowa, 186, 73 N. W. 484; Poole v. Burnham, 105 Iowa, 620, 75 N. W. 474; Frazer v. Andrews, 134 Iowa, 621, 11 L.R.A.(N.S.) 593, 112 N. W. 92, 13 Ann. Cas. 556; Newberry v. Newberry, 114 Iowa, 704, 87 N. W. 658.

The relations between partners, so far as they involve their rights between themselves, are necessarily "personal transactions" as between them, and, on the death of either, the other is not a competent witness to testify in relation thereto, in any case involving any matter of probative force, against the executor, legatee, or devisee of the decedent.

Re Brown, 92 Iowa, 379, 60 N. W. 659; Williams v. Brown, 45 Iowa, 102; Peck v. McKean, 45 Iowa, 18; Smith v. Johnson, 45 Iowa, 308; Wilson v. Wilson, 52 Iowa, 44, 2 N. W. 615; Ridler v. Ridler, 93 Iowa, 347, 61 N. W. 994; Van Sandt v. Cramer, 60 Iowa, 424, 15 N. W. 259; Duffield v. Walden, 102 Iowa, 676, 72 N. W. 278.

One who asks to establish a resulting trust by parol evidence and ingraft the same on legal title must do so by evidence that is clear, certain, and practically overwhelming.

Andrew v. Andrew, 114 Iowa, 526, 87 N. W. 494; Murphy v. Hanscome, 76 Iowa, 192, 40 N. W. 717; Noel v. Noel, 1 Iowa, 423; Sunderland v. Sunderland, 19 Iowa, 325.

The fact that the plaintiff managed the operation of the farm does not make him the owner of the profits arising therefrom, and it does not give him any interest in the property purchased with such profits, or create a trust in his favor.

Deere, W. & Co. v. Bonne, 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59; Robb v. Brewer, 60 Iowa, 540, 15 N. W. 420; Carse v. Reticker, 95 Iowa, 25, 58 Am. St. Rep. 421, 63 N. W. 461; Nash v. Stevens, 96 Iowa, 616, 65 N. W. 825; Carn v. Royer, 55 Iowa, 651, 8 N. W. 629; Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632; Hoag v. Martin, 80 Iowa, 718, 45 N. W. 1058.

It is the general rule that the evidence necessary to take a contract out of the Statute of Frauds must all be

furnished by the writings, parol evidence not being admissible to supply evidence not found in them.

1 Greenl. Ev. § 268; Watt v. Wisconsin Cranberry Co. 63 Iowa, 730, 18 N. W. 898; Vaughn v. Smith, 58 Iowa, 558, 12 N. W. 604; 3 Phillips, Ev. 351; 8 Am. & Eng. Enc. Law, 722.

The evidence is not sufficient to establish the alleged contract of February, 1882.

Holmes v. Connable, 111 Iowa, 298, 82 N. W. 780; Ross v. Ross, 148 Iowa, 729, 127 N. W. 1034; Finger v. Anken, 154 Iowa, 507, 131 N. W. 657; Bolton's Estate, 14 Pa. Co. Ct. 575; Moore, Facts, §§ 47, 728, 830, 893, 976; McCarn v. Rundall, 111 Iowa, 406, 82 N. W. 924; Bremer v. Haag, 151 Iowa, 449, 131 N. W. 667; Re Gazett, 35 Minn. 532, 29 N. W. 347.

It is not permissible to read to a witness a paper that purports to be a copy of a lost writing, to enable him to testify as to whether the copy corresponds with his recollection of the original.

8 Enc. Ev. 358; Singer Mfg. Co. v. Riley, 80 Ala. 314; Jaques v. Horton, 76 Ala. 238.

Where a fact must be proved by clear evidence, as the contents of a destroyed will, testimony of a witness to the best of his recollection will be insufficient.

McCarn v. Rundall, 111 Iowa, 406, 82 N. W. 924.

The contract of February, 1882, is of no force and effect, because of the provisions of § 3154 of the Code.

Berry v. Donald, 168 Iowa, 744, 150 N. W. 1049; Re Kennedy, 154 Iowa, 460, 135 N. W. 53; Pieper v. Pieper, 145 Iowa, 373, 124 N. W. 181.

It is the duty of the court to construe the will of decedent according to the expressed intention thereof, and to do so must be given full force and effect to every clause therein.

McTigue v. Ettienne, 155 Iowa, 450, 136 N. W. 229; Roskrow v. Jewell, 154 Iowa, 634, 135 N. W. 3, Ann. Cas. 1914B, 63; Richards v. Richards, 155 Iowa, 394, 136 N. W. 132.

Messrs. J. C. Mitchell and Robert R. McBeth for appellee.

Gaynor, J., delivered the opinion of the court:

Samuel M. Stewart and one Emma A. Stewart were husband and wife. On or about February, 1881, they entered into a contract in writ-

ing. The original of this contract was not produced on the trial. Its absence was accounted for, and secondary evidence of its contents rightly permitted. From this evidence it appears that the contract so entered into was substantially as follows:

"Contract entered into this — day of February, 1881, by and between Emma A. Stewart and S. M. Stewart, both of Van Buren county, Iowa, witnesseth:

"That said parties have agreed to start a general store under the firm name of E. A. Stewart, in which each party is to be an equal partner. S. M. Stewart is to transact and do all the business, sign the firm name of E. A. Stewart to any and all papers necessary, and all the property accumulated, purchased, and owned by either party to be in the firm name of E. A. Stewart. Both parties to use any money they need, and at the death of either party the one living shall fulfil all contracts, pay all debts, and have all property left or owned by either party, or in the firm name."

Upon the execution of this contract the parties thereto opened a general store at Mt. Sterling, Iowa, in the name of E. A. Stewart. The capital used in this enterprise was very small, but the larger portion of it was undoubtedly furnished by Samuel M. Stewart. From that time until 1894 the store was run in the name of E. A. Stewart, managed and controlled, so far as this record shows, by Samuel M. Stewart, Mr. and Mrs. Stewart both assisting in the purchase and sale of goods and in the conduct of the business generally. This proved a successful venture, and the close of each year found a large profit to the credit of the firm.

On the 25th day of September, 1894, the stock of merchandise and fixtures in this store were sold to Madden & De Hunt, the contract reciting "that E. A. and S. M. Stewart have this day sold to Madden & De Hunt their stock of merchandise and fixtures, situated," etc., describ-

ing the location. The consideration paid was \$3,000. The exact amount is not clearly ascertainable from this record.

On February 28, 1894, before the sale of this stock and while the store was being operated under the contract aforesaid, Emma A. Stewart and S. M. Stewart entered into a written contract with one John Gwinup for the purchase of 196 acres of land for \$6,550. This contract was signed by Emma A. Stewart and S. M. Stewart. In the consummation of the contract the deed was made on June 2, 1894, to Emma A. Stewart. The original deal was made by S. M. Stewart, and the preliminary contract signed by both. The purchase price was paid with partnership money, the proceeds of accumulated profits during the continuance of the business. The record affirmatively shows that up to this time neither party had any source of revenue except that which came from this partnership venture. There is some suggestion that Mrs. Stewart may have received money from her father, but there is no substantive evidence of this fact, and therefore we say that the record discloses that this land was purchased and paid for out of partnership funds.

Soon after the purchase of this land Samuel M. Stewart and his wife took possession, and thereafter continued to occupy it as their home farm until the death of Mrs. Stewart. The land is referred to in the record as the "home farm."

After the purchase of this farm, it was managed and controlled by Samuel M. Stewart. Stock was purchased by him and placed on the farm. In fact, he had the full management and control of it. The farm also proved profitable, and, in the course of time, other lands were purchased, and title taken in the names of E. A. Stewart and Emma A. Stewart, a detailed description of which is not necessary to the determination of the matters involved in this suit. But the record discloses that after the sale of the store there

was no source of revenue to these parties except that which came as profits from this farm venture. In fact, all property the legal title to which stood in the name of Emma A. Stewart or E. A. Stewart at the time of the death of Mrs. Stewart on September 9, 1913, was purchased from accumulated profits arising from the original enterprise started by these parties under the contract of partnership made in 1881, and is traceable to that enterprise, except the lands conveyed to Emma A. Stewart in 1896 by her father and mother. The record of these conveyances is found in book 59, pages 108, 109, of the Clark county records of the state of Missouri, and in book 36, page 66, of the Van Buren county records of this state. There seems to have been no consideration paid for either of these pieces of land, either by Mr. or Mrs. Stewart.

The plaintiff, however, does not rely upon a claim of partnership as a basis for the relief sought in this case. He bases his claim of right to all the property, whether in the name of E. A. or Emma A. Stewart, on the claimed binding force of the original contract entered into in 1881, providing "that at the death of either party the one living shall fulfil all contracts, pay all debts, and have all property left or owned by either party, or in the firm name," supplemented by two reciprocal wills executed on the 1st day of May, 1896.

The existence of the partnership is only an incident, and not the basis on which plaintiff rests his right to relief in this case. The rights he seeks to enforce are based upon the original written contract of partnership entered into in 1881, supplemented by the two reciprocal wills executed on the 1st day of May, 1896. It is claimed that the formation of the partnership, the investment of money in the partnership, and the subsequent investment of the earnings of the partnership in land in the name of one of the parties, show a consideration for a

performance of, and such reliance on, that contract that its binding force and legal efficacy, supplemented by the wills aforesaid, cannot be avoided by the acts of one of the parties to it without the consent of the other.

In May, 1896, Mr. and Mrs. Stewart went to the office of William M. Walker, a practising attorney in Van Buren county. They had with them at that time the original contract of partnership hereinbefore set out. It was submitted to Mr. Walker for examination. He read it. He said: "The contract was handed to me, and I was asked to read it and give my opinion as to whether or not it was a valid and binding contract. After an examination, I said to them that, in my judgment, it was a valid and binding contract, and that I would advise that she and her husband each make a will in favor of the other, and then, in my judgment, the contract and the wills would be binding and valid. At that time, Mrs. Stewart's father and mother and husband were all present. Mrs. Stewart said at that time that it was her thought and her husband's that she would in all probability outlive him, and they wanted to know whether the contract would have the effect of giving to her, in case of his death, all their property, and wanted to know, in case of her death, would it have the same effect as to him. They expressed the desire that in case of death of either of them the other should have all the property which they owned at the time. Thereupon I prepared two wills, one for each. They were exactly alike, except that Mrs. Stewart made a special bequest of her watch to one of her nieces."

After the wills were executed, they discussed between themselves a place of deposit. They concluded, however, to deposit them with the clerk of the district court on Mr. Walker's suggestion. The will executed by Samuel M. is substantially as follows:

"I will and bequeath that all my

just debts and funeral expenses be paid.

"2d. After the payment of my debts and expenses, I will, devise, and bequeath all my property, both real and personal, of whatever kind and wherever situated, of which I may die possessed, to my beloved wife, Emma A. Stewart."

Mrs. Stewart's will was the same, except as to the devise of her watch to her niece, and devised all the property of which she died seised to Samuel M. Stewart. These reciprocal wills were deposited with the clerk of the court, but were subsequently taken from his custody and placed in a receptacle, to which both parties had access, in the home of Mr. and Mrs. Stewart. So far as Samuel M. Stewart knew, or had reason to know, they remained there and were there at the time of the death of Mrs. Stewart. Upon the death of Mrs. Stewart, however, it developed that on the 17th day of August, 1907, Mrs. Stewart executed another will, in which she revoked and canceled any and all former wills made by her, and undertook to and did make a disposition of her property inconsistent with the provisions of the reciprocal will heretofore referred to. It is this will that provokes the controversy. This will was produced and duly probated, and under this will claims are being urged, antagonistic to the claims of plaintiff in this suit.

This is the record on which the rights of the parties in this suit are to be determined.

Before coming to the real merits of the controversy, we have to say that the contract relied upon was one which the parties had a right to make. There is no statutory inhibition Contract—
between husband and wife
—survivorship
of property. against the making of such a contract, and when it rests

upon a good consideration it is enforceable. A married woman can contract freely with relation to her own property. The inhibition of Code § 3154 relates only to trafficking in her inchoate right in the

property of her husband. *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998. That she had a right to enter into a partnership with her husband

**Partnership—
between
husband and
wife—validity.**

and carry on a partnership business the same as a stranger might do has been settled by the decisions of this court. *Hoaglin v. Henderson*, 119 Iowa, 720, 61 L.R.A. 756, 97 Am. St. Rep. 335, 94 N. W. 247.

As said before, the original written contract of partnership was not produced. Its contents are proven by the testimony of Mr. Walker, to whom it is claimed it was submitted at the time the reciprocal wills were drawn. Both parties were present at that time. It was submitted to him for a legal opinion at the request of both parties, and in the presence of the father and mother of one of the parties, and it is claimed that what was said is privileged under the statute. This position cannot be sustained. The

**Evidence—
communications
to attorney
—privilege.**

privilege does not apply to cases where two or more persons consult an attorney for their mutual benefit. *Mueller v. Batcheler*, 131 Iowa, 653, 109 N. W. 186.

It is claimed that the contract is testamentary in its character, at least in so far as it purports to give all property left by Mrs. Stewart at the time of her death to her husband; and that being testamentary in character, and not executed as the law requires testamentary instruments to be executed, it cannot be enforced.

It is true that as a testamentary instrument it cannot be enforced, but an agreement to leave property to another, resting upon a consideration, is valid and binding, and

**Contract—to
leave property
to another—
testamentary
character.**

will be enforced by the courts. In *Mueller v. Batcheler*, 131 Iowa, 650, 109 N. W. 186, the facts were that one William C. Knight executed and delivered to his wife a deed to certain real estate

and a bill of sale to certain personal property; that as part of the same transaction Mrs. Knight executed and delivered to William C. Knight a deed to all the real estate of which she was then owner. The mutual agreement between them was that the survivor of them, on the death of the other, was to own all the property, that the deed executed by the survivor was to be destroyed, and that the survivor should give by deed or by will all the property which such survivor should own at the time of his or her death to the plaintiff in the action; the consideration of each deed being the mutual promise of the other. William C. Knight died intestate. His wife also died intestate. At the time of her death she was the owner of all the property claimed by the plaintiff in the action. Plaintiff brought an action against her heirs to recover the property. The court below granted him the relief prayed for, and this court affirmed the action.

As said in *Baker v. Syfritt*, 147 Iowa, 55, 125 N. W. 1001: "It has often been held that an agreement upon sufficient consideration to make a will is valid, and that upon breach of such promise the beneficiary thereof has a right of action for damages, or, under some circumstances, may enforce specific performance. And the person coming into the possession of such property otherwise than as an innocent purchaser is held in equity to be trustee thereof for him to whom it ought of right to have been devised."

See *Carmichael v. Carmichael*, 72 Mich. 76, 1 L.R.A. 596, 16 Am. St. Rep. 528, 40 N. W. 173. In this case it is held that, where a husband and wife bind themselves to make a particular disposition of their property by will, and such contract is fully performed on the part of the husband, and the benefits received and accepted by the wife, equity will prevent the wife from violating her part of the contract in fraud of parties interested, and that, if a conveyance is made by her after the

death of her husband, in violation of her agreement, the conveyance may be set aside at the suit of the parties for whose benefit the agreement was made. See also Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57.

This doctrine has been quite generally recognized by the courts, to wit, that where one makes a valid agreement, resting upon a sufficient consideration, to dispose of his property by will, such agreement may be enforced, after his decease, against

his heirs, devisees, or personal representatives. A part performance of an agreement to make a particular disposition of property by will takes it out of the operation of the Statute of Frauds. Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

In Turnipseed v. Sirrine, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757, 1035, it was held that, if two persons make an oral agreement to make mutual wills, and one of them, in execution thereof, bequeaths to the other, who subsequently dies without making a will, a legacy of \$10,000 and the residue of her estate, this is such a part performance of an agreement on her part as takes the case out of the Statute of Frauds and permits the agreement to be proved by parol, and authorizes a decree against the heirs of the deceased, to the effect that the party who has made her will is the equitable owner, and entitled to be clothed with the legal title to all of the property which she would have received, if the will of the other party to the agreement had been made. See also Allen v. Bromberg, 147 Ala. 317, 41 So. 771.

If, therefore, it can be said to be the rule that one can make an agreement in writing or in parol without executing it in the form required in the execution of testamentary in-

struments, and bind himself by such agreement to give his property upon his death to another, and that such agreement can be enforced after the death of the promisor provided it is shown that the agreement rests upon a valid consideration, there can be no logical reason for holding that, where one makes such a contract, resting upon a consideration, and thereafter, in pursuance of the contract, makes a will for the purpose of making more effectual this agreement and promise to make the will, the original contract becomes less binding upon him.

We are met, however, with the proposition that before the death of Mrs. Stewart she revoked the reciprocal will by executing another will, disposing of her property to the defendants in this suit. Now, of course, this reciprocal will could not be probated. She had revoked it. The revocation destroyed the right to probate, but the contract still remained, and the last will, being probated, gave no added right by its probate. It simply pointed out and designated the persons who were appointed in her stead to perform the contract made. The will undoubtedly passed the property to these parties named

Trust—devisees of property promised to another.

in the last will, but they took it impressed with a trust in favor of the party to whom the promise was originally made. Courts of equity, considering that done which ought to be done, will enforce the original contract by impressing a trust on the property received under the second will in favor of the original promisee.

Inasmuch as their original contract rested on the mutual promise of the contracting parties, carried out and recognized by the making of reciprocal wills, it cannot be rescinded except by the consent of both. As it takes the mutual consent of both to make a contract, so it takes the mutual con-

Contract—revocation—mutual will.

sent of both to rescind or destroy the contract.

We have said that the promise must rest upon a consideration. A promise made upon a consideration binds the promisor and promisee.

—promise on
consideration
—binding effect.

What is the consideration for the promise made in the contract executed between these parties in 1881, and what was the consideration for the mutual promise made in the reciprocal will?

It appears that all the property, except that which came from the father and mother of Mrs. Stewart, is simply the product of the growth and development of the original business entered into at the time the contract was made. The money used in purchasing the Gwinup farm was the money of the partnership. The title to it was taken in the name of one of the parties. It was purchased at a time when the commercial enterprise was still in

Partnership—
dissolution—
title to
property.

operation. It belonged to the partnership, and upon the dissolution of the partnership, if there was any dissolution, the property became the joint property of the partners. It was managed and controlled by the husband.

The record shows that practically all the business that made the farm profitable was done by him. The proceeds of this joint property were invested in other property, and this continued to be the joint property of these parties. After the purchase of this Gwinup farm, Mr. and Mrs. Stewart made their visit to the office of William M. Walker. The original contract was then exhibited to him, and recognized by them as a then binding contract between them. This was after the sale of the store, and after the purchase of the Gwinup farm. The husband continued to recognize the contract as binding, and labored in the interest of the joint enterprise, giving his time and attention and money

to make it effectual and profitable.

Without his consent, and without notice to him, his wife, on the 17th day of August,

Contract—
revocation—
survivorship of
property—
consideration.

1907, made her will, in which she attempted to revoke, and we may assume did revoke, the reciprocal will made in 1896, and undertook to relieve herself of the obligation of her contract, without the knowledge or consent of Mr. Stewart. This will was admitted to probate. Mr. Stewart filed an election not to take under the will, and brought this action, in which he claims to be the owner of all the property left by the deceased at the time of her death, unaffected by the provisions of this later will. The court below found in his favor, and we think rightly so, for the reason that the original contract and its agreements therein, supplemented by the reciprocal wills made later, became and are as one contract binding upon both parties, and not revocable by either. *Brown v. Webster*, 90 Neb. 591, 37 L.R.A. (N.S.) 1196, 134 N. W. 185, supports this conclusion, and is such a full and fair discussion of the question involved in this suit that we invite a careful reading of it. See also *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151.

The record in this case discloses that the plaintiff devoted the best years of his life to the performance in good faith of the original contract entered into in 1881. For thirteen years a mercantile business was carried on in the name of E. A. Stewart, a name agreed upon under which the partnership business should be transacted. So far as this record shows, the entire accumulation of these years was invested with his consent, and in reliance, no doubt, upon the original contract, in lands in the name of his wife. After much of this land had been purchased and taken in the name of his wife, they together consulted Mr. Walker. Some question had undoubtedly arisen in their minds

touching the legal efficacy of the contract. They both recognized it as binding upon them if enforceable at law. To make sure that the contract was binding, they applied to Mr. Walker. He informed them then that the contract was legal and of binding efficacy upon both, and suggested that, to avoid any doubt as to the legal efficacy of this contract, reciprocal wills should be made. These reciprocal wills were made, undoubtedly for the purpose of making more effectual, and more fully evidencing, the agreement made in the original contract. They could have been made for no other purpose, so far as Mrs. Stewart was concerned. The property at that time was all in her name. So far as Samuel was concerned, the will and contract remained in full force with all the legal efficacy that attached to it up to the time of the death of his wife. It was then for the first time that he discovered that she had attempted to repudiate her obligation and to assume to be the owner of all the property in her own right, and to make disposition of it accordingly. We may assume that she revoked her reciprocal will to the extent that it could not, upon her death, be admitted to probate, but the contractual rights which the contract and the will created could not be destroyed by her act without the consent of her husband. Therefore the rights of the plaintiff in this suit rest upon the agreement evidenced by the original contract of 1881, of which the reciprocal will attempted to be revoked was a part by mutual consent of both parties, as evidenced by the testimony of Mr. Walker.

While it is true that any effort at a testamentary disposition of property can be made effectual only by following the statute governing the making of testamentary instruments, yet it does not follow that two parties cannot make an agreement upon consideration touching the disposition of the property of each upon the death of either. If

20 A.L.R.—81.

such contracts were not binding upon the parties, no suit could be maintained for a breach thereof, and yet this court has recognized the right to maintain actions as for a breach of such contracts, and damages have been recovered. Equity may enforce a contract a breach of which might be the foundation of a civil action for damages. It will not always do so, but it lies in the power of the court to do so. *Chehak v. Battles*, 133 Iowa, 107, 8 L.R.A. (N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; *Stiles v. Breed*, 151 Iowa, 86, 130 N. W. 376. In this case plaintiff claims that a contract was entered into by the terms of which he was to live with decedent until attaining his majority, and upon decedent's death he was to take all his property as though his own son. The court said: "That [such] a contract . . . may be enforced was decided in *Chehak v. Battles*, 133 Iowa, 117, 8 L.R.A. (N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140. There the contract was in writing, while in this case oral evidence is relied on. The only difference is the manner of proof. Such an agreement, if resting in parol, must be fully established by clear, satisfactory, and convincing evidence."

Specific performance—when enforced.

The evidence is conclusive that plaintiff complied with all the terms of his alleged agreement. The court found the contract was enforceable, and enforced it against the heirs of the deceased. See also *Horner v. Maxwell*, 171 Iowa, 660, 153 N. W. 331.

It is argued, however, that the contents of this original instrument are proven, if at all, by parol testimony. The right, however, rests upon a written instrument. The proof of the contents of the written instrument is by parol. We say the proof of the contents leaves in our minds no doubt of the existence of the original contract and of its contents, as claimed by the plaintiff. The proof of the contents was made

by a lawyer skilled in his profession, to whom the original instrument was submitted for advice, submitted by both parties, and its contents examined for the purpose of giving advice as to its efficacy as a legal document. It was read carefully by the lawyer, and upon reading the advice was given which resulted in the preparation of the reciprocal wills. The existence of the original contract was fully proven, its contents were fully proven,

—parol evidence
—contents of
writing.

and this justifies us in saying that the writing was substantially as hereinbefore set out. The loss of the contract was fully accounted for. Search was made in every place where the contract was likely to be. While there is some statement in plaintiff's petition that it might be in the hands of White, White was on the stand and denied that he ever had possession of it. It seems to be conceded by the defendant that the loss of the contract was fully proven. Further, the objections first urged to the instrument as a copy were withdrawn by the defendant, and no point is made in defendant's brief points as to the sufficiency of the evidence to show that the contract was lost and not within the power of the plaintiff to produce.

It is urged in argument that, because the plaintiff did not oppose the probate of this last will, and filed his election not to take under the will, he is estopped to claim that the will was not efficacious as an instrument disposing of all rights which he might have urged under the original contract now sought to be enforced. This contention is not sound, inasmuch as it was his duty, under the law, to file the will with the clerk for probate. There is a penalty for suppressing it. Code 1897, § 5043. It is the duty of the clerk to fix the date for proving it. On a hearing the only issue is: Is the instrument the last will and testament of the decedent? Was she of sound mind when she signed it, etc.? It is probated or

proven when this is shown. A husband cannot contest the will of his wife. If he does not care to take under the will, he can file his election not to take under the will. In filing his election not to take under the will, no matter what its provisions are, he receives the same share in his wife's estate as he would receive had there been no will. No matter

Will—
conferring
rights in
property not
owned by
testator.

what the provisions of the will are when probated, it confers no rights in property not owned by the testator at the time of her death, and in no event could it be made to avoid contractual obligations assumed during her life. There is no estoppel shown in this case.

No prejudice resulted to any of the contesting parties as a consequence of the silence, or even active participation, of the plaintiff in the probate of this will. It is only a circumstance tending to show, if anything, that he consented in the revocation of the original reciprocal will, and it is our opinion it has no such tendency under the record in this case. The will neither negatives nor affirms the ownership of the property mentioned in the will against the rights of third persons. The court below in its decree found in favor of the plaintiff, and adjudged him to be the owner and entitled to all the property owned by Emma A. Stewart at the time of her death, except the watch and chain referred to in her reciprocal will hereinbefore set out, and decreed specific performance of said contract.

Estoppel—
probate of will
—setting up
contract for
estate.

There are other questions discussed, but they do not reach the merits of this controversy. On the whole record we think the court was right in its decree, and the cause is affirmed.

Ladd, Ch. J., and Weaver, Preston, and Stevens, JJ., concur.

Salinger, J., dissenting:

I. Something should be said upon

the admission of secondary evidence to prove the contents of the alleged lost written contract. The majority opinion has the statement that: "the original of this contract was not produced on the trial. Its absence was accounted for and secondary evidence of its contents rightly permitted."

Again: "The loss of the contract was fully accounted for. Search was made in every place."

This surely treats the right to introduce secondary evidence as being a question in the case. So treating it, I pointed out, among other reasons for holding that no sufficient foundation was laid, the following allegation of the petition: Plaintiff "has not access to the alleged contract, because he has no copy of it and does not know of any copy within the jurisdiction of this court. He does not know whether the alleged contract has been destroyed or not, and, if not destroyed, he does not know in whose hands it now is, but he believes it is in the possession of Matthew White, one of the defendants, and who resided in the state of Texas."

I argued that since White was a party to the suit, filed answer, and testified on the trial, and since plaintiff pleaded that he believed the original of the alleged lost contract to be in the possession of White, it was error to receive secondary evidence of the contents of that paper until it was determined, by the examination of White or some other method available, that the belief of the plaintiff that White had the paper was unfounded. These statements on my part carried the inference that White had not been examined upon the point, and when I made them I mistakenly believed that this was so. The majority opinion still retains its ruling that secondary evidence was rightly received, and so its inferential holding that that question is in the case. But it has added, in effect, that the testimony of White shows that he did not have the paper. It is further stated in effect that the objec-

tion of insufficient foundation was abandoned on the trial. I am unable to agree to either position.

It is true, as said, that White was examined upon the point, but the examination was this:

Q. You have heard Mr. Walker's testimony with reference to the alleged contract of partnership; did you ever have a contract of that kind, or anything like it, in your possession?

A. No, sir; I never did, never knew of it until this suit.

Q. In all your conversations with Mrs. Stewart, did she ever mention a contract of that kind? What would you say as to whether or not she would have mentioned such a contract if such a contract ever had existed?

A. Well, I would have thought she would; of course, she might not.

Q. You say that you never had in your possession a contract like Mr. Walker spoke of in his testimony with reference to the alleged partnership.

A. No, sir; I never did.

This, true enough, settles that White never had a paper containing what Mr. Walker's testimony says it did contain. But it is not a statement that he did not have in his possession a paper dealing with the partnership, but which did not contain the particular stipulation upon which the plaintiff relies and to which Mr. Walker testifies. I am of opinion, therefore, that, notwithstanding this testimony, secondary evidence should not have been permitted. As to abandonment of the objection, one objection to testimony by Walker made was: "We make the further objection as to the contents of that paper, because there is no evidence sufficient of its loss or destruction, or that the original cannot be produced."

Later plaintiff offered in evidence a part of the original petition included in pencil parentheses,—the part which sets up the survivorship feature of the contract. Objection was made to this which does not in-

clude want of sufficient foundation, and later counsel for the defendant stated: "We will withdraw any objection made to the inquiries on account of it being a copy of the original."

It will be noticed that nowhere was a withdrawal of the objection that was made when Mr. Walker was being examined; to wit, the objection "as to the contents of that paper, because there is no evidence sufficient of its loss or destruction, or that the original cannot be produced."

The withdrawal relates solely to the needless offer of a part of plaintiff's petition. Same was in the record without offer in evidence, and offering it in evidence would add nothing to the force of the pleading. If there was a concession that the alleged copy set out in the petition contained what the original did, there would be no occasion for most of the majority opinion. Had it been conceded that the petition was a true copy of the original contract, this court need have spent no time in considering whether the testimony of Mr. Walker proves the contents of the original; there would have been no occasion to say: "Its contents are as fully proven and as clearly made known as though the written instrument itself were before the court."

The case would have come to an end in the trial court and here, on the one proposition that defendant had conceded that the copy pleaded in the petition was as good as the original.

In the same opinion which treats the question of foundation in the case comes the final amendment that the brief points for the appellant do not present this question. I find upon examination thus suggested that this is so. For that reason I have no more to say on the question of secondary evidence, except that the majority should dispose of the reception of that testimony upon the one ground that the brief points do not raise the question.

II. In the main, the majority

states clearly enough that plaintiff may not recover in this suit unless he has proved the contract he has pleaded. Also, that the contents of that contract "are proved by the testimony of Mr. Walker,"—and so, only. It should be said in passing that this clarity is not maintained throughout, and there are statements in the opinion from which it can be gathered that plaintiff can prevail though he has not proved the very contract alleged, and that things other than the testimony of Walker have made that proof. Three illustrations of this confusion of thought are typical and illustrative. It is unnecessary to advert to more, and any attempt to keep this dissent at reasonable length forbids so doing. The three illustrations are these: A large part of the opinion is devoted to a demonstration that such a contract as is asserted is valid and enforceable. I agree, and shall later use its validity as an argument. But I cannot understand how the fact that a given contract would be valid if made dispenses with proof of its existence and contends against a denial of its existence. Time and again the thought is expressed that the making of mutual wills by the parties will permit plaintiff to recover even if he has not proved the contract he has pleaded. Again, much stress is laid upon the alleged fact that money belonging to both husband and wife bought the property in controversy, and that such property was put in the name of the wife. Neither the making of the wills, nor so buying and placing the title of the property, in the least dispenses with proving the contract pleaded. If the contract is not what is pleaded, the wills are of no avail because they are revocable, and revoked by a later will made by the wife. It is universally held that mutual wills, whether joint or several, are revocable by either testator during the lifetime of the other so far as his disposition of property is concerned, without notice to or consent of the other, unless the making

of the will is the result of a valid contract by which each has agreed to devise his property to the other. 1 Underhill, Wills, p. 19, § 13; Robertson v. Robertson, 136 Am. St. Rep. 604, note, div. 6, 30 Am. & Eng. Enc. Law, 2d ed. p. 621; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 463. The plaintiff himself recognizes this situation, because he pleads that the said reciprocal wills "were executed in confirmation and consideration as well as supplemental to the written contract set out in the original petition." So the pleader concedes that the wills are not material until the alleged contract has been established. The will is available only if it was so executed. A will cannot be a confirmation of, supplemental to; or supported by, the consideration of a contract if no contract existed. Without the contract the plaintiff gets no "rights" except such as belong to a claimant under a revoked will. If the contract is proved, he gets all the property though there be no will. Without the contract the will gives him nothing. It follows that the existence of the will cannot dispense with proving the contract pleaded.

If it be necessary to establish the contract, neither its existence, nor the fact that the will is made pursuant to and in consideration of the contract, is established by proving the existence of the will. See div. 4, 136 Am. St. Rep. 596, note, citing Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265.

As to the buying the property with joint money and placing the title in the wife—assume this fact and others of like character to be competently established by the proof, and yet they are irrelevant on the issues. The fact that property was paid for with joint money and the title placed in the wife can effect no more than to give the husband a right to enforce a trust to the extent of his contribution. Proving it will not dispense with

his proving the contract pleaded, because so buying and placing gives neither party *all* the property. The majority declares over and again, and in every variety of expression, that all that was done was done "under the terms of said contract." Plaintiff demands all the property because he has performed what the alleged contract requires. In attaching importance to the alleged manner of dealing with the property, the majority confuses the case with a suit to enforce a trust to the extent of half the property. Plaintiff is not declaring on a trust in part of the property. He says, "Give me more than the law of trusts will give, because my contract entitles me to more." Under the contract he claims the land given his wife by her parents. Without such contract no court would give the husband all of that land. It is manifest that proving property was bought with joint funds and title placed in the name of one party is no evidence that the parties made a contract that on the death of one the survivor should have all the property. With all deference, it seems to me the majority is confused on *what* is indispensable proof and on *what* is proper evidence to establish whatsoever is indispensable. The mind of man cannot conceive how this plaintiff can get *all* the property without competent proof that the contract he sues on was made and that its provisions entitle him to all. It seems to be conceded that on that question the only competent testimony is that of Mr. Walker. As, then, nothing will base the relief the majority proposes to give plaintiff, except the contract pleaded, and as nothing but the testimony of Mr. Walker is competent evidence upon the existence and provisions of this contract, elimination brings about that plaintiff can have no relief unless the testimony of Walker establishes the contents of the paper with the clarity required by hornbook law. To whether it does this I now address myself.

III. There is a denial that the alleged contract bore the signatures of plaintiff and his wife. The only competent testimony as to signatures is that of Mr. Walker, and he disclaims ability to speak to the question. He says: "At this time I don't think I was acquainted with the genuine signature of either one of them; that is, to take the signatures by themselves and say whether it was their genuine signature, I wouldn't be able to do that."

IV. Part of Mr. Walker's testimony is clear. I have but one criticism to make of the dealing with it by the majority. It asserts that Mr. Walker carefully read the paper.

The testimony is:

Q. State whether or not you examined this contract.

A. Yes, I read it.

Q. Did you or not read it carefully?

A. I think I did.

Q. You read it carefully.

A. I would have to do that from the question that you asked me.

This is not, in strictness, any statement that the paper was carefully read. The clear testimony is this: "The contract was handed to me, and I was asked to read it and give my opinion as to whether or not it was valid and binding. Mrs. Stewart said it was the thought of both that she would, in all probability, outlive him, and they wanted to know whether the contract would have the effect of giving her all their property in case of his death. And whether, in case of her death, it would have the same effect as to him. They expressed the desire that in case of death of either the other should have all the property which they owned at the time. After an examination I said to them that, in my judgment, it was a valid and binding contract, that I should advise that each make a will in favor of the other, and then, in my judgment, the contract and the wills would be binding and valid. Thereupon I prepared two wills, one for each. They were exactly alike, ex-

cept that Mrs. Stewart made a special bequest of her watch to one of her nieces."

It will be noticed that nowhere in this statement does the witness assume to state the wording of the contract he examined. What he does say is that, in his present opinion, the paper examined by him and some provision which would effect that the survivor should have all "their" property, provided mutual wills were executed. He does not reveal a page in his memory which exhibits what the contract was, but gives his deduction from some things he does remember. His reasoning is that the parties desired a contract to a certain general effect; that he examined to see whether they had one and found that they had, if wills were added. His deduction is that the contract, when supplemented by the wills, would at the death of either give "their" property to the other. He could testify truthfully just as he does, if, in fact, the paper merely provided that partnership property in existence when one partner died should go to the other if the partnership had not been earlier dissolved. His testimony does not negative a provision making the contract effective only if death occurred by a stated time. It would seem certain that the witness did not read a contract such as is set out in the petition, because, if the contract examined was such a one as that, there was no occasion to say that the contract would be binding and valid if the parties made the will aforesaid, and that then, in his judgment, "the contract and the wills would be binding and valid." If the contract provided that all property owned by either partner or the partnership should go to the survivor, no matter when the death occurred, and no matter whether the partnership then still subsisted, there was no occasion to make a will. Such will gave less than such a contract. Such contract would give the survivor all. The will would give nothing but the individual property and

the half interest in the partnership possessed by the decedent. The majority intimates that advising the wills may have been due to abundance of caution. The witness makes no such claim. He does not say he thought the contract would effect the purpose of the parties, but advised it would be safer to make wills and so save all doubt upon the point. He says the wills were necessary; in other words, that the contract did not contain the survivorship clause. His testimony is: "I said to them that, in my judgment, it was a valid, binding contract, and I would advise that she and her husband each make a will in favor of the other, and that *then*, in my judgment, the contract and the wills would be binding and valid."

And there is no room for urging mere abundance of caution. The majority not only concedes, but asserts, that the adviser was well skilled in the law. We are all agreed that the alleged contract was effective without the making of a will. No skilled lawyer would doubt it. As well say that proof that a deed was made is not weakened by the fact that a skilled lawyer, who claims he saw an effective deed, advised the grantee to take a mortgage on the same land from the same grantor. In the dissent by Mr. Justice Evans, addressed to the finding that the land given to Mrs. Stewart by her parents should go to plaintiff, the point I have just spoken to is most forcefully dealt with. It is there said: As to the right to include the land given the wife by her parents, that "rests wholly upon four little words," found in the alleged contract. "No attention was directed to particular words. . . . Nor did the proof offered purport to be anything but an approximation or substance of a contract. . . . The method adopted for the proof of the contents of the alleged lost contract was a very vague one. The purported copy set forth in the pleading was formulated by the pleader, not by the witness. . . . Is the evidence clear

and convincing that these little words were contained in the alleged lost contract? . . . He also testified to his recollection of the contents of a paper read twenty years before, and which had been completely forgotten by him for many years. Can it be said that this general and approximate recollection by the witness of the contents of this paper is clear and convincing evidence that the paper contained the four words, . . . upon which the title to the 136 acres hangs? I cannot think so."

It seems to me the only flaw in the dissent is failing to hold that what is said of proof of part of plaintiff's claim applies with equal force to all of the claim. All, as well as part, rests upon the proof of the alleged contract.

V. Counsel for appellee evidently were of opinion that the testimony referred to would not meet the exigencies of this case. They did not stop with it. They brought the witness squarely to the vital point, and attempted to have him say that the paper examined by him contained the survivorship clause pleaded. Assume here that witness carefully read the paper on a single occasion, twenty years in the past. No matter how carefully it was read, that will not add to the clarity of the testimony which attempts to give the result of such reading. When the vital point was reached, and the witness was asked concerning the alleged survivorship clause, this occurred: He was asked to examine "that part of the first page of the petition closed in pencil line, and to state whether or not, as you recollect, the same is substantially a copy of the contract exhibited to you that day by Mrs. Stewart, and on which you gave her the advice you did and prepared the wills you have testified to preparing." He answered, over objection: "I could not, from recollection, give the contents of that paper, only in a general way. This paper agreed in the parenthesis on the first page of the original petition is as near my recollection of it

as I can give now, and I think it is my opinion that the date '1882,' in this—I think it was a year earlier, 1881. Now I do not say that to be sure. I think it was 1881, from my recollection of the contract, and perhaps more from my knowledge and of their business and when they were doing business, and from the conversation there that day, and from that I think this is incorrect as to its date, although it may be correct as to its date, but the contents of this is as near my recollection of what that contract was as I can give it." (Ab. 81.)

This testimony does not appear in the majority opinion. If it be as much as referred to, it must be by the declaration that the contents of the paper "are as fully proven and as clearly made known as if the written instrument itself were before the court." In all deference, that is a rather strong indorsement of this loose, almost incoherent, testimony.

(a) This loose statement deals with an examination made twenty years before the day on which this testimony was given. To be sure, there is an attempt to strengthen the case by claiming an extraordinary memory for the witness. On page 77 of the abstract appears a claim by the witness to remember, twenty years back, where all the parties were sitting with reference to each other, and that he remembers plaintiff "had his feet upon the desk." If this supports the case of the plaintiff because it does disclose an extraordinary memory, that case is weakened because it appears also, and most strongly, that the witness lacked average memory. Eleven years before the day on which he testified, he drew and witnessed a will for Mrs. Stewart. On the day of the trial he remembered what occurred twenty years earlier, when he examined the alleged contract. But he had utterly forgotten the making of this will, which was nine years more recent than the examination of the contract. It may be said that it is not unusual to remem-

ber an event long past, and to forget one more recently occurring. As a rule, this is true only where senile dementia is indicated. Be that as it may, such an avoidance can hardly avail where the more recent event is highly impressive,—as much or more so than the more remote occurrence. I submit the witness does not claim to remember that the contract was the one pleaded. But if, as is insisted by the majority, he does remember the contents of the contract, from a single examination of the paper made twenty years before, he should not have forgotten the will in question, prepared nine years subsequent to the examination of the contract. The will is exceedingly elaborate and complicated, and must have required great care and preparation. What is more, if the witness remembered twenty years after the examination of the contract the terms of that contract, then he surely remembered those terms at a time nine years earlier. Grant that one might remember a contract twenty years after reading it, and not remember a will drawn by him eleven years after drawing it, I know of no peculiarity of the human mind by which one would remember the terms of a contract twenty years after reading the contract and have forgotten the same contract eleven years after reading it. If, then, the witness did remember the contract when he drew this will, it is inexplicable how he can have forgotten the will. As said, not only was it complicated and laborious, but it was an absolute repudiation of the contract. To follow the majority to the logical end, one must believe that the witness here had so good a memory as that one may depend on his narration of the terms of a contract read twenty years before, and so poor a memory that he has utterly forgotten the drawing and witnessing of the will which destroyed that contract which will he drew only eleven years after reading the contract. I do not care to elaborate the claim that he did

forget the will. A reference to page 74 of the abstract will demonstrate that he did.

On one theory he had forgotten the contract when he prepared this will. If so, it is strange he remembered the same contract eight years later. If his testimony were clear, and it is not, the weight of it must be seriously affected by his not having recollected the contract in 1907 while professing to recollect it in 1915. On the other theory, if he did recollect the contract in 1907, when he drew what should certainly have impressed him as a breach of the contract, then the fact that he does not now remember the very making of such a will greatly detracts from any claim that may be made that his testimony establishes he recollected the material clause in the contract, in the year 1915. The majority does not mention the forgetting of the will. I do not overlook the witness says he has been pretty busy in the last thirty years, and has transacted a great deal of court business and written many instruments. If the fullness of his life explains why he has forgotten the making of this will, it also affords a reason for being skeptical as to his recollection of the contract. If a full professional life explains why in 1915 he had forgotten an impressive occurrence in 1907, that absorption is some reason for doubting that in 1915 he could recollect from one reading a paper read by him in 1896.

VI. It has, I think, been made to appear that Mr. Walker does not profess to remember the terms of the alleged contract. And up to this point his testimony is neither clear, convincing, nor satisfactory. I now come to a matter which comes near to demonstrating affirmatively that on September 26, 1913, only some fifteen months before he testified, he did not remember the alleged contract. And this point the majority gives practically no attention to. On that day he signed and had plaintiff verify an application reciting that said will had been filed for probate, and praying that same be

admitted to probate. This will utterly disregarded the alleged contract. If he remembered the terms of that contract when he became a witness in January, 1915, he should have remembered them on September 26, 1913, when this application to probate was made. If he then remembered these terms, said application is inexplicable. If the terms of the contract were then remembered and are what plaintiff now asserts them to be, the maker of the will had no property to will. Why should one who knew the will was a piece of waste paper ask that it be probated? Why should he say to the court on oath of his client that "this applicant was the husband of decedent, and is interested in the estate and the settlement thereof?" If, by contract, he owned all the property devised by the will, what did it matter that he was the husband of deceased? The statement is, in effect, a declaration that his rights in the property arose from that relation, and not from contract. Why should one who knew that decedent had no estate, that there was no "property of the estate," and that he owned all that the will touched, say that "owing to the character of the property of the estate, the nature of the legacies in the will, and some other matters that may be involved in the estate, it is desired that all matters as to the probate of the will, and questions as to its being admitted to probate, be determined at an early date?"

Why should one who owned all the property described in the will say "that, so far as the applicant knows or is informed, there will not be any objections made to the probate of the will?" The testator having nothing to devise, how was it material to say that "the person named as executor in said will is not now a resident of Iowa?" Why, as late as October 24, 1913, was there a contest made against this executor serving, on the ground that because a nonresident he could not manage the estate properly?

When the executor resisted, giving as one reason that testatrix intended to enlarge her legacy by the fees due an executor, why was it answered that the legacy as found in the will was all that testatrix "intended to leave that branch of the family?" Why should Mr. Walker testify that he advised this application in order "to have the property taken care of?" If it was remembered that the contract made plaintiff owner, it did not matter what ability to manage that property the executor named in the will had or did not have; it did not matter what intent there was to enlarge his legacy. No application that the probate court care for the property was necessary. The owner of the property could demand it and care for it himself. There was no need for the owner to have the court act because of "the character of the property of the estate." This owner had no interest "in the estate and the settlement thereof." As to him, there was no estate to settle and "no property of the estate." It is evident that, a short time before the petition in this suit was filed, neither Mr. Walker nor the plaintiff remembered any contract such as is now being asserted. Plaintiff pleads that decedent "had no right or interest in any of the property, either real or personal, which in what is termed her last will she purports to bequeath or devise, by which she could deprive this plaintiff of the sole possession and absolute ownership of the same at her decease." In second amendment to petition it is pleaded that all the property attempted to be willed was accumulated "under the terms of said contract." This was evidently not remembered when said probate proceedings were conducted a short time before the petition in this suit was filed. The only possible explanation is that while witness remembered in January, 1915, that there was such a contract as is now asserted, he did not remember it on September 26, 1913, and on October 24, 1913. But such explanation

comes very near to destroying the standing of the memory of the witness.

I adopt the statements of Mr. Justice Evans as to the inconsistent conduct exhibited in the application to probate and the contest on who should be appointed executor, but am unable to see why that inconsistency operates only against giving plaintiff a certain part of the property. It seems to me it is as much and as good reason for denying him all of it.

(a) But I must not overlook that the majority attempts an explanation. It is that the probate proceedings were initiated because "it was his duty under the law to file the will with the clerk for probate. There is a penalty for suppressing it. Code 1897, § 5043." That statute provides a severe penalty if one having in his possession or under his control any last will "wilfully suppress, secrete, deface, or destroy the same . . . with intent to injure or defraud any devisee, legatee, or other person." How could this statute touch the plaintiff or his counsel after plaintiff had promptly filed said will with the clerk? What penalty does it threaten that compelled the application to probate aforesaid? The statute does not explain.

(b) There is still another time at which it was forgotten that plaintiff owned this property. He was served with formal notice to make an election under the statute. Everything indicates that the witness Walker drew the resulting declination to take under the will. The statute has, of course, no application where the deceased spouse leaves no property. It is therefore undeniable that a statute election to take under the will is a solemn admission that the testator owns what the will devises. A declination under the statute, as much as does a taking, admits that testator owns such property, because the declination works an election to take, instead of what is given by the will,

such part of said property as is given by statute.

VII. The witness is competent, but not disinterested. He states laboriously what he did and did not do about drawing pleadings and aiding in trial. But he studiously refrains from saying that he has no financial interest growing out of the fact that his partner is conducting this litigation. The case is fairly within *State v. Jensen*, 178 Iowa, 1098, L.R.A.1917C, 455, 160 N. W. 832, where a partner was disqualified from helping prosecute an indictment because of a civil suit carried on by the other partner.

VIII. Some things shown by the evidence tend to disprove rather than to prove that the claimed contract ever existed. One alleged provision of it is that the husband "is to transact and do all the business and sign the firm name E. A. Stewart to any and all papers necessary." If there was such contract, why did husband and wife affix their individual signatures to the paper selling the partnership store, —or to the contract to buy the Gwinup farm?

The alleged contract contemplates inevitably that the time of the husband belonged to the joint venture, and the majority opinion asserts he so devoted it. Why, then, the testimony that he did a large separate business?

There is testimony that when the husband effected insurance he did so in the name of the wife. If he had the interest he now claims, he endangered the insurance by obtaining it in that manner.

Why did plaintiff respond to a formal notice requiring him to elect, by declining to take under the will? The will gave him a life estate in lands which, under the contract claimed by him, he owned in fee. The natural answer by the possessor of such a contract would have been a statement that he had no occasion to elect whether or not to take under the will, because he owned the property attempted to be disposed of by the will.

(a) The plaintiff as a witness was asked—

Q. Now, why did you have these deeds all in her name?

He answered: Well, the reason I put it in her name was because it was property we wanted to keep for ourselves. I was always sickly, and if anything happened to me she would have no trouble afterwards. You see in the *Alcorn* affair they had robbed the widow there, and we had no children, and we fixed it so when I was gone there would be nothing to bother the woman. That was my reason.

When asked whether he recollected why he put "the title of the Kansas land in the name of E. A. Stewart," he answered: "It was because it was trading land and I was not expecting to keep it."

How unnatural all these answers are in view of the asserted contract! How natural it would have been to answer: "I did these things because the contract I am seeking to enforce required me to put the title to lands bought in the name of my wife."

(b) All the testimony, including *Mr. Walker's*, agrees that *Mrs. Stewart* was a conscientious, God-fearing woman. It is inconceivable that such a woman would have made the will she made, knowing that she had made such a contract as is asserted. Something is claimed for the wills as being a construction of what was intended by the contract. If the contract was worded as claimed, it needed no construction. But if construction is the theory, an honest woman construed it when she made her last will, which repudiates such a contract as plaintiff asserts.

(c) The contract is unnatural and unreasonable. It is claimed to have been made with one who had just left an earlier partnership as an insolvent, with judgments hanging over his head. The enterprise required a capital of some \$215, which the husband borrowed by having the father of his wife sign

the note. Past treatment of Mrs. Stewart by her parents made it reasonably plain that she would receive a large property from them. It is testified to without dispute that she was a capable business woman. Yet, the claim asserted is that in this situation she made an agreement that everything she might ever own should belong to her husband after she died, and that even what her parents might give could not be willed to those of her blood, to the grandchildren of the donors. Something is claimed for the love of the wife for the husband. If that was strong enough to prove that she desired to give him what her parents gave her, at the expense of the only grandchildren of those parents, how can it be explained that she made a will recognizing the natural claims of these grandchildren?

IX. I am constrained to dissent from the holding of the majority that the contents of the contract "are proved by the testimony of Mr. Walker. . . . Its contents are as fully proven and as clearly made known as if the written instrument itself were before the court." Nor can I agree that the probate proceedings are "only a circumstance tending to show, if anything, that he consented to the revocation of the original reciprocal will, . . . and it has no such tendency under the record in this case." I think that these proceedings and all else which has so far been adverted to work that plaintiff has failed to establish his case by that amount and quality of evidence which the law requires.

It would be affectation to go deeply into authority on the degree and quality of proof required. For manifest reasons sounding in public policy the evidence by which one person takes the estate standing in the name of another must be clear, satisfying, convincing,—practically overwhelming. See *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Mullong v. Schneider*, 155 Iowa, 12, 134 N. W. 957; *Andrew v. Andrew*, 114 Iowa, 526, 87 N. W. 494, and

cases cited; *Malley v. Malley*, 121 Iowa, 237, 96 N. W. 751, and cases cited; *Stiles v. Breed*, 151 Iowa, 86, 130 N. W. 376; *Potter v. Potter*, 185 Iowa, 559, 170 N. W. 773, and *Melin's Case*, — Iowa, —, 171 N. W. 20. If the claim were that the alleged contract was oral instead of the claim that it was written and has been lost, appellee would be confronted with the requirement of the statute on express trusts and those of the Statute of Frauds. See *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461. Where the law fears perjury will be committed unless there be a duly signed writing, it may well be said that the law is hostile to oral proof that the contract was in writing and has been lost. The danger of perjury is as imminent in one case as the other. While I do not claim the law will refuse evidence of the contents of a contract which must be made in writing where it is shown that the contract has been lost, I do say that the policy underlying the requirement that the contract shall be in writing emphasizes that the proof of the contents to such lost writing must be clear and overwhelming. See *Re Thorman*, 162 Iowa, 239, 144 N. W. 7, Ann. Cas. 1916B, 484, and cases cited.

Speaking to the farm given the wife by her parents, the dissent by Mr. Justice Evans says: "I think that the evidence in that respect has much more corroboration in the circumstances, as well as in its reasonableness and probability, than does the evidence pertaining to the individual property of the wife. I cannot avoid doubt of its sufficiency even in this respect. I am not disposed, however, to interpose my mere doubt as a basis of dissent on this point from the settled judgment of the majority."

This indicates upon just what that "settled judgment" rests. The basis seems to be that doubts of the sufficiency of the testimony are not sufficiently vigorous. The

consultation gave me the impression that the claim of contract was sustained because, while the testimony for plaintiff was not strong, it had not been demonstrated that the asserted contract had not been made. As I view it, this exhibits a mental twist. Such a contract cannot be held to be established unless the testimony is practically overwhelming and clearly satisfies the judicial mind of its existence. It is not enough that the claim of the plaintiff is possible or even probable. It is not enough that the testimony for the defendant has not satisfied the court the alleged contract was not made. If, when the testimony is all considered, the mind of the judge is not abidingly satisfied that the claims of the plaintiff are made out, then his claim should be rejected.

We said in *Stennett v. Stennett*, 174 Iowa, 435, 156 N. W. 407, that to establish such a contract "the proof must be clear, unequivocal, and definite," and held that the proof there did not meet this standard. Many inconsistencies and contradictions found present in this case controlled in the *Stennett Case*. It being found here that the witness is skilled in the law, unusual clarity was demanded.

Insistence upon this burden will, in individual cases, work hardship, but not a greater hardship than to deny all relief because the contract was not made in writing originally, even though there be irrefragable proof that such contract was orally entered into. The occasional hardship will be found to arise because of negligence, and such isolated suffering is more than compensated by general safety afforded by insistence upon strict proof. I say, in all respectfulness, that an affirmance here will tend to prove the statement in *Graves v. Bonness*, 97 Minn. 282, 107 N. W. 164, that it has been charged "American appellate courts rule on such questions to sustain or reverse the trial courts because of convictions as to the merits of the case, or for other rea-

sons which they are unwilling or unable to express," and say, further, that the majority opinion will either upset elementary rules of law of evidence, or else be a decision that will remain in the books without either being followed or being expressly repudiated; that it will accrete the army of judicial "snags," and of cases that are overruled by being "distinguished!"

Division two.

The plaintiff can recover nothing in this suit, even if he proved the existence and the contents of the alleged contract. I have exhibited the probate proceedings as an evidentiary factor bearing on the weight to be given to the testimony of Mr. Walker. I now enlarge, and assert that these proceedings are more than a piece of evidence on that point, and that they estop plaintiff from now asserting that he, and not testatrix, owned the property described in the will and in the petition.

As to this point the majority says: "There is no estoppel shown in this case, no prejudice resulted to any of the contesting parties as a consequence of the silence or even active participation of the plaintiff in the probate of this will."

It is to be gathered from the opinion that there is no estoppel, because the admission of the will to probate did not settle who owned the property described in the will, and that the admission was no benefit to plaintiff and no injury to the appellants. Grant that. That such want of advantage and of prejudice, respectively, is fatal to an estoppel in pais, is true. But the majority overlooks that the estoppel here is one that the books classify as "estoppel by conduct in court." In such estoppel the element of prejudice is supplied by the fact that it would discredit the administration of justice if one were allowed to assert a thing in court in aid of an object then being promoted, and later to aid a differing object by an assertion contrary to the first. See

Bigelow, Estoppel, 6th ed. p. 783. I contend that it is overwhelmingly settled that, on estoppel by inconsistent conduct in court, it is immaterial that neither loss nor gain has resulted from the change in position.

It is hornbook law that one may not make a solemn assertion in court, then having knowledge of all the facts, and afterwards obtain relief by the assertion of something which is so inconsistent with the position first taken as to destroy that position. See *Tone Bros. v. Shankland*, 110 Iowa, 528, 81 N. W. 789; *Clough's Case*, L. R. 7 Exch. 36, 41 L. J. Exch. N. S. 17, 25 L. T. N. S. 708, 20 Week. Rep. 189; *Butler v. Hildreth*, 5 Met. 49; *McCormick v. McCormick Harvesting Mach. Co.* 120 Iowa, 593, 95 N. W. 181; *Theusen v. Bryan*, 113 Iowa, 502, 85 N. W. 802; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510; *Powers v. Iowa Glue Co.* 183 Iowa, 1082, 168 N. W. 326; *Sloanaker v. Howerton*, 182 Iowa, 487, 166 N. W. 78; *Kirkhart v. Roberts*, 123 Iowa, 139, 98 N. W. 562; *Kelly v. Norwich F. Ins. Co.* 82 Iowa, 142, 47 N. W. 986; and *Colton's Case*, 143 Iowa, 366, 368, 122 N. W. 152, wherein is quoted with approval the statement of Lord Kenyon that "a man shall not be permitted to blow hot and cold with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations, according to the promptings of his private interests."

We said in *Thorson's Case*, 107 Iowa, 50, 77 N. W. 510, that no suit-or shall be allowed to invoke the aid of the courts on contradictory principles of redress upon one and the same line of facts. In *Sioux City v. Chicago & N. W. R. Co.* 129 Iowa, 694, 702, 113 Am. St. Rep. 501, 106 N. W. 186, we condemn the assuming of "antagonistic positions in litigation with reference to the same property, or the same . . . state of facts." We said in *Seeley's Case*, 180 Iowa, 632, 114 Am. St. Rep. 452, 105 N. W. 382, that it is

not essential to the application of this principle that there shall be technically an election of remedies, "and no action in court need be taken as the basis for such an election. Any unequivocal act with knowledge of the fraud, whether in court or not, is sufficient." And this estoppel prevails as well on plain inferences from the facts in hand as on the facts themselves. *Bigelow, Estoppel*, 6th ed. 788, citing *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *East Hampton v. Kirk*, 68 N. Y. 459, 464.

Assent to a particular proceeding in court, if given with knowledge of the facts, is conclusive. *Bigelow, Estoppel*, 6th ed. p. 788, citing *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433, 2 N. W. 795. It is all summed up in *Bigelow, Estoppel*, 6th ed. 783, by a statement that it may be laid down as a broad proposition that one who, without mistake of fact, has deliberately taken a particular position in the course of any litigation, must forever act consistently with that position.

What if obtaining the admission to probate gave plaintiff nothing? Even if the position first taken gets a party nothing of value, how can that affect the rule, which is that one may not get something in court which would give him something by making an assertion which is contrary to a position taken earlier. The rule has often been applied where nothing was gotten by the first position. *Kearney Mill & Elevator Co. v. Union P. R. Co.* 97 Iowa, 724, 59 Am. St. Rep. 434, 66 N. W. 1059; *Elliott v. Merchants & B. F. Ins. Co.* 109 Iowa, 39, 79 N. W. 452. A party has been estopped because of a position taken in an action which he discontinued by dismissal without trial (*Kearney Mill & Elevator Co. v. Union P. R. Co.* 97 Iowa, 726, 59 Am. St. Rep. 434, 66 N. W. 1059); and where all he got by taking the earlier position was a judgment void for want of jurisdiction (*Clay Dist. Twp. v. Buchanan Independent Dist.* 69

Iowa, 90, 91, 28 N. W. 449; Shank v. Mohler, 93 Iowa, 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981; Ellis's Case, 61 Iowa, 646, 17 N. W. 28; Israel's Case, 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81; Nield v. Burton, 49 Mich. 53, 12 N. W. 906). The making the matter turn on want of prejudice wholly disregards all applicable law.

The election "cannot be withdrawn, though it has not been acted upon by another by any change of position." Kearney Mill & Elevator Co. v. Union P. R. Co. 97 Iowa, 725, 66 N. W. 1059, citing Bigelow, Estoppel, 673. See Bigelow, 6th ed. 733; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Ward's Case, 4 Best & S. 355, 122 Eng. Reprint, 492; Campbell v. Kaufman Mill. Co. 42 Fla. 328, 29 So. 435; O'Bryan Bros. v. Glenn Bros. 91 Tenn. 106, 30 Am. St. Rep. 862, 17 S. W. 1030. Where one claims she dismissed her suit without prejudice, she is estopped to claim in the supreme court that there was a final judgment to be reviewed, and it is not material that elements essential to an estoppel in pais are lacking, or that the taking of the contradictory position has worked no prejudice. Mollring v. Mollring, 184 Iowa, 464, 167 N. W. 525. Where defendant makes a special appearance, and challenges the jurisdiction of the court on the ground that notice was served on an improper person, if effective service is subsequently had, it may not thereafter plead in abatement on the ground that the action was prematurely brought because the first notice was binding and effective; and it is held the position may not so be changed, even if the original assertion to the contrary has caused the plaintiff no injury. Hueston v. Preferred Acci. Ins. Co. 184 Iowa, 408, 168 N. W. 150. Though a delivery of a shipment by a carrier is unauthorized, it is ratified if the shipper thereafter, with knowledge of all the facts, demand payment of the price from the buyer. And such

demand estops him to sue the carrier for conversion, although his subsequent taking of this contrary position has worked no injury. Midland Linseed Co. v. American Liquid Fireproofing Co. 183 Iowa, 1046, 166 N. W. 574, 575.

I conclude that the disposition of the point by the majority on the ground that appellant suffered no prejudice is a disposition upon a ground which is not in the least controlling, and is utterly untenable.

II. The will made by the wife in favor of plaintiff was made on May 1, 1896, and after the date of the alleged contract. The deed from the parents to Mrs. Stewart was a gift, and it was made later than said will was, on December 26, 1896. Abstract, 100, 216. The contract on its face is a partnership contract. Throughout all the pleadings it is treated as being such a contract. The opinion so treats it, time and again. The will cannot be said to have contemplated devising this gift from parent to child, because the gift was not yet made. If the partnership contract is carried beyond disposing of all property accumulated by the partnership, then the partnership contract diverts the farm given to Mrs. Stewart from those of the blood to a stranger to the blood. In other words, the partnership contract is claimed to cancel the will of Mrs. Stewart, by which she attempts to pass the land given to her by her parents to the only grandchildren of those parents. A court of equity should not strain to give the contract such effect. And the least that should be done is to construe the alleged contract to cover nothing but property accumulated by the partnership, as such. On this point the dissent of Justice Evans covers the ground fully and most ably.

III. One statement by the majority is that "plaintiff, however, does not rely on a claim of partnership as a basis for the relief sought in this case." In the light of the pleadings, of plaintiff's own testi-

mony, and of the relief sought and given, this is a most remarkable pronouncement. If language can express a thing aptly, this record and the majority opinion overflow with words that can have but the one meaning, to wit, that the parties contracted to and did form a partnership; that same accumulated property; that such contract partnership subsisted until the death of the wife dissolved it; that it then possessed the property in question; and that plaintiff demands all of such property, because the terms of the partnership contract give him all of the property if the partnership is still in existence when the other partner dies. In other words, the entire framework and the theory of the case is that the parties remained in the contract partnership until death dissolved that partnership, and that, while without the contract the survivor could not have all the partnership property, by the terms of the contract he gets all such property, provided the partnership subsists until death dissolves it and leaves the claimant the survivor. It is not a suit based upon the fact that the parties were once in partnership, dissolved it, and then formed a partnership other than the one formed by said contract, or that they formed a trust by investing the money of the dissolved contract partnership in the name of one of the parties. It is a suit demanding that the survivor have all the property because the partnership subsisted until Mrs. Stewart died, and that therefore the condition precedent of the contract had transpired. I invite an examination of the petition and the decree and of the testimony of Mr. Stewart, and am sure that thereupon it must be found that in this suit plaintiff can recover nothing unless it is made to appear that the partnership continued until it was dissolved by the death of Mrs. Stewart. If it was dissolved by something other than that, no rights accrue under the contract, whatever rights the plaintiff

may have. I submit it is absolutely proved that the partnership was dissolved years before Mrs. Stewart died.

Nothing appears in the alleged contract to compel the partnership to continue until one of the partners die. See 2 Lindley, Partn. p. 571. The partnership was dissolved about September 25, 1894, by a sale of the entire stock and the fixtures. The contract expressly provides that the partnership shall be one conducting a "general store." Necessarily such a sale of stock and fixtures terminated such a partnership. It is well settled that "a sale which practically includes all the property used by a firm in carrying on its business, whether made by the firm or a member thereof, operates as a dissolution thereof."

See note found on page 416 of 69 Am. St. Rep., citing the following authorities: *Patterson v. Hare*, 4 App. Div. 319, 320, 38 N. Y. Supp. 565; *Pennville Natural Gas & Oil Co. v. Thomas*, 21 Ind. App. 1, 51 N. E. 351; *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Smith v. Vanderburg*, 46 Ill. 34; *Thompson v. Bowman*, 6 Wall. 316, 18 L. ed. 736; *Blaker v. Sands*, 29 Kan. 551; *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727.

It follows plaintiff should fail in this suit because, even if the alleged contract were proved, such contract defeats the suit brought to enforce it. The contract relief is due only if death dissolved the partnership. Here it appears as matter of law that it was dissolved by act of the partners in selling out. The contract gives property to the partner who shall survive the other,—to the surviving partner in the contract partnership. There can be no such surviving partner if there be no partnership existing when one of the parties to the contract dies. It follows inevitably that the contract deals with nothing save property that may be owned by the contract partnership when death dissolves it. In a suit upon such contract it is fatal that the contract partnership

was dissolved before either party to the contract died.

I am unable to agree to the statement in the dissent of Justice Evans that the selling of the store "was not necessarily a dissolution of the partnership." So to declare overlooks that the contract was for a partnership in a mercantile store. Of necessity, selling that store and its stock, fixtures, and good will ended the contract enterprise. No doubt, investment of what was realized from operating and from selling the store might become the capital of a new partnership or trust property. No store business was engaged in after the sale. And whatever rights might accrue after the sale dissolved the contract partnership, they do not rest on the contract to become partners in the store business that was sold. The sale ended the contract business and the contract.

IV. It is defended that if the contract was made it was with purpose to hinder and delay the creditors of plaintiff. I have to say there is no reasonable explanation of why the contract was entered into if that was not the purpose. Just before its alleged making, plaintiff had retired from a concern that had become insolvent, and there were unsatisfied judgments against him, and he was insolvent. The contract was not recorded. It was never mentioned or shown, except that thirteen years after it was made it was read by Mr. Walker,—and as to showing it to him, it was no doubt thought that the exhibition was a privileged communication. Plaintiff made no claim of rights under the contract, and his wife asserted that he had none. No proper reason can be imagined for covering the half interest of the plaintiff with a firm name that was the name of the wife. Such firm name concealed that plaintiff had any interest which creditors could subject. It told the world that the wife owned all. No purpose but a covinous one explains putting the lands in the name of the wife. The contract stipulation that

20 A.L.R.—82.

lands should so be held does not explain. The contract was at an end when most of the property was acquired. Of course I agree with the statement of the dissent of Justice Evans that defendants had the burden of proving the alleged fraudulent purpose. But I submit they have proven it. It must usually be done by circumstantial evidence. It is, here, and the evidence exhibits most of the main badges of fraud. I am unable to agree that the evidence "simply is that the fact of partnership was not generally known." At the least the evidence establishes an intent to *hinder and delay* creditors.

V. Little can be added to what Mr. Justice Evans says on the effect of § 3154 of the Code. The only criticism I can make is to say that his reasoning calls for his applying the ban of the statute to all the property rather than to a part of it. The statute provides that neither spouse has any interest in the property of the other which can be made the subject of contract between them. This contract clearly contemplates that any lands or other property either party might acquire in his own right should be transferred to the partnership by death of the survivor. This amounts to an advance agreement for the transfer of such interest as was owned by reason of being a spouse. To put it mildly, it was an advance relinquishment of dower rights to the partnership, and ultimately to the surviving partner. Be that as it may, there is an express provision that the survivor should take all the property and in consideration pay the debts of both the partnership and of the deceased partner. This might easily become an advance agreement that rights of the spouse exempt from the payment of debts should be exhausted by the paying of debts.

I would reverse.

Evans, J., dissenting in part:

I. I cannot wholly agree with the

majority opinion. The property involved in the controversy falls into two classes: (1) The alleged partnership property; (2) the property acquired by the wife, independently of the partnership, from her parents in the distribution of their estate.

I do not think that these properties upon this record can be deemed to fall into hotchpot, nor that the facts of this record decisive as to one are decisive as to the other. The contract pleaded was as follows: "Contract entered into this ——— day of February, 1882, by and between Emma A. Stewart and S. M. Stewart, both of Van Buren county, Iowa, witnesseth: That said parties have agreed to start a general store under the firm name of E. A. Stewart, in which each party is to be an equal partner. S. M. Stewart is to transact and do all the business, sign the firm name of E. A. Stewart to any and all papers necessary; and all the property accumulated, purchased, and owned by either party to be in the firm name of E. A. Stewart. Both parties to use any money they need, and at the death of either party the one living shall fulfil all contracts, pay all debts, and have all property left or *owned by either party*, or in the firm name."

This alleged contract was not produced at the trial; neither was a written copy of it offered; nor did the proof offered purport to be anything but an approximation or substance of the contract. It will be noted that the claim of the appellee to the 136 acres of land acquired by his wife from her parents as a distribution of their estate rests wholly upon four little words which we have italicized above. If these words were eliminated there would be nothing left to the appellee as a basis for any claim to the ownership of such land. Is the evidence clear and convincing that these little words were contained in the alleged lost contract? The method adopted for the proof of the contents of the alleged lost contract was a very

vague one. The purported copy set forth in the pleading was formulated by the pleader, not by the witness.

This pleading being presented to the witness Walker, the following question and answer appears in the record:

Q. I will ask you to examine that portion of the first page of the original petition in this case, and which we have inclosed in pencil lines, and state whether or not, as you recollect it, that is substantially a copy of the contract that was exhibited to you that day by Mrs. Stewart, and on which you gave her the advice you did and prepared the wills which you have testified to have prepared.

A. I could not from my recollection give the contents of that paper, only in a general way. This paper agreed (inclosed) in the parenthesis on the first page of the original petition, is as near my recollection of it as I can give now; and I think it is my opinion that the date 1882 in this—I think it was a year earlier, 1881. Now I do not say that to be sure. I think it was 1881, from my recollection of the contract, and perhaps more from my knowledge and of their business, and from the conversation there that day; and from that I think this is incorrect as to its date, although it may be correct as to its date; but the contents of this is as near my recollection of what that contract was as I can give it.

A similar question was put to the plaintiff as a witness, which resulted in a similar answer. This is the entire evidence on the question of the actual contents of the lost paper. No attention was directed to particular words. The witness Walker frankly concedes: "I could not from my recollection give the contents of that paper only in a general way. This paper is as near my recollection of it as I can give now. . . . This is as near my recollection of what that contract was as I can give it."

He was testifying to his recollection of the contents of a paper read twenty years before, and which had been completely forgotten by him for many years. Can it be said that this general and approximate recollection of the witness of the contents

Evidence—
contents of
lost paper—
sufficiency.

of this paper is clear and convincing evidence that the paper contained the four words above italicized and upon which the title to the 136 acres hangs? I cannot think so.

II. If we had the exact terms of the alleged contract before us, it might present a question of construction. If the exact terms were those set forth by the pleader, it would present such a question of construction. I am of the opinion that the contract presented by the pleader should be construed as referring solely to the fruits of the partnership. It will be noted that the subject-matter of that contract is the partnership affairs. Primarily it is a contract of partnership whereby the parties propose to engage in business and whereby they declare each other's rights in the fruits to be realized. Under the evidence they did engage in partnership upon a capital of \$215. The earnings of this partnership while they were engaged in the mercantile business amounted to several thousand dollars, and this was invested in lands, title to which was taken in the name of one of the partners. Assuming, therefore, that this contract extends in its application to all such fruits of the partnership, is it not a forced construction thereof to say that it includes also matters that were entirely foreign to such partnership and foreign to the contemplation of the parties at the time that the contract was entered into?

If it be thought that the question of construction is close as to the four words referred to, then the doubt ought to be solved against the appellee, because of the great weakness of his proof that the particular

words which create the doubt were contained in the contract at all.

III. I think also that Code § 3154 is an impediment in the way of appellee to claim that the contract can operate upon the individual property of the wife acquired independently of the partnership. Under this section it is provided that neither husband nor wife has any interest in the property of the other which can be the subject of contract between them. The majority opinion has dealt with this question rather briefly, and has considered the application of the rule only as to partnership property. We have held that husband and wife may enter into partnership and that they may contribute their individual property to the partnership. We have held, also, that the necessary effect of such a course is to withhold the inchoate right of dower in the partnership property, and that the entire partnership property thus contributed becomes liable to the call of the partnership. *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998. I am not, therefore, claiming that § 3154 is an impediment to the operation of this contract between husband and wife in so far as it is construed to apply only to partnership property. I claim only that it is an impediment to an application of the contract to the individual property of the wife, treating the contract, as appellee does, as the equivalent of an agreement by the wife to make a will conveying all her property to her husband subject to her debts. The completion of such an agreement depends upon the valid acceptance thereof by the husband. An acceptance by the husband would mean nothing else than that, after the death of the testatrix, he would waive his right to dower and would take under the will, even though all the property might be absorbed in the payment of the debts of the testatrix. Of course, on first impression, it would seem that where a husband or wife leaves all his or her property to the surviving spouse, the benefits are

one-sided and operate necessarily to the advantage of the surviving spouse. But such is not necessarily the case. To put the question briefly, could a husband and wife enter into a contract during their lifetime whereby the husband agreed to leave all the property to his wife subject to his debts, and whereby she agreed to accept under such will and to waive dower? It might appear at the time of the making of such contract greatly advantageous to the wife, in that the property of the husband was greatly in excess of his indebtedness. Can the wife elect in her lifetime to waive dower and take under the will of her husband? Can she make a binding contract in advance of the death of her husband, to so elect after his death? Does not this section of the statute say in express terms that this right is not the subject of contract between them? Indeed, we have so held. *Berry v. Donald*, 168 Iowa, 744, 150 N. W. 1048. The prohibition of the statute, if it applies at all, necessarily applies to advantageous contracts as well as to disadvantageous ones. The application of this statute therefore furnishes a further reason why the contract should be construed, as I have already contended, to apply only to partnership property.

IV. I think that there is much in the conduct of the plaintiff pertaining to the probate of the will and the appointment of an executor which was wholly inconsistent with his present claim that he already owned *all* the property devised in the will. I can see how he might have claimed the ownership of some of the property and yet claim the benefit of the devise in the will as to other property; but his conduct was wholly inconsistent with his present position that he held *all* the devised property, by a superior right. He obtained the will from its custodian and presented it to the court with verified petition for its probate. He asked and obtained the appointment of an executor other than the one named in the

will. The executor thus appointed upon his application was Tobin. White, who was named executor in the will, appeared and showed his competency to act, and asked that the appointment of Tobin be set aside, and that he be appointed pursuant to the terms of the will. This application by White was successfully contested by the plaintiff. He had not at that time disclosed his present contention. If he had, he would have appeared without direct interest either in the probate of the will or in the appointment of the executor. In contesting the removal of Tobin he was simply saving his antagonist. He had no other interest in the question except the selection of an antagonist. It is said that he was bound to file the will under the mandate of the statute. This mandate applies to the custodian of the will. The plaintiff was not the custodian. He obtained it from the custodian. He had a right to return it to him. In applying for immediate probate of the will he averred that there would be no contest thereon. The opinion treats this conduct on the part of the plaintiff as a mere question of estoppel in pais. It is not such. It has to do with that rule enforced by the courts, that a litigant who, by assuming a certain attitude, obtains orders of the court in furtherance of his claim, may not thereafter adopt the contrary attitude and obtain relief inconsistent with his first attitude.

V. I think the evidence is sufficient to establish the contract of partnership between husband and wife. As against this it is claimed that the contract, if entered into, was covinous, and therefore void, as tending to defeat the creditors of Stewart. Stewart was insolvent. The burden of proving its alleged character as a covinous contract is upon the appellants. They introduced evidence that the money for starting the business was furnished by the wife. This is their contention in argument. It is quite destructive to the charge of covin.

If she furnished the money for the capital of the partnership, no fraud was perpetrated upon the creditors so far as the formation of the partnership was concerned. As to whether, notwithstanding this fact Stewart may have intended to conceal from his creditors his profits earned in the firm, a somewhat different question is presented. The evidence does not deal with it except as inference might be drawn from the circumstances. The fact remains that the interest of Stewart was subject to the appropriation of creditors at any time. The existence of the partnership was not wrongful. Nor is there any evidence that the fact of partnership was actively concealed or denied by Stewart at any time. The evidence on this question simply is that the fact of partnership was not generally known. I think, therefore, that the charge of covin is not sustained. I do not think that the fact that the parties sold their store in 1894 was necessarily a dissolution of the partnership. It was entirely competent for the parties to continue in partnership to handle the proceeds of the sale of the partnership property. If they invested the same in the 196-acre farm and took the title in the name of one of the partners, I see no reason why the farm should not be deemed partnership property. It is urged that, the husband having negotiated for this farm and taken the title in the name of his wife, Emma A. Stewart, and not in the partnership name, E. A. Stewart, this created the presumption of gift to the wife. It was not necessary that the title should be taken in the name of the firm. Indeed, we should take judicial notice that it is quite customary for a partnership to take title to real estate in the name of a partner rather than in the name of the firm, in that it often avoids complexities in the record chain. This is not a case where a husband bought land with his own funds and took the title in the name of his wife. In such a case the presump-

tion of gift would obtain, as contended by appellants. It is a case where a partnership, through one of its members, bought land with the partnership funds and took the title in the name of the other partner. It is universally held in such a case that the grantee thus named is presumed to hold the title in trust for the partnership. I reach the conclusion, therefore, that the plaintiff was entitled to impress a trust upon this farm as being held for the partnership, and that this is so also as to other lands paid for with partnership funds, including the Todd-Buckles lands and some town lots. I see no legal obstacle to the indefinite continuation of this partnership in the management of the farm business. This conclusion would entitle the plaintiff to one half of all such property as owner and to one half of the other half as surviving husband of his wife. I think he would be entitled to relief along that line. If, however, he is permitted to take *all* of the alleged partnership property it must be by virtue of the terms of the contract pleaded. Can the contents of the contract be deemed proved to the extent of its application to the partnership property? I think that the evidence in that respect has much more corroboration in the circumstances, as well as in its reasonableness and probability, than does the evidence pertaining to the individual property of the wife. I cannot avoid doubt of its sufficiency even in this respect. I am not disposed, however, to interpose my mere doubt as a basis of dissent on this point from the settled judgment of the majority.

I dissent, therefore, from the opinion of the majority as regards the 136-acre farm acquired by Mrs. Stewart from her parents in the distribution of their estate. In other respects I concur.

A petition for rehearing having been filed, the following Per Curiam response was handed down December 16, 1920 (190 Iowa, 296, 327, 180 N. W. 146):

Upon further examination of the record, we have reached the conclusion that the contract entered into by Stewart and his wife should be construed as one of partnership, and as having relation only to property which might be invested therein in the prosecution of its business, and the profits, together with its earnings, investments, and to profits derived therefrom. In this view, the farm of 136 acres acquired by Mrs. Stewart from her parents in the distribution of their estate would not be included in that passing under the contract to Stewart upon her death, but would descend under the general law or will, but what disposition shall be made thereof is not adjudicated in this action. The reasons for this conclusion appear in the first two paragraphs of Judge Evans's dissent to the main opinion. With this modification, the petition for rehearing is overruled, and the decree as so modified is affirmed.

Salinger, J., dissenting:

While I am with the result, I am of opinion the steps that lead to that result demand more than is now given. My reasons for that position are fully stated in the dissent I have heretofore filed. I call special attention to that part of the dissent which points out that Mr. Walker never claimed to remember the contents of the alleged lost contract, and that he discloses a memory which would make it impossible for him to remember it. Also call attention to the conduct utterly inconsistent with the claim now being advanced and sustained; to the fact that Mr. Walker advised the contract would be binding if wills were made, while, if the contract is as plaintiff claims, it was valid and binding without the making of wills. I call attention to the last-quoted paragraph in the left-hand column of page 628, 173 N. W., to the last paragraph on

the left-hand side of page 629, and the remainder of that page to the first paragraph on page 630, and the remainder of that column to paragraph "a" in the right-hand column of page 630, and the first paragraph on page 631. I insist once more that the present holding destroys the rule that claims such as this must be established by evidence that is conclusive and overwhelming. I wish to specially emphasize my opposition to the pronouncement: "There is no estoppel shown in this case, no prejudice resulted to any of the contesting parties as a consequence of the silence or even active participation of the plaintiff in the probate of this will."

In my judgment this overrules an unbroken line of cases to the effect that as to inconsistent conduct in court the rules governing an estoppel in pais do not obtain, and that such inconsistencies cannot be permitted, even though no prejudice has resulted, and though no one has changed his position. The cases so holding are set out on page 633. I wish to emphasize further that here was, at best, nothing but a partnership contract dealing with the fruits of the partnership; that therefore the surviving partner has no interest in anything but partnership property existing when the partnership was dissolved; that this partnership was dissolved in the lifetime of Mrs. Stewart, and therefore her partner has no interest in the property of which Mrs. Stewart thereafter died seised. See 173 N. W. 634.

I would reverse.

NOTE.

The validity of partnership agreement between husband and wife is the subject of the annotation following *MARCRUM v. SMITH*, post, 1304.

J. A. MARCRUM, Admr., etc., of Mary A. Smith, Deceased, Appt.
v.

A. C. SMITH et al.

Alabama Supreme Court — October 13, 1921.

(206 Ala. 466, 91 So. 259.)

Husband and wife — right to become partners.

1. A husband and wife may contract with each other to perform certain services and thereby make themselves partners.

[See note on this question beginning on page 1304.]

Parties — husband and wife — partnership service.

2. Where a husband and wife, in accordance with a contract between themselves to render services for another, perform the contract with him, each is a proper and necessary party to an action to enforce the latter contract.

Appeal — presumption as to evidence.

3. When the record does not purport to contain all the evidence, the reviewing court will assume that there was evidence before the court sufficient to warrant its ruling in refusing an affirmative charge.

APPEAL by defendant from a judgment of the Circuit Court for Madison County (Kyle, J.) in favor of plaintiffs in a suit to recover an amount alleged to be due for board, care, and attention of defendant's decedent by plaintiffs. *Affirmed.*

It was alleged in the complaint that plaintiffs made an agreement with deceased during her lifetime to board and care for her, to furnish fuel and do her washing, and in compliance with that agreement they did board and care for her, furnish her fuel, and did her washing, from March 5, 1918, to April 8, 1919.

Messrs. Cooper & Cooper for appellant.

Messrs. Betts & Richardson, for appellees:

The law implies a contract or promise to pay for services rendered by one or more persons to another, whatever the nature of the services, whether personal or otherwise.

Kinnebrew v. Kinnebrew, 35 Ala. 628; Davis v. Badders, 95 Ala. 348, 10 So. 422; Jonas v. King, 81 Ala. 285, 1 So. 591; 9 Cyc. 242, 653, 655 & 660.

If any two persons can jointly contract to perform a certain act, or to do a certain thing, or carry on a certain business, then a wife and husband can so contract between themselves, even though the wife is contributing her personal services to the enterprise, as a personal service to another.

Larkin v. Woosley, 109 Ala. 258, 19 So. 520; Schlappack v. Long, 90 Ala. 525, 8 So. 113; Compton v. Smith, 120 Ala. 233, 25 So. 300.

If the relation of blood between parties is close, then the law will presume

that personal services rendered are so rendered gratuitously, and not upon an implied contract to pay therefor; but this applies to parent and child, does not extend to relation of aunt and nephew, and does not apply to facts in this case.

3 Am. & Eng. Enc. Law, 861; Borum v. Bell, 132 Ala. 91, 31 So. 454; Kinnebrew v. Kinnebrew, *supra*.

Miller, J., delivered the opinion of the court:

A. C. Smith and Mattie K. Smith sue J. A. Marcrum, as administrator of the estate of Mary A. Smith, deceased, under the common counts for board, washing, fuel, nursing, care, and attention of decedent from November 5, 1918, to April 8, 1919. There was jury trial and verdict for plaintiffs, judgment of court thereon, and defendant appeals.

A. C. Smith is the husband of Mattie K. Smith. The husband and wife may contract with each other

except as prohibited by statute.

Husband and wife—right to become partners.

Code 1907, § 4497.

They (the husband and wife) could contract together to

perform the services rendered deceased as averred in the complaint, and thereby make themselves partners; and, if they jointly contracted with each other to render the services, and if they rendered them as contracted, then each would be a

Parties—husband and wife—partnership service.

proper and necessary party plaintiff to recover under their express or im-

plied contract, jointly made with the deceased, as averred in the complaint. *Schlapback v. Long*, 90 Ala. 525, 8 So. 113; Code 1907, §§ 4492, 4497, 4487; *Belser v. Tuscumbia Bkg. Co.* 105 Ala. 517, 17 So. 40; *Compton v. Smith*, 120 Ala. 233, 25 So. 300.

There are three assignments of error, but in fact there is practically one. They are refusing, at request of defendant, by the court to give these written charges:

"If you believe the evidence, you cannot find for the plaintiffs under either count of the complaint in this case."

"If the jury believe the evidence

in this case, the verdict should be for the defendant."

And the third assignment of error is in overruling appellant's motion for a new trial. This motion is based on refusal of the court to give those written charges, and that the verdict was contrary to the evidence and the law.

The bill of exceptions does not purport to contain or state it is all, or in substance all, of the evidence in the case. It sets out certain evidence, but there is no express statement that all of the evidence or the substance thereof is contained therein. This being the condition of the record on the evidence, the court will presume there was other evidence sufficient before the court

Appeal—presumption as to evidence. to warrant its ruling in refusing the

general affirmative charges and in overruling the motion for new trial. *Griggs v. State*, 58 Ala. 425, 29 Am. Rep. 762; *Hood v. Pioneer Min. & Mfg. Co.* 95 Ala. 461, 11 So. 10. Therefore we decide the court did not err in refusing to give those written charges, and in overruling the motion for a new trial.

Affirmed.

Anderson, Ch. J., and Sayre and Gardner, JJ., concur.

ANNOTATION.

Validity of partnership agreement between husband and wife.

I. In absence of statute, 1804.

II. Under statute:

- a. View that agreement is valid, 1305.
- b. View that agreement is invalid, 1312.

I. In absence of statute.

At common law the legal existence of the wife was so far merged in that of the husband that they could not contract with each other, hence all partnership agreements between them were prima facie invalid. *De Graum v. Jones* (1887) 23 Fla. 83, 6 So. 925; *Brown v. Jewett* (1846) 18 N. H. 230; Wal-

lace v. Finberg (1876) 46 Tex. 35; *Brown & Co. v. Chancellor* (1884) 61 Tex. 437; *Miller v. Marx* (1885) 65 Tex. 131; *Purdom v. Boyd* (1891) 82 Tex. 130, 17 S. W. 606. See also the cases cited, infra, II. a.

In *De Graum v. Jones* (Fla.) supra, the rule at common law was followed that it was impossible for a married woman to enter into a contract of partnership, the court saying: "To establish a partnership between two or more persons the parties must be capable of contracting to regulate the terms of their joint enterprise, to wit, the amount

of capital stock to be furnished and the services to be performed by each partner; the business in which said partners are to engage, and the length of time it is to last. These are all obligations of a purely personal character. When one of the parties is without the legal capacity to assume these obligations, as a married woman is, there can be no legally existing partnership between them. She has no separate legal existence, her husband and she being in contemplation of law but one person. *Smith, Contr.* 317, 318; 2 *Story, Eq. Jur.* § 1367. To make an agreement of partnership requires a contracting capacity which is not possessed by a married woman."

In *Brown v. Jewett* (1846) 18 N. H. 230, it appeared that one of the members of the defendant partnership was a married woman. It was held that her coverture at the time of making the promise was a bar to the action, and recovery could not be had against her.

In *Wallace v. Finberg* (1876) 46 Tex. 35, it was held that a husband and wife could not make a partnership agreement, and that debts incurred under such an agreement were void as to the wife. The court said: "If the husband should use the separate property of the wife in carrying on a mercantile business, it does not render her liable as a partner in the purchase of goods made to continue the enterprise; and, notwithstanding the husband and wife may assume to act as mercantile partners in trade, and the merchants with whom they deal in the purchase of goods may so recognize them in their dealings, and the attorneys who bring suits upon contracts made by them in such dealings may bring or defend suits against them substantially as partners or joint obligors,—it is the duty of the courts, in adjudicating their liabilities, to repudiate the existence of such a relation between man and wife in this state; for surely the marital relation has become sufficiently complicated already

without adding that of mercantile partnership or anything like it."

In *Miller v. Marx* (1885) 65 Tex. 131, a wife who had attempted to enter into a partnership was joined in an action on a debt contracted by the firm. The court held that a married woman could not become a partner in business, either with her husband or anyone else.

In *Purdom v. Boyd* (Tex.) *supra*, the rule as laid down in the *Wallace* and *Miller Cases* (Tex.) *supra*, was followed.

In *Brown & Co. v. Chancellor* (1884) 61 Tex. 437, it appeared that the defendant White was a married woman who, prior to her marriage, had engaged in a partnership agreement with the codefendant, and such partnership was continued after her marriage to him. Subsequently to her marriage, the debt in question was contracted. The court held that the partnership agreement was dissolved by the defendant's marriage, and subsequent to her marriage she could not enter into a partnership with her husband or another by which she could be bound.

II. Under statute.

a. *View that agreement is valid.*

In practically every state, legislation has been enacted enlarging the rights of married women, but the construction placed on these statutes by the courts of the various states is not uniform. In some jurisdictions it has been held that enabling statutes passed by the legislature confer on a married woman the right to enter into a partnership agreement with her husband.

United States. — *Re Kinkead* (1873) 3 Biss. 405, Fed. Cas. No. 7824 (Illinois statute); *Bernard & L. Mfg. Co. v. Packard & Calvin* (1894) 12 C. C. A. 123, 28 U. S. App. 84, 64 Fed. 309.

Alabama. — *Leinkauff v. Frenkle* (1885) 80 Ala. 136 (Pennsylvania statute); *Schlapback v. Long* (1890) 90 Ala. 525, 8 So. 113; *Belser v. Tuscumbia Bkg. Co.* (1894) 105 Ala.

514, 17 So. 40; *MARCRUM v. SMITH* (reported herewith) ante, 1303.

Georgia. — *Butler v. Frank* (1910) 7 Ga. App. 655, 67 S. E. 884; *Schofield v. Jones* (1890) 85 Ga. 816, 11 S. E. 1032; *Burney v. Savannah Grocery Co.* (1896) 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915; *Ellis v. Mills* (1896) 99 Ga. 490, 27 S. E. 740; *Vizard v. Moody* (1904) 119 Ga. 918, 47 S. E. 348; *Morrison v. Dickey* (1905) 122 Ga. 353, 69 L.R.A. 87, 50 S. E. 178.

Illinois. — *Heyman v. Heyman* (1904) 210 Ill. 524, 71 N. E. 591, affirming (1903) 110 Ill. App. 87.

Indiana. — *Anderson v. Citizens Nat. Bank* (1906) 38 Ind. App. 190, 76 N. E. 811. Compare *Montgomery v. Sprankle* (1869) 31 Ind. 113 (before statute) and *Haas v. Shaw* (1883) 91 Ind. 384, 46 Am. Rep. 607 (under early statute).

Iowa. — *Hoaglin v. Henderson* (1903) 119 Iowa, 720, 61 L.R.A. 756, 97 Am. St. Rep. 335, 94 N. W. 247. *STEWART v. TODD* (reported herewith) ante, 1272.

Kentucky. — *Louisville & N. R. Co. v. Alexander* (1894) 16 Ky. L. Rep. 306, 27 S. W. 981.

Mississippi. — *Toof v. Brewer* (1888) 96 Miss. 19, 3 So. 571; *Jones v. Jones* (1911) 99 Miss. 600, 55 So. 361. Compare *Howard v. Stephens* (1876) 52 Miss. 239.

Missouri. — *Dunifer v. Jecko* (1885) 87 Mo. 282.

New York. — *Zimmerman v. Erhard* (1879) 8 Daly, 311, affirmed in (1880) 83 N. Y. 74, 38 Am. Rep. 396; *Suau v. Caffé* (1890) 122 N. Y. 308, 9 L.R.A. 593, 25 N. E. 488; *Graff v. Kinney* (1885) 15 Abb. N. C. 397, 1 How. Pr. N. S. 59, affirmed in (1885) 37 Hun, 405.

Vermont. — *Lane v. Bishop* (1893) 65 Vt. 575, 27 Atl. 499.

In the case of *Re Kinkead* (U. S.) supra, it appeared that the relator and her husband engaged in business as partners. By an act of the legislature in Illinois passed in 1861, full control was given to a married woman of all real and personal property owned by her at the time of her marriage or acquired

during coverture. The court said, after considering these statutes: "In other words, she may become a partner with another person, and why not with her husband? I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she could be a partner with any other person. The logical effect of the statutes and decisions thereon in this state tend inevitably to this conclusion, and I can see no sound reason for stopping short of that point. I conclude, therefore, that Mrs. Kinkead could be and was a member of the firm of Kinkead & Company, and that it was a valid partnership at the time it was adjudged bankrupt."

In *Bernard & L. Mfg. Co. v. Packard* (Fed.) supra, it appeared that a limited partnership was formed by two married women and their respective husbands. The court held that such a partnership was valid and the firm was liable for debts it had incurred.

In *Leinkauff v. Frenkle* (Ala.) supra, creditors sought to set aside as fraudulent a conveyance of personal property made to the defendant by the firm of Myer & Company. The complainants urged that the firm of Myer & Company, being composed of husband and wife, was incapable of making a valid contract. The court held that it was no defense that one of the partners was a married woman at the time the liability was incurred, as the statute gave a married woman the power to engage in trade or business on her separate account, and therefore she could become a partner with another.

In *Schlapback v. Long* (1890) 90 Ala. 525, 8 So. 113, it appeared that the defendants were husband and wife and engaged in the hotel business as partners, they were sued by the plaintiff for goods furnished to the partnership. The court held that the partnership was liable, as, under statutory provisions, the wife was expressly authorized to engage in trade on her separate account

and may become a partner with another person, the court adding: "As modified by statute, there is nothing in the relation of husband and wife which prevents them from contracting to enter into partnership and constituting a firm."

In *Belser v. Tuscumbia Bkg. Co.* (1894) 105 Ala. 514, 17 So. 40, the court held that the rule at common law, that husband and wife were incapable of contracting with each other, did not prevail in Alabama, as the statute expressly authorized husband and wife to contract with each other. In that case a deed of assignment for the benefit of the creditors of the partnership, composed of husband and wife, was executed by the wife in the firm name. A creditor whose debt was included in the assignment attempted to obtain priority by garnishment. The court held that, the partnership agreement being valid, the suit for garnishment should be dismissed.

In *Butler v. Frank* (Ga.) *supra*, it was held that it is possible for a married woman to enter into a partnership agreement with her husband, and such agreement is valid if the contract is not entered into for the purpose of evading the law. By enabling statutes enacted at different times, married women have been given the power to enter into contractual relations the same as a feme sole, with certain restrictions but none of these restrictions refer to partnership agreements, so a married woman is free to assume such obligations.

In *Burney v. Savannah Grocery Co.* (1896) 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915, it appeared that a husband and wife entered into a partnership agreement. The firm was indebted to the plaintiff for goods purchased, and suit was brought. The wife defended on the ground that she could not be a partner with her husband. The court ruled against this contention and held the wife liable, saying: "After a careful examination of all our statutes and many decisions, we have reached the conclusion that

there is no law or public policy in Georgia which forbids such a partnership, provided, always, it is bona fide and actual, and not merely colorable. An alleged partnership cannot be used as a mere device for rendering the wife liable for, or subjecting her property to the payment of, debts of her husband. But if they really engage in a business as actual partners, we see no reason why the partnership should not be regarded as a lawful one. The 'Woman's Law' of 1866 went far towards the emancipation of married women. The only restrictions left upon their power to contract were designed for their protection and benefit. In all cases where these restrictions do not apply, they are as free to contract as men; and no one of these restrictions, so far as we have been able to ascertain, prevents a married woman from engaging in a partnership business either with her husband or with another."

See *Ellis v. Mills* (1896) 99 Ga. 490, 27 S. E. 740, wherein the rule laid down in the *Burney Case* (Ga.) *supra*, was followed.

In *Schofield v. Jones* (1890) 85 Ga. 816, 11 S. E. 1032, it appeared that a husband and wife entered into a partnership agreement for the purpose of conducting a hotel, and gave their joint obligation therefor. It was held that the wife was liable under such agreement, as the statute of Georgia gave her the same power to contract as a feme sole. The court said: "Moreover, there is nothing contrary to public policy in allowing husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of the family. Very often it would contribute to the well-being and prosperity of both, and to the permanent good of the family. No doubt such a power can be abused and misapplied, but this is no reason for not recognizing its existence, or why the law should not tolerate it, if on the whole its results are bene-

ficial rather than pernicious. At all events, we think the power exists at present under our law, and that the trial court erred in charging the jury to the contrary."

In *Vizard v. Moody* (1904) 119 Ga. 918, 47 S. E. 348, it appeared that husband and wife were members of a partnership formed to purchase property, and gave a deed of trust as security for a sum due. In an action of ejectment under the deed of trust it was held that the wife might be a partner in business with her husband.

In *Morrison v. Dickey* (1905) 122 Ga. 353, 69 L.R.A. 87, 50 S. E. 175, the rule was declared to be that a partnership agreement between husband and wife was valid where the husband carried on a business with another and the wife was an undisclosed partner. The wife made a gift to her husband, which he assigned to his partner. It was held that such assignment was valid, as the gift by the wife had been made unconditionally, and it could be used as the husband wished, and the debt so paid was one which the wife would have been compelled to pay in accounting of the partnership, as she could sue and be sued as a partner.

In *Heyman v. Heyman* (1904) 210 Ill. 524, 71 N. E. 591, affirming (1903) 110 Ill. App. 87, it appeared that a wife furnished moneys for the establishment of a business, and her husband carried on the business, the relation between them being that of partners. In an action for an accounting the question arose whether a partnership agreement between husband and wife was valid. The statute of Illinois gave a married woman the same rights as a feme sole, save that she may not enter into or carry on any partnership business "except with the consent of her husband." The court, in holding such an agreement valid, said: "It thus appears that husband and wife may contract with each other without restriction, except that the wife may not enter into or carry on any partnership business 'except with

the consent of her husband.' The plain inference is that she may carry on a partnership business, if she has the consent of her husband, and, as she may make contracts with him, there is no reason why she may not make a partnership contract with him, or a contract for a partnership business with him, where she obtains his consent thereto. The very fact that a partnership is formed between husband and wife presupposes that it is done with his consent. In the case at bar, all the evidence upon the subject tends to show that, if there was a partnership between appellant and appellee, it was with the consent of appellant. There being such consent, there is no want of power, under the statutes and decisions in this state, in the husband and wife to form a partnership with each other."

The rule of the common law preventing partnership agreements between husband and wife prevailed in Indiana 'until 1881, when a statute was enacted which abolished all legal disabilities of married women to make contracts, with certain exceptions. In *Anderson v. Citizens Nat. Bank* (1906) 38 Ind. App. 190, 76 N. E. 811, it appeared that a wife obtained money from a bank to carry on a partnership business with her husband. The court held that the wife was liable for the debt in the same manner as though she were a feme sole, saying: "The statute neither authorizes a married woman to enter into a business partnership with another person, nor does it prohibit her from doing so. And it is held in *Burk v. Platt* (1882) 88 Ind. 283, that by *Burns's Anno. Stat.* 1901, § 6967, *Rev. Stat.* 1881, § 5122, coverture is no bar to a married woman's contracting debts in carrying on any business on her separate account or as partner with another, and that her separate real estate and personal property may be levied upon and sold to satisfy a judgment against her and her copartner for debts contracted in carrying on the partnership business. See *Conant v. National State Bank* (1889) 121

Ind. 323, 22 N. E. 250. The legislature evidently contemplated that a wife might form a business partnership, not only with a third person, but with her husband, as it is provided by § 6967, *supra*, that a husband shall not be liable for any debts contracted by his wife in carrying on any business on her separate account, 'or when she is in partnership with any person other than himself.' "

Compare *Montgomery v. Sprankle* (1869) 31 Ind. 113, wherein it appeared that a husband and wife entered into a partnership agreement, and credit was extended to such firm. The court held that a married woman could not enter into such an agreement, as her contracts during coverture are void, the rule of common law being applied that a feme covert is incapable of binding herself by contract, and a recovery against the wife was denied.

Compare also *Haas v. Shaw* (1883) 91 Ind. 384, 46 Am. Rep. 607, wherein it was sought to recover for goods sold to a partnership consisting of husband and wife. The wife defended on the ground that she was a married woman and could not enter into such an agreement. The statute under consideration enabled a married woman to bind herself by her executory contracts, in connection with her trade, business, labor, or service, "on her sole and separate account." In dismissing the action against the wife the court said: "Certainly, there is no sentence, clause, or section, from the enacting clause to the final word or syllable of the above-entitled Act of March 25, 1879, which can be said by any fair construction to authorize a married woman to bind herself by a contract of copartnership with her husband or any other person, or to carry on any trade or business, or to perform any labor or service on the joint copartnership."

In *Hoaglin v. Henderson* (1903) 119 Iowa, 720, 61 L.R.A. 756, 97 Am. St. Rep. 335, 94 N. W. 247, it appeared that the plaintiffs were husband and wife, doing business as

partners. They brought the action for the wrongful retention of a draft forwarded to the defendants for merchandise which was never delivered. The provisions of the Iowa Code (§§ 3153, 3164) give to married women the right to acquire, own, and dispose of property in the same manner and to the same extent as their husbands may do. The court, commenting on these sections, said: "These unquestioned powers of a married woman in this state to deal with her husband would seem to cover all the powers and liabilities involved in entering into or continuing the relation of partner with her husband. The essential characteristics of a partnership seem to be joint ownership of property, and authority of each partner to bind the other by his acts with reference to the partnership property, and also to impose upon the other partnership liability. As these relations may be separately sustained between husband and wife, we see no reason why they may not be collectively created by entering into and carrying on the relation involved in the formation of the entity known as a partnership."

In *Louisville & N. R. Co. v. Alexander* (1894) 16 Ky. L. Rep. 306, 27 S. W. 981, it was held that a statute empowering a feme covert to trade in the same manner as a feme sole empowered her to enter into a partnership with her husband. The court said: "We perceive no reason why she may not become a joint obligor with her husband. She cannot say to the world, 'I am interested in this business venture with my husband, and my property is therefore pledged to the payment of partnership debts,' and then escape liability on the plea that the peace and quiet of domestic life render it impolitic for husbands and wives to form such business relations. These considerations cannot be allowed to affect strangers, and the property rights of the parties are not here involved."

In *Toof v. Brewer* (1888) 96 Miss. 19, 3 So. 571, it appeared that husband and wife owned and operated a

plantation in Arkansas as partners. A debt was contracted there, and was sued on in Mississippi. The wife defended on the ground that she did not have capacity to enter into a partnership contract. It was held that under the laws of Arkansas she could enter into such a contract, and her personal estate would be liable therefor in Mississippi. The court said: "We find it difficult to conceive of any public policy that would prevent the formation of a partnership between husband and wife in a state in which her individuality is so completely provided for as to her dealings with others. If she may engage in trade, and, as an incident thereto, may enter into partnership with others, why may she not form that relation with her husband? If it be said, as by the supreme court of Massachusetts, that the power is not expressly conferred, the reply is that neither is it as to third persons; and yet it is held that with such third persons she may make such contract. The power springs as an incident from the recognition by law of her separate existence, and from the capacity given her to engage in trade. A married woman could not at common law contract either with her husband or a third person, for her existence apart from his was not recognized. He and she were by that law one, and he was that one. But by the statute her individuality is preserved. She is one, and the husband is one. Each has the capacity to contract. Both may desire to contract. Partnership is a lawful subject-matter of contract, and there is nothing in the law which, either expressly or by necessary implication, forbids them from contracting. If we reflect upon the extent of the changes wrought by the Constitution and statutes, that they withdraw from the husband the ownership, control, disposition, and enjoyment of the wife's estate; that the same are secured to her as though she were a feme sole; that the right to her personal services, and the fruits of her labor, are denied to him, and given to her; that her will is freed

from the dominion of his as to all property rights; that she may, without his consent, enter into the closest business relations with third persons,—and if we add to this the declaration of the statute that the changes it has wrought shall not be restrained by the rule of construction that is ordinarily applied to statutes in derogation of the common law,—there seems to be but little force in the suggestion that by implication a disability as to business transactions and contracts, springing from the common-law notion of the unity of the husband and wife, still obtains."

In *Jones v. Jones*. (1911) 99 Miss. 600, 55 So. 361, it appeared that a partnership was carried on by husband and wife. The husband, prior to his marriage, had been the manager of his wife's plantation. Following their marriage they entered into a partnership agreement. In an action by the wife for an accounting, it was held that, under the provisions of the Mississippi statute, a married woman may lawfully enter into a partnership with her husband, as such statute removes all the disabilities of coverture and a married woman may contract as if she were sole.

Compare *Howard v. Stephens* (1876) 52 Miss. 239, wherein it was held that a statute giving a married woman power to contract in respect to her separate property did not enable her to enter into a partnership agreement with her husband or another, and she was not liable for firm debts.

In *Dunifer v. Jecko* (1885) 87 Mo. 282, it appeared that husband and wife carried on a newspaper business under a partnership agreement, and instituted this action to recover a debt due the firm. The defendants claimed a misjoinder of parties, contending that a wife could not enter into such an agreement with her husband. The court held that while such rule existed at common law it had been abrogated by a statute providing that property coming into her possession during coverture shall be and remain her separate property and

under her sole control, and the statute gave her the power to contract with her husband.

In *Zimmerman v. Erhard* (1879) 8 Daly (N. Y.) 311, affirmed in (1880) 83 N. Y. 74, 38 Am. Rep. 396, the rule was established that a husband and wife could contract with each other and therefore they could enter into a partnership agreement. The court said: "It seems evident from the above adjudications that a married woman is invested, by the logical effect of our legislation, in regard to her separate estate and business, with all the attributes and powers of a feme sole, and, so being, any contract made by her relative thereto is valid, including a copartnership agreement with her husband." The enabling statute as passed by the legislature gave a married woman power to carry on business "on her sole and separate account." This was construed to refer to her marital status, and not intended to restrict her business ventures in which she alone would be interested.

In *Fairlee v. Bloomington* (1884) 14 Abb. N. C. (N. Y.) 341, it appeared that a husband and his wife had entered into a partnership agreement and had executed the note in suit. It was held that a husband could not enter into a partnership agreement with his wife. The court, in commenting on the *Zimmerman Case* (N. Y.) *supra*, held that the reasoning and conclusion that such a partnership was valid were erroneous, and such a rule did not exist. This case was reversed on appeal on another ground, in (1885) 38 Hun, 220, the court remarking, however, that were it necessary to the decision of the case they should probably agree with the doctrine of *Zimmerman v. Erhard* (1879) 58 How. Pr. (N. Y.) 11, and *Graff v. Kinney* (N. Y.) *infra*, holding that a husband and wife may form a partnership.

In *Graff v. Kinney* (1885) 15 Abb. N. C. (N. Y.) 397, 1 How. Pr. N. S. 59, affirmed in (1885) 37 Hun, 405, it was held that a woman might enter into a partnership agreement with her husband, and the opinion in the

Fairlee Case, *supra*, was disapproved and overruled. The statutes gave a married woman the power "to carry on any trade or business," and this was construed to give a married woman the power to enter into such a partnership agreement.

In *Jacquín v. Jacquín* (1885) 15 Abb. N. C. (N. Y.) 408, note, it appeared that a husband and his wife had entered into a partnership agreement before marriage, and such relation was continued after marriage. In an action for an accounting it was held that the enabling statutes had not given a married woman the power to enter into a partnership with her husband, and no such right was implied.

In *Noel v. Kinney* (1887) 106 N. Y. 74, 60 Am. Rep. 423, 12 N. E. 351, it appeared that a wife authorized her husband to contract for fixtures to be placed in houses belonging to her, and the note sued upon was given plaintiff under the name of J. P. Kinney & Company, for such fixtures. It was held that the wife was liable for the debt contracted, even though a form of partnership existed. The court expressly stated, however, that they did not decide the question as to the validity of a partnership agreement.

In *Kaufman v. Schoeffel* (1885) 37 Hun (N. Y.) 140, it was held that under the statute enabling a married woman to enter into contracts, she could not enter into a partnership agreement with her husband. The enabling Statute of 1860 gives married women the power to "carry on any trade or business and perform any labor or services on her sole and separate account." The court here construed the words "sole and separate account" to refer back to "carry on any trade or business," and therefore a partnership agreement was invalid.

In *Hendricks v. Isaacs* (1889) 117 N. Y. 411, 6 L.R.A. 559, 15 Am. St. Rep. 524, 22 N. E. 1029, it appeared that a husband made advances to his wife upon her written promise to reimburse him, such writings being the subject of this action. It

was held that the contract was void at law, as the common-law doctrine that husband and wife could not contract had never been abrogated by statute. The court said: "She may enter into contracts with third persons for the purchase and sale of property . . . enforceable in a legal action to the same extent as though she was a feme sole. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged."

In *Suau v. Caffé* (1890) 122 N. Y. 308, 9 L.R.A. 593, 25 N. E. 488, the rule established in the *Zimmerman Case* (N. Y.) *supra*, to the effect that married women may enter into partnership agreements with their husbands, was followed and the *Hendricks Case* (N. Y.) *supra*, was overruled. The court said: "But a single question is involved in this appeal, which is whether a married woman who contracts a debt with her husband in a business carried on for their joint benefit can avoid liability for it on the ground of coverture. The second section of chapter 90 of the Laws of 1860 provides that 'a married woman may . . . carry on any trade or business . . . on her sole and separate account.' It is urged that this language is not broad enough to authorize married women to engage in business as partners or jointly with others, or at least with their husbands, but that the statute simply confers power on them to contract by themselves and apart from others. This construction is too narrow and fails to express the evident intent of the legislature, which was not to prescribe the mode in which married women should carry on their business, but to free them from the restraints of the common law and permit them to engage in business in their own behalf as free from the control of their husbands as though unmarried. Before this statute, the profits of their business belonged to their husbands, and the words 'sole and separate account' were intended to convey the idea that the beneficial interest of any business in which they might engage belonged

to them, and not to their husbands."

In *Lane v. Bishop* (1893) 65 Vt. 575, 27 Atl. 499, it appeared that the defendants were husband and wife doing business under a partnership agreement, and were sued therein for a partnership debt. The statute granting powers to married women to contract provided as follows: "A married woman may make contracts with any person other than her husband, and bind herself and her separate property in the same manner as if she was unmarried, and may sue and be sued as to all such contracts made by her, either before or after coverture, without her husband being joined in the action as plaintiff or defendant, and execution may issue against her and be levied on her sole and separate goods, chattels, and estate." The court held that under this statute a partnership agreement entered into between husband and wife was valid, and the wife was liable for the firm debts.

b. View that agreement is invalid.

In the following jurisdictions the view has been taken that a married woman has not the power under a married woman's separate property act to enter into a partnership agreement with her husband, and that such agreements when made are invalid.

Arkansas. — *Gilkerson-Sloss Commission Co. v. Salinger* (1892) 56 Ark. 294, 16 L.R.A. 526, 35 Am. St. Rep. 105, 19 S. W. 747.

Connecticut. — *Barlow Bros. Co. v. Parsons* (1901) 73 Conn. 696, 49 Atl. 205.

District of Columbia. — *Norwood v. Francis* (1905) 25 App. D. C. 463, 4 Ann. Cas. 865.

Louisiana. — *Squire v. Belden* (1831) 2 La. 268.

Maryland. — *Bradstreet v. Baer* (1874) 41 Md. 19; *Mayer v. Soyster* (1869) 30 Md. 402.

Massachusetts. — *Lord v. Parker* (1861) 3 Allen, 127; *Edwards v. Stevens* (1862) 3 Allen, 315; *Bowker v. Bradford* (1886) 140 Mass. 521, 5 N. E. 480; *Voss v. Sylvester* (1909) 203 Mass. 233, 89 N. E. 241.

Michigan. — *Artman v. Ferguson* (1888) 73 Mich. 146, 2 L.R.A. 343, 16 Am. St. Rep. 572, 40 N. W. 907; *Speier v. Opfer* (1888) 73 Mich. 35, 2 L.R.A. 345, 16 Am. St. Rep. 556, 40 N. W. 909.

Ohio.—*Payne v. Thompson* (1886) 44 Ohio St. 192, 5 N. E. 654.

South Carolina. — *Gwynn v. Gwynn* (1887) 27 S. C. 525, 4 S. E. 229.

Washington. — *Board of Trade v. Hayden* (1892) 4 Wash. 263, 16 L.R.A. 530, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224.

West Virginia. — *Carey v. Burruss* (1882) 20 W. Va. 571, 43 Am. Rep. 790.

Wisconsin. — *Fuller & F. Co. v. McHenry* (1892) 83 Wis. 573, 18 L.R.A. 512, 53 N. W. 896.

In *Gilkerson-Sloss Commission Co. v. Salinger* (Ark.) supra, it appeared that credit was given to a firm consisting of husband and wife, and, the latter being the sole survivor of the partnership, recovery was sought against her. The statute of Arkansas is as follows: "A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may alone sue or be sued in the courts of this state, on account of the said property, business or services." It was held that under the statute a wife could not contract with her husband, and therefore the partnership agreement was invalid. The court said: "In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could

20 A.L.R.—83.

not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action."

In *Barlow Bros. Co. v. Parsons* (Conn.) supra, it was held that a wife was not liable for debts contracted by a partnership consisting of husband and wife. The statute under consideration provided that a wife, by contract, must agree to accept the provisions of the law of that date before such provisions should become applicable to her property rights. The defendant wife gave her husband permission to use her name in connection with the private banking house which he conducted. The action was to recover for certain deposits made by the plaintiff with the banking house of defendant's husband prior to his death. The court held that inasmuch as the wife had failed to comply with the provisions of the statute as to accepting the provisions of the statute, the partnership agreement was invalid and no liability attached to the defendants.

In *Norwood v. Francis* (D. C.) supra, it appeared that the defendant was a copartner with her husband and others in a savings bank, which was an unincorporated joint stock company. The plaintiff's testator deposited money in the bank, and on its failure sued defendant as a stockholder therein. It was claimed that the defendant had power to enter into a partnership with her husband under the following statute: "That any married woman may carry on any trade or business, occupation, or profession by herself, or jointly with others, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, profession, occupation, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." The court, in holding that a husband and his wife could not be members of a partnership, said: "While the tendency of legislation has been to remove the disabilities of married

women, we think, in view of all the authorities, that such statutes removing such disabilities should not be construed so broadly as to permit a partnership between husband and wife, unless the statute expressly gives the husband and wife power to contract with each other generally. We therefore conclude that the appellee Anna M. Johnson could not become a member of a partnership such as the one in question."

In *Squire v. Belden* (La.) *supra*, the action was against a firm consisting of father, husband, and wife. The suit was dismissed as to the wife, the court holding that a wife could not bind herself jointly with her husband for any debt. The court distinguished between legal and commercial partnerships, saying, as to the former, that they are void by statute between husband and wife, and as to the latter existing between husband and wife the court expressed a doubt, saying: "Perhaps a commercial partnership cannot, in this country, exist between husband and wife, even where there is no community of acquits and gains."

In *Bradstreet v. Baer* (Md.) *supra*, it was held that a statute empowering a married woman to carry on a trade as a feme sole, with a capital not exceeding \$1,000, and making her money and property, to that extent, liable to attachment for any claim or debt incurred by her, was by implication a denial of the power to carry on business in any other mode, and that a feme covert could not enter into a partnership with her husband. The court, in discussing other legislative restrictions, said: "She cannot enter into any contract which will bind her at law, unless it be in writing and executed jointly with her husband. In so far as her disabilities have not been removed by statute, they remain as at common law. There is no statute in existence in this state which either directly, or by implication, authorizes her to form a copartnership. The contract of one partner respecting the partnership business binds all the members of the firm, and if a married

woman could enter into a copartnership, the anomaly would be presented of her being bound at law by the acts and contracts of others, when, under the statute, she cannot so bind herself except by her contract in writing, executed jointly with her husband."

In *Mayer v. Soyster* (1869) 30 Md. 402, a husband and wife were sued as copartners on a debt due plaintiffs. The court, in quashing the attachment, stated the rule of law applicable as follows: "It is well settled that a married woman can in no case be sued upon a mere personal contract made during coverture."

In *Lord v. Parker* (1861) 3 Allen (Mass.) 127, it appeared that a married woman was a copartner with her husband and others. The firm was sued on two of its promissory notes, and the court held that the feme covert could not be included as a codefendant, as she did not have the power, under the statute, to make a partnership agreement with her husband. In construing the legislative acts enlarging the rights of married women, the court said: "Their leading object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability

for his engagements. The property invested in such an enterprise would cease to be her 'sole and separate' property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband."

In *Edwards v. Stevens* (1862) 3 Allen (Mass.) 315, the court followed the rule laid down in the *Lord Case* (Mass.) *supra*, saying: "These statutes are in derogation of the common law, and are not to be extended by implication. The express power to contract with her husband is not given in terms, and there is a strong implication from various provisions that it was not contemplated by the legislature. The language of Gen. Stat. chap. 108, § 3, is indeed quite broad, and provides that she may 'carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor and earnings, in the same manner as if she were sole.' But in order to make a valid contract with her husband, he should also have the power to contract as if he were sole, which is nowhere given him."

In *Bowker v. Bradford* (1886) 140 Mass. 521, 5 N. E. 480, the question again arose as to the validity of a partnership agreement between husband and wife, and the court followed the rule laid down in the *Lord Case* (Mass.) *supra*, holding that a married woman could not be held for the rent of a store where she and her husband carried on a partnership venture.

In *Voss v. Sylvester* (1909) 203 Mass. 233, 89 N. E. 241, it appeared that a man signed a lease in the name of himself and his wife as partners. In an action on the lease, the husband set up the fact that his wife had not been joined as a defendant. It was held that the nonjoinder was proper, since the partnership agreement was of no force or effect, and the wife could not be sued on the lease.

In *Artman v. Ferguson* (1888) 73

Mich. 146, 2 L.R.A. 343, 16 Am. St. Rep. 572, 40 N. W. 907, it was held that the statutes of Michigan had not conferred full powers on a feme covert to carry on business or make contracts, but only to contract in regard to her separate property. The court said: "Our statute has not removed all the common-law disabilities of married women. It has not conferred upon her the powers of a feme sole, except in certain directions. It has only provided that her real and personal estate acquired before marriage, and all property, real and personal, to which she may afterwards become entitled in any manner, shall be and remain her estate, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, and bequeathed by her as if she were unmarried; and she may sue and be sued in relation to her sole property as if she were unmarried. How. Stat. §§ 6295-6297. In all other respects she is a feme covert, and subject to all the restraints and disabilities consequent upon that relation. A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a copartner with a person other than her husband, is held in many states under the married woman's statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law prevails, and she cannot enter a firm. It has been held by a great preponderance of authorities, even under the broadest statutes, that a married woman has no capacity to contract a partnership with her husband, or, in other words, to become a member of a firm in which her husband is a partner, even in those states in which she may embark in another partnership; and though she holds herself out as such partner, and her means

give credit to the firm, she is held not liable for the debts, as she cannot, by acts or declarations, remove her own disabilities."

In *Speier v. Opfer* (1888) 73 Mich. 35, 2 L.R.A. 345, 16 Am. St. Rep. 556, 40 N. W. 909, it appeared that a husband and wife held property jointly, and contracted for the erection of a building upon land which had been deeded to them jointly. The enabling statutes gave married woman the power to contract only in regard to her separate property. The court held that, this property being held jointly with her husband, she could not be sued on the contract.

In *Payne v. Thompson* (1886) 44 Ohio St. 192, 5 N. E. 654, it appeared that a partnership agreement had been entered into between husband and wife, and suit was brought on debts incurred by such firm. The statute gave married women power to bind themselves in certain respects by their contracts, but no power was given them to engage in business as partners with their husbands, and it was therefore held that the partnership agreement was invalid and that a recovery could not be had against the wife.

In *Gwynn v. Gwynn* (1887) 27 S. C. 525, 4 S. E. 229, it appeared that a husband and his wife entered into a partnership agreement. It was sought to hold the wife under the agreement. The statute of South Carolina provided that a married woman could "contract and be contracted with as to her separate property in the same manner as if she were unmarried." This statute was construed to apply only to her separate property, and it was held that she could not enter into a partnership agreement, since the property invested was no longer her separate property when she became a copartner with others. The court said: "But if, on the other hand, the alleged contract of partnership could be regarded as an agreement on the part of the wife to put her separate property into the partnership as a part of its capital, the very moment it was so put in, it would at once cease to be her separate prop-

erty and would become the property of the partnership, and hence any contract subsequently made by the alleged partnership could not be regarded as a contract made by the wife 'as to her separate property,'—the only kind of contract which she has the capacity to make,—and she could not, therefore, be bound thereby. A married woman being thus denied the capacity to assume one of the liabilities necessarily incident to the partnership relation, it would seem to follow necessarily that she has no power to form such a relation."

In *Carey v. Burruss* (1882) 20 W. Va. 571, 43 Am. Rep. 790, the statutes granting the power to married women to contract were construed as not permitting a feme covert to enter into a partnership agreement with anyone. The court said: "Our Married Women's Law remains unchanged from what it was originally. It went into effect on April 1. 1869, and is to be found in the 66th chapter of our Code, p. 447. No portion of this act, either expressly or by implication, can be construed in any manner to remove the legal incapacity of a married woman to make any contract, while she is living with her husband, except we so construe the first three sections. These are substantially the same as the New York Statutes of 1848 and 1849; and indeed two of these sections are copied from these New York laws, excepting only a proviso, which we have added to the third section, which has no bearing on the question before us. Now the New York cases we have cited above have construed these sections, and have decided that they in no manner removed or affected the legal incapacity of a married woman to make any contract. And if our views as expressed above are correct, they could reach no other conclusion; for these sections could have no possible influence on the capacity of a married woman to make any contract which would be recognized by a law court, unless this effect were to be deduced from their converting, as they do, the equitable separate estate of a married woman into a legal estate. And we

have seen that, both on reason and on the weight of the authorities, this conversion of a married woman's separate estate from an equitable to a legal estate has no effect upon her capacity at law to make a contract." It is to be observed that the New York cases referred to were subsequently overruled. See the preceding subdivision of this note.

In *Board of Trade v. Hayden* (1892) 4 Wash. 263, 16 L.R.A. 530, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224, it was sought to hold a wife for the firm debts of a partnership of which she was a member with her husband and others. A statute provided that a married woman could make contracts and incur liabilities as if unmarried, and gave her full power to manage and dispose of her own property. The court construed this to exclude the wife's right to contract with her husband and hence she could not make a partnership agreement. The court, in commenting on the statute, said: "In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that, unless she become his partner, she will not be wholly free, if yielded to, will place her and her property within the touch of the very dangers which it is sought in the first place to withdraw her from. Her im-

provident husband, by the most ordinary persuasion, or by his mere declaration, made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which it seems to us stands out the most clearly in the act in question, i. e., to secure her protection in the management and enjoyment of her estate, would be defeated."

In *Fuller & F. Co. v. McHenry* (1892) 83 Wis. 573, 18 L.R.A. 512, 53 N. W. 896, there was involved a statute of Wisconsin authorizing a married woman to make contracts in relation to her separate estate. A wife having attempted to enter into a partnership with her husband, the court held that debts incurred by the firm could not be collected from her, saying: "The guarded terms of this section show that her right to transact business in her own name, beyond the scope of the power implied from the ownership, use, and enjoyment of a separate estate, is denied, except in the particular emergencies specified. The wife has not, therefore, in our judgment, the power to enter into an agreement of partnership with her husband, nor, as for that matter, with anyone else, if she has no separate estate in respect to which she can be considered as a feme sole, so as to bind herself at law." E. C. B.

CITY STREET IMPROVEMENT COMPANY, Appt.,

v.

F. E. PEARSON, Respnt.

California Supreme Court (In Banc)—December 8, 1919

(181 Cal. 640, 185 Pac. 962.)

Bills and notes — absence of consideration — assessment in excess of authority.

1. A note given by a property owner to secure extension of time for payment of an assessment against his property for street improvements which was invalid because in excess of the statutory limit is without consideration and unenforceable.

[See note on this question beginning on page 1326.]

Public improvements — provision for assessments — effect of appeal.

2. Where, by the provisions of the charter and ordinances of a city providing for street improvements, it is made mandatory that, in case the assessment shall exceed 50 per cent of the assessed value of the property, provision must be made for instalment payments, failure to make such provision cannot be cured by appeal to the board of supervisors.

— curative provisions — validity.

3. Provisions cannot be made by municipal ordinance for curing defects in assessments for street improvements which contravene the terms of the city charter.

— curing fundamental defects.

4. Provisions for curing defects in street improvement proceedings do not apply to any of the preliminary steps in the proceedings which the statute requires to be taken to confer jurisdiction upon the body in charge thereof.

Contract — consideration — extension of baseless demand.

5. Extension of time to pay a baseless demand, and forbearance to sue thereon during the time allowed, are not a valid consideration for a contract.

[See 6 R. C. L. 661.]

(Olney and Lawlor, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco (Crothers, J.) in favor of defendant in an action brought to recover an amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Adams & Adams, for appellant:

An agreement to forbear to sue to foreclose a lien, in good faith believed by plaintiff to be valid, but which in fact may be invalid, constitutes a sufficient consideration for the execution of the note.

Longridge v. Dorville, 5 Barn. & Ald. 117, 106 Eng. Reprint, 1136; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. N. S. 181, 18 Week. Rep. 1127; Cook v. Wright, 1 Best. & S. 559, 121 Eng. Reprint, 822, 30 L. J. Q. B. N. S. 321, 4 L. T. N. S. 704; Ockford v. Barelli, 25 L. T. N. S. 504, 20 Week. Rep. 116; Miles v. New Zealand Alford Estate Co. L. R. 32 Ch. Div. 266, 55 L. J. Ch. N. S. 801, 54 L. T. N. S. 582, 34 Week. Rep. 669; Kingsford v. Oxenden, 7 Times L. R. 13; Di Iorio v. Di Brasio, 21 R. I. 208, 42 Atl. 1114; Grandin v. Grandin, 49 N. J. L. 508, 514, 60 Am. Rev. 642, 9 Atl. 756; Prout v. Pittsfield Fire Dist. 154 Mass. 450, 28 N. E. 679; Wahl v. Barnum, 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280; Union Bank v. Geary, 5 Pet. 99, 8 L. ed. 60; Morris v. Munroe, 30 Ga. 630; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; McKinley v. Watkins, 13 Ill. 140; Fish v. Thomas, 5 Gray, 45, 66 Am. Dec. 348; Wells & Morris v. Brown, 67 Wash. 351, 121 Pac. 828, Ann. Cas. 1913D, 317; Sellars v.

Jones, 164 Ky. 458, 175 S. W. 1002; Blount v. Wheeler, 199 Mass. 330, 17 L.R.A.(N.S.) 1036, 85 N. E. 477; Sheppey v. Stevens, 185 Fed. 147; Mackin v. Dwyer, 205 Mass. 472, 91 N. E. 893; Silver v. Graves, 210 Mass. 26, 95 N. E. 948; Bellows v. Sowles, 55 Vt. 391, 45 Am. Rev. 621; Grochowski v. Grochowski, 77 Neb. 506, 13 L.R.A.(N.S.) 484, 109 N. W. 742, 112 N. W. 335, 15 Ann. Cas. 300; Moss v. Cohen, 158 N. Y. 240, 53 N. E. 8; Snohomish River Boom Co. v. Great Northern R. Co. 57 Wash. 693, 107 Pac. 848; Lockwood v. Title Ins. Co. 73 Misc. 296, 130 N. Y. Supp. 824; 1 Elliott, Contr. 235; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62.

The assessment was not void, and the right of the respondent to resist payment was lost by a failure to appeal to the board of supervisors.

Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Bates v. Hadamson, 2 Cal. App. 574, 84 Pac. 51; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Kenny v. Kelly, 113 Cal. 366, 45 Pac. 699; Perine v. Lewis, 128 Cal. 366, 45 Pac. 422, 772; City Securities Co. v. Harvey, 176 Cal. 682, 169 Pac. 380.

The note given in payment of the street work was not executed under a mutual mistake of fact.

Barfield v. Price, 40 Cal. 535; Goode now v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Kenyon v. Welty, 20 Cal. 637, 81

(181 Cal. 640, 185 Pac. 962.)

Am. Dec. 137; Christy v. Sullivan, 50 Cal. 337, 19 Am. Rep. 655; Boggs v. Fowler, 16 Cal. 565, 76 Am. Dec. 561; Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301.

Messrs. Hugo D. Newhouse and Jesse A. Mueller, for respondent:

If an assessment is void, the owner need not appeal to the board of supervisors, but may rely upon such fact when it is attempted to enforce the assessment.

Pacific Paving Co. v. Berso, 12 Cal. App. 362, 107 Pac. 590; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; Donnelly v. Howard, 60 Cal. 291; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; DeHaven v. Berendes, 135 Cal. 178, 67 Pac. 786; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431.

Where the subject of a contract is not in existence, and there has been a mutual mistake about its existence, the contract made under such mistake of fact is void.

Barfield v. Price, 40 Cal. 535; Iowa Loan & T. Co. v. Schnose, 19 S. D. 248, 103 N. W. 22, 9 Ann. Cas. 255; Stahl v. Schwartz, 67 Wash. 25, 120 Pac. 866; Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62.

There was no consideration for the note in suit.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; People v. Pearne, 118 Cal. 158, 50 Pac. 376; Hatch v. Hanson, 46 Mo. App. 323.

The assessment in controversy was, in its origin, and now is, unlawful.

Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Re Groome, 94 Cal. 69, 29 Pac. 487; 15 Am. & Eng. Enc. Law, 2d ed. 941, note 4; Chateau v. Singla, 114 Cal. 91, 33 L.R.A. 750, 55 Am. St. Rep. 63, 45 Pac. 1015; 9 Cyc. 465, 475-480; Morgan v. Menzies, 60 Cal. 341.

Primarily, and independently of any ordinance on the subject, the assessment is void, because in contravention of the negative provisions of subd. 3 of § 8 of chapter 11, article 6, of the city charter, as limited by a proviso engrafted upon it by § 33 of the same chapter.

Baggage & O. Transfer Co. v. Portland, 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570; Iowa-Teleph. Co. v. Keokuk, P.U.R.1916B, 141, 226 Fed. 82; Platt v. San Francisco, 158 Cal. 74, 110 Pac. 304; Hyatt v. Allen, 54 Cal. 353; 25 Am. & Eng. Enc. Law, 2d ed. 688; McDonald v. Patterson, 54 Cal. 245;

Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20; Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3; Ewing v. Oroville Min. Co. 56 Cal. 649; Law v. People, 87 Ill. 385; Pacific Electric Co. v. Los Angeles, 118 Fed. 746; Hurford v. Omaha, 4 Neb. 336; Donahue v. Graham, 61 Cal. 276; Wren v. Dixon, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918D, 1064.

The resolution of intention was not in the form prescribed by § 28 of the ordinance, and it, and the subsequent proceedings dependent thereon, are nullities.

Ogden City v. Armstrong, 168 U. S. 224, 234-236, 42 L. ed. 444, 450, 451, 18 Sup. Ct. Rep. 98; Zeigler v. Hopkins, 117 U. S. 683, 687, 688, 29 L. ed. 1019-1021, 6 Sup. Ct. Rep. 919; Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683; Fay v. Reed, 128 Cal. 357, 60 Pac. 927; Turrill v. Grattan, 52 Cal. 97; Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750; Townsend v. Tal-lant, 33 Cal. 45, 54, 91 Am. Dec. 617; Kertchem v. George, 78 Cal. 597, 21 Pac. 372; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 658.

The assessment is a unit, and therefore void as an entirety.

Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; Donnelly v. Howard, 60 Cal. 291; Dyer v. Chase, 52 Cal. 440; Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699.

Since the assessment is a unit, and absolutely void as an entirety, it cannot be apportioned.

Hedges v. Dixon County, 150 U. S. 182, 187-192, 37 L. ed. 1044, 1046-1048, 14 Sup. Ct. Rep. 71, affirming 37 Fed. 304; Prickett v. Marceline, 65 Fed. 469, affirmed in 15 C. C. A. 700, 32 U. S. App. 767, 69 Fed. 462; State ex rel. Dexter v. Gordon, 251 Mo. 303, 158 S. W. 683; Harmony v. Truman, 128 C. C. A. 544, 212 Fed. 4, reversing 205 Fed. 549, s. c. 198 Fed. 557.

The assessment, being illegal, because made in violation of law, imposed no obligation, either legal or moral; and therefore the alleged forbearance to enforce the same was no consideration for the note in question.

Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Pacific R. Adv. Co. v. Carr, 29 Cal. App. 722, 157 Pac. 529; Scheeline v. Pezzola, 29 Cal. App. 266, 155 Pac. 127.

Shaw, J., delivered the opinion of the court:

The plaintiff sued to recover upon a promissory note for \$612.77. Defendant answered, alleging want of consideration for the note. The court found that it was wholly without consideration, and gave judgment for the defendant. Plaintiff appeals.

Plaintiff made certain improvements of the street in front of the defendant's property in San Francisco, under a contract with the board of public works, executed in pursuance of the proceedings taken for that purpose. An assessment for the cost thereof was issued to plaintiff. The amount assessed against defendant's property was \$1,225.54. Plaintiff demanded payment, and threatened to foreclose the assessment if payment was not made. Defendant asked for an extension of time, and after some negotiation an agreement was reached whereby defendant paid \$612.77, being one half of the assessment, and executed to the plaintiff the note in suit, payable in ninety days, for the remaining half. The lien of the assessment was not formally released, but plaintiff agreed not to foreclose during the time covered by the note. Both parties at that time believed that the assessment was valid, and that it constituted a valid lien on defendant's property, and in that belief the note was given and accepted.

Two questions are presented: (1) Was the assessment void? (2) If it was void, was the note based on a lawful and valuable consideration?

1. The proceedings for the street improvement were taken under an ordinance of the board of supervisors of San Francisco, providing the procedure therefor, under the authority of § 33, chapter II., of article 6, added to the city charter by the amendment of 1913. This section authorizes the board of supervisors to adopt an ordinance providing a method of procedure for the improvement of streets, and for

an assessment upon private property to defray the expense thereof. It contains the following additional provision: "In such ordinance, if said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual instalments covering a term not to exceed ten years upon [such] conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed 7 per cent per annum. In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual instalments, the amount of such assessment shall not be limited by the provisions contained in subd. 3 of § 8 of this chapter." Stat. 1913, p. 1623.

The provisions of subd. 3 of § 8, referred to in the foregoing quotation, are as follows: "No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than 50 per centum of the value at which said property was assessed upon the last preceding assessment book of the city and county." Stat. 1899, p. 297.

In pursuance of the authority given by § 33 aforesaid, the board of supervisors of the city and county of San Francisco, on October 27, 1913, adopted an ordinance providing a procedure to be followed in San Francisco in making improvements upon streets and assessing the expense thereof upon private property. The proceedings in question were taken under this ordinance, and the question to be determined is whether or not they were valid under the ordinance and the aforesaid provisions of the charter. The proceedings for the street improvement were begun by a resolution of expediency adopted by the board of public works on May 20, 1914. The work was completed on

March 11, 1915, and the assessment was issued on May 5, 1915. The assessed value of the property of the defendant for the year 1914, that being the year in which the contract for the improvement was let, was \$2,260. One half of this sum, \$1,130, was the limit of the amount which the city authorities had power to assess against defendant's property, unless provision was made for the payment thereof in annual instalments, as provided in § 33 aforesaid. The objection to the assessment is that no such provision was made, and that, in consequence thereof, the assessment is void. The plaintiff, in answer to this proposition, contends that this defect in the proceeding is not jurisdictional; that it could have been cured by the appeal to the board of supervisors provided for in § 21 of the ordinance fixing the procedure. For the understanding of this question it will be necessary to state in some detail the provisions of said ordinance.

It is first provided that the board of public works, deeming that public convenience requires a street improvement, the expense of which should be assessed upon private property, shall by resolution declare such expediency, briefly describing the improvement, and cause plans and specifications therefor to be prepared (§ 3); that after such plans and specifications are prepared the board "shall pass a resolution of its intention to recommend to the supervisors that said improvements be ordered to be made," referring therein to the plans and specifications, and fixing a day for taking action upon the matter, of which day notice shall be given (§ 4); that at the time fixed in the notice, if no objections are made, the board of public works shall "pass a resolution recommending to the supervisors that they order such improvements to be made" (§ 7); that the supervisors may, in their discretion, order that not exceeding one half of the expense of the work may be paid out of the city

treasury (§ 7); that the improvement so proposed may be ordered by the board of supervisors by ordinance adopted in the manner provided by chapter I., article 2, of the charter (§ 7). When the improvements are thus ordered, bids shall be advertised for, and the contract for the work let to the lowest bidder. Section 16 of the ordinance contains a provision as follows: "No assessment shall be levied upon any property, which, together with all assessments for street improvement that may have been levied upon the same property during the year last preceding, will amount to a sum greater than 50 per centum of the value at which said property was assessed, exclusive of improvements thereon, upon the assessment book of the city and county current at the date of the passage of the resolution of intention, except, however, as in this ordinance hereinafter provided."

Section 18 provides that if, at the time street work is done, none of the methods provided in the ordinance is sufficient to authorize the board of public works to make an assessment to pay for the expense thereof, the board, before it passes "a resolution of its intention to recommend the ordering of said work or improvement," shall establish by resolution a method by means of which such assessment shall be made, and that when the work is done the assessment shall be made according to the method so established. The ordinance provides in the usual manner for the issuance of an assessment and warrant to the contractor for the expense upon the completion of the work to the satisfaction of the board of public works. Section 28 is as follows: "Any assessment imposed under the provisions of this ordinance may be paid in annual instalments, not exceeding 10 in number, whenever the board of public works shall so determine and declare in the resolution of intention or whenever the board of supervisors shall so determine and declare in the ordinance

ordering the work, and it shall be mandatory for the board of public works to so determine and declare in every case when the amount of the assessment imposed will exceed one half of the assessed value of the lot or parcel of land against which such assessment is imposed. Such resolution or ordinance shall state the number of instalments in which the assessment may be paid, and the rate of interest to be charged on all deferred payments, which rate of interest shall not exceed 7 per centum per annum."

The ordinance further provides that any person aggrieved by any act of the board of public works in the matter, or who claims that the work has not been properly performed, or having any objection to the correctness or legality of the assessment, shall, within thirty days after the date of the warrant, appeal to the supervisors, and that, upon such appeal, the supervisors may remedy and correct any error in the acts of the board of public works or in the assessment, and cause said board to correct the warrant assessment or diagram in any particular so as to conform to their decision upon the appeal; that the decisions of the supervisors on such appeal "shall be final and conclusive upon all persons entitled to appeal under the provisions of this section as to all errors, informalities, and irregularities which the supervisors might have avoided or have remedied during the progress of the proceedings, or which they can at that time remedy;" and that "no assessment, . . . and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided." Section 21.

The proceedings for this assessment did not conform to the provi-

sions of this ordinance regarding cases in which the assessment amounts to more than half of the assessed value of the property for general taxation for the current year, as was the case here. Neither the resolution of intention of the board of public works to recommend the making of the improvement nor the ordinance of the board of supervisors, ordering the work to be done, nor any resolution, order, or ordinance of either body, declared or provided that the assessment should be paid in instalments, or made any provision on that subject. The consequence was that the entire assessment, under the terms of the ordinance, became due and payable immediately upon the issuance of the warrant, and a suit to foreclose the same could have been begun at the expiration of thirty-five days thereafter. Sections 19 and 22. If the proceedings had been valid, the contractor would have had the right to insist upon this date of maturity.

The above-quoted provision of § 8, chapter II., article 6, of the charter, forbids the making of such an assessment in such a case. Section 33, above quoted, qualifies this prohibition so far as to allow an assessment of that amount to be made under a method of procedure ordained by the board of supervisors, if provision is made in the proceeding for the payment of the assessment in instalments, but not otherwise. The provision for instalment payments can only be made in the manner prescribed in the procedure ordinance. The board of supervisors and the board of public works, in making improvements and levying assessments under the provisions of an ordinance adopted under § 33 aforesaid, are acting as agents under a special power, and they cannot lawfully act at all except as authorized by the terms of the law under which they act. They are as much limited by the terms of the ordinance of the supervisors, providing the procedure, as they would be if they were acting under some street improvement act enacted by

the legislature. The ordinance declares that, in order to authorize instalment payments, the board of public works must "so determine and declare in the resolution of intention;" or, as an alternative thereto, the board of supervisors must "so determine and declare in the ordinance ordering the work." It is declared to be mandatory that the resolution thus referred to shall so state whenever "the amount of the assessment imposed will exceed one half of the assessed value of the lot or parcel of land" to be assessed. Section 28. Furthermore, the provisions of § 18, above mentioned, require that the board of public works, if none of the methods provided in the ordinance is sufficient to authorize an assessment to pay for the expenses of an improvement, shall, before it passes the resolution of its intention to recommend the ordering of the work, establish an adequate method for making the assessment. It is difficult to give this section any meaning, unless it was intended to require the board of works to look into the matter at the beginning, and provide for instalments if it found that the assessment was likely to exceed one half of the tax valuation on the properties.

The contention that this departure from the authorized procedure could have been lawfully cured or corrected on appeal to the board of supervisors, had such appeal been taken, cannot be sustained. Section 28 of the procedure ordinance, it will be noted, provides that, in every case where the assessment will exceed one half the tax valuation, "it shall be mandatory" that the board of public works shall first determine, and then declare in its resolution of intention, that payment of the assessments may be made in annual instalments. Section 18 of that ordinance, if we interpret it aright, also requires such preliminary determination. And §§ 8 and 33 of chapter II. of article 6 of the

charter withhold entirely from the two boards the power to make such an assessment, unless it is made in the manner to be prescribed by the procedure ordinance which § 33 authorizes the supervisors to adopt. Under that ordinance, the resolution of intention of the board of public works, together with the notices to be given of the time of taking action thereon, comprise the mode, and the only mode, whereby either of said boards can obtain jurisdiction of such a proceeding or power to make any assessment. It is very clear from all these provisions that, in a case where the necessary assessment for the work will exceed one half of the assessed value of the land for the current year, they cannot obtain such jurisdiction or power, except by determining to make the assessment payable in annual instalments, and inserting in the resolution of intention of the board of public works a declaration to that effect. This, of course, could not be done by the supervisors in deciding the appeal. It could not lawfully be done at all after the contract was let, for the contractor would then have a contractual right to immediate payment upon the completion of the work.

Curative provisions in a law of this character may cure any defect that does not go to the jurisdiction of the board over the proceeding. It has been said that they may cure any defect arising from the omission of any step in the proceeding which the legislature might have itself omitted from the law, if it be a thing not essential to due process of law, or necessary to comply with some other constitutional prerequisite. *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Chase v. Trout*, 146 Cal. 359, 80 Pac. 81. As a general proposition this is a correct statement of the law. The difficulty with its application to the present case is that here the charter, with respect to the powers of the board of supervisors to adopt a procedure ordinance, stands in the place of a constitution; indeed, it is more

Public improve-
ments—provision
for assessments
—effect of appeal.

stringent, for its provisions on this subject constitute a specific grant of power, and not a limitation upon powers included in a general grant. The charter says that an assessment for this amount shall not be made, except it be payable in annual instalments. The curative provision of the ordinance, if allowed the effect contended for, would, in effect, declare that a valid assessment for this excessive amount can be made, although payable immediately and not in instalments, provided no objection thereto is made until after the work is done.

—curative provisions—validity. The prohibition of the charter against such assessments would thus be evaded and defeated.

We think the general rule of construction with regard to curative provisions of this character is that they are not to be considered as intended to apply to any one of those preliminary steps in the proceeding

—curing fundamental defects. which the statute itself requires to be taken whereby jurisdiction of the proceeding is to be acquired by the local board or body in charge thereof, unless such intent is expressly declared, or appears by necessary implication. Of course, it could in no case excuse or cure a want of due process of law. And where several material acts are prescribed for obtaining jurisdiction, and are adapted to that purpose, it is difficult to perceive how a general curative clause can be held to apply to any of them. For if it could be applied in one case to excuse the want of one of such acts, it could in another case be made to dispense with another, and so all of them would, one by one, be declared unimportant, and a compliance with any one of them would be sufficient in any case. With respect to the curative provision here involved, we think it must be held that it was not intended to allow a disregard of the jurisdictional acts which the ordinance itself expressly declares shall be mandatory. Our conclusion is that the assessment against the

property of Pearson was void. This brings us to the second question.

2. There was no dispute or difference between the parties concerning the existence or nonexistence of any fact, nor regarding the validity or invalidity of the claim of the plaintiff. Both parties acted with the belief, or upon the tacit assumption, that it was a valid demand and an enforceable lien upon the property. So far as the evidence shows, neither party knew the amount of the tax valuation for the current year. Even if the claim had constituted a valid lien against the property, it would not have been a personal obligation of the defendant, but a mere lien upon his property, enforceable only by foreclosure. *Taylor v. Palmer*, 31 Cal. 254. It does not appear that the plaintiff asserted that Pearson was personally liable for the claim. The asserted lien was not released, and there was no agreement or understanding that it should be released. The fact that the assessment was more than 50 per cent of the tax valuation was a matter which appears of record, and could not be, and was not, disputed by either party. There was therefore no consideration whatever for the note, other than the extension of time to the defendant wherein to pay a claim that he was under no obligation to pay at all, and the corresponding forbearance of plaintiff for ninety days to foreclose the claim of lien which was of no validity, and which, if foreclosed and the land sold thereunder, would have given the purchaser no title thereto.

On behalf of the plaintiff it is contended that a promise given in consideration of an extension of time to pay a demand, and a corresponding forbearance to sue during the time allowed, is based upon a good consideration, even if it appears that the demand was of no legal validity, and there was no doubt or dispute concerning the facts upon which it was founded. In sup-

Bills and notes—absence of consideration—assessment in excess of authority.

port of this proposition a number of decisions are cited. Upon examination we find that each of them comes within the well-established rule that a promise given in consideration of the settlement or compromise of a dispute or controversy, the event of which is uncertain or doubtful, or even in consideration of the forbearance to sue upon or the extension of time of payment of a lawful demand, is founded upon a sufficient consideration. Of the cases cited, the nearest in analogy to the case at bar is *Young v. French*, 35 Wis. 111. In that case the defendant was in possession of logs, with power to sell them on commission. His sales depended upon his continued possession. The plaintiff claimed a lien against the logs for a demand against the owner, and threatened to file such lien. Defendant promised plaintiff to pay his demand if he would refrain from filing the lien, which the plaintiff thereupon did; defendant holding possession of the logs by means of his promise. The decision was expressly put on the ground that the defendant had thus retained possession of the logs, and was enabled to exercise his right to sell them on commission, and that plaintiff had relinquished his right to file a claim of lien, and that these respective concessions and benefits were sufficient consideration for the promise. It was said that, under these circumstances, it was immaterial whether the plaintiff's claim to a lien was valid or not.

The decision was correct, but it is not applicable here. Where there has been a compromise of doubtful claims, or concessions and benefits given and received in good faith, as consideration for a promise, the actual validity of the claims is immaterial; otherwise, as remarked by Mr. Wharton: "There could be no compromise of litigation, since there is no litigation . . . in which one or the other party, if the case be pressed to judgment, does not fail to make out his case."

Wharton, Contr. § 533; *McClure v. McClure*, 100 Cal. 343, 34 Pac. 822.

But in the same section that author states that "a promise to compromise a claim utterly unfounded will not be regarded as a valuable consideration."

In *Elliott on Contracts*, vol. 1, § 235, it is said: "If the claim threatened to be enforced is invalid or worthless, a promise not to attempt to enforce or to refrain from making trouble concerning it is not a consideration, recognized by the law as valuable."

In 8 C. J. at page 238, the rule is stated thus: "The actual forbearance or the promise to forbear to prosecute a claim on which one has a right to sue is a sufficient consideration; but such forbearance is no consideration, if it is clear that no action would lie."

Other writers state the same doctrine. 1 *Beach*, Contr. § 176; *Bishop*, Contr. § 70; 1 *Chitty*, Contr. § 39; 1 *Parsons*, Contr. § 441. An examination of the cases cited by these writers shows that the text is fully supported. There has been no decision of this court precisely on the point involved, but it was presented to the district court of appeal in *Pacific R. Adv. Co. v. Carr*, 29 Cal. App. 722, 157 Pac. 529. There the plaintiff presented to defendant a claim against a corporation in which the defendant was the principal stockholder. The claim against the corporation was invalid. The defendant agreed to assume the claimed indebtedness and executed a note therefor, and upon its maturity she executed another note in renewal. The action was upon the last note. The court said: "The consideration for her note was the purported obligation of the company upon this contract; but there was no obligation, either express or implied. This being true, it cannot be said there was any consideration for the execution of the note sued upon. Clearly, if suit had been brought upon the contract against

the Amritam Company, no recovery could have been had thereon upon a showing of the facts here presented. And if there was nothing upon which to base an action against the Amritam Company, it must follow that plaintiff, in releasing the company from liability which did not exist, suffered no prejudice by reason thereof."

And it was said that, unless there was some uncertainty or doubt concerning the validity of the claim for which the note was given, it did not come within the category of a compromise of a doubtful or disputed claim, and there was no consideration for the new promise. We cite a few of the many cases establishing this doctrine: *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492; *Daniel v. Hughes*, 196 Ala. 368, 72

So. 23; *Ernst Bros. v. Hollis*, 86 Ala. 513, 6 So. 85; *Smith v. Easton*, 54 Md. 147, 39 Am. Rep. 355; *Foster v. Metts*, 55 Miss. 82, 30 Am. Rep. 504.

In this case there was no disputed claim, no compromise of a doubtful right, no release of the lien of the plaintiff, and there was no valid claim against the defendant in existence.

Contract—
consideration—
extension of
baseless demand.

The claimed lien was wholly without foundation and absolutely void, and it constituted no consideration for a promise to pay the demand or any part thereof.

The judgment is affirmed:

We concur: *Lennon, J.; Wilbur, J.; Melvin, J.*

We dissent: *Olney, J.; Lawlor, J.*

ANNOTATION.

Validity of promise based on invalid paving assessment.

The general principles regulating the validity of the compromise and settlement of doubtful and unfounded claims are well stated in the reported case (*CITY STREET IMPROV. CO. v. PEARSON*, ante, 1317). A disputed or doubtful claim is a good consideration for an executory contract of compromise, while a claim utterly unfounded is not. See also 5 R. C. L. pp. 879 et seq. A question of difficulty arises, however, in determining whether the claim which furnishes the basis of the compromise falls in

one class or the other. No cases other than the reported case (*CITY STREET IMPROV. CO. v. PEARSON*) have been found in which the sufficiency of an invalid paving assessment as a consideration for a compromise was decided. Nor has a case been found in which the sufficiency of such a consideration for a promise, other than by way of compromise, is discussed. As may be observed, in the reported case, the invalid paving assessment is held not to be sufficient consideration to support a compromise. W. A. E.

EVELYN P. FERRY, Appt.,

v.

SPOKANE, PORTLAND, & SEATTLE RAILWAY COMPANY et al.

United States Supreme Court — April 10, 1922.

(— U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 358.)

Constitutional law — privileges and immunities — dower right.

1. Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provision of U. S. Const. article 4,

§ 2, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, or of the declaration of U. S. Const. 14th Amendment, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

[See note on this question beginning on page 1330.]

—equal protection of the law — non-residents — dower.

2. Limiting the dower right of a nonresident to the lands of which the husband died seised, while residents are entitled to dower in any lands of which the husband was seised during coverture, does not deny the equal protection of the laws.

—due process of law — barring dower.

3. The legislature of a state having

the power to give or withhold dower, it follows that it has the power to declare the manner in which the dower may be barred, or the grounds upon which it may be forfeited; and, if so, it has the right to provide, so far as any question of due process of law is concerned, that it may be barred as to property of which the husband did not die seised, by the wife's nonresidence in the state.

APPEAL by plaintiff from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the District Court for the District of Oregon dismissing a bill filed to establish a dower right.; *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Henry L. Brant, Charles Haldane, Francis L. Patton, Jr., James G. Wilson, and George B. Guthrie, for appellant:

The "privileges and immunities" section of art. 4, § 2, of the United States Constitution and of the 14th Amendment thereto, protects citizens of other states in the enjoyment of substantial rights, and is not circumvented by statutes designed to discriminate on the mere basis of non-residence.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; Magill v. Brown, Brightly, N. P. 346, note, Fed. Cas. No. 8,952; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Re Stanford, 126 Cal. 122, 45 L.R.A. 788, 58 Pac. 462; Re Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228; United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 Sup. Ct. Rep. 133.

"Citizenship" and "residence," while not strictly synonymous under all circumstances, are practically so,

so far as they are used in the Oregon statutes and as they apply to the case at bar.

Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228.

The right to succeed to property in one state by a citizen residing in another state is protected by art. 4, § 2, of the Federal Constitution, and by the 14th Amendment thereto.

Magill v. Brown, Brightly, N. P. 346, note, Fed. Cas. No. 8,952; Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; Re Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; Re Johnson, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424.

A state has no right to penalize a person for removing from the state, either by fine, or tax, or the deprivation of any property right based merely on such removal.

Crandall v. Nevada, 6 Wall. 36, 18 L. ed. 745; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Chalker v. Birmingham & N. W. R. Co. and Travis v. Yale & T. Mfg. Co. supra.

The right of dower is just as fundamental and substantial as the right of inheritance or succession to property; and the states may not discriminate against citizens of other states

in applying laws of dower, inheritance, or succession.

Magill v. Brown, *supra*; *Re Stanford*, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; *Re Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; *Re Johnson*, *supra*.

Messrs. Charles H. Carey, James B. Kerr, and Omar C. Spencer, for appellees:

A woman not a resident of the state is not entitled to dower in the lands therein, of which her husband did not die seised.

Thornburn v. Doscher, 13 Sawy. 60, 32 Fed. 810; *Cunningham v. Friendly*, 70 Or. 222, 139 Pac. 928, 140 Pac. 989; *Woolsey v. Draper*, — Or. —, 201 Pac. 730; *Pratt v. Tefft*, 14 Mich. 191; *Ligare v. Semple*, 32 Mich. 438; *Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886; *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222; *Ekegren v. Marcotte*, 159 Wis. 539, 150 N. W. 969; *Atkins v. Atkins*, 18 Neb. 474, 25 N. W. 724; *Miner v. Morgan*, 83 Neb. 400, 119 N. W. 781; *Burr v. Finch*, 91 Neb. 417, 136 N. W. 72; *Buffington v. Grosvenor*, 46 Kan. 730, 13 L.R.A. 282, 37 Pac. 137.

The right of a state to define marital property rights as between residents and nonresidents is directly recognized by the Supreme Court.

Conner v. Elliott, 18 How. 591, 15 L. ed. 497.

There is a just ground for the distinction between residents and nonresidents in the statute, and therefore § 2 of article 4 of the Federal Constitution does not apply.

LaTourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 Sup. Ct. Rep. 160; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *Travis v. Yale & T. Mfg. Co.* 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *Anderson v. Durr* (U. S. Adv. Ops. 1921-22, p. 18) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 15.

Mr. Justice McKenna delivered the opinion of the court:

By a bill filed in the district court of the United States for the district of Oregon, appellant asserted a dower right in one half part of certain land in possession of the railway company.

The bill was dismissed on motion of the railway company, and the company was awarded judgment

for costs. On appeal by the complainant in the suit, the judgment was affirmed. Against the affirmance this appeal is prosecuted.

The law of Oregon provides: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one half of the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." § 7286.

"A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seised, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death." § 7306.

Appellant adduces against the validity of § 7306, the provision of § 2 of article 4 of the Constitution of the United States that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the provisions of the 14th Amendment, which declare that no state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws."

Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is

Constitutional law—privileges and immunities—dower right.

attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits. *Conner v. Elliott*, 18 How. 591, 15 L. ed. 497. Neither § 2 of article 4 nor the 14th Amend-

ment takes from the several states the power to regulate this subject; nor does either make it a privilege or immunity of citizenship. *Maxwell v. Bugbee*, 250 U. S. 525, 537, 538, 63 L. ed. 1124, 1130, 1131, 40 Sup. Ct. Rep. 2, and cases cited; *United States v. Wheeler*, 254 U. S. 281, 296, 65 L. ed. 270, 274, 41 Sup. Ct. Rep. 133.

The further contention, based on the 14th Amendment, necessarily is, as counsel urge, that dower is "fundamental and substantial"—"a property right, being, while inchoate, a chose in action, of which no citizen of the United States, wherever he [she] may be resident, can be deprived without 'due process of law,' and as to which every person is entitled to the 'equal protection of the laws,' as provided in the 14th Amendment of the Constitution."

The court of appeals considered this contention, and it is difficult to add anything to its opinion. It pointed out that the Oregon statute was taken from the laws of Michigan, adopted in 1846, and sustained.¹ The example of Michigan was followed in Wisconsin, Kansas, and Nebraska, and sustained by the courts of those states.²

To the decisions of those courts we may add *Thorburn v. Doscher*, United States district court for Oregon, 13 Sawy. 60, 32 Fed. 810, which sustained the Oregon statute, as did the supreme court of Oregon in *Cunningham v. Friendly*, 70 Or. 222, 139 Pac. 928, 140 Pac. 989. And we may add also *Richards v. Bellingham Bay Land Co.* 4 C. C. A. 290, 7 U. S. App. 494, 54 Fed. 209, which decided to be legal a like statute of the state of Washington.

¹ *Pratt v. Tefft*, 14 Mich. 191; *Ligare v. Semple*, 32 Mich. 438; *Stringer v. Dean*, 61 Mich. 203, 27 N. W. 886.

² *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222; *Ekegren v. Marcotte*, 159 Wis. 539, 150 N. W. 969; *Atkins v. Atkins*, 18 Neb. 474, 25 N. W. 724; *Miner v. Morgan*, 83 Neb. 400, 119 N. W. 781; *Buffington v. Grosvenor*, 46 Kan. 730, 13 L.R.A. 282, 27 Pac. 137.

20 A.L.R.—84.

And Blackstone speaks of dower as having become "a great clog to alienation," and "otherwise inconvenient to families." 1 Washb. Real Prop. 5th ed. 278, in note.

The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate, and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification. It satisfies, therefore, the constitutional requirement —equal protection of the law—nonresidents—dower. of the equal protection of the laws; and we proceed to the inquiry whether the statute is otherwise valid.

Appellant's contention is that, though she be living in New York, it is her privilege, under the 14th Amendment, to resist the law of Oregon as a limitation of her dower rights; that is, a limitation of rights in property situated in Oregon. The contention might be tenable if the legislature of a state was required to grant dower rights. As repellent of that proposition, the difference the laws of the states exhibit in the rights that attach to the marriage relation may be adduced. The states greatly differ as to what lands are dowable, and as to what claims are paramount to dower, and, to some extent, how it will be barred. 4 Kent, Com. 35 et seq.

The granting of dower, therefore, is a matter of statutory regulation. It was so decided by the United States district court of Oregon in 1887 (*Thorburn v. Doscher*, supra), Judge Deady expressing it as follows: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may, for the security of titles and the protection of innocent purchasers, provide that a

nonresident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man." The law thus declared has been the law of Oregon for sixty-five years.

There is a distinction between dower created by the parties and that given by law, and the latter "it is believed to be the only kind which ever obtained in this country." *Randall v. Kreiger*, 23 Wall. 137, 148, 23 L. ed. 124, 126. Expressing the power of the legislature over it, the court said: "During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs, the law of descent and distribution may be molded according to the will of the legislature."

The ruling is a deduction or incident of the more general principle expressed in *Kerr v. Moon*, 9 Wheat. 565, 569, 6 L. ed. 161, 162, "that the title to, and the disposition of, real property, must be exclusively subject to the laws of the country where it is situated." And this was so considered and the case cited in *Thomas v. Woods*, 26 L.R.A. (N.S.) 1180, 97 C. C. A. 535, 173 Fed. 585, 593, 19 Ann. Cas. 1080, along with a number of other cases, to sustain the court in the declaration and decision that "the right of dower in real property is determined by the laws of the state in which the property is situated."

From these cases it results, as said by the circuit court of appeals, that, "the legislature having this power to give or withhold dower, it follows that it has ^{—due process of law—barring} the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the state." [268 Fed. 120.]

The action of the court, affirming the decree of the District Court, is affirmed.

ANNOTATION.

Constitutionality of statutes in relation to dower.

The construction of the statutes, except so far as affected by consideration of constitutional limitations, is not within the scope of the annotation.

In general.

By the great weight of authority the wife's right of dower may, at any time before the husband's death, be enlarged, abridged, or abolished.

United States.—*Randall v. Kreiger* (1875) 23 Wall. 137, 23 L. ed. 124; *Thornburn v. Doscher* (1887) 13 Sawy. 60, 32 Fed. 810; *Richards v. Bellingham Bay Land Co.* (1893) 4 C. C. A. 290, 7 U. S. App. 494, 54 Fed.

209; *Ferry v. Spokane, P. & S. R. Co.* (1920) 268 Fed. 117.

Alabama.—*Boyd v. Harrison* (1860) 36 Ala. 533; *Ware v. Owens* (1868) 42 Ala. 212, 94 Am. Dec. 642.

Illinois.—*Sturgis v. Ewing* (1856) 18 Ill. 176; *Henson v. Moore* (1882) 104 Ill. 403; *McNeer v. McNeer* (1892) 142 Ill. 388, 19 L.R.A. 256, 32 N. E. 681 (overruling *Russell v. Rumsey* (1864) 35 Ill. 362).

Indiana.—*Noel v. Ewing* (1857) 9 Ind. 37; *Taylor v. Stockwell* (1878) 66 Ind. 505; *Green v. Estabrook* (1906) 168 Ind. 123, 120 Am. St. Rep. 349, 79 N. E. 373.

Iowa. — *Lucas v. Sawyer* (1864) 17 Iowa, 517.

Kansas. — *Buffington v. Grosvenor* (1891) 46 Kan. 730, 13 L.R.A. 282, 27 Pac. 137; *Hamblin v. Marchant* (1918) 103 Kan. 508, 6 A.L.R. 1403, 175 Pac. 678.

Maine. — *Barbour v. Barbour* (1858) 46 Me. 9; *McAllister v. Dexter & P. R. Co.* (1910) 106 Me. 371, 29 L.R.A. (N.S.) 726, 76 Atl. 891, 21 Ann. Cas. 486.

Minnesota. — *Morrison v. Rice* (1886) 35 Minn. 436, 29 N. W. 168; *Griswold v. McGee* (1907) 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382, 12 Ann. Cas. 186.

Mississippi. — *Magee v. Young* (1866) 40 Miss. 164, 90 Am. Dec. 322.

Missouri. — *Chouteau v. Missouri P. R. Co.* (1894) 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

Nebraska. — *Miner v. Morgan* (1909) 83 Neb. 400, 119 N. W. 781.

New York. — *Lawrence v. Miller* (1848) 1 Sandf. 516; *Moore v. New York* (1851) 4 Sandf. 456, affirmed in (1853) 8 N. Y. 110, 59 Am. Dec. 473.

Pennsylvania. — *Melizet's Appeal* (1851) 17 Pa. 449, 55 Am. Dec. 573.

Washington. — *Hamilton v. Hirsch* (1884) 2 Wash. Terr. 223, 5 Pac. 215.

West Virginia. — *Thornburg v. Thornburg* (1881) 18 W. Va. 522.

Wisconsin. — *Bennett v. Harms* (1881) 51 Wis. 251, 8 N. W. 222.

In *Randall v. Kreiger* (U. S.) *supra*, upholding a state statute enacted before the husband's death, which had the effect to validate a deed executed under a joint power of attorney from husband and wife, which at the time it was given was not authorized by the law of Minnesota where the real property was situated, the court, as to the right of dower, said: "During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, be-

fore the death of the ancestor. Until that event occurs, the law of descent and distribution may be molded according to the will of the legislature."

The right of dower not existing by virtue of contract, the obligation of a contract is not impaired by the modification of the law which governs it prior to the husband's death. *Boyd v. Harrison* (Ala.) *supra*.

So, the interest of a wife under a statute declaring that one half her husband's property shall be set apart to her upon his death may be changed or destroyed by statute before the husband's death. *Hamblin v. Marchant* (Kan.) *supra*.

And it is competent for the legislature, before the husband's death, to change the relative rights of husband and wife after marriage, and to substitute for dower inchoate another and larger estate, to be carved out of that of the husband after his death. *Noel v. Ewing* (Ind.) *supra*.

So, a statute providing that a wife shall not be entitled to dower if her separate property is equal in value to what would be her portion of her husband's real and personal property is, with reference to the rights of married women whose husbands were living at the date of its enactment, a legitimate exercise of the power of the legislature. *Magee v. Young* (Miss.) *supra*.

So, too, it is competent and constitutional for the legislature to provide that in acquiring the estate of a husband in land, subject to public use, the inchoate right of dower therein is suspended during the existence of the public use. *Chouteau v. Missouri P. R. Co.* (Mo.) *supra*.

And the legislature has the power to pass an act providing that a wife who voluntarily leaves her husband without such just cause as would entitle her to divorce, and lives separate and apart from him at his death, shall be debarred of her dower inheritance. *Thornburg v. Thornburg* (W. Va.) *supra*.

A statutory provision that, in all cases of judicial sales of real estate in which a married woman had an inchoate interest by virtue of her mar-

riage, such interest, if not directed by the judgment to be sold, should be absolutely vested in the wife, in the same manner and to the same extent as upon the death of her husband, whenever, by virtue of such sale, the legal title of the husband should become absolutely vested in the purchaser, was held to apply to all sales upon judgment rendered, after its passage, upon contracts entered into before its passage, and was not in conflict with the provisions of the state and Federal Constitutions, prohibiting the enactment of any statute impairing the obligations of contracts. Accordingly, it was further held that where a husband, before the passage of such law, executed his promissory note, upon which, after the passage of such act, the payee recovered judgment to satisfy which the land was sold on execution, his wife was entitled to the interest given her by the statute in the land sold. *Taylor v. Stockwell* (1878) 66 Ind. 505.

And in *Green v. Estabrook* (1906) 168 Ind. 123, 120 Am. St. Rep. 349, 79 N. E. 373, this statute was held not to be invalid as depriving the husband of his property, since it did not attach until all his interest in the premises sold on execution was irretrievably lost. The court declared that the authority of the lawmaking power over the marriage relation and its incidents was clearly sufficient to uphold the statute.

There are a few cases which seem to be opposed to the general rule, and which hold that it is beyond the power of the legislature to change the relative rights of husband and wife to the extent of giving the wife enlarged dower rights, even when no rights of third persons have vested prior to the passage of the act enlarging such dower rights. *Sutton v. Askew* (1872) 66 N. C. 172, 8 Am. Rep. 500; *Wesson v. Johnson* (1872) 66 N. C. 189; *Jenkins v. Jenkins* (1880) 82 N. C. 208.

In *Sutton v. Askew* (N. C.) supra, holding that an act giving a widow dower in all lands of which her husband was seised during coverture, instead of in the lands only of which

the husband died seised, as was the law before the act was passed, could not apply to parties whose marriage was contracted before it took effect, since it was beyond the power of the legislature to increase dower rights springing from former marriages, the court reasoned that thus to increase the dower right would be interfering with the vested right of the husband.

And *Sutton v. Askew* was followed in *Wesson v. Johnson* (1872) 66 N. C. 189, in which it was held that the same statute was unconstitutional, so far as it applied to marriages contracted previous to its passage, and that a widow whose marriage took place before its enactment had no interest in land mortgaged by her husband without her joining therein.

A curative act which attempts to legalize a husband's conveyance of his wife's dower rights, under power of attorney given him by the wife for that purpose, is unconstitutional where, by statute, a wife is prohibited from granting her husband power of attorney to alienate her right of dower. *Swartz v. Andrews* (1908) 137 Iowa, 261, 126 Am. St. Rep. 285, 114 N. W. 888.

The opinion expressed in *Williams v. Courtney* (1883) 77 Mo. 587, that the legislature has not the power to divest inchoate right of dower, was stated in *Chouteau v. Missouri P. R. Co.* (1894) 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, to be disapproved and not to be followed.

Discrimination against nonresident.

The decision in the reported case (*FERRY v. SPOKANE, P. & S. R. Co.* ante, 1326) that a statute limiting the dower rights of a nonresident wife to the land of which her husband died seised, while a resident wife is entitled to dower in any land of which her husband was seised during coverture, is constitutional, is supported by *Buffington v. Grosvenor* (1891) 46 Kan. 730, 13 L.R.A. 282, 27 Pac. 137, holding that there is no unconstitutional discrimination against a nonresident widow under the Federal Constitution, 14th Amendment, where by statute it is provided that a conveyance by her husband of his property is

sufficient to cut off her interest, if she was not then, and never had been, a resident of the state.

So, in *Miner v. Morgan* (1909) 83 Neb. 400, 119 N. W. 781, it was held that a statute providing that a non-resident widow should have dower only in lands of which her husband died seised, while a resident widow was entitled to dower in lands of which the husband was seised during coverture, was not unconstitutional as denying the equal protection of the laws, or as denying due process of law.

And to the same effect is *Bennett v. Harms* (1881) 51 Wis. 251, 8 N. W. 222. [Bennett v. Harms was overruled in *Ekegren v. Marcotte* (1915) 159 Wis. 539, 150 N. W. 969, but only as to the construction placed upon the statute.]

And see also *Thornburn v. Doscher* (1887) 13 Sawy. 60, 32 Fed. 810; *Pratt v. Tefft* (1866) 14 Mich. 191; *Ligare v. Semple* (1875) 32 Mich. 438; *Atkins v. Atkins* (1885) 18 Neb. 474, 25 N. W. 724, and *Cunningham v. Friendly* (1914) 70 Or. 222, 139 Pac. 928, 140 Pac. 989, which recognize the constitutionality of such a statute.

The court in the *Thornburn* case (Fed.) supra, said: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether, or it may, for the security of titles and the protection of innocent purchasers, provide that a nonresident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man."

As affecting rights previously vested by contract or death of husband.

Legislation affecting dower rights will not be upheld if it divests vested rights. *M'Cafferty v. M'Cafferty* (1846) 8 Blackf. (Ind.) 218; *Strong v. Clem* (1859) 12 Ind. 37, 74 Am. Dec. 200; *Logan v. Walton* (1859) 12 Ind. 639; *Frantz v. Harrow* (1859) 13 Ind.

507; *Strong v. Dennis* (1859) 13 Ind. 514; *Hoskins v. Hutchings* (1871) 37 Ind. 324; *May v. Fletcher* (1872) 40 Ind. 575; *Taylor v. Sample* (1875) 51 Ind. 423; *Parkham v. Vandeventer* (1882) 82 Ind. 544; *Helphenstine v. Meredith* (1882) 84 Ind. 1; *Davis v. O'Ferrall* (1853) 4 G. Greene (Iowa) 168; *Young v. Wolcott* (1855) 1 Iowa, 174; *Moore v. Kent* (1873) 37 Iowa, 20, 18 Am. Rep. 1; *Bottomf v. Lewis* (1903) 121 Iowa, 37, 95 N. W. 262; *Given v. Marr* (1847) 27 Me. 212; *Curtis v. Hobart* (1856) 41 Me. 230; *Morrison v. Rice* (1886) 35 Minn. 436, 29 N. W. 168; *Talbot v. Talbot* (1883) 14 R. I. 57.

Thus, so far as the husband and wife, or the widow and heirs, are concerned, the legislature has full control of the subject of dower prior to the husband's death; but such is not the case when the legislation would affect the rights of innocent purchasers. Vested rights and the obligation of contracts cannot be impaired. *Davis v. O'Ferrall* (1853) 4 G. Greene (Iowa) 168.

So, a statute abolishing dower and substituting fee simple was held in *Strong v. Clem* (1859) 12 Ind. 37, 74 Am. Dec. 200, to be unconstitutional and void so far as it operated to divest rights vested under a previous conveyance by the husband to a third person, in which the wife did not join although it was effective to destroy the wife's inchoate right of dower. And this case was followed as authority in *Logan v. Walton* (1859) 12 Ind. 639.

And the rule laid down in *Strong v. Clem* (Ind.) supra, was applied in *Hoskins v. Hutchings* (1871) 37 Ind. 324, where a widow claimed one third in fee simple of land mortgaged by her husband alone before the passage of the statute. In reply to this claim the court said that when the mortgage was executed it gave the creditor a valid lien on the land, subject only to the contingent right of the wife to dower, if she should survive her husband; and that it was beyond the power of the legislature to "increase the interest of the wife, and in the same proportion diminish that of the mortgagee, without incurring the

charge of having impaired the obligation of the contract. The creditor has here a specific lien upon the mortgaged premises which cannot be taken away from him, without an evident infraction of the Constitution of the United States, and a violation of a plain principle of justice and right."

In *Hilton v. Thatcher* (1906) 31 Utah, 360, 88 Pac. 20, it was held that a statute that gives a widow an estate in fee in her husband's land, instead of a third interest for life as dower, cannot be made effective retroactively as against a prior purchaser from the husband. [Although the point is not within the scope of the annotation, it may be noted that the court in this case, by holding that the statute did not create a new right, but enlarged the common-law right, held that the widow was entitled to the common-law right of dower as against the prior purchaser, thus avoiding the result reached in *Strong v. Clem* (Ind.) supra, of holding that the widow had no right at all.]

In *M'Cafferty v. M'Cafferty* (1846) 8 Blackf. (Ind.) 218, supra, it was held that a statute which gave a wife, divorced for the fault of her husband, dower in the same manner as if he were dead, could not affect a title procured from the husband prior to the enactment of the law. The court said that the purchaser held a vested right in the land conveyed, subject to the contingency of the dower right of the wife should she survive her husband. "To subject these lands by a subsequent law to the right of dower upon the happening of some other event would not only be depriving the own-

ers of a vested right, but it would also be impairing the obligation of the grant or contract under which they hold that right. To do this is beyond the constitutional power of the legislature." And to the same effect is *Comly v. Strader* (1848) Smith (Ind.) 75.

The legislature cannot enlarge dower rights of a widow as against the rights of one who has contracted for a judgment lien on the property of the husband, in view of the constitutional provision against impairing the obligation of contracts, although the judgment is not actually entered until after the statute is passed. *Davidson v. Richardson* (1907) 50 Or. 323, 17 L.R.A. (N.S.) 319, 126 Am. St. Rep. 738, 89 Pac. 742, 91 Pac. 1080.

In *Bottorff v. Lewis* (1903) 121 Iowa, 27, 95 N. W. 262, it was held that the dower interest of a widow which had become vested upon the death of her husband could not be increased by subsequent legislation to the prejudice of the heirs.

And see *Swartz v. Andrews* (1908) 137 Iowa, 261, 126 Am. St. Rep. 285, 114 N. W. 888, which held unconstitutional an act which deprived a widow of her vested right of dower.

A statute that provides that the court may authorize the owner of an estate in fee to give security for the annual value of dower assigned to a widow in lieu of an estate out of the rents, issues, and profits, out of which it was assigned, even though the widow be unwilling, is, in so far as it affects dower assigned before its enactment, unconstitutional and void. *Talbot v. Talbot* (1883) 14 R. I. 57.

J. H. B.

J. T. WILKERSON et al., Plffs. in Err.,

v.

CITY OF ROME et al.

Georgia Supreme Court — February 18, 1922.

(152 Ga. 762, 110 S. E. 895.)

Constitutional law — requiring Bible to be read in public schools.

1. The ordinance enacted by the city commission of Rome, requiring

Headnotes by GILBERT, J.

some portion of the King James version of the Bible of either the Old or New Testament to be read and prayer offered to God in the hearing of the pupils daily during the regular sessions of the school, is not in conflict with either of the following paragraphs of the Constitution of Georgia: (a) Article 1, § 1, ¶ 12, which reads as follows: "All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience." (b) Article 1, § 1, ¶ 13, which reads as follows: "No inhabitant of this state shall be molested in person or property, or prohibited from holding any public office or trust, on account of his religious opinions; but the right of liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." (c) Article 1, § 1, ¶ 14, which reads as follows: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

[See note on this question beginning on page 1351.]

Schools — control — municipal charter.

2. Under the terms of the charter of the city of Rome, the board of education has supervision and control over the public schools of said city, subject to the provisions of the charter and the ordinances lawfully passed by the city commissioners.

Mandamus — to require reading of Bible in school.

3. Mandamus is a proper remedy to require the board of education of the city of Rome to perform the duty imposed by the ordinance of the city of Rome, because mandamus is the only

adequate, specific, and complete remedy to enforce such duty. While courts will not undertake to control the exercise of matters intrusted to the discretion of public school officers, nor to compel such officers to do in a specific manner any act which involves discretion and judgment, it will issue to command said officers to act in the exercise of their discretion. [See 18 R. C. L. 124; 3 R. C. L. Supp. 786.]

— absolute writ.

4. The court did not err, for any of the reasons stated, in granting a mandamus absolute.

(Beck, P. J., and Hines, J., dissent.)

ERROR to the Superior Court for Floyd County (Wright, J.) to review a judgment in favor of petitioners in a proceeding for a writ of mandamus to compel defendants to put in effect an ordinance requiring religious exercises in the public schools of the plaintiff city. *Affirmed.*

Statement by Gilbert, J.:

The city of Rome, E. E. Lindsay as chairman of the commission of the city of Rome, and E. E. Lindsay as a citizen of that city filed a petition against the individual members of the board of education of the city, reciting that it is the duty of the board of education, under the charter of the city, to supervise and control the public schools of the city in accordance with the provisions of the charter and ordinances of the city, and to carry into effect all ordinances duly and regularly adopt-

ed by the commission of the city of Rome with reference to the government and conduct of the schools, and that said board of education has refused to carry into effect the provisions of an ordinance adopted by the city commission as follows, to wit: "Be it ordained by the board of commissioners of the city of Rome, Georgia, and it is hereby ordained by authority of the same, that the board of education shall require some portion of the King James version of the Bible, of either the Old or New Testament, to be

read and prayer offered to God in the hearing of the pupils of the public schools of the city of Rome daily during the regular sessions of these schools and that such time shall be allowed and appointed for these exercises as will admit of their being conducted with order and impressiveness. That these readings and prayers shall be conducted by the principals of said schools, or by persons invited by them for such services, and the selections of Scripture to be read shall be made by the persons conducting the readings, and the readings shall be without comment. Be it further ordained by the authority aforesaid, that exemption from attendance on these readings and prayers shall be granted to any pupil or pupils whose parents or guardians shall present to the superintendent of the schools request in writing for such exemption upon the ground of conscientious objections."

The prayer is that defendants be compelled by the writ of mandamus to perform the duty required of them by the ordinance.

The defendants filed an answer, in which, after denying that they are under any duty to comply with the provisions of the ordinance, they plead:

(a) Under the terms of the charter of the city of Rome they have authority, without interference from the commission of the city of Rome, to prescribe and put into effect the course of instruction in said schools, and that the ordinance is a usurpation of their powers, privileges, and duties in this respect; that the ordinance is of no legal effect, because it deprives them of their legal right to supervise and control the public schools of the city of Rome, by providing that the readings and prayers required shall be conducted by the principals of said schools, or by persons invited by them for such service, and further providing that the selections of the Scripture to be read shall be made by the persons conducting the readings, and by further providing

that the prayers offered to God in the hearing of the pupils of the public school shall be such prayers as the person offering should desire to make without regard to their tenor or effect. Defendants say that this puts the supervision and control of the passages of the Bible read, and prayers offered, in the hands of the principals of the schools, and removes any right or control over such principals from the board of education, and to this extent vests in the said principals the power and authority of selecting the course of instructions or readings from the Bible, without regard to the opinion of the board of education, or its right and duty to supervise and control the said schools. The said ordinance further in this endeavors to vest the principals of the schools with the right, duty, and authority to select and invite other persons to read the Bible and offer prayer. Said readings and offering of prayers, if it be a religious exercise, is prohibited by the law in public schools, as stated; and if it be a course of instructions, then the person delivering said course of instructions must of necessity be a teacher, and the absolute right of selecting the teachers for the public schools is vested in the board of education by the charter of the city of Rome, and this ordinance is violative of such provision of the charter. Also, that this proceeding for mandamus is useless and of no effect, for the reason that said ordinance prescribes what shall be done by said principals of the public schools, and if the same is valid and enforceable there is no necessity for the board of education to enforce the same.

(b) That the charter of the city provides a remedy for the failure of the school board to properly perform their duties, such remedy being by removal from office; and therefore mandamus will not lie.

(c) Said ordinance is in violation of article 1, § 1, ¶ 12, of the Constitution of Georgia.

(d) Said ordinance is in violation

of article 1, § 1, ¶ 13, of the Constitution of Georgia.

(e) That said ordinance is in violation of the Constitution of the state of Georgia as contained in ¶ 14, § 1, art. 1, in that the reading of the King James version of the Bible, either in its entirety or in part, and prayer, without any restriction on or guide for the person offering the prayer, is in aid of the Protestant sect of the Christian Church. Such version of the Bible is contrary to the beliefs, opinions, and teachings of the Roman Catholic sect of the Christian Church, and the reading of the New Testament therein is contrary to the beliefs and opinions of those holding the Jewish faith, and there are many Roman Catholics in the city of Rome, whose children or dependents attend the public schools, and who pay taxes on their property for the support and maintenance of the public schools, and there are many persons of the Jewish faith whose children or dependents attend the public schools, and who pay taxes for the maintenance of the public schools, besides other probable sects and religions. Furthermore, there are only seven principals of the public schools in the city of Rome, and each and all of them are members of the Protestant sects of the Christian religion. These persons are vested with the right to read such portion of said version of the Bible as they may desire, and to offer such prayers as they see fit, and furthermore to invite persons to perform such acts, without restriction or guide. Such prayers may be highly sectarian, and the defendants have no power under said ordinance to prohibit the same. The defendants officially represent the city of Rome and the people of the city, no matter what their religious views, opinions, or convictions may be. The ordinance in question is violative of the three paragraphs of the Constitution above set out, as well as of the charter of the city of Rome. No matter what may be said or given as a reason for the passage of said ordi-

nance, it was passed for the purpose and has the effect of giving religious instruction to the children attending the public schools in the Protestant branch of the Christian religion; and such persons as would not desire their children or dependents to receive such instructions are simply allowed to have them exempt from such instructions, but nevertheless the money which they pay for taxes is in part used for giving such religious instructions.

Messrs. Willingham, Wright, & Covington for plaintiffs in error.

Messrs. Max Meyerhardt, Graham Wright, and Maddox & Doyal for defendants in error.

Gilbert, J., delivered the opinion of the court:

1. The portions of the Constitution of this state now under consideration are all found in the Bill of Rights, art. 1, § 1, ¶¶ 12, 13, and 14. These paragraphs, declaring three distinct principles, may be referred to in their order as: (1) Freedom of religious conscience; (2) freedom of civil status; and (3) freedom from taxation for sectarian purposes. The precise question made in this case must not be overlooked. The reasons for the contention that the ordinance is violative of the above-mentioned paragraphs of the Constitution are as follows: First, that the reading of the King James version of the Bible is in aid of the Protestant sect of the Christian religion. Second, that such version is contrary to the beliefs, opinions, and teachings of the Roman Catholic sect of the Christian religion. Third, that it is contrary to the beliefs and opinions of those holding the Jewish faith. Fourth, that there are many persons of the Jewish faith and others not of the Protestant Christian sect who pay taxes for the maintenance of the public schools, and that the principals of the public schools are all of the Protestant sect; and therefore there would be a discrimination and violation of the freedom from taxation clause of the Constitution. It will conduce to a clearer construc-

tion by tracing to their origin the paragraphs of the Constitution referred to, and ascertaining the evils intended to be cured by them. The founders and early settlers of America consisted in large part of persons who fled from the religious persecutions of the old world to the shores of the new world in search of religious freedom. In establishing a government for themselves founded upon principles of religious liberty, they were by no means ungodly or insensible to the benefits of Christianity. There is abundant historical evidence, as well as the opinions of eminent statesmen and jurists, for the statement that the pioneers in the formation and conduct of American colonial governments did not have it in mind to bring about a complete separation of church and state. Indeed, as stated in 10 Mich. L. Rev. 164: "It is doubtful if in a single one of the colonies, before the Revolution, there was absolute freedom of belief and worship. . . . Thus, in every one of the American colonies the state already endeavored to interfere in matters religious, and in most of them a state church was established."

The colony of Georgia was not an exception to the general rule. In the charter granted to the "Trustees for Establishing the Colony of Georgia in America," it was declared that "there shall be a liberty of conscience allowed in the worship of God, to all persons . . . resident within our said province, and that all such persons, except papists, shall have a free exercise of religion, so they be contented with the quiet and peaceable enjoyment of the same, not giving offense or scandal to the government." McElreath, Ga. Const. § 235; 1 Jones's History of Georgia, 92.

In the year 1758 the province was divided into districts according to parishes. The parish at Savannah was designated as "Christ Church." The church erected there and the burial place appurtenant thereto were designated as "Parish Church and Cemetery of Christ Church."

It was provided that "Bartholomew Zouberbuhler, clerk, the present minister of Savannah, shall be the rector and incumbent of said church of Christ Church, and he is hereby incorporated and made a body politic and corporate, . . . enabled to sue and be sued, and shall have the cure of souls within said parish, and shall be in the actual possession of the said church with its cemetery and appurtenances, . . . together with the glebe land already granted to him."

And it was further provided that for the purpose of church repairs, care of cemeteries, to pay the salaries of the clerk and sexton, the rector and his church officials were authorized to levy a tax on the estate, real and personal, of all the inhabitants within their respective parishes. While the patronage of the Crown and of the colonial assembly was extended in this special manner in aid of churches professing the Episcopal faith, it was not designed to favor them by an exclusive recognition. Apparently it was intended to place the Episcopal Church on much the same basis as it existed in England. Mr. Jones, in his history, says: "There can be no doubt, however, but that it was the intention of the government, both royal and colonial, to ingraft the Church of England upon the province." 1 Jones, History of Georgia, 527.

We have no reported case arising in the colony of Georgia, involving the freedom of religious conscience clause of the royal charter to Georgia; but in the colony of Massachusetts, where a similar religious-liberty covenant existed, the question did arise. The provision in the colonial statute of Massachusetts was substantially identical with the ordinance of Rome, Georgia, now under consideration, except that the former, in addition to providing for the reading of the Bible and prayer, also provided "that the pupils learn the Ten Commandments and repeat them once a week." In this case, Com. v. Cooke, decided in 1859, reported in 7 Am. Law Reg. O. S. 417,

a son of the complainant, eleven years of age, a pupil in a public school, was chastised by the teacher for a refusal to comply with the requirements of the school in the matter. The case arose on the prosecution of the teacher. The court elaborately discussed the question, and, rejecting the contention of the complainant, said in part: "Our schools are the granite foundation on which our republican form of government rests. They were created and are now sustained by our Constitution and laws, and the almost unanimous voice of the people. But a pupil in one of them has religious scruples of conscience, and cannot read or repeat the Commandments, unless from that version of the Bible which his parents may approve. . . . If the plea of conscience and his constitutional rights would protect him from reading the Bible, is it not equally clear that he could not be compelled to hear it read? If, then, these are constitutional rights, secured to the children in our common schools, at any time when one pupil can be found in each public school in the commonwealth with conscientious scruples against reading the Bible, or hearing it read, the Bible may be banished from them, and so the matter of education may be taken from the state government and placed in the hands of a few children. Not Roman Catholic children alone. For if the plea of conscience is good for one form of sectarian religion, it is good for another. The child of a Protestant may say: 'I am a conscientious believer in the doctrine of universal salvation. There are portions of the Bible read in school which it is claimed by others tend to prove a different doctrine; my conscience will not allow me to hear it read, or to read it.' Another objects as a believer in baptism by sprinkling. 'There are passages in the Bible which are believed by some to teach a different doctrine. I cannot read it; conscience is in the way.' Still another objects as a believer in one God. 'The Bible, it is claimed by some,

teaches a different doctrine; my conscience will not allow me to read it or to hear it read.' And so every denomination may object for conscience' sake, and war upon the Bible and its use in common schools. Those who drafted and adopted our Constitution could never have intended it to meet such narrow and sectarian views. That section of the Constitution was clearly intended for higher and nobler purposes. It was for the protection of all religions,—the Buddhist and the Brahmin, the Pagan and the Jew, the Christian and the Turk,—that all might enjoy an unrestricted liberty in their religion, and feel an assurance that for their religion alone they should never, by legislative enactments, be subjected to fines, cast into prisons, starved in dungeons, burned at the stake, or made to feel the power of the inquisition."

Antedating the decision of this case, and continuing thereafter under the leadership of Roger Williams of Rhode Island, the movement for the separation of church and state proceeded with ever-increasing volume and strength. It should be clearly understood, however, that this was not a movement for the separation of state from Christianity, but specifically a separation of church and state. Christianity entered into the whole warp and woof of our governmental fabric. Many of the statesmen of this country treated Christianity as a part of the law of the land. In the Declaration of Independence, God, as our creator, was acknowledged as follows: "We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do," etc. "And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

Edward Thomson, in 20 Case & Comment, 525 et seq., has furnished

a most interesting paper on the subject of the relation of religion to our government. He quotes from Coolsey's Constitutional Limitations and Story on the Constitution, showing a construction by these eminent authors with which we find ourselves in accord. He makes the claim that Christianity is the only religion known to our American law; that marriage, usury, the doctrine of charities, and the like, are all derived from the Christian religion. He draws attention to the fact that when our Chief Executive is inaugurated, he is sworn upon the Bible, and he quotes from the last inaugural address of President Cleveland this language: "Above all, I know there is a Supreme Being, whose goodness and mercy have always followed the American people; and I know he will not turn from us now if we humbly and reverently seek his powerful aid."

Similar language is quoted from the addresses of other Presidents, and attention is called to the fact that religious proclamations and national Thanksgiving proclamations have been issued by our Presidents for more than a generation. We will add that General Washington, in his first inaugural address in 1789, said: "It would be peculiarly improper to omit, in this official act, my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aid can supply every human defect, that his benediction may consecrate to the liberties and happiness of the people of the United States. . . . No people can be bound to acknowledge the invisible hand which conducts the affairs of men more than the people of the United States."

Lincoln, in his famous Gettysburg address, expressed this sentiment: "That this nation, under God, shall have a new birth of freedom."

Daniel Webster, in his great speech in the Girard College Case, said: "The massive cathedral of the Catholic, the Episcopalian church,

with its lofty spires pointing heavenward, the plain temple of the Quaker, the log church of the hardy pioneer of the wilderness, the mementoes and memorials around about us, the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their moldering contents, all attest it. The dead prove it as well as the living. The generations that are gone before speak to it and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land." 7 Works of Daniel Webster, 176.

Professor Goddard, in 10 Mich. L. Rev. at page 166, said: "In every colony were men who had seen and sorely felt the evils of church control by the state, and to them it must have seemed clear how infinitely the difficulties would be multiplied if the Federal government undertook to interfere in the establishment of any form of religion. At all events, upon the proposition of Charles Pinckney of South Carolina, § 3 of article 6 of the[Federal] Constitution, which provided for the oath to be taken by officers to support the Constitution, closed with that famous clause: 'But no religious test shall ever be required as a qualification to any officer or public trust under the United States.' The Federal Constitution was afterwards amended, prohibiting any law respecting the establishment of religion or prohibiting the free exercise thereof." Civil Code (1910) § 6684.

The article just referred to denies that this provision of the Federal Constitution can be attributed to atheism, and contends that every one of its members was a believer in God, and most of them were church members, including General Washington. The article further says: "Of all its members Franklin has been regarded as least orthodox. And yet, during its delibera-

tions, when it seemed impossible to harmonize the varying opinions, Franklin offered his celebrated resolution, in which he moved that 'henceforth prayers imploring the assistance of heaven and its blessings upon our deliberations be held in this assembly every morning before we proceed to business, and that one or more of the clergy of the city be requested to officiate in that service.'" In support of this resolution Dr. Franklin, among other things, said: "I have lived, sir, a long time, and, the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it possible that an empire can rise without His aid? We have been assured, sir, in the sacred writings, that 'except the Lord build the house, they labor in vain that build it.' I firmly believe this; and I also believe that, without His concurring aid, we shall succeed in this political building no better than the builders of Babel." "

Salmon P. Chase, Secretary of the Treasury, declaring that "no nation can be strong except in the strength of God, or safe except in His defense, the trust of our people in God should be declared on our national coins," ordered the Director of the Mint to prepare a suitable motto. Finally, "In God We Trust" was selected, and for nearly sixty years our national coins have borne that motto. In 1907, during the administration of President Roosevelt, the motto was omitted from the eagle and the double eagle, but, in response to a general demand, the Congress restored it. Catalogue of Coins, Tokens, etc., Treasury Dept. 1914, p. 16. The Constitutions of every state in the Union contain provisions similar to those found in the Constitution of Georgia, and practically all of them, though varying in language, contain the three elements of religious freedom of conscience, freedom of the civil status on account of religion, and freedom from taxation for sectarian purposes.

All of these draw their inspiration from a common source. It is confidently asserted that those cases not in accord with the view which we take have fallen into their error by overlooking the source of their constitutional provisions; to wit, § 16 of the Virginia Bill of Rights of 1776, and the famous Virginia Religious Liberties Statute of 1785, written by Thomas Jefferson. The Virginia Bill of Rights did not include a freedom from taxation clause. The freedom from taxation portion of the Jefferson statute is as follows: "No man shall be compelled to frequent or support any religious worship place or ministry whatsoever."

Considering the words of this statute, it is clear that it intended to prohibit the creation of any state religion or the support of any particular Christian sect. This was so important, in the view of Mr. Jefferson, that he caused it to be written on his epitaph as one of three chief achievements; the other two being the Declaration of Independence and the founding of the University of Virginia. This statute, as written by Mr. Jefferson, was pressed to its adoption by James Madison, and the immediate cause of its passage throws tremendous light upon its meaning. As stated by Mr. Schofield, 2 Constitutional Law, 463: "The immediate cause of that statute was a bill introduced in the Virginia legislature in 1784 to lay a tax for the benefit of the clergy of all Christian sects in Virginia, leaving the taxpayer free to designate on the collector's warrant the particular sect the taxpayer wanted to give his money to."

And further: "Jefferson's statute was not aimed at the Christian religion; it draws a clear line between the clergy and religion; it divorced the church from the state, but not the state, i. e., the people, from the Christian religion."

The first Constitution of Georgia, that of 1777, provided as follows: "All persons whatever shall have the free exercise of their religion;

provided it be not repugnant to the peace and safety of the state; and shall not, unless by consent, support any teacher or teachers except those of their own profession." Article 56.

This provision, it will be observed, was not antagonistic to the proposed Virginia Statute of 1784, and did not prohibit all taxation for sectarian purposes. In the Constitution of 1789 the religious liberty provision did not, in substance, differ from that of 1777. In the Constitution of 1798 a similar provision, but not differing in substance from the two previous ones, appears. In the Constitution of 1861, after declaring in the second paragraph that "God has ordained that men shall live under government," it was declared in ¶ 7: "No religious test shall be required for the tenure of any office; and no religion shall be established by law; and no citizen shall be deprived of any right or privilege by reason of his religious belief."

In the Constitution of 1865 the provision of the immediately previous Constitution was in substance repeated, and so it was in the Constitution of 1868. That brings us to the Constitution of 1877, with which we are now dealing, and which was the first to contain the freedom from taxation clause. From an examination of all of them and of their origin, we think it clearly appears that the framers of our constitutions have never intended to declare the policy of this state to be unreligious or unchristian. They did intend, in the Constitution of 1877, to prohibit taxation for the support of any church, denomination, or sectarian institution maintained as a state institution. Indeed, the protection afforded by the Constitution is a protection to individuals, and not to churches; and this theory is in accord with the ablest thinkers on the subject. It is not specifically contended here that the religious beliefs of any individual, certainly not of any adult citizen, are interfered with in an unconstitutional way by the ordi-

nance in question. It is contended that the enforcement of the ordinance would be to instruct the school children in the teachings of the Bible in a manner contrary to the beliefs of the Roman Catholic Church and of those of the Jewish faith. But assuming, for the sake of argument, that the contention is broad enough to include individual members of the church, we think that certainly as to ¶¶ 12 and 13 of the Constitution, relating to religious freedom of conscience and freedom of civil status, there can be no merit in the contention. It would require a strained and unreasonable construction to find anything in the ordinance which interferes with the natural and inalienable right to worship God according to the dictates of one's own conscience. The mere listening to the reading of an extract from the Bible and a brief prayer at the opening of school exercises would seem far remote from such interference. It would be equally difficult to find anything in the ordinance which could in any way molest any inhabitant of this state in person or property, or prohibit him from holding any public office or trust, on account of religious opinions. Finally, when it is noted that pupils whose parents or guardians so request may, under the terms of the ordinance, be excused from attendance on Bible reading and prayers, the whole contention of plaintiffs in error as to ¶¶ 12 and 13 must crumble into nothingness. As to the freedom from taxation clause, paragraph 14, the privilege of the pupil to be excused has no relation. It stands upon quite another basis.

Our Constitution, article 1, § 1, ¶ 14 (Civ. Code 1910, § 6370), declares as follows: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

It is this section of the Constitution upon which plaintiffs in error must chiefly depend. Fortunately

the meaning of paragraph 14 has already been construed by this court. In the case of *First M. E. Church v. Atlanta*, 76 Ga. 181, the constitutionality of a statute of the general assembly was attacked on the ground that it was violative of the paragraph of the Constitution now under consideration. The act of the general assembly (Acts 1880-81, p. 359) was one giving to the city of Atlanta authority to grade, pave, and otherwise improve its streets, and to assess the cost thereof against abutting real estate. The city paved streets on each side of the First Methodist Church on Houston, Peachtree, and Pryor streets, and issued a *fi. fa.* against the church for the amount of the assessment. The trustees of the church filed a petition to enjoin the sale by the city marshal, contending that such property, under the Constitution, was exempted from taxation, and that this was a species of taxation, and that the property of the church was exempt therefrom. The legal question there considered was different from the question now before us, but the interpretation by the court at that time is important. In the opinion the court calls attention to the fact that "no civil officer, from the governor down to the bailiff of a district, no juror or witness, is qualified to enter upon his office, or give testimony in any matter, without taking an oath or equivalent affirmation, to the observance of which he solemnly and reverently appeals to the Supreme Being for help and guidance."

Reference is also made to the fact that "desecration of the Lord's Day is prohibited in various ways and under heavy penalties; worldly affairs, as a general thing, except in cases of necessity, cannot be transacted on Sunday," etc.; that places of religious worship and church services are protected from intrusion. And we will add that in the preamble to the Constitution of Georgia are found these words: "We, the people of Georgia, relying upon the protection . . . of Al-

mighty God, do ordain and establish this Constitution."

In reference to the constitutional provision, article 1, § 1, ¶ 14, the court said: "The manifest object of the provision was to prevent any appropriation or subsidy that might look even remotely to the establishment of a state religion, and thereby prevent the full enjoyment of that freedom of worship secured by the same instrument to every inhabitant of the state. Judge Cooley, *Const. Lim.* pp. 470, 471, has dealt directly with this subject, and has expressed reasons so sound and convincing as to entitle them to the careful study of all who are in pursuit of truth and correct principle, and what was said by him so fully conveys our own views that we offer no apology for transferring it at length to this opinion: 'But while thus careful to establish, protect, and defend religious freedom and equality,' says this eminent author, 'the American Constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the universe, and of acknowledging with thanksgiving His boundless favors, or bowing with contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the Army and Navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of state governments. Undoubtedly

the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any one of these things does not become unconstitutional simply because of its susceptibility to abuse.' Our Constitution, while it takes away the temptation and power to make such discrimination either in favor of or against any one religious denomination or sect, leaves it open to the legislature to encourage religious instruction by exempting from taxation for the support of the state government 'places of religious worship.' Code, § 5182 [1910, § 6554]."

Similar questions have been before the courts of many states. For a consideration of divergent views reference is made to the following as representative, but not as exhaustive. As holding the majority view of the question to the effect that reading extracts from the Bible and prayers in public schools did not offend the constitutional provision against the appropriation of public moneys in aid of sectarian institutions or denominations of religionists, the following cases contain able and comprehensive discussions of the question: *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Church v. Bullock*, — Tex. Civ. App. —, 100 S. W. 1025; *id.* 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Spiller v. Woburn*, 12 Allen, 127. As entertaining the minority view that such religious readings and prayers are unconstitutional, the following cases are cited for able and elaborate discussion: *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169; *State ex rel. Weiss v. District*

Bd. 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220. The case of *Herold v. School Directors*, 136 La. 1034, L.R.A. 1915D, 941, 68 So. 116, Ann. Cas. 1916A, 806, is in line with the majority in so far as it affects those of the Roman Catholic belief, but with the minority in so far as those of the Jewish faith are concerned. From the opinion we quote as follows: "It is generally accepted that the Old Testament was originally written in Hebrew, and that the New Testament was originally written in Greek. The first complete English translation is said to have appeared about the year 1383. The Geneva Bible, embracing the New and Old Testaments, was translated into English at Geneva in 1560, and in London in 1576; it was the first to omit the Apocrypha. There is the King James version, or translation, of the year 1604; the Douai version or translation of the New Testament at Rheims in 1582; and the Old Testament at Douai in 1609. There is Luther's Bible, 1521; and then there is the Rabbinical Bible. There is also the Koran, often called the Mohammedan Bible. There are doubtless differences in the several translations of the Bible just referred to. But it is not within the province of the court in this case to point out these differences, or to give them consideration. The court recognizes the difference between the Rabbinical Bible and the Christian Bible, in that the latter adds to the former the New Testament Scriptures, which are the bases of the Christian religion. There may be other differences, such as the inclusion in the one, and the exclusion from the other, of the Apocrypha. But this difference is immaterial in the matter before the court. Christians make daily use of the Old Testament Scriptures, and the differences between the Rabbinical and Christian editions are not known to the ordi-

nary lay reader beyond the fact that the Christian Bible contains the New Testament. The same condition of mind exists with reference to the Douai and the King James translations. There are said to be some differences and some errors in translation, but they are not known to the ordinary lay reader; and the court is not called upon to point out these differences. They are both Christian Bibles, or the Bibles of the Christians."

In that case it was also held that a requirement that extracts from the New Testament be read in public schools was a discrimination against Jews, because: "He denies that the New Testament is the Word of God, and he denies our Savior. He does not deny most of the moral teachings of Jesus Christ, but he denies His divinity and His resurrection."

In our opinion the ordinance in question is no more a discrimination under the Constitution against those of the Jewish faith than those of the Roman Catholic belief. The mere reading of extracts from the New Testament or the Bible in the public schools cannot, in any legitimate sense, be considered as an appropriation of public moneys to the support or establishment of a system of religion or a sectarian institution. It is true that the teachers of the public schools are paid from the proceeds of public taxation, and that an insignificant fraction of their time would be consumed in the reading. If the theory contended for could once be established, it might easily be carried to an absurd extent. For instance, it might, as an inference from such a ruling, be contended that the inclusion in the school curriculum of books containing denials of the teachings of Darwin, Brahma, Buddha, or Confucius, and the like, would be teaching sectarian doctrines, and therefore in conflict with the Constitution of Georgia. We quite agree with the supreme court of Louisiana that "the court will not concern itself with the differences or alleged errors in the different

translations of the Christian Bible or Bible of the Christians."

In the case of Pfeiffer v. Board of Education, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250, the question was substantially the same as the one with which we are now dealing. In the opinion it was said: "It is not to be inferred that . . . the convention intended to prohibit in the public schools all mention of a subject [morality and religion] that schools were to be established to foster,—particularly as the provision, when traced to its historic origin [the Virginia Constitution and statute of Jefferson], is shown to have been aimed at quite another evil."

The court decided that the reading of extracts from the Bible is not in violation of any constitutional provision. Paraphrasing the language used in Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256, we will say that no theological doctrines are required to be taught. The creed of no sect must be affirmed or denied. There is no necessary interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority. "Reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmation of the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith." No one is required to believe, or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its accuracy, or in any set of doctrines deducible or not deducible therefrom. The plaintiffs, in the trial court admitted that the reading of the King James version of the Bible was contrary to the beliefs, opinions, and teachings of the Roman Catholic Church, and that the reading of the New Testament is likewise contrary to the beliefs of

those citizens holding the Jewish faith. This can have no effect on the meaning of the Constitution, which, as we hold, fails to show any violation of constitutional rights.

The case of *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220, goes to greatest extremes in taking a contrary view of the question, and for that reason it is selected for discussion. An analysis and criticism of this case by a leading member of the bar of Illinois, a professor in Northwestern University (Illinois) is of peculiar value and should carry more weight for that reason. Such we find in Mr. Schofield's work on *Constitutional Law*, edited and published after his death by the law faculty of Northwestern University. That the analysis was thorough is shown by the fact that it, together with marginal notes of authorities, comprises pages 459 to 509, inclusive. In that case there was a majority opinion concurred in by five justices, and a dissenting opinion by two justices. It cites as authority the cases of *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169; *State ex rel. Weiss v. District Bd.* 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, and we think Mr. Schofield is sustained in his statement that neither of these cases is sufficient to support the majority opinion in its entirety, because they hold, at most, that Bible reading may be so conducted in the public schools as to discriminate against those of the Roman Catholic faith, and therefore he concludes that the majority opinion "makes Illinois the only state in the Union which puts the constitutional padlock on the Bible in the public schools." He shows the origin of the Illinois constitutional provisions to be the same as that to which we have traced the Georgia provisions, and thus accounts for the fundamental error in the majority opinion. In reference to the source of these constitu-

tional provisions, he makes the following comment: "Mr. Justice Story concisely expresses, in his work on the Constitution, the effect of the guaranties of religious liberty, as they appear in the Virginia Constitution of 1776 and in the Virginia Statute of 1785, in the Illinois Bill of Rights, and in the 1st Amendment to the Federal Constitution, as limitations on the power of organized government."

And quotes from 2 Story on the Constitution, § 1877: "The real object was . . . to exclude all rivalry among Christian sects, and to prevent any [governmental] ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of . . . the government."

He asserts that the proposition ultimately rests, not on the ground that reading the Bible in the public schools molests a person in the exercise of religious professions, worship, or opinion, but on the ground that reading the Bible in the public schools molests the taxpayer without any regard to his religion or want of religion.

"Reading the Bible in the public schools, even as a mode of worship, does not transform the teachers into an order of clergy to attend upon the offices of religion; nor does it transform the appropriation to pay the salaries of the teachers into an appropriation to help support the clergy of any sect; nor does it transform the school houses into churches or places of worship; nor does it confine the occupation of teaching in the public schools to the members of any sect."

And further: "The truth is, none of the original religious-liberty guaranties, as they appear in the Virginia Constitution and statute and in the Illinois Bill of Rights, either the one for freedom of religious profession, worship, and opinion, or the one for freedom from civil and political disabilities on account of religion, or the one for freedom from taxation to help support any church estab-

lishment, ever had any serious application or force as limitations on the power of the legislature to provide public schools and prescribe the public school curriculum."

In regard to the objection that the King James version of the Bible is opposed to the Roman Catholic belief, he says: "The answer is, the objection only shows, at the most, that the King James Bible is non-Roman Catholic, not that it is, of itself and necessarily in a constitutional sense, anti-Roman Catholic."

In regard to the objection on the part of those of the Jewish faith, he says: "The case of a Jew complaining to a court of reading the Bible or instruction in the Christian religion in the public schools raises the question whether the Constitution vests in a Jew, not as a Jew, but as a taxpayer, a constitutional right to command . . . courts to exclude reading the Bible or instruction in the Christian religion from the public school curriculum altogether, merely because it is the Bible or the Christian religion. The answer is, the Constitution does nothing of the kind. The Jew may complain to a court as a taxpayer just exactly when, and only when, a Christian may complain to a court as a taxpayer, i. e., when the legislature authorizes such reading of the Bible or such instruction in the Christian religion in the public schools as gives one Christian sect a preference over others."

The analysis clearly shows the unsoundness of the conclusion reached by the majority of the court in that case, and the absence of authority to sustain it.

The weight of authority among American courts is in accord with the view taken by this court in the case of *First M. E. Church v. Atlanta*, 76 Ga. 181, to the general effect that the constitutional provisions like article 1, § 1, ¶ 14, of the Constitution of Georgia, were intended to forbid the levy of direct taxation to support the establishment of a state religion, or to for-

bid any preference or discrimination between religious sects or creeds. The reading of the Scriptures in the public schools does not convert the school into a sectarian institution. The case of *First M. E. Church v. Atlanta*, supra, was subsequently reviewed and overruled; but there was no modification or change in the construction given to the meaning of article 1, § 1, ¶ 14, of the Georgia Constitution. *Atlanta v. First Presby. Church*, 86 Ga. 730, 12 L.R.A. 852, 13 S. E. 252. Courts are not concerned with the wisdom of legislation. It is the duty of the court to decide in a proper case whether legislation is in conflict with the Constitution; but in all cases the conflict must be clear and manifest before the court will declare the same void. All doubts must be resolved in favor of the constitutionality, certainly with regard to the Constitution of this state. Construing ¶ 14 of article 1, § 1, in connection with ¶¶ 12 and 13 of the same article of the Constitution of Georgia, as we do, in harmony with the previous expression of this court and with the weight of authority throughout the American Union, we hold that the ordinance of the city of Rome, requiring the board of education to have, through the principals and others, the reading of extracts from the Bible and prayers in the public schools of Rome, is not in conflict with the Constitution of this state for any reason assigned.

Constitutional law—requiring Bible to be read in public schools.

2. The act of the general assembly approved August 19, 1918 (Acts 1918, pp. 813 to 885), providing a new charter for the city of Rome and establishing government by city commissioners in § 83 provided for the establishment of a system of public schools, and further that "the said commission is empowered to maintain and is authorized and empowered to provide by ordinance, in their discretion, for appropriate agencies to regulate, supervise, and carry on said system of public

schools, and to render same efficient."

In § 84 it provided that a board of education to consist of five members, "be and the same is hereby established." In § 86 it was provided that said board of education and the individual members thereof shall be amenable to the said city commission, and may be removed from office upon trial and conviction, and that the city commission shall elect the successor of the member or members so removed. In § 87 it was provided that the board of education "shall have supervision and control over said [system of] public schools in accordance with the provisions of this charter and the ordinances of said city." Section 92 of the act provides that it shall be the duty of the board of education to make reports to the city commission, at such times as they may be called upon to do so, of all matters pertaining to said public schools; and further provides that all books, papers, bills, and vouchers of the board shall at all times be open to inspection and examination by the commission or such other agency as they may employ for that purpose. Section 93 provides for a board of visitors for the public schools, and provides that such board of visitors shall make a report to the city commission and the board of education of their work, with such recommendations as they may deem proper concerning the further management of the schools; and § 94 provides: "That the said city commission are authorized and empowered to pass such further ordinances and resolutions, not in conflict with this act, as they may deem for the best interest of said public schools, and further define the duties of said board of education."

All of the sections of the charter of the city of Rome relating to the public school system must be construed together; and, thus construed; we think it is clear that it was the intention of the general assembly to make the board of educa-

tion amenable to the city commission as expressed by ordinance in all matters not contrary to the charter of the city of Rome or the laws and Constitution of this state. As we view the provisions of the charter, we find no conflict between the provision in § 87 to the effect that the board of education shall have supervision and control over the public schools in accordance with the provisions of the charter and the ordinances of the city, and the other provisions of the charter establishing the board of education; therefore we think the contention made by the plaintiffs in error, that, under the terms of the charter of the city of Rome, the board of education have authority, without interference from the commission of the city, to prescribe and put into effect the course of instructions, and that the ordinance is a usurpation of their privileges and duties in this respect, is without merit. While the board of education is an important agency of the municipal government, and invested with wide discretion and power, it is not independent of the municipal government, but is made subject to and dependent upon the municipal government in all respects within the lawful powers of the latter as above expressed.

3. Mandamus is the proper remedy to require the board of education of the city of Rome to perform the duty imposed by law, where it is the only adequate and specific remedy at law. *Mattox v. Board of Education*, 148 Ga. 577, 581, 5 A.L.R. 568, 97 S. E. 532. In the present case it is the only adequate, specific, and complete remedy to enforce the terms of the city ordinance in question. Section 86 of the charter of the city, empowering the commissioners to remove the board of education, is not adequate and complete, since the successors of the officers removed would have it in their power to also refuse compli-

Schools—
control—
municipal charter.

Mandamus
—to require
reading of
Bible in school.

ance, and so would their successors, and so on ad infinitum, thus bringing about delay and no certainty as to bringing about obedience to the terms of the ordinance. While courts will not undertake to control the exercise of matters intrusted to the discretion of public school officers, or to compel such officers to do in a specified manner any act which involves discretion and judgment, mandamus will issue to command said officers to act or to set them in motion. *Richmond County v. Steed*, 150 Ga. 229, 103 S. E. 253. Judgment affirmed.

All the Justices concur, except *Beck*, P. J., and *Hines*, J., who dissent.

Beck, P. J., dissents from the judgment in this case on the ground that the court will not undertake, by writ of mandamus and proceedings ancillary thereto, to compel the observance of the ordinance in question.

Hines, J., dissenting:

I dissent from the opinion of the majority in this case. I do so with considerable misgiving, as I am without the aid and comfort of a single one of my associates; but, being committed with my whole soul to the doctrine of religious freedom, including freedom from molestation in matters of conscience, I feel in duty bound to give vent to my inability to agree to the conclusion reached by my able associates.

The ordinance of the city of Rome provides that "the board of education shall require some portion of the King James version of the Bible, of either the Old or New Testament, to be read and prayer offered to God in the hearing of the pupils of the public schools of the city of Rome daily during the regular sessions of these schools; . . . that these readings and prayers shall be conducted by the principals of said schools, or by persons invited by them for such services, and the selections of Scripture to be read shall be made by the persons conducting the readings, and the

readings shall be without comment."

This ordinance further provides that "exemption from attendance on these readings and prayers shall be granted to any pupil or pupils whose parents or guardians shall present to the superintendent of the schools request in writing for such exemption upon the ground of conscientious objections."

This ordinance is attacked on the ground that it conflicts with these provisions of the state Constitution:

(a) "All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience." Article 1, § 1, ¶ 12.

(b) "No inhabitant of this state shall be molested in person or property, or prohibited from holding any public office or trust, on account of his religious opinions; but the right of liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." Paragraph 13.

(c) "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution." Paragraph 14.

This ordinance violates the rights secured by all the above constitutional provisions, and therefore is unconstitutional and void. The first provision declares the natural and inalienable right of the individual to worship God according to the dictates of his own conscience; and guarantees and safeguards this sacred right of conscience by declaring that no human authority, not even the board of commissioners of the city of Rome, shall in any case control or interfere with such right of conscience. Yet this ordinance provides a system of worshipping God, consisting of reading the King James version of the Scriptures and prayers, and names the

principals of the Rome schools, or the persons selected by them, as the ministers of the system. This ordinance establishes a system of worship for the schools of Rome, and thus in this case controls or interferes with the individual worship of God. Roger Williams said: "No one should be bound to worship, or to maintain a worship, against his own consent." Religious freedom includes the right not to worship God at all. All the pupils of the Rome public schools, unless their parents or guardians, in writing, request that they be excused, are bound to attend these religious exercises. The unexcused children are bound to attend and listen to this worship. It will not do to say that parents or guardians, having conscientious objections to the Rome system of worship, can exempt their children or wards from attendance thereon, and that this exception saves the constitutionality of this ordinance. The exemption of certain classes from the operation of an unconstitutional enactment will not save its face.

The second provision of the state Constitution, above set out, provides that "no inhabitant of this state shall be molested in person or property . . . on account of his religious opinions." Does this ordinance conflict with this provision? Is the language, "molested in person," confined to deprivation of personal liberty and to the infliction of stripes or punishment, because of one's religious beliefs? It seems to me that this language has a much broader significance. It treats the person as made up of body, mind, and spirit. To "molest" is to vex, worry, or disturb. Anything which vexes, worries, or disturbs a person in body, mind, or soul falls within the meaning of this language.

The religious opinions of the Catholics proscribe the King James version of the Scriptures. The beliefs of the Jews condemn the teachings of the New Testament, which constitutes a part of this version of the Bible. Various branches of the

Protestant Church base their peculiar tenets upon certain texts of the New Testament found in this version. The reading of this version offends and molests the Catholics and the Jews. The reading of certain texts of this version will molest certain sects of Protestants. The system of worship provided for in this ordinance will offend the deists, atheists, and agnostics. This molestation of these various sects will or may come from the enforcement of this ordinance, and on account of their religious beliefs; and falls within the condemnation of this provision of our state Constitution. Parents and guardians who may be deists, atheists, or agnostics, and even Christians with strong convictions, may be loath to disclose their objection to this worship, for fear they might be subjected to criticism, if they were to request in writing that their children or wards be excused from attendance.

Finally, this ordinance falls within the spirit, if not within the letter, of the provision of our state Constitution which declares that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

We cannot disguise the fact that making the reading of the King James version of the Bible a part of the worship of the public schools puts municipal approval upon that version, and thus discriminates in favor of and aids the Protestant sects of the Christian religion. So the selection of the Douai Bible would put the stamp of municipal approval on it, and thus discriminate in favor of and aid the Catholics. The public schools are supported by taxation. Members of all denominations of religionists contribute to the funds by which they are supported. No public funds can be lawfully taken from the public treasury and used in any manner which aids any sect or denomination. The use of such funds in running public schools, in which a curricu-

lum exists, and which aids any sect, is forbidden by this provision.

I recognize the perils of the public schools to morals and religion, due to the lack of moral instruction; and the importance of supplying the teaching of morals and religion. Yet this must be accomplished by

methods which keep the state and church separate, which protect the natural and inalienable right of any individual to worship, or not to worship, God according to the dictates of his own conscience, and under which no aid is given to any sect or denomination.

ANNOTATION.

Sectarianism in schools.

Since the preparation of the note appended to *Knowlton v. Baumhover*, 5 A.L.R. 866, to which the present discussion is supplemental, but few cases have passed on the question of sectarianism in the schools.

The reported case (*WILKERSON v. ROME*, ante, 1334) holds that a city ordinance requiring some portion of the King James version of the Bible to be read and prayer to be offered daily in the public schools does not infringe a constitutional provision securing to every person the right to worship according to the dictates of his own conscience, a provision that no person shall be molested in person or property on account of his religious opinions, or a provision that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

The case of *Hardwick v. Fruitridge School Dist.* (1921) — Cal. App. —, 205 Pac. 49, bears collaterally on the question under discussion. In that case a regulation of the school board, requiring dancing as a part of the curriculum, was held to be invalid at the suit of taxpayers, who asserted that their religious convictions were offended by the requirement that their children should be instructed in dancing. Holding that it was not necessary that the complainants should show that they were members of a religious sect which was opposed to dancing, the court stated the general doctrine of the toleration and equality of all forms of religious worship, and added: "The principles above

stated are not alone applicable to religious organizations or to persons actively affiliated with such organizations. They apply as well to any person having religious convictions, irrespective of whether he is a member of any church or other religious society. Manifestly, a person may have religious views or principles of his own, different, perhaps, on doctrinal matters, from those of any church organization or any other person. He may have a way, peculiar to himself, of worshiping the Supreme Being, and there is no logical ground for holding that, in thus worshiping his Maker, he is not equally entitled with every other person or church society to the protection of the constitutional guaranties to which we have above adverted, assuming, of course, that his mode of worshiping is not offensive or detrimental to the peace and safety of society. In this connection we may call attention to the argument of counsel for the respondents, as if a fatal defect in the complaint was thus pointed out, that, so far as it appears from that pleading, the 'religious principles' of the appellant may be personal to himself. A man's religion is always 'personal to himself,' whether he be a member of a church or not. Whom could a man's religion concern but himself? True, if a member of a church organization, he will, of course, as he should, endeavor, in the very best way of which he is capable, to spread and disseminate the principles of the religion of which he is a devotee, and so assist in upbuilding and fortifying the spiritual standard

of the world; yet, in the last analysis, his religion is his, and is, of course, personal to himself, as it is to every other person who professes it."

The case of *Roman Catholic Separate Schools v. Quebec Bank* [1920] 1 A. C. (Eng.) 230, grew out of the separate school system of Ontario, discussed in the note in 5 A.L.R. at pages 895 et seq. It appeared that certain Roman Catholic schools were not conducted in accordance with the regulations of the Education Depart-

ment. The provincial legislature authorized commissioners to take over and manage these schools. This act of the legislature was later declared to be invalid in *Roman Catholic Separate Schools v. Ottawa* [1917] 1 A. C. (Eng.) 76, 32 D. L. R. 10, set out in 5 A.L.R., at page 904. An act of the legislature thereafter made the expenditures of the commissioners in their management of the schools a charge on the schools, and this act the court held to be valid. W. A. S.

KATHERINE C. ORTH, Admr., etc., of A. B. Orth, Deceased, Substituted as Plaintiff,

v.

BOARD OF PUBLIC EDUCATION of the School District of Pittsburgh, Appt.

Pennsylvania Supreme Court — January 3, 1922.

(272 Pa. 411, 116 Atl. 366.)

Architect — compensation — effect of failure to let contract.

1. Under a contract by architects to prepare plans for a building and supervise its construction for a certain percentage of the cost, payable 3 per cent when plans are adopted and remainder during progress of work and at completion of the building, with right of owner to terminate the contract on certain contingencies upon paying the percentages then due, the architects are entitled only to 3 per cent for preparation of the plans if the contract for the building is not let because of increased cost due to war conditions and the architects' contract is terminated, plus the fixed percentage on all work completed.

[See note on this question beginning on page 1356.]

Contract — construction — meaning to all words.

2. All the words of a contract are to be given an appropriate meaning, whenever it is reasonably possible to do so.

[See 6 R. C. L. 837, 838.]

Architect — basis for estimating percentage.

3. In estimating the percentage of the cost price to which the architect of a building is entitled for preparation of the plans, it should not be reckoned on the excessive cost shown by bids which were all rejected be-

cause of the greatly increased cost of construction due to war conditions, but the architect's own estimate of the cost which accompanies his plan should be adopted.

Evidence — threat during negotiations.

4. In an action for compensation due under a contract to furnish plans for a building, evidence is not admissible of a threat made by plaintiff's counsel to defendant during negotiations for settlement of the controversy.

APPEAL by defendant from a judgment of the Court of Common Pleas

for Allegheny County (Reid, J.) in favor of plaintiffs, a firm of architects, in an action brought to recover compensation alleged to be due under a contract to furnish plans for a building. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. Rodgers McCrury for appellant.

Messrs. W. K. Johnson, C. Elmer Brown, Ernest C. Irwin, and Watson & Freeman, for appellee:

The intention of the parties when the contract in question was made was to erect the school building. It was clearly not intended that the school board would abandon that erection. There is, indeed, no covenant in the contract that the school board would proceed with the work, but such covenant is always implied.

Loehr v. Dickson, 141 Wis. 332, 30 L.R.A.(N.S.) 495, 124 N. W. 293; Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co. 141 Wis. 199, 124 N. W. 291, 18 Ann. Cas. 976; Elliot Nat. Bank v. Beal, 141 Mass. 569, 6 N. E. 742.

Defendant cannot plead its own wrong or fault, and claim that through that wrong it had escaped full payment for work fully performed.

United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472; Gay v. Blanchard, 32 La. Ann. 497; Burton v. Shotwell, 13 Bush, 271; Levy & H. Motor Co. v. City Motor Cab Co. 174 Ill. App. 20.

By refusing to accept bids submitted in December, 1916, and thereupon abandoning the construction of the building, defendant cannot escape payment of the 1 per cent (1%) due to the architect at the time the contract is awarded.

Cann v. Church of the Redeemer, 111 Mo. App. 164, 85 S. W. 994; Crescent Hill Presby. Church v. McDonald, 144 Ky. 655, 139 S. W. 849; Sauer v. School Dist. 243 Pa. 294, 90 Atl. 150; Lambert v. Sanford, 55 Conn. 437, 12 Atl. 519; Harlow v. Beaver Falls, 188 Pa. 263, 41 Atl. 533.

Under the law and the facts of the case, plaintiff was entitled to recover his full 6 per cent, less his cost of completing his contract.

Harlow v. Beaver Falls, *supra*; Sauer v. School Dist. 243 Pa. 294, 90 Atl. 150; Newman v. Rutter, 8 Watts, 51; Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min.

Rep. 98; Cann v. Church of the Redeemer, 111 Mo. App. 164; Crescent Hill Presby. Church v. McDonald, 144 Ky. 655, 139 S. W. 849; Dinsmore v. Livingston County, 60 Mo. 241; Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631, s. c. 153 Mo. 487, 54 S. W. 689; Blaine v. Publishers George Knapp & Co. 140 Mo. 241, 41 S. W. 787; Kinneker v. Philadelphia Ball Club, 92 Mo. App. 669; Eldridge v. Fuhr, 59 Mo. App. 44; Shipman v. State, 42 Wis. 377.

Simpson, J., delivered the opinion of the court:

Defendant appeals from a judgment in favor of plaintiffs, a firm of architects, who recovered upon a contract for preparing plans and specifications and superintending the construction of a high school building in the city of Pittsburgh; the paragraph relied on being as follows:

"7. The board shall pay the architect as and in full compensation for his services hereunder, 6 per cent upon the entire cost of the building; payments to be made as follows:

"One per centum when the final preliminary study is adopted.

"Two per centum when the working drawings and specifications are completed and adopted.

"One per centum when the contract is awarded.

"One per centum in monthly instalments, prorated in accordance with the monthly certificate for payment to the contractor or contractors.

"One per centum upon the completion and acceptance of the building."

If this paragraph was the only one to be considered, it would be difficult, perhaps, unless we overruled Harlow v. Beaver Falls, 188 Pa. 263, 41 Atl. 533, and Sauer v. School Dist. 243 Pa. 294, 90 Atl. 150, to do other than affirm the judgment; since here, as in those cases, the compensation is specified to be

a certain percentage "upon the entire cost of the building;" the later provisions, relating to the instalments, apparently fixing only the times for payment, and not altering the duty to ultimately allow the entire "6 per cent." Other paragraphs in the present contract, however, compel a different conclusion from the one reached in those cases.

It further provides that plaintiffs shall prepare "preliminary plans, revisions, and changes therein, with such estimates of cost of construction as may be required," shall thereafter "promptly prepare full specifications and such further plans" as may be needed; "shall have supervision of the construction of the building;" that the board reserves the right to terminate the contract if the architect dies, or upon "fifteen days' written notice," without the happening of this contingency, in either of which latter events plaintiffs "shall be entitled as full compensation to the percentages then due."

Evidently knowing of the limitations placed by law upon the expenditure of public funds, and that the members of the board would be guilty of a breach of duty if they erected the building at a cost largely in excess of its actual value to the district, plaintiffs inserted in the specifications, which they prepared, the usual provision that the board reserved the right to reject any and all bids. They also, in accordance with the contract, advised the board that the cost of completing the building would be \$643,025; and this, with certain additions afterwards made by consent of the board, indicated a total cost of \$833,530.96.

When the bids were received and opened, it was discovered that—owing to the greatly increased cost of labor and materials, due to the World War—the lowest amount for which anyone would do the work and the additions above referred to was the sum of \$1,234,499.89. This was not only greatly in excess of the estimates made by plaintiffs,

but, as the court below says, was "far beyond the funds available, or, in any event, a sum which the board did not deem it prudent to expend," and hence, acting in good faith and in accordance with its duty, it rejected all the bids. So far as appears, plaintiffs made no objection to this. The cost of labor and materials having continued to advance, it was decided to abandon the project until matters in the building trades became more nearly normal; and this had not occurred when one of the architects died, and the contract with the firm was rescinded, in accordance with the foregoing provisions of the contract.

The court below held that plaintiffs were entitled to recover 6 per cent of whatever sum the jury found would have been the cost of the building if it had been constructed at the time the bids were received and rejected, less the sum of \$23,677.94, which had been paid on account, and also whatever plaintiffs would have had to expend in superintending the work (which was estimated to be \$7,000), and that the jury might find the cost of the building would have been the lowest bid above set forth; on this basis the verdict was rendered.

Three questions are raised on the appeal: (1) Were plaintiffs entitled to 6 per cent upon the full cost of the building, though it had not been erected? (2) Was this percentage to be reckoned upon what the cost would have been had the work been done at the time the bids were received and rejected? (3) Was it competent to prove that the contract with plaintiffs was canceled because of their threat to bring suit if they were not paid? Each of these questions must be determined in favor of appellant.

It is certain plaintiffs must have anticipated the possibility the school would not be erected. This necessarily follows from the provision above referred to, and by the insertion in the specifications of the clause authorizing the board to re-

ject any and all bids. It is certain, also, that the words, they "shall be entitled, as full compensation, to the percentages then due," in the clause relating to cancelation of the contract, can mean only the particular percentages applicable to the situation existing at the time of cancelation. If it was meant, as appellees contend, that the percentage referred to was the single percentage of 6 per cent, which was provided for superintendence as well as for drawing the plans and specifications, not only was the plural form improper, but the words "percentage then due" were unnecessary and meaningless, for precisely the same result would be reached if they had been omitted. It is an unbending rule, however, that all

Contract—
construction—
meaning to all
words.

the words of a contract are to be given an appropriate meaning whenever it is reasonably possible so to do, as in the present case it is (*Wager v. Wager*, 1 Serg. & R. 374; *Knickerbocker Trust Co. v. Ryan*, 227 Pa. 245, 75 Atl. 1073; *Vulcanite Pav. Co. v. Philadelphia*, 239 Pa. 524, 86 Pa. 1086); and hence the words "percentages then due" must be

Architect—
compensation—
effect of failure
to let contract.

given here their usual meaning, and this compels the conclusion that, if the building was not erected, only 3 per cent was to be paid for the preliminary study and the preparation of working drawings and specifications. There was, however, some work actually done, and for this plaintiffs are entitled to 6 per cent of its actual cost; we say 6 per cent instead of 5, because there was a "completion and acceptance of the building," so far as concerns this particular work.

It was also erroneous to estimate the 3 per cent on the excessive cost, arising out of the unusual conditions prevailing when the bids were received. As already pointed out, 1 per cent was due when "the final preliminary study

is adopted," and an additional 2 per cent when "the working drawings and specifications are completed and adopted." There was then no other "cost of the building" except the "estimates of cost of construction," calculated by plaintiffs themselves, and hence the 3 per cent, if then paid, as the contract provided it should be, necessarily would have had to be computed thereon. Appellee's contention that these "estimates of cost presented to board, were but rough estimates largely based upon data deceived from defendants' superintendent of buildings," is of no moment. They were none the less plaintiff's estimates, prepared for the purpose of enabling the board to determine whether or not it would ask for bids, and must be held binding, therefore, in case of a decision, in good faith, not to proceed. The same conclusion, however, is reached from another standpoint.

The contract calls for the 6 per cent to be estimated on the "entire cost of the building," of which, strictly speaking, there was none, since the building was not constructed. Hence it is necessary to determine, according to equitable principles, what the parties contemplated should be paid in the event of this contingency. Appellee contends that the words "percentages then due" necessarily refer to the time of cancelation, and this is, of course, true; but they do not refer to the "cost" on which those percentages are to be calculated. Clearly they were to be compensation for the work actually done, not for that which might be done, and equally clearly they were to be measured by the value of the work at the time it was done, not at some later time, when the basis might be either more or less, and certainly not when an unexpected contingency greatly changed the status. In the present instance, this period of time was before the great increase in the cost of labor and materials, and not afterwards. This conclusion does not militate against the

—basis for
estimating
percentage.

fact that, if the work had been done, the actual cost would have been the basis; for then there would have been an "entire cost of the building," and the different parts of the contract, "preliminary study," the preparation of "the working drawings and specifications," the additional drawings which, appellee testified, always have to be made during the progress of the work, and the supervision of the work itself, would have furnished together, and not separately, the 6 per cent payable on that "entire cost."

Perhaps everyone would admit that if, by reason of the draft, it had been almost impossible to obtain labor and materials for building purposes, so that the lowest bid had been \$10,000,000 or \$20,000,000 instead of \$1,234,499.89, these percentages could not have been charged on the larger figure; yet the difference is one of degree only and not in kind, and, under the ruling of the court below, the cost, determined even by such an excessive bid, if fairly made, might have furnished the proper basis.

It follows that, so far as the present record discloses, the jury should have been told that the 3 per cent was to be calculated on the \$643,025 "estimate of cost of construction" prepared by plaintiffs and accepted by defendant, plus the additions of \$190,515.96 made by consent of the board.

The error, which underlies the court's conclusion on this point, consists in supposing that the method, which is usually adopted in applying the appropriate legal rule to the facts of a particular case, is the rule itself. This mistake is not an un-

common one, for a statement of the means nearly always adopted to reach a particular end, if repeated often enough, will cause many to unthinkingly conclude it is the only method to attain the end, and hence is, in effect, the end itself. A striking instance of this is found in the cognate case of *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687, where the court below was reversed for holding that the measure of damages for the failure to deliver stock was the difference between the market price and the contract price, at the time and place of delivery; whereas, the true measure is the difference between the value of the article and the contract price, at that time and place; the "value" being nearly always determined by the "market price," but not permissible there because of the unusual circumstances appearing in the evidence.

We are also of opinion that evidence of the alleged threat made by plaintiff's counsel to defendant's when they were negotiating for a settlement of the controversy, should not have been admitted; it could not aid the jury in determining any of the questions to be decided by them. If for no other reason, it was inadmissible because defendant had the right to cancel the contract, and hence its reasons for so doing were wholly immaterial. *Scott v. Pittsburgh*, 266 Pa. 52, 109 Atl. 603; *Roush v. Herbick*, 269 Pa. 145, 112 Atl. 136.

The judgment of the court below is reversed, and a *venire facias de novo* is awarded.

Petition for rehearing denied.

Evidence—
threat during
negotiations.

ANNOTATION.

Construction of contract for compensation of architect.

I. Amount of compensation:

- a. In general, 1357.
- b. Where construction is abandoned or employment terminated, 1357.
- c. Basis on which percentage is to be computed, 1358.

I.—continued.

- d. Additional compensation, 1310.
- e. Reduced compensation, 1361.
- II. Time when compensation payable, 1361.
- III. Who liable for compensation, 1362.
- IV. Entire and divisible contracts, 1362.

*I. Amount of compensation.**a. In general.*

As a general rule, where the contract contains an express stipulation as to the amount of compensation for architectural services, or the manner of determining the same, such stipulation is conclusive, and measures the amount of recovery for performance, regardless of doubtful inferences from other provisions.

California. — *Havens v. Donahue* (1896) 111 Cal. 297, 43 Pac. 962.

Georgia. — *Lambright v. Everett* (1917) 21 Ga. App. 488, 94 S. E. 593.

Illinois.—*Chicago v. Hunt* (1906) 130 Ill. App. 462, affirmed in (1907) 227 Ill. 130, 81 N. E. 243 (superintending engineer); *Atchison v. McKinnie* (1908) 233 Ill. 106, 84 N. E. 208.

Indiana. — *Weatherhogg v. Jasper County* (1901) 158 Ind. 14, 62 N. E. 477.

Kentucky. — *McDonald Bros. v. Whitley County Ct.* (1887) 8 Ky. L. Rep. 874; *O'Kain v. Davis* (1919) 186 Ky. 184, 216 S. W. 354.

Maryland.—*Harrison v. McLaughlin* (1908) 108 Md. 427, 70 Atl. 424.

Massachusetts. — *Perkins v. Hanks* (1905) 188 Mass. 120, 74 N. E. 314.

Minnesota.—*Irwin v. Gould Elevator Co.* (1909) 107 Minn. 233, 119 N. W. 1065. And see *Marcotte v. Beaupre* (1870) 15 Minn. 152, Gil. 117.

New Jersey.—See *Hoisting Machinery Co. v. Goeller Iron Works* (1913) 84 N. J. L. 504, 87 Atl. 331.

New York. — *Davis v. New York Steam Co.* (1898) 33 App. Div. 401, 54 N. Y. Supp. 78.

Pennsylvania. — *Osterling v. Carpenter* (1911) 230 Pa. 153, 79 Atl. 405; *Osterling v. First Nat. Bank* (1918) 262 Pac. 448, 105 Atl. 633.

Texas.—See *Vaky v. Phelps* (1917) — Tex. Civ. App. —, 194 S. W. 601.

Utah. — See *Headlund v. Daniels* (1917) 50 Utah, 381, 167 Pac. 1170.

Canada.—*Bond v. Colonial Invest. & Loan Co.* (1908) 11 Ont. Week. Rep. 617. And see *Schwab v. Shragge*

(1906) — *Manitoba*, —, 3 West. L. R. 463.

Thus, in *Perkins v. Hanks* (Mass.) supra, in applying the rule that an express provision must control an implication of a different rate arising from another provision of the contract, it was held that where a contract for preparation of plans, after adjusting existing accounts, stipulated for further services, and that the architect's commission thereon at 5 per cent was not to exceed the value of \$350, and provided that it was "further mutually understood and agreed that the equity" of certain lands "is given as security for a further payment" of \$250, "which sums shall, when paid, be considered to be full payment" for the plans, the explicit agreement must control, and that the architect could recover only the agreed price of \$250.

b. Where construction is abandoned or employment terminated.

In *O'Kain v. Davis* (1919) 186 Ky. 184, 216 S. W. 354, where an architect's contract provided that he should prepare preliminary plans, working drawings, specifications, and furnish services during erection of a proposed building for 5 per cent of the contract price, payable 3½ per cent on awarding of the contract and 1½ per cent on completion and acceptance of the building, but that, in the event the employer failed to erect the building within a certain time, the architect should receive \$250 "for preliminary services rendered in connection with his contract," it was held that the contract provided for payment on one basis in the event a contract was awarded for the construction of the building, but on the basis prescribed by the proviso in the event the building was not erected, and therefore that since the employer had abandoned the project without having let a contract for construction, recovery was limited to \$250, although the architect, pursuant to instructions, had prepared not only pre-

liminary plans, but complete working drawings, plans, and specifications.

And it has been held that where, by the contract, the architect is to furnish all necessary general drawings, specifications, and details for the construction of a building for a specified percentage of the total cost, he cannot be limited to commissions upon the cost of construction as far as the building has proceeded at the time his employment is terminated, since at such time he has fully performed his contract, and the completion of the building is material only as fixing the amount to be paid for the services rendered under the contract. *Havens v. Donohue* (1896) 111 Cal. 297, 43 Pac. 962. But compare *Shipman v. State* (1877) 42 Wis. 377, wherein it was held that an architect having a contract to make plans and specifications and superintend construction for "5 per cent on the cost of construction," could, upon being lawfully discharged during the construction of the building, recover only the contract price for his plans and specifications and services as superintendent of construction up to the time of his discharge, and upon quantum meruit for the plans and specifications of that portion of the work which he did not superintend, the employer having exceeded his statutory authority in making a single entire contract with the architect. And see *Hand v. Agen* (1897) 96 Wis. 493, 71 N. W. 899, wherein an architect was allowed to recover the customary architect's fee of 2½ per cent for the making of plans and specifications under a contract to draw plans and specifications and superintend construction for 4 per cent where the building was never erected. See also *Gouinlock v. Maclean* (1918) 14 Ont. Week. N. 142, wherein the contract called for 5 per cent on the cost, but in which it was held, the building having been taken out of the architect's hands when partially completed, that he was entitled to 5 per cent on the work done before his supervision was terminated and 2½ per cent on the balance of the cost.

In the reported case (*ORTH v. BOARD OF PUBLIC EDUCATION*, ante, 1352), where the contract entitled the architect superintending construction to 6 per cent "upon the entire cost of the building," with payments of certain percentages to be made at various stages of the construction, and reserving the right to the owner to terminate the contract of employment, in which event the architect "shall be entitled as full compensation to the percentages then due," it was held that the architect, upon termination of his contract in accordance with the terms of the contract, could recover only the percentages then due according to the amount of work already done.

And see *School Comrs. v. Lafond* (1911) Rap. Jud. Quebec 23 B. R. 193, as set out *infra*, I. c.

c. Basis on which percentage is to be computed.

In *Weatherhogg v. Jasper County* (1901) 158 Ind. 14, 62 N. W. 477, where the contract provided for the drawing of plans and specifications for a building that should not exceed a certain sum in cost, and should, if required, make changes or draw new plans without additional expense, and that the compensation for drawing of plans and specifications and superintending of construction should be a certain per cent of the "total cost of the fully completed building," and the employers ordered changes and additions which made the building cost much more than the specified sum, it was held that the provision limiting the cost to a certain sum was a mere statement of the basis upon which the architect should work in the preparation of the initial plans and specifications, and did not set up a limit to his compensation, and consequently that he could recover upon the basis of the actual cost, the employer having ordered the changes which increased the cost. So, in *Harrison v. McLaughlin* (1908) 108 Md. 427, 70 Atl. 424, it was held that where the architect's commission was to be a specified percentage of the "total cost of the building," he was entitled to

such per cent, although the contract provided that the entire cost should not be estimated to exceed a considerably smaller but estimated sum than the actual "total cost," it appearing that the employer had ordered changes which materially increased the cost.

And in *Osterling v. Carpenter* (1911) 230 Pa. 153, 79 Atl. 405, where the architect for a tomb was to be paid 5 per cent on the total cost of materials and labor, and the tomb actually erected cost \$40,000, it was held that the architect was entitled to recover 5 per cent on that sum, although the parties had originally intended a \$75,000 tomb, and plans therefore had been started which, at the request of the employer, and without objection on the part of the architect, had been altered so as to call for the \$40,000 tomb.

Where the compensation of an architect is a specified per cent of the "estimated cost," and the contract itself does not fix the same, it has been held that such "estimated cost" is the reasonable cost of buildings erected in accordance with the plans and specifications, and not necessarily the amount of some actual estimate made by a builder, or an estimate agreed upon by the parties, or an estimate or bid accepted by the employer. *Lambert v. Sanford* (1887) 55 Conn. 437, 12 Atl. 519.

And in *Israels v. Macdonald* (1907) 123 App. Div. 63, 107 N. Y. Supp. 826, appeal dismissed in (1908) 193 N. Y. 598, 86 N. E. 1126, where the compensation for making plans and specifications was to be 3 per cent on the cost of the building, it was held that the "actual cost" must govern, that being provable, and not the estimate of the plaintiff, or of experts, or the amount named in papers filed with the building department. So, in *Lawton v. Roseno* (1908) 125 App. Div. 628, 110 N. Y. Supp. 14, it was held, construing a provision for payment to an architect of a percentage of the cost of the work for which he had prepared plans and specifications, that the plaintiff must prove the actual cost, and that recovery could not

be based on the testimony of experts as to what was the reasonable cost of the finished work. And again in *School Comrs. v. Lafond* (1911) Rap. Jud. Quebec 23 B. R. 193, where the plaintiff contracted to furnish architectural services for a fixed percentage of the cost, it was held that such percentage must be figured on the actual cost, and not on the cost as estimated at the time. And the work having been stopped, such actual cost was held to be the amount for which the contractor had offered to complete the building.

Where the contract for construction names a certain sum, with a proviso for an increase under certain circumstances, which conditions are met, the "contract price," in an agreement to pay a certain per cent of that price for superintending the work, includes the additional compensation earned by the contractor in meeting the specified conditions. *Chicago v. Hunt* (1907) 227 Ill. 130, 81 N. E. 243, affirming (1906) 130 Ill. App. 462.

And in *Osterling v. Allegheny County* (1922) — Pa. —, 116 Atl. 385, construing a contract to furnish the plans and specifications for additions and alterations of a courthouse for a commission of 5 per cent upon "the cost of the work," which commission was to include general supervisions, drawings, plans, specifications, and contracts, and such duties as are usual and customary among architects, and any charges for preliminary plans and studies, it was held that superintending the removal of the old buildings from the land on which the addition was to be erected was part of the architect's work, so that he was entitled to receive 5 per cent on the cost thereof as his commission. It was further held in this case that the cost of testing the steel used in the building at a testing laboratory was a part of the cost of the work within the meaning of the architect's contract.

But it has been held that payment to an architect of more than the agreed price does not necessarily require payment of a percentage on the actual cost of the work as finally,

completed. Thus in *Dick v. Jullien* (1922) 279 Fed. 993, where an architect was employed to supervise repairs to a building at a cost not to exceed \$45,000, and was to receive 10 per cent of that amount for his services, it was held that the fact that more than \$4,500, had been paid him did not preclude the owner from setting up the contract in an action for additional compensation, but was merely evidential as bearing upon the existence of the alleged contract.

In the reported case (*ORTH v. BOARD OF PUBLIC EDUCATION*, ante, 1352), where the architect's commission was to be "6 per cent upon the entire cost of the building," 3 per cent to be payable when the drawings and specifications were adopted, it was held that the 3 per cent was to be computed on the basis of the architect's own estimate of the cost of construction made before increase of building costs, on account of which construction was abandoned and the architect's employment terminated as permitted by the contract, and not on the amount the building would have cost, although that would have been the basis if the building had been completed.

In *Spencer v. New York* (1917) 179 App. Div. 69, 166 N. Y. Supp. 177, under a contract providing for furnishing plans and specifications and supervising the construction of certain buildings for 5 per cent of the actual cost of the work, to be paid "2½ per cent upon the estimated cost of the work after the plans and specifications had been approved, and 2½ per cent upon the estimates of the contractor, as certified by the architect, which, together with the 2½ per cent herewith authorized to be paid for preparing the plans, specifications, and estimates, shall equal a total of 5 per cent on the actual cost," it was held that the architects were entitled to 5 per cent on the buildings completed and 2½ per cent on buildings not erected, but for which plans, etc., had been made pursuant to the contract.

d. Additional compensation.

The question of extra compensation has been raised in a few instances.

Thus, in *Osterling v. First Nat. Bank* (1918) 262 Pa. 448, 105 Atl. 633, where the plaintiff contracted to furnish the plans, specifications, and detailed drawings, and to supervise the work, prepare contracts, and perform the usual and customary services of an architect for a commission of 5 per cent upon the cost of the work, and the contract was let upon the original plans, etc., for \$59,000, but the actual cost, because of changes being made from time to time for which he prepared revised drawings, was increased to about \$115,000, upon which sum he was paid his commission, it was held that he could not recover additional compensation for having prepared the revised drawings. In this connection the court said: "*Osterling* [the architect] 'proposed and agreed to furnish all necessary plans and specifications to erect the building.' This contemplated not only the plans which he had already prepared, but included any and 'all' plans which in the process of erection might be called for. As an architect he was doubtless familiar with the fact that most owners in the course of building make changes in both plans and specifications, and he is fairly to be presumed to have contemplated just that in his letter of September 3, 1913. He stated in this letter that the cost would be \$58,000, and, in point of fact, his estimate of the cost was nearly verified, as the original building contract was for \$59,000. The changes made during the process of building increased the total cost, as we have seen, to \$114,000. He was paid 5 per cent on this amount as his compensation. If he regarded the work of preparing the drawings as work outside of his contract, he should not have accepted the percentage on the total cost. He surely cannot claim both the percentage on the total cost and extra compensation for preparing the drawings which increased the total cost, but he must be held to his contract, which is clearly expressed." Nor under

such a contract can the architect recover extra compensation for services as an arbitrator between the contractor and owner, where, in the building contract prepared by him, he inserted the usual clause that such disputes should be referred to him for final decision, since such services, by his own interpretation, fall within that part of the contract by which he agreed to perform the "usual and customary services of an architect." *Ibid.* Likewise, it was held in this case that the architect's compensation could not be increased by adding to the actual cost of the work the value of material taken from an old building and used in the new, the building contract and specifications having provided for such use. It was also held that no additional compensation could be recovered because of the fact that there was a delay in completing the construction, upon which question the court said: "The claim for compensation for delay is also without merit. The contract under which he claims fixes no time within which his services were to be completed. The building actually cost almost double the amount originally contemplated, and his commissions were correspondingly increased. This was adequate compensation for the delay incident to the construction of the enlarged building, but this is not the reason for our refusal to allow his claim. He was not entitled to make it under the contract which he himself prepared."

In *McDonald Bros. v. Whitley County Ct.* (1887) 8 Ky. L. Rep. 874, where architects, without limit or conditions as to time for construction of a building, contracted to superintend the construction for a specified sum, it was held that they could only recover such sum for their work, although the building contract, to their knowledge at the time of the execution of the contract for supervision of construction, contained a provision that if any charges were made by the architects for supervision of work extending over a longer time than that agreed upon for the completion of the work under the building contract,
20 A.L.R.—86.

such charges should be deducted from the amount of the contract price. It also appeared that the original contractor abandoned the work, and that the contract was let to a second contractor, who refused to agree to the provision for deductions for architect's charges, but it seems probable that this fact did not affect the conclusion reached by the court, since their decision apparently was based on the fact that, as the architect's contract was for a definite sum without limit or condition as to time, he could not maintain that the provisions of the building contract modified the same.

And see *Chicago v. Hunt* (1907) 227 Ill. 130, 81 N. E. 243, affirming (1906) 130 Ill. App. 462, as set out *supra*, I. 2.

e. Reduced compensation.

In *Irwin v. Gould Elevator Co.* (1909) 107 Minn. 233, 119 N. W. 1065, under a contract which provided that an architect and supervising engineer for services in furnishing plans and specifications for a grain elevator and superintending construction should receive 7 per cent on a certain sum, and should not be held responsible for delays, however caused, but that if he failed to have the elevator completed on a date named, he should receive only 6 per cent, it was held that the plaintiff was only entitled to 6 per cent where the elevator was not completed on the specified date, even though there had been no lack of diligence on his part; it being said that the proviso as to delays had no reference to the amount of commissions, and that the proviso reducing the commissions to 6 per cent applied in case of delay from any cause, and even though all the parties had proceeded with due diligence and in good faith.

II. Time when compensation payable.

In *Davis v. New York Steam Co.* (1898) 33 App. Div. 401, 54 N. Y. Supp. 78, where an architect offered to prepare plans and specifications and superintend construction for 3 per cent on total cost of the work, with "payments to be made on month-

ly estimates," which offer was accepted "conditioned on this agreement terminating in twenty-four months," to which condition the architect agreed, it was held that the contract fixed the time of payment, and that the architect was entitled to payment each month for twenty-four months, of 3 per cent on the estimated cost of work performed during each such month. In reaching this conclusion the court overruled the contention that the architect could recover, as per custom among architects on completion of the plans and specifications, 2 per cent of the total estimated cost, and that the provision as to payment on monthly estimates related only to the supervision, saying that, in view of the express provisions of the contract, it was impossible to split the plaintiff's services.

When the time for payment of compensation for architectural services is not stipulated, but the amount is to be determined by the total cost of construction, the employer, in the absence of a showing of a controlling custom, is liable only upon the basis of completed work. See *Fitzhugh v. Mason* (1905) 2 Cal. App. 220, 83 Pac. 282.

III. Who liable for compensation.

It has been held that where an owner hires an architect to superintend construction, and the contract is silent as to who shall pay the commissions, the owner, and not the builder, is liable, unless it appears that there is a custom which renders the latter liable, or that he has received the money from the owner to the plaintiff's use. *Locke v. Morter* (1885) 2 Times L. R. (Eng.) 121.

IV. Entire and divisible contracts.

Where architects are employed to prepare plans and specifications and to superintend construction for a specified per cent of the contract price, that is, one sum for the entire services, the contract is entire, and not divisible—at least, where it contains nothing evidencing a contrary intent upon the part of the parties thereto. *Spalding County v. Cham-*

berlin (1908) 130 Ga. 649, 61 S. E. 533, holding that no recovery can be had under such a contract for the mere preparing of plans and specifications, where no excuse is offered for not having superintended construction.

But where the contract, which is the basis of the demand, provides for separate items, and the price is apportioned to each item, the contract is severable, and the architect may recover for one or more items, though he cannot recover for others. *Audubon Bldg. Co. v. F. M. Andrews Co.* (1911) 111 C. C. A. 92, 187 Fed. 254; *Gauntt v. Chehalis County* (1913) 72 Wash. 106, 129 Pac. 888. And see *Hutchinson v. Conway* (1900) 34 N. S. 554. In *Audubon Bldg. Co. v. F. M. Andrews & Co.* (Fed.) *supra*, where the contract was to furnish preliminary sketches for a specified per cent of the cost of the building, payable on acceptance, to furnish working drawings and specifications for a specified per cent payable on completion, and to supervise the construction of the building for a specified per cent payable pro rata with the architect's certificates issued during the progress of the work, it was held that the contract was severable, so that the architect could recover for working plans and specifications furnished, although he could not recover for supervision of construction, because of the fact that he had acted in derogation of the duties owed his employer. In *Gauntt v. Chehalis County* (Wash.) *supra*, the plaintiff contracted to prepare plans and specifications for a courthouse for 2½ per cent of the cost of the proposed building, which was to be \$100,000, and to superintend construction for an additional 2½ per cent, but in case the contract was not let the compensation was to be \$1,000 only for plans and specifications, which, however, was to be applied as part payment in the event of the building going ahead at some future time. The architect was held entitled to no compensation beyond the \$1,000, no contract for construction based on his plans ever having been let.

G. J. C.

NETTIE B. VEYSEY, Respt.,
v.

S. MORIYAMA, Appt.

California Supreme Court (Dept. No. 2)—February 1, 1921.

(184 Cal. 802, 195 Pac. 662.)

Landlord and tenant — evidence — loss of water for irrigation — effect of remaining in possession.

1. A tenant of land requiring irrigation cannot remain in possession and claim exemption from paying rent on the theory of a partial eviction because of breach by the lessor of his covenant to pay the assessments on the water stock, so that the stock is sold and the tenant loses the benefit of the water.

[See note on this question beginning on page 1369.]

— what is constructive eviction.

2. Any disturbance of the tenant's possession by the landlord, where the premises are rendered unfit or unsuitable for occupancy, in whole or in substantial part for the purpose for

which they were leased, amounts to a constructive eviction if the tenant so elects and surrenders his possession.

[See 16 R. C. L. 686; see also notes in 4 A.L.R. 1461; 13 A.L.R. 818.]

APPEAL by defendant from a judgment of the Superior Court for Imperial County (Cole, J.) in favor of plaintiff in an action brought for unlawful detainer of land after defendant's default in payment of rent. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. James L. Allen, for appellant:

Defendant was entitled to the enjoyment of the premises as leased.

Standart v. Round Valley Water Co. 77 Cal. 399, 19 Pac. 689; Stanislaus Water Co. v. Bachman, 152 Cal. 727, 15 L.R.A.(N.S.) 359, 93 Pac. 858; Clark v. Koesheyan, 26 Cal. App. 305, 146 Pac. 904; McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984; Christopher v. Austin, 11 N. Y. 216; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Coburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Leishman v. White, 1 Allen, 489; Salmon v. Smith, 1 Wms' Saund. 204, note 2, 85 Eng. Reprint, 207; Levitzky v. Canning, 33 Cal. 306; Agar v. Winslow, 123 Cal. 593, 69 Am. St. Rep. 84, 56 Pac. 422; Jones, Land. & T. § 354; 1 Taylor, Land. & T. § 309; Agoure v. Lewis, 15 Cal. App. 71, 113 Pac. 882.

A constructive eviction excludes the tenant from liability for rent falling due.

Frepons v. Grostein, 12 Idaho, 671, 87 Pac. 1004; McCall v. New York L. Ins. Co. 201 Mass. 223, 21 L.R.A.(N.S.) 38, 87 N. E. 582; Lester v. Griffin, 57 Misc. 628, 108 N. Y. Supp. 580; Dono-

van v. Koehler, 119 App. Div. 51, 103 N. Y. Supp. 935; Kaiser v. Marks, 115 N. Y. Supp. 120.

It is not necessary that there should be an actual ouster to constitute an eviction, but any act of the lessors which results in depriving lessees of the beneficial enjoyment of the premises and the appurtenances thereto constitutes an eviction.

Agar v. Winslow, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422; Levitzky v. Canning, 33 Cal. 299; Camarillo v. Fenlon, 49 Cal. 202; Skaggs v. Emerson, 50 Cal. 3; Kelley v. Long, 18 Cal. App. 159, 122 Pac. 832; Doran v. Chase, 2 W. N. C. 609; Edmison v. Lowry, 3 S. D. 77, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 583; Marchant v. Hayes, 117 Cal. 669, 49 Pac. 840; Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857; First Nat. Bank v. Perris Irrig. Dist. 107 Cal. 55, 40 Pac. 45.

Messrs. Conkling & Brown for respondent.

Sloane, J., delivered the opinion of the court:

This is an action for unlawful

detainer of land after default of defendant in payment of rent.

Defendant at the time the action was brought was in possession of the land in question consisting of 640 acres of farm land in the county of Imperial, under a three-year lease which by its terms had yet over two years to run. Two instalments of rent aggregating the sum of \$5,500 were delinquent at the time of filing suit.

The only defense offered is a plea of eviction from a substantial part of the land and a resultant release of defendant from liability to pay rent. This claim of eviction rests upon the following circumstances: The land covered by the lease was dependent for its use and value upon the necessary water for irrigation. There was appurtenant to this land 460 shares of water stock in the Imperial Water Company No. 8, the water company furnishing water for irrigation to this part of the Imperial valley. By the terms of the lease it is provided that the lessee "shall have the right to use the water on said land, provided that he shall pay for all water ordered, and used by him as it becomes due and payable," and that the lessor "agrees to pay all assessments levied against the water stock located on said land as the same becomes due and payable, in order that the party of the second part (the lessee) shall have unrestricted use of the proportion of water to which said stock is entitled." The lessor, soon after the execution of the lease, defaulted in the payment of an assessment on this water stock, and in consequence thereof the water company caused ten shares of the stock to be sold under the assessment. It is alleged in the answer that from the date of such sale defendant "has been unable to procure any water on the shares so sold," and that the lessors have ever since failed to "replace said water stock on said land, so that defendant might have the free and unrestricted use of the proportion of the water to which such stock was en-

titled, or to place sufficient water stock on said land to irrigate same," and that defendant "has been deprived of the unrestricted use of the water to which such stock was entitled." It is further alleged that, because of these conditions, the defendant has been evicted from the portion of the land upon which said stock was located.

There is no allegation showing what part or how much of the land was affected by the sale of this water stock, or what was the extent or amount of damage resulting to defendant.

The defendant remained in the actual occupancy of the whole tract, and planted and harvested a crop from the whole of it. The evidence discloses that there was a partial failure of the crop on a fraction of this land said to have been served by this withdrawn water stock. The evidence is conflicting as to whether or not there was an actual shortage of or insufficiency of water for the proper irrigation of the tract. The trial court found that this state of facts did not constitute an eviction.

Although not pleaded, it appears in evidence and is found by the court that defendant expended \$391 in purchasing water stock to replace that sold under assessment against the lessors, and \$220 of assessment on water stock appurtenant to the land, and that the water stock and water supply were thus restored by defendant himself prior to the commencement of these proceedings.

Defendant is relying in this case on a constructive eviction. It is not contended that he was at any time actually ousted from possession of any part of this land, or that he was not at all times, from the beginning of the lease until some time after this suit was begun, occupying and farming the whole of it. His interest under his lease in the water stock was not in the possession of the stock itself, but in the right to a supply of water incident to such stock, and while, if he was sufficiently deprived of his water supply to

materially affect the purposes of his lease hold, he might be justified in treating such breach of the covenants of the lease as an eviction, and thereupon terminating his occupancy of the part of the premises affected, or even all of them, yet he could not remain in the use and occupation of the whole of this property and claim exemption from paying rent on the ground of a constructive eviction.

There are cases in the decisions where a tenant who has been actually and forcibly ousted of possession of a part of the rented premises has been permitted to hold the remainder of the leasehold without paying rent, as where, in a house consisting of several rooms, the landlord had wrongfully taken possession of part of them, it has been held that the tenant could not be required while this partial eviction continued either to vacate the remainder of the house or pay rent for the part he occupied. Such is the application of *Christopher v. Austin*, 11 N. Y. 216, *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415, and other like decisions cited by appellant.

The general rule, however, relating to a constructive eviction is that any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy, in whole or in substantial part, for the purposes for which they were leased, amounts to a constructive eviction, if the tenant so elects and surrenders his possession. 16 R. C. L. p. 686. There can be no constructive eviction if the tenant continue in the possession of the whole, however much he may be disturbed in the beneficial enjoyment. 16 R. C. L. pp. 686, 687; *Keating v. Springer*, 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Boreel v. Law-*

ton, 90 N. Y. 293, 43 Am. Rep. 170. For instance, the failure of the landlord to heat a leased building as agreed under the lease may constitute an eviction, but the tenant must abandon the possession. He cannot remain in possession and enjoy without paying the rent such supply of heat as is furnished, although so inadequate as to have warranted an abandonment of the lease had the tenant so elected. 16 R. C. L. p. 692; note in 37 L.R.A. (N.S.) 1218; *Minneapolis Co-op. Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473, 52 N. W. 986; *Berlinger v. Macdonald*, 149 App. Div. 5, 133 N. Y. Supp. 522; *Koehler v. Scheider* (Com. Pl.) 15 Daly, 198, 4 N. Y. Supp. 611; *Siebold v. Heyman* (Sup.) 120 N. Y. Supp. 105.

So, in this case, conceding that a failure of the water supply on 10 out of 460 shares of water stock on a total acreage of 640 acres is sufficient to constitute a constructive eviction, the tenant cannot avoid his covenant to pay rent while he remains in possession of the entire premises and continues to cultivate the whole thereof and enjoy the benefits of the remaining water supply. He has ample remedy under such circumstances in recouping the damages he may sustain against the accruing rentals. *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *McCoy v. Oldham*, 1 Ind. App. 372, 50 Am. St. Rep. 208, 27 N. E. 647.

The evidence discloses that defendant harvested \$25,000 worth of produce from this tract of land during the one cropping season he was in possession. If he had lost the entire use of the proportion of the land served with water from the 10 shares of stock sold from the total 460 shares, his proportionate loss would have been less than \$600.

The finding of the trial court that the failure of the lessors to protect these shares did not amount to an eviction was justified under the evidence.

Although there was no pleading to support a judgment for damages,

Landlord and
tenant—evidence
—loss of water
for irrigation—
effect of remain-
ing in pos-
session.

—what is
constructive
eviction.

the court allowed the sum of \$611 to defendant as a set-off against the rent due, as compensation for the amount expended by defendant for replacing the forfeited shares and for payment of water assessments, giving judgment for the balance claimed on the unpaid instalments of rent.

The defendant surrendered possession of the premises during the pendency of the action. This action was maintained by the assignee and grantee of the original lessors, but there is nothing in the issues presented making that circumstance material.

The judgment is affirmed.

I concur: Lennon, J.

Wilbur, J.:

I concur. The trial court found

that there was no insufficiency or shortage of water for the proper irrigation of the tract, and, as the finding of the court is supported by sufficient evidence, it follows that there was no eviction from any substantial part of the premises. For that reason I concur in the judgment.

Petition for rehearing denied March 3, 1921.

NOTE.

The rights and remedies of a tenant who remains in possession of all or part of the premises against the landlord for interfering with his possession or enjoyment, are the subject of the annotation following *TOY v. OLINGER*, post, 1369.

CHARLES TOY, Respt., v. J. B. OLINGER, Appt.

Wisconsin Supreme Court—February 8, 1921.

(173 Wis. 277, 181 N. W. 295.)

Landlord and tenant — onion odors — waiver.

1. A tenant of a moving picture theater waives any right which might arise from the fact that the landlord permits odors of onions to escape into the theater from the basement, if the tenant could have discovered the condition before taking possession, and paid rent unqualifiedly for a considerable period after learning of it.

[See note on this question beginning on page 1369.]

— discordant music in adjoining tenement — liability.

2. To render the lessor of a moving picture theater liable to the lessee for losses caused by discordant music produced by a tenant of other portions of

the building, the landlord must be shown to be in some way responsible for it.

[See 16 R. C. L. 694; 3 R. C. L. Supp. 594; see also note in 4 A.L.R. 1464.]

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County (Fairchild, J.) in favor of plaintiff, and dismissing defendant's counterclaim, in an action brought to recover a balance alleged to be due for rent of a portion of plaintiff's building. *Affirmed.*

Statement by Eschweiler, J.:

Action to recover a balance due for rent on a certain portion of plaintiff's building in Milwaukee, occu-

pied by defendant for a moving picture theater. The written lease provided for a term commencing January 1, 1917, terminating December

31, 1919, and at an annual rental of \$4,000 for two years, and then \$5,000. Rent was duly paid until August 1, 1917. February 18, 1918, the usual form of notice to pay the rent then due, or vacate, was served. Pursuant to such notice the premises were vacated by defendant March 1st. This action was then brought for the rent due up to March 1st.

Defendant counterclaimed for damages, alleging a breach of the covenant for the quiet use and enjoyment of the premises, in that they were rendered untenable for moving picture purposes by reason of noxious odors arising from the basement of the building, and further from noise and disturbance, permitted to be carried on in another portion of the building in premises adjoining defendant's, by another tenant of plaintiff, conducting a café in which there was music furnished to his patrons, all of these things being to the great annoyance and disturbance of defendant's patrons. Defendant maintained that such situations continued by plaintiff or permitted by him were sufficient in fact and in law to amount to his constructive eviction, either total or partial, thereby relieving him from the obligation to pay rent during such period, and further entitling him to damages from the resulting financial harm.

The plaintiff conducted a restaurant in another portion of the same building. In connection therewith he had in the basement of the building, for a long time prior to the making of the lease with defendant and thereafter, stored and cut up onions. Within two weeks after taking possession defendant discovered that the odor from the onions permeated his premises, and from then on he complained of such condition at times to the plaintiff, and attempted himself to remedy the same by changes in ventilation and other methods. In March he rented the theater to other tenants. These tenants occupied it for seven or eight weeks, and then vacated. He

then opened the theater himself for a period of three or four weeks, and then closed it, opening again at the end of October for one week. It then remained closed until March 1st, when he vacated.

Sometime in the spring of 1917 another portion of plaintiff's building was leased to a third person for café purposes. Immediately after taking possession this tenant commenced, and thereafter continued, to furnish music to his patrons. Defendant complained to plaintiff that this music interfered with the renting of the theater and drove away patronage.

By letter of September 17, 1917, the plaintiff notified defendant he would not give up the use of his basement for the purposes above indicated. On November 5, 1917, by letter, plaintiff notified defendant that the rent then unpaid was over \$1,300, and such default was considered a violation of the lease. Thereafter defendant paid \$100 in December, and the same amount in January, 1918. Defendant testified that his net loss in this particular enterprise was between \$7,000 and \$8,000.

At the conclusion of the trial before a jury the court granted plaintiff's motion for judgment for the amount of the unpaid rent, and dismissed defendant's counterclaim, and directed judgment in accordance therewith. From such judgment defendant has appealed.

Messrs. Cochems, Wolfe, & Kolin-ski, for appellant:

Defendant should not be compelled to pay rent where he remains in possession of the premises under his lease in reliance upon the landlord's promise that the beneficial use and enjoyment thereof will be restored to him by acts on the landlord's part, which will cause a cessation of the nuisances theretofore in existence.

24 Cyc. 1057; Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co. 141 Wis. 199, 124 N. W. 291, 18 Ann. Cas. 976; Eldred v. Leahy, 31 Wis. 546; 18 Am. & Eng. Enc. Law, 2d ed. 298; Kuschinsky v. Flanigan, 170 Mich. 245, 41 L.R.A.(N.S.) 480,

136 N. W. 362, Ann. Cas. 1914A, 1228; Silber v. Larkin, 94 Wis. 9, 68 N. W. 406; Wade v. Herndl, 127 Wis. 544, 5 L.R.A.(N.S.) 855, 107 N. W. 4, 7 Ann. Cas. 591; Northwestern Realty Co. v. Hardy, 160 Wis. 324, 151 N. W. 791; Jones, Land. & T. § 368; Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N. W. 502; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N. W. 487; Hall v. Irvin, 78 App. Div. 107, 79 N. Y. Supp. 614.

Messrs. Stover & Stover, for respondent:

Defendant, by remaining in, waived his right to claim a constructive eviction.

24 Cyc. 1159; Kerr, Real Prop. 1082; 11 Am. & Eng. Enc. Law, 2d ed. 479, note; Buchanan v. Orange, 118 Va. 511, L.R.A.1916E, 739, 88 S. E. 52, Ann. Cas. 1918D, 391; Wurz v. Watts, 73 Misc. 262, 132 N. Y. Supp. 685; Russell v. Olson, 22 N. D. 410, 37 L.R.A.(N.S.) 1217, 133 N. W. 1030, Ann. Cas. 1914B, 1069; Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 38 Am. St. Rep. 473, 52 N. W. 986; Bass v. Rollins, 63 Minn. 226, 65 N. W. 348; Berlinger v. Macdonald, 149 App. Div. 5, 133 N. Y. Supp. 522; Koehler v. Scheider, 15 Daly, 198, 4 N. Y. Supp. 611; Jackson v. Paterno, 58 Misc. 201, 108 N. Y. Supp. 1073, affirmed in 128 App. Div. 474, 112 N. Y. Supp. 924; Siebold v. Heyman, 120 N. Y. Supp. 105; Feist v. Peters, 120 N. Y. Supp. 805; Merida Realty Co. v. Coffin, 123 N. Y. Supp. 120.

Eschweiler, J., delivered the opinion of the court:

So far as the defendant's claim to defeat the payment of rent during the period of his occupancy of the premises or as a basis for damages is predicated upon the fact that another tenant of plaintiff furnished to his patrons a certain class of music which at times was quite out of harmony with the music

Landlord and tenant—dis-cordant music in adjoining tenement—liability.

being played in defendant's theater, no sufficient showing of responsibility on the part of the plaintiff for such situation has been presented so as to make plaintiff in any wise liable.

The odor with which nature has so bountifully endowed the onion had been escaping from the base-

ment into the theater premises prior to defendant's taking possession thereof, as could then have been discovered by him. He first discovered it in about two weeks after taking possession on January 1st. In spite of that condition, so early brought to his attention, he continued to pay rent on said premises according to the lease and at the specified rate until August 1st. During this period he leased to others the same premises at a greater rental rate than that which he was paying, and after such subtenants gave up their lease, finding it an unprofitable venture, he used the theater himself. After he had stopped paying the rent in August he again opened the theater in October for a week, and then remained in possession thereof until the notice to vacate was served on him. On November 5th he was notified that his failure to pay rent was being considered a violation of the lease. He nevertheless elected to remain there, and did pay, after such notice, two instalments on the rent in December and January, of \$100 each.

Under the facts and circumstances the trial court was correct in holding that there was no constructive eviction, either partial or whole, by the landlord of the defendant as tenant. His remaining in possession, his ^{—onion odors—}unqualified payment ^{—waiver.} of rent up till the 1st of August, 1917, must be considered to have been a waiver of any rights he then might have had to treat this condition, if chargeable to plaintiff, as a breach of the covenant of the lease.

Neither is there satisfactory proof that the substantial failure of defendant's business venture was the result of these odors escaping into his theater premises.

It follows that the trial court was right in dismissing defendant's counterclaim and directing judgment for the amount of the unpaid rent.

Judgment affirmed.

ANNOTATION.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment.**I. Introductory, 1369.****II. Rights in general:**

- a. To claim constructive eviction, 1370.
- b. To claim partial actual eviction:
 - 1. In general, 1372.
 - 2. Liability upon a quantum meruit, 1378.
- c. To claim breach of covenant, 1379.
- d. To claim trespass or tort, 1382.

III. Form of remedy:

- a. In general, 1383.
- b. Set-off or counterclaim, 1384.
- c. Action for damages, 1387.
- d. Injunction:
 - 1. In general, 1390.
 - 2. Damages in lieu of injunction, 1393.

IV. Causes of complaint:

- a. In general, 1394.
- b. Infestation of premises by vermin during the tenancy, 1394.
- c. Use to which other portions of leased premises are put:

I. Introductory.

Where the landlord interferes with the tenant's beneficial enjoyment of the leased premises to an extent causing injury and damage to the tenant, but not amounting to an actual eviction partial or otherwise, several courses of procedure are open to the tenant. If the conduct of the landlord has the effect of destroying, in part at least, the beneficial use of the premises by the tenant, the latter may vacate the premises and assert the claim of constructive eviction in avoidance of further liability under the lease. But it is to be noted that, in order to assert constructive eviction, the tenant must abandon the premises (see II. a).

It does not follow, however, that the tenant loses all remedy by remaining in possession of the leased premises. The landlord's conduct may be such as to amount to an actual partial eviction in which case the entire rent is suspended (see II. b). Frequently he may treat the wrongful interference

IV. c—continued.

- 1. By lessor, 1395.
- 2. By third person or other tenant with authority of landlord, 1395.
- d. Use to which adjoining premises are put by or under authority of landlord, 1399.
- e. Obstruction to access, air, or light:
 - 1. Means of access, 1400.
 - 2. Light and air, 1405.
- f. Active interference by lessor with lessee's possession or use of the leased premises, 1406.
- g. Existence of infectious disease, 1408.
- h. Failure to repair, 1409.
- i. Failure to heat, 1410.
- j. Failure to furnish power or water, 1412.
- k. Failure to furnish elevator or telephone service, 1414.
- l. Miscellaneous, 1414.

with his beneficial enjoyment or use of the premises as constituting a breach of covenant (see II. c), and he may usually treat the acts of his landlord as constituting a tort or trespass (see II. d). In either event he may maintain an independent action (see III. c), or, if the local practice in regard to recoupment, set-off, or counterclaim permits, he may avail himself of his right in that form against the landlord's action for rent (see III. b).

It is a matter of importance, in the first instance, for the tenant to determine whether it is advisable to treat the wrongful conduct of the landlord as a constructive eviction and abandon the premises, or to retain possession and rely upon the acts complained of to reduce or offset the rent. From a practical standpoint, in making the choice, the fact is to be taken into consideration that, without apparent exception, any wrongful act of the landlord which would amount to a constructive eviction if the premises were abandoned will also support the alter-

native remedy to which reference has been made; but there may be wrongful acts by the landlord which would support that remedy that could not be relied upon as a constructive eviction. In this connection it is to be noted that the question as to what constitutes a constructive eviction is not within the scope of this annotation.

II. Rights in general.

a. To claim constructive eviction.

The great weight of authority is to the effect that, in order for the lessee to rely upon constructive eviction as a ground for avoiding payment of the rent contracted for, he must surrender or abandon the leased premises. Without being exhaustive, the following cases illustrate this rule.

Alabama. — *Paterson v. Bridges* (1917) 16 Ala. App. 54, 75 So. 260; *Crossthwaite v. Caldwell* (1894) 106 Ala. 295, 18 So. 47.

California. — *VEYSEY v. MORIYAMA* (reported herewith) ante, 1363; *Billicke v. Janss* (1910) 14 Cal. App. 342, 112 Pac. 201.

Illinois. — *Patterson v. Graham* (1892) 140 Ill. 531, 30 N. E. 460; *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Barrett v. Boddie* (1895) 158 Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143; *Leiferman v. Osten* (1897) 167 Ill. 93, 39 L.R.A. 156, 47 N. E. 203; *Kistler v. Wilson* (1898) 77 Ill. App. 149; *Dennick v. Ekdahl* (1902) 102 Ill. App. 199; *Fred K. Higbie Co. v. Charles Weeghman Co.* (1906) 126 Ill. App. 97; *Sloss v. Brockman* (1912) 171 Ill. App. 465; *Carey v. Tremont* (1912) 171 Ill. App. 604; *Saunders v. Fox* (1913) 178 Ill. App. 309; *Meyers v. Johnson* (1914) 186 Ill. App. 37; *Furman v. Wiczorkowski* (1916) 202 Ill. App. 347.

Indiana. — *Talbott v. English* (1900) 156 Ind. 299, 59 N. E. 857.

Iowa. — *Filkins v. Steele* (1904) 124 Iowa, 742, 100 N. W. 851.

Massachusetts. — *Boston & W. R. Corp. v. Ripley* (1866) 13 Allen, 421; *International Trust Co. v. Schumann* (1893) 158 Mass. 287, 33 N. E. 509; *Taylor v. Finnigan* (1905) 189 Mass. 568, 2 L.R.A. (N.S.) 973, 76 N. E. 203;

Callahan v. Goldman (1913) 216 Mass. 238, 103 N. E. 689.

Michigan. — *Beecher v. Duffield* (1893) 97 Mich. 423, 56 N. W. 777.

Missouri. — *Jackson v. Eddy* (1848) 12 Mo. 209; *Griffin v. Freeborn* (1914) 181 Mo. App. 203, 168 S. W. 219.

New York. — *Edgerton v. Page* (1859) 20 N. Y. 281; *Boreel v. Lawton* (1882) 90 N. Y. 293, 43 Am. Rep. 170; *Wyckoff v. Frommer* (1895) 12 Misc. 149, 33 N. Y. Supp. 11; *Seaboard Realty Co. v. Fuller* (1900) 33 Misc. 109, 67 N. Y. Supp. 146; *Beakes v. Haas* (1901) 36 Misc. 796, 74 N. Y. Supp. 843; *Thomson v. Ludlum* (1901) 36 Misc. 801, 74 N. Y. Supp. 875; *Olson v. Schevlovitz* (1904) 91 App. Div. 405, 86 N. Y. Supp. 834; *Butler v. Carillo* (1904) 88 N. Y. Supp. 941; *Kinney v. Libbey* (1907) 54 Misc. 595, 104 N. Y. Supp. 863; *Jackson v. Paterno* (1908) 58 Misc. 201, 108 N. Y. Supp. 1073, affirmed in (1908) 128 App. Div. 474, 112 N. Y. Supp. 924; *Lawrence v. Katcher* (1909) 117 N. Y. Supp. 105; *Siebold v. Heyman* (1909) 120 N. Y. Supp. 105; *Merida Realty Co. v. Coffin* (1910) 123 N. Y. Supp. 120; *Herrmann v. Chase* (1913) 140 N. Y. Supp. 371; *Carolina T. Paterno Corp. v. Grossman* (1919) 175 N. Y. Supp. 510; *Cram v. Dresser* (1848) 2 Sandf. 120.

Oregon. — *Perry v. Fletcher* (1919) 93 Or. 43, 182 Pac. 143.

Pennsylvania. — *Harper & Bros. Co. v. Jackson* (1913) 240 Pa. 312, 87 Atl. 430.

Tennessee. — *Weinstein v. Barrasso* (1918) 139 Tenn. 593, L.R.A.1918D, 1174, 202 S. W. 920.

Washington. — *Weinstein v. Lomer* (1891) 3 Wash. 401, 28 Pac. 760; *Hockersmith v. Sullivan* (1912) 71 Wash. 244, 128 Pac. 222; *Tennes v. American Bldg. Co.* (1913) 72 Wash. 644, 131 Pac. 201.

Wisconsin. — *TOY v. OLINGER* (reported herewith) ante, 1366.

To constitute an eviction there must be either an actual expulsion of the tenant, or some act of a permanent character, by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises, or some part of them, to which he yields, abandoning the

possession within a reasonable time. The intent with which the act is done may be inferred from the act itself. *Voss v. Sylvester* (1909) 203 Mass. 233, 89 N. E. 241.

In *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805, involving a case of alleged eviction on the ground of interference with the means of securing light which the tenant was entitled to under his lease, the court said: "To evict a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. Hence, it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right."

In *Garrett v. Conner* (1910) 155 Ill. App. 161, it was held that the lessee who remained in possession of the leased premises could not, in an action by the lessor for the rent, assert as a defense thereto his partial eviction from the premises, on the ground that during the continuance of the lease

the lessor, who owned the property adjoining the building in which the leased premises were located, began the erection of a building thereon, and during the construction of this building holes were cut in the walls of the building in which the leased rooms were located, the hallway became loaded with brick and mortar, interfering with the ingress to and egress from the rooms, and the litter created thereby was more or less ground and tracked into the rooms occupied by the lessee.

In *Leary v. Meier* (1881) 78 Ind. 393, the trial court was asked and refused to instruct the jury that an eviction of the tenant by a landlord of rented premises suspends the rent, that the modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but an interference with the tenant's beneficial enjoyment of the rented premises will amount to an eviction in law, and when such is the case the rent is suspended. On appeal the court said that this instruction was properly refused, because it was not applicable to the case made by the evidence, since the rent was payable in advance, and the lessor was undertaking to forfeit the lease because of the refusal of the lessee to pay rent which had accrued prior to the time of the act which the lessee claimed constituted an eviction. It was, however, said, in considering the question, that, as the lessee retained possession of the premises and refused to surrender them, the most that he might claim from an interference with the beneficial enjoyment was a deduction from the rent equal to the damages sustained.

In *Mortimer v. Brunner* (1860) 6 Bosw. (N. Y.) 653, the court said that the proposition that there can be retention of demised premises, and an eviction, is logically and legally contradictory. The position has not the slightest warrant in law, principle, sense, or decision.

In *Goldberg v. Lloyd* (1908) 110 N. Y. Supp. 530, the tenant abandoned the premises sometime after the matters which he complained of and relied upon as a ground for constructive

eviction, and his right to do so was denied. The court said: "Assuming, without deciding, that the plaintiff was required to make such repairs, and to see to it that the front door was kept closed, his failure to do so need not be considered, in view of the uncontradicted evidence that the particular matter just mentioned had been remedied, or did not exist when the defendant vacated the premises. The defendant, by thus remaining upon the premises, waived whatever right he may have had, by reason of these matters, to claim a constructive eviction."

Any right to claim a constructive eviction, due to bad odors in and dampness of a leased apartment was waived by the tenant remaining in possession for some months after this condition arose. *Heilbrun v. Aaronson* (1909) 116 N. Y. Supp. 1096.

In *Larsen v. New York* (1912) 76 Misc. 569, 137 N. Y. Supp. 144, the court said that the lessee could not go on occupying the premises and refuse to pay rent because possession of a portion thereof was interfered with.

In *International Trust Co. v. Schumann* (1893) 158 Mass. 287, 33 N. E. 509, the court said: The tenant, "having remained in possession until the end of the term demised, now alleges as an eviction the fact that during the term his landlord entered on the premises under claim of right to repossess them for breach of covenants by the tenant, and brought a process to eject the tenant, on which final judgment for the tenant was rendered; and he further alleges as breaches of the implied covenant for the quiet enjoyment the same entry and suit, and the fact that the landlord, knowing that the premises were of value to the tenant only for his business of common victualer and seller of liquors, caused the license commissioners to refuse him a liquor license, and also caused his license as a common victualer to be taken from him wrongfully and without right. None of these acts were an eviction of the tenant, or an ouster equivalent to an eviction, for the reason that he remained in the occupation of the

premises until the end of his term, and for the same reason, if for no others, none of them worked a breach of the implied covenant for quiet enjoyment. The entry was a formal one, not interrupting the tenant's occupation, and doing him no damage. The process was not a malicious suit, and for it his costs, as the prevailing party, are the only remedy. Assuming that the entry and suit were an unjustifiable attempt to oust the tenant, which, if he had yielded, would have been an eviction and a breach of the covenant, as he did not yield, and was never ousted, the entry was, at most, a mere trespass, for which he might recover nominal damages in a suitable action, but not in his present suit, which, by his declaration, he has elected to treat as an action of contract for breach of covenant. The alleged acts of the landlord with reference to the tenant's licenses from public authorities had no tendency to interrupt, and did not interrupt the tenant's possession."

In this regard it has been pointed out that a deduction of the entire rent of a building during the period of interruption cannot be allowed, although the act of the plaintiffs may have been such as to give defendant a right to treat it as an eviction, if he did not choose so to treat it, but remained in possession, and had some use of the building more or less beneficial. *Goebel v. Hough* (1879) 26 Minn. 252, 2 N. W. 847.

b. To claim partial actual eviction.

1. In general.

It may be observed that any discussion in this subdivision of the distinction between actual and constructive eviction has reference to a partial actual eviction, the tenant retaining possession of at least a portion of the premises.

Where the acts or conduct of the landlord are such as to deprive the lessee of the beneficial enjoyment and use of some portion of the leased premises, he may retain possession of the remainder of the premises, and use and enjoy the same, without rendering himself liable for any part of the rental; since an actual eviction

from a portion of the premises suspends the rent as to the whole.

Alabama.—*Rice v. Dudley* (1880) 65 Ala. 68.

Arkansas.—*Collins v. Karatopsky* (1880) 36 Ark. 316.

California.—*Skaggs v. Emerson* (1875) 50 Cal. 6; *McAlester v. Landers* (1886) 70 Cal. 80, 11 Pac. 505.

Colorado.—*Gray v. Linton* (1906) 38 Colo. 175, 88 Pac. 749.

Illinois.—*Halligan v. Wade* (1859) 21 Ill. 470, 74 Am. Dec. 108; *Smith v. Wise* (1871) 58 Ill. 141; *Hayner v. Smith* (1872) 63 Ill. 430, 14 Am. Rep. 124; *Lynch v. Baldwin* (1873) 69 Ill. 210; *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Barrett v. Boddie* (1895) 158 Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143.

Massachusetts.—*Shumway v. Collins* (1856) 6 Gray, 227; *Fuller v. Ruby* (1858) 10 Gray, 285; *Leishman v. White* (1861) 1 Allen, 489; *Colburn v. Morrill* (1875) 117 Mass. 262, 19 Am. Rep. 415.

Michigan.—*Kuschinsky v. Flanagan* (1917) 170 Mich. 245, 41 L.R.A. (N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228.

New Jersey.—*Morris v. Kettle* (1894) 57 N. J. L. 218, 30 Atl. 879.

New York.—*Christopher v. Austin* (1854) 11 N. Y. 216; *Hamilton v. Graybill* (1897) 19 Misc. 521, 43 N. Y. Supp. 1079; *Brown v. Wakeman* (1891) 42 N. Y. S. R. 677, 16 N. Y. Supp. 846, affirmed in (1892) 45 N. Y. S. R. 671, 18 N. Y. Supp. 363; *Cushman v. Thompson* (1908) 58 Misc. 539, 109 N. Y. Supp. 757; *Lawrence v. Edwin A. Denham Co.* (1908) 58 Misc. 543, 109 N. Y. Supp. 752; *Fifth Ave. Bldg. Co. v. Kernochan* (1917) 221 N. Y. 370, 117 N. E. 579; *Schulte Realty Co. v. Pulvino* (1919) 179 N. Y. Supp. 371; *Kiddie Art Novelty Co. v. Paneth, Falk & Weinhandler* (1921) 187 N. Y. Supp. 242; *Kerrigan v. May* (1921) 188 N. Y. Supp. 774; *Moffat v. Strong* (1861) 9 Bosw. 57; *Pendleton v. Dyett* (1825) 4 Cow. 581; *Vermilya v. Austin* (1853) 2 E. D. Smith, 203; *Campbell v. Shields* (1855) 11 How. Pr. 565; *Peck v. Hiler* (1856) 14 How. Pr. 155; *Johnson v. Oppenheim*

(1872) 43 How. Pr. 433; *People ex rel. Murphy v. Gedney* (1877) 10 Hun, 151.

Ohio.—*Frankel v. Steman* (1915) 92 Ohio St. 197, 110 N. E. 747; *Crown Mfg. Co. v. Gay* (1885) 9 Ohio Dec. Reprint, 420.

Oklahoma.—*Holden v. Tidwell* (1913) 37 Okla. 555, 49 L.R.A. (N.S.) 369, 133 Pac. 54, Ann. Cas. 1915C, 394.

Pennsylvania.—*Hoeveler v. Fleming* (1879) 91 Pa. 322; *McSorley v. Allen* (1908) 36 Pa. Super. Ct. 271; *Wolf v. Weiner* (1868) 2 Brewst. 524.

South Dakota.—*Edmison v. Lowry* (1892) 3 S. D. 77, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 583.

Vermont.—*Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 583.

Virginia.—*Tunis v. Graudy* (1872) 22 Gratt. 109; *Miller v. Southern R. Co.* (1921) — Va. —, 108 S. E. 838.

Wisconsin.—*Wade v. Herndl* (1906) 127 Wis. 544, 5 L.R.A. (N.S.) 855, 107 N. W. 4, 7 Ann. Cas. 591.

England.—See *Upton v. Townend* (1855) 17 C. B. 30, 139 Eng. Reprint, 976, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56; *Morrison v. Chadwick* (1849) 7 C. B. 266, 137 Eng. Reprint, 107, 6 Dowl. & R. 567, 18 L. J. C. P. N. S. 189.

It has been said that it is extremely difficult to define with technical accuracy what is an eviction. The word "eviction" was formerly used to denote an expulsion by the assertion of a paramount title, or by process of law. But that sort of an eviction is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby suspended. *Upton v. Townend* (Eng.) supra.

Under the modern doctrine as to what constitutes an eviction, an actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law. *Hoeveler v. Fleming* (Pa.) supra.

Any act of the lessor depriving a tenant of the beneficial enjoyment of the leased premises, which amounts to

a substantial interference, constitutes an eviction. *Kelley v. Long* (1912) 18 Cal. App. 159, 122 Pac. 832. But this rule does not apply when the deprivation is of an insignificant or inconsequential portion of the premises. In the latter case the tenant is only entitled to reduction of the rent to the extent of the deprivation. *Ibid.*

In *Holden v. Tidwell* (1913) 37 Okla. 553, 49 L.R.A.(N.S.) 369, 133 Pac. 54, Ann. Cas. 1915C, 394, the court said: "Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord, or the failure of his title. Of late years it has come to include any wrongful act of his landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as one of commission. The rent is suspended by an eviction, because it is plainly unjust that the landlord should be permitted to collect it, while by his own act he deprives the tenant of the possession which is the consideration for it. But the landlord is not responsible for the actions of others lawfully done on their own premises. He is liable only for his own acts and for such acts of others as it was his duty to protect his tenant from."

In *Dolph v. Barry* (1912) 165 Mo. App. 659, 148 S. W. 196, the court said that an actual eviction exists where the lessor wrongfully enters upon the premises demised and by affirmative acts deprives the lessee of the beneficial use thereof, either in whole or in part. A constructive eviction may be found, even though no actual entry upon the premises is made by the lessor, when it appears that he, or one acting under his authority, does some act amounting to intentional, injurious interference by the landlord with the tenant's possession, and which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or any part thereof, or materially impairs his beneficial enjoyment. A mere trespass on the part of the landlord will not suffice, but, to constitute an eviction by construction of law, the

wrongful conduct of the landlord must be sufficient, through affirmative act or omission of duty, to render the premises untenable for the purpose for which the tenant leased them, or, at least, seriously interfere with their permanent use.

In *McSorley v. Allen* (1908) 36 Pa. Super. Ct. 271, Morrison, J., said that physical expulsion is not now necessary to constitute an eviction. Any act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under a lease will amount in law to an eviction, and suspend the rent. This language is quoted with approval in *Gibson v. Earling* (1912) 48 Pa. Super. Ct. 566.

Upon this point in *Schulte Realty Co. v. Pulvino* (1919) 179 N. Y. Supp. 371, the court said: "A constructive eviction arises where a landlord, while not actually depriving the tenant of possession of any part of the premises leased, has done or suffered some act by which the premises are rendered untenable, and has thereby caused a failure of consideration for the tenant's promise to pay rent. In the present case, however, there is no claim that the landlord's act in making or authorizing alterations has rendered the premises actually untenable. As a matter of fact, the tenant can still use the premises as a barber shop, and his only claim is that they have been rendered less convenient for that purpose. It is plain, therefore, that, if the landlord has interfered with the tenant's legal rights, the tenant must be permitted to urge the breach of the landlord's obligation, either as a defense or as a counterclaim to the landlord's claim for rent, or the tenant has no means of enforcing the landlord's obligation. The demise to the tenant undoubtedly included right of access to his premises, right to light and ventilation, and any act of the landlord which physically interfered with these rights of the tenant constitutes, in my opinion, an invasion of the demised premises and a partial eviction of the tenant therefrom. . . . If the demise includes a right to light and air, and the

landlord physically interferes with such light and air, his act must logically constitute an eviction of the tenant from the beneficial enjoyment of part of the demise."

In *Shumway v. Collins* (1856) 6 Gray (Mass.) 227, the court said: "The only remaining ground on which the plaintiffs relied to maintain their suit was that the right of the defendant to occupy the premises was terminated by a failure to pay rent, and by a notice to quit, given according to the provisions of the statutes before cited. But we think the plaintiffs fail to bring their case within any of those provisions. It is clear that the defendant was not a mere tenant at will. He occupied the premises by virtue of a written lease, which was, as has been already shown, valid between him and the plaintiffs. The only question, therefore, is whether he is liable to this process, under Stat. 1847, chap. 267, § 1, for the reason that he has neglected or refused to pay rent according to the terms of this written lease. Clearly he is not. By the wrongful act of the plaintiffs, he has been evicted from a part of the premises demised to him. This has been found by the jury, under instructions to which no exception is taken. We do not deem it necessary to determine whether, according to the ruling of the judge at the trial, and in conformity with many of the authorities, an eviction extinguishes all claim for rent (*Bacon, Abr. Rent L.; Morrison v. Chadwick* (1849) 7 C. B. 283, 137 Eng. Reprint, 107, 6 Dowl. & L. 567, 18 L. J. C. P. N. S. 189; *Upton v. Townend* (1855) 17 C. B. 30, 139 Eng. Reprint, 976, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56; *Christopher v. Austin* (1854) 11 N. Y. 216; *Smith, Land. & T.* 202); or whether, as has been sometimes said, after an eviction, a tenant is liable on a quantum meruit, for use and occupation of such part of the premises as was actually occupied by him subsequent to the eviction (*Stokes v. Cooper* (1813) 3 Campb. (Eng.) 514, note; *Smith v. Raleigh* (1814) 3 Campb. (Eng.) 513, 14 Revised Rep. 829; *Grand Canal Co. v. Fitzsimons*

(1828) 1 Hud. & B. L. R. (Ir.) 449; *Smith, Land. & T.* 307). The decision of this case does not depend on the determination of that question. All the authorities concur in declaring that a lessee is not liable to pay the rent stipulated by his lease, after an eviction by his landlord. The agreement in a lease to pay rent is entire, in consideration of the demise of the whole estate; and it cannot be severed or apportioned by an eviction of part of the premises by the tortious act of the landlord. After the eviction, therefore, in the present case, there was no wrongful refusal or neglect by the defendant to pay rent, according to the terms of the written lease under which he held the premises in the controversy. To any claim for rent under this lease, the eviction of the plaintiffs was a legal and sufficient answer. The defendant, after his eviction from a part of the premises by the plaintiffs, had a right to continue in the occupation of the residue, though not bound to do so; and while he so occupied he was in, not as a tenant at will, but under his written lease. The plaintiffs could not, by their own wrongful act, change the tenure by which the defendant occupied the residue of the premises."

In *Kuschinsky v. Flanigan* (1912) 170 Mich. 245, 41 L.R.A. (N.S.) 430, 136 N. W. 362, Ann. Cas. 1914A, 1228, an action to recover unpaid rent, the defense was the partial eviction of the lessee, due to the act of the lessor in constructing an outside stairway attached to a portion of the leased premises, to permit access to an adjoining apartment, causing the tenants of the apartment to pass to the street over the leased premises, and, as a result of remodeling, the tenant's back yard was filled with building material and rubbish. The court referred with approval to *Morris v. Kettle* (1894) 57 N. J. L. 218, 30 Atl. 879, and said, in applying the rules of law therein stated to the admitted facts in the case: "It at once becomes apparent that the defendant did not waive his right to insist upon a partial eviction by remaining in possession of the remainder of the premises, and paying

rent therefor, for several months after the acts complained of were committed." In the Michigan case the defendant vacated the premises a month and a half before the lease expired, and tendered a half month's rent then due, but the plaintiff refused to accept it, and sued to recover two months' rent.

In *Moffat v. Strong* (1891) 9 Bosw. (N. Y.) 57, it was held to constitute an actual eviction where the tenant of premises, including a building the wall of which rested partially upon the adjoining premises, was required to remove the portion encroaching and rebuild it upon the leased premises; the lessor, after notice from the tenant of the demand upon him to remove the encroachment, having taken no measures to protect the lessee.

In *Epstein v. Dunbar* (1915) 221 Mass. 579, 109 N. E. 730, where the lessor cut off the original means of access to the leased premises and substituted a means of access through a third person's property, and this was subsequently cut off by such third person, the court said that these facts showed a partial eviction, since the premises were no longer suitable for the purpose for which they were hired, but the lease was not thereby necessarily terminated, and it was not essential that the tenants should abandon the entire premises before seeking relief in equity.

But an interruption of a tenant's enjoyment or beneficial use of the leased premises by the landlord is not necessarily an eviction of him, and nothing less than an eviction will suspend rent either in whole or in part. *Fuller v. Ruby* (1858) 10 Gray (Mass.) 285. And see *Kelley v. Long* (1912) 18 Cal. App. 159, 122 Pac. 832, *supra*.

In *Delmar Invest. Co. v. Blumenfeld* (1906) 118 Mo. App. 308, 94 S. W. 823, not in point as to facts, the court said that it never has been held that every breach by the landlord of a covenant contained in the lease, which to any degree impairs the tenant's use of the leasehold, is an eviction. The law is the other way. Many breaches fall short of warranting an abandonment to the tenant, who must look to an action on his covenant for damages.

Unless the premises are rendered useless to the tenant by the positive act of the landlord, or unless the tenant has been deprived, in whole or in part, of the possession and enjoyment of the demised premises, actually or constructively, by the landlord, no defense exists to the right to recover rent because of eviction. *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Barrett v. Boddie* (1895) 158 Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143.

In *Blaustein v. Pincus* (1913) 47 Mont. 202, 131 Pac. 1064, Ann. Cas. 1915C, 405; after the lessee vacated the premises, he brought an action for breach of the covenant of quiet enjoyment on the ground that the lessor constructed, upon premises adjoining the leased premises, a garage which was leased for a public purpose, the operation of which caused such noise, confusion, and odors as to render the lessee's use of the premises as a rooming house impossible, and recovered substantial damages.

In *Baumgardner v. Consolidated Copying Co.* (1892) 44 Ill. App. 74, it is held not to constitute an eviction for a landlord to neglect to remove from the demised premises chattels belonging to him, and not included in the lease.

Under the defense of eviction the effect of the eviction, if established, is to relieve the lessee of the payment of any rent during its continuance, whether the eviction is actual or constructive; but at this point the similarity between the two kinds of eviction ceases, for, if actual eviction is established, the lessee may defeat all recovery of rent although he retains possession of a portion of the leased premises; while, as heretofore pointed out, it is a condition of the right to claim a constructive eviction that the lessee shall vacate the premises.

In *Lawrence v. Katcher* (1909) 117 N. Y. Supp. 876, the court said: "The law recognizes two classes of eviction: First, where by the act of the landlords, or title paramount, the tenant has been actually physically deprived of a material portion of the premises demised. This is termed 'an actual eviction.' Upon such eviction, the lia-

bility of the tenant to pay rent is suspended until the premises are restored to the tenant. The tenant may, in such cases, continue in possession of the remainder of the premises, yet not be held to pay rent. Second, where the landlords have been guilty of such sins of omission or commission, in relation to their duty towards the premises, as to deprive the tenant of the beneficial enjoyment thereof. The character of the enjoyment to which the tenant is entitled depends upon the character of the building and the purpose for which it is maintained and let. This class of eviction is known in law as a 'constructive eviction.' There can be no constructive eviction without an actual abandonment by the tenant of the premises demised. . . . As long as the tenant continues in possession of the premises, he is liable to pay all the rent which has accrued during his occupancy."

Most, if not all, the cases considering the question as to when the acts complained of constitute an actual partial, and when a constructive, eviction, apparently apply as a test the fact as to whether the act complained of results in a deprivation of some right or appurtenance to the premises to which the tenant was entitled, or whether it constitutes merely an interference with the beneficial enjoyment of the premises by the tenant; if the former, the act constitutes an actual eviction; if the latter, it may constitute a constructive eviction, although all wrongful acts of the lessor interfering with the enjoyment of the premises by the lessee do not amount to a constructive eviction.

In *Seigel v. Neary* (1902) 38 Misc. 297, 77 N. Y. Supp. 854, the court said: "The fundamental distinction between a constructive eviction and an actual eviction should be borne in mind. When the landlord suffers acts to be done which make it necessary for the tenant to remove, or does or permits any intentional or injurious interference, either by himself or those acting under his authority, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or materially impairs such enjoyment, such acts are considered

20 A.L.R.—87.

as tantamount to constructive eviction. But, in order to make a constructive eviction available as a defense, there must be an abandonment of the premises. . . . An actual eviction consists in the deprivation by the landlord of the tenant, from the whole or some portion of the demised premises, and where there has been an actual eviction from a part of the demised premises, the tenant may retain possession of what he has, the entire rent being suspended until full possession has been restored. The act of the landlord in depriving the tenant of a portion of the demised premises, being a wilful one, and done in defiance of the tenant and his rights under the lease, is in the nature of a trespass."

In *Jackson v. Paterno* (1908) 58 Misc. 201, 108 N. Y. Supp. 1073, supra, the court said that an actual eviction exists where the physical expulsion of the tenant is effected. A constructive eviction exists where the physical expulsion of the tenant is not effected, but the acts of the landlord, paramount title, or process of law so interfere with the beneficial enjoyment of the premises demised as to necessitate the abandonment of the premises.

In *Hamilton v. Graybill* (1907) 19 Misc. 521, 43 N. Y. Supp. 1079, the distinction is drawn between an actual eviction and a constructive eviction, and it is pointed out that if the eviction had been constructive the tenant would have had to surrender possession of the premises, but that this is not necessary as to an actual eviction. The court said that, considering these entrances as appurtenances to the demised rooms, it could not say that the tenant should, at the instance of the landlord, do without the use of either one of the entrances, without assuming to make for the parties a contract which differs materially in respect to the subject thereof from the one which relates to themselves. From the use of one of such appurtenances the tenants were actually and physically ousted and kept expelled. The case at bar, therefore, was not one of a constructive eviction, merely, from the office rooms let to the respondent, in which event the eviction would not be available as a defense to a demand for

the rent without an abandonment of the demised premises before the rent accrued, but one of an actual eviction from a part of such premises, which, though the tenant continued to occupy the remainder, has the effect of suspending the entire rent so long as the eviction endures, the same as if the eviction was from the whole of the premises demised.

As will be seen by a reference to the cases hereinafter referred to in IV., in the practical application of the rules of law pertinent to the subject, it is not, in all cases, clear whether the particular breach complained of constitutes an actual partial eviction, or a constructive eviction.

2. Liability upon a quantum meruit.

In *Shumway v. Collins* (1856) 6 Gray (Mass.) 227, the question was raised as to whether the tenant might be held on a quantum meruit for the reasonable rental value of that portion of the leased premises he continued to occupy after an actual eviction from a part of the premises, but it was pointed out that a decision of that case did not require an answer to the question. Upon the same point, however, in *Leishman v. White* (1861) 1 Allen (Mass.) 489, the court said: "Nor can an action for use and occupation of the premises be maintained against the defendant. The lease is not terminated by the unlawful eviction of the lessee. He still continues to occupy that part of the estate from which he has not been evicted, under and by virtue of the demise under seal. No implied promise arises to pay for such occupation and enjoyment. The case, therefore, stands thus: To the claim on the covenant, the answer is the eviction; to the demand for use and occupation, the answer is that the defendant holds under his lease; so that in neither aspect of the case can the plaintiff maintain his action."

Upon the same point, in *Christopher v. Austin* (1854) 11 N. Y. 216, the court said: "It is not contended by the plaintiff's counsel that although such an eviction would be a bar to an action on the agreement to pay rent,

yet that it is no bar to an action under the statute to recover a reasonable sum for the use and occupation, if the tenant continue to occupy a portion of the premises after such eviction from a part. There is no reason for such a distinction, nor can it be sustained by authority. The rule is that if the landlord enter wrongfully upon, or prevent the tenant from the enjoyment of a part of, the demised premises, the whole rent is suspended till the possession is restored. It would be a palpable evasion of the rule and of the penalty the law imposes upon the landlord for a wrongful eviction, to hold that he may recover for use and occupation on a quantum meruit, when he is not permitted to recover on the agreement itself."

In *Dolph v. Barry* (1912) 165 Mo. App. 659, 148 S. W. 196, the court said: "There can be no doubt that in a case where an actual eviction appears—as where the lessor himself, or through someone authorized by him, actually enters upon the demised premises and appropriates a portion thereof to his own use, or deprives the tenant of the benefits of any portion thereof—there is a total suspension of the whole grant, even though but a portion of the premises is thus appropriated by the landlord, until the tenant is restored to the whole possession. . . . This rule obtains in such cases notwithstanding the fact that the tenant may continue the occupancy of a portion of the leased property. Such eviction presents a tortious aspect involved in the wrongful trespass of the landlord. Because of this, the reason of the rule is said to be that, as the estate created by the lease is an entire one, for which one consideration is given, the landlord may not evict the tenant from a portion of the demised premises, and then be permitted to apportion his own wrong by insisting upon a part of the rent; for to hold otherwise, it is said, would be to encourage landlords to evict their own tenants (whose possession they are rather bound to protect) when such eviction would inure to the pecuniary advantage of such landlords."

According to the late Illinois case

of *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462, even though there is an actual partial eviction, the tenant is nevertheless liable for the pro rata value of the rental of the premises of which he retains the possession and use. In this regard the case is apparently out of harmony with *Hayner v. Smith* (1872) 63 Ill. 430, 14 Am. Rep. 124, and *Lynch v. Baldwin* (1873) 69 Ill. 210. In the *Selz* Case, however, an actual eviction could hardly be claimed, since the complaint of the lessee was that the lessor, without authority under the lease and against the protest of the lessee, permitted a business to be carried on in a portion of the building not covered by the lease, which he well knew to be hurtful to the business for which the property to the complaining lessee had been leased.

c. To claim breach of covenant.

Although, as already stated, a tenant who remains in possession may not defend an action for rent upon the ground of constructive eviction, nevertheless, if the landlord's conduct has been such as to amount to a breach of covenant, the lessee, although remaining in possession, may treat the wrongful disturbance of or interference with his beneficial use and enjoyment of the possession of the demised premises as a breach of covenant.

United States.—*Owens v. Wright* (1883) 5 McCrary, 642, 18 Fed. 865; *Wait v. O'Neil* (1896) 34 L.R.A. 550, 22 C. C. A. 248, 76 Fed. 408.

California.—*Levitzky v. Canning* (1867) 33 Cal. 299; *McAlester v. Landers* (1886) 70 Cal. 79, 11 Pac. 505; *McDowell v. Hyman* (1897) 117 Cal. 67, 48 Pac. 984; *Agoure v. Lewis* (1910) 15 Cal. App. 71, 113 Pac. 882.

Colorado.—*Gray v. Linton* (1906) 38 Colo. 175, 88 Pac. 749.

Georgia.—*Adair v. Allen* (1916) 18 Ga. App. 636, 89 S. E. 1099.

Illinois.—*Chicago Legal News Co. v. Browne* (1882) 103 Ill. 317; *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Cleveland, C. C. & St. L. R. Co. v. Wood* (1901) 189 Ill. 352, 59 N. E.

619; *Rubens v. Hill* (1904) 213 Ill. 523, 72 N. E. 1127; *White v. Y. M. C. A.* (1908) 233 Ill. 526, 84 N. E. 658; *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462; *Harmony Co. v. Rauch* (1896) 62 Ill. App. 97; *Garrett v. Conner* (1910) 155 Ill. App. 161; *Globe Asso. v. Brega* (1914) 190 Ill. App. 60. **Indiana.**—*Leary v. Meier* (1881) 78 Ind. 398.

Iowa.—*Boyer v. Commercial Bldg. Invest. Co.* (1900) 110 Iowa, 49, 81 N. W. 720.

Massachusetts.—*Dexter v. Manley* (1849) 4 Cush. 14; *Boston & W. R. Corp. v. Ripley* (1866) 13 Allen, 421; *Brown v. Holyoke Water Power Co.* (1890) 152 Mass. 463, 23 Am. St. Rep. 844, 25 N. E. 966; *Case v. Minot* (1893) 158 Mass. 577, 22 L.R.A. 536, 33 N. E. 700; *Kansas Invest. Co. v. Carter* (1894) 160 Mass. 421, 36 N. E. 63.

Michigan.—*Ives v. Williams* (1883) 50 Mich. 100, 15 N. W. 33.

Minnesota.—*Collins v. Lewis* (1893) 53 Minn. 78, 19 L.R.A. 822, 54 N. W. 1056.

Missouri.—*Riley v. Pettis County* (1888) 96 Mo. 318, 9 S. W. 906; *Morse v. Maddox* (1853) 17 Mo. 569, subsequent appeals in (1854) 19 Mo. 451, and (1855) 21 Mo. 524; *B. Roth Tool Co. v. Champ Spring Co.* (1907) 122 Mo. App. 603, 99 S. W. 827.

Montana.—See *Blaustein v. Pincus* (1913) 47 Mont. 202, 131 Pac. 1064, Ann. Cas. 1915C, 405.

Nebraska.—*Kitchen Bros. Hotel Co. v. Philbin* (1902) 2 Neb. (Unof.) 340, 96 N. W. 487.

New Jersey.—*Whitcomb v. Brant* (1908) 76 N. J. L. 201, 68 Atl. 1102; *Metropole Constr. Co. v. Hartigan* (1912) 83 N. J. L. 409, 85 Atl. 313.

New York.—*Hirsch v. Olmesdahl* (1902) 38 Misc. 757, 78 N. Y. Supp. 832; *Williams v. Getman* (1906) 114 App. Div. 282, 99 N. Y. Supp. 977; *Thomson v. Ludlum* (1901) 36 Misc. 801, 74 N. Y. Supp. 875; *Borchardt v. Parker* (1908) 108 N. Y. Supp. 585; *Egan v. Browne* (1908) 128 App. Div. 184, 112 N. Y. Supp. 689; *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685; *Coleman Constr. Co. v. Boomgaarden* (1918) 170 N. Y. Supp.

25; *Paddell v. Janes* (1915) 90 Misc. 146, 152 N. Y. Supp. 948; *Jacob New Realty Co. v. Noxall Shirt Co.* (1918) 104 Misc. 82, 171 N. Y. Supp. 376; *Cox v. Cryder* (1915) 168 App. Div. 624, 154 N. Y. Supp. 452; *Green v. Brenner* (1918) 169 N. Y. Supp. 682; *Schulte Realty Co. v. Pulvino* (1919) 179 N. Y. Supp. 371.

North Carolina. — See *Huggins v. Waters* (1911) 154 N. C. 443, 70 S. E. 842.

Ohio.—*Frankel v. Steman* (1915) 92 Ohio St. 197, 110 N. E. 747.

Pennsylvania. — *Depuy v. Silver* (1843) 1 Clark, 385; *Schienze v. Eckels* (1910) 227 Pa. 305, 76 Atl. 15.

Virginia.—*Hubble v. Cole* (1891) 88 Va. 236, 13 L.R.A. 311, 29 Am. St. Rep. 716, 13 S. E. 441.

Washington.—*Matzger v. Arcade Bldg. & Realty Co.* (1918) 102 Wash. 423, 173 Pac. 47.

England.—See *Upton v. Townsend* (1855) 1 Jur. N. S. 1089, 17 C. B. 30, 139 Eng. Reprint, 976, 25 L. J. C. P. N. S. 44, 4 Week. Rep. 56; *Tebb v. Cave* [1900] 1 Ch. 642, 69 L. J. Ch. N. S. 282, 48 Week. Rep. 318, 82 L. T. N. S. 115; *Malzy v. Eicholz* (1916) 115 L. T. N. S. 9, [1916] 2 K. B. 308, 10 B. R. C. 231, 85 L. J. K. B. N. S. 1132, 32 Times L. R. 506, 60 Sol. Jo. 511; *Sanderson v. Berwick-upon-Tweed* (1884) L. R. 13 Q. B. Div. 547, 53 L. J. Q. B. N. S. 559, 51 L. T. N. S. 495, 33 Week. Rep. 67, 49 J. P. 6.

It will be observed that the principle presupposes that there has been an actionable breach of a covenant, and therefore will not apply to an implied covenant of quiet enjoyment, in a jurisdiction where the view prevails that that covenant is not breached if the tenant remains in possession.

In *Sanderson v. Berwick-upon-Tweed* (Eng.) *supra*, the rule is thus stated: "Where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

In *Delmar Invest. Co. v. Blumenfeld*

(1906) 118 Mo. App. 308, 94 S. W. 823, the court said that every breach of covenant in a lease which impairs the tenant's use of the leasehold is not an eviction, but that where the interference falls short of an eviction, warranting an abandonment of the premises by the tenant, he may have recourse to an action on his covenant for damages.

And it has been held that where the lessee continues in the occupation of the leased premises he cannot assert an eviction by the landlord, and the latter is therefore entitled to collect the whole of the rent for the premises, subject, however, to any counterclaim for damages that the lessee may show by reason of the landlord's failure to keep his covenant, or by reason of any other legitimate claim that the lessee may set up as a set-off, or by way of recoupment; and the mere fact that the lessee entered into possession of the premises, and continued such possession, and paid all rents and other charges during the term of the lease, does not, as a matter of law, constitute a waiver by him of his right to recoup. *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462.

The question also received very able consideration by the court in *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685, which sustained the right of a barber to counterclaim damage in an action by the landlord to recover rent, where the counterclaim was based upon the failure of the landlord to furnish heat and hot water according to agreement, the contention of the landlord being that the remedy of the tenant was to surrender the premises and claim constructive eviction. In denying this contention, the court considered many of the principal New York cases upon the subject. Upon this point it is said: "The question is thus presented as to what is the status of this case at bar and what are the rights of the parties. It was held in the case of *West Side Sav. Bank v. Newton* (1879) 76 N. Y. 616, that where the use of water was a privilege or easement which constituted a part of the demised premises, and plaintiff caused the water to be shut off, it

could not recover rent beyond the time the premises were actually occupied. Defendant, having left the premises when the water was shut off, differentiates that case somewhat from the one at bar. My attention is not called to any case exactly similar to this one, but there are very numerous cases in the books in which the landlord has made a breach of his contract to make repairs, and I think those cases are practically analogous to this one. . . . In the case at bar it appears that the tenant has himself furnished such heat as he has had, and has himself procured the necessary water, and apparently he has acted under the 'second' provision stated by Underhill, and quoted above. It is held in numerous cases in this state that where a landlord has agreed to make repairs,—which seems to me to be analogous to the case at bar,—and does not do so, the tenant, upon his refusal, may make them and charge the expense to the landlord, or he may remove from the premises and sue for damages. . . . It seems to me that in the case at bar it is fair to consider that, under all the circumstances, there has been no eviction, but there has obviously been a breach of the contract, which has affected the rental value of the premises in question, and that defendant is entitled to recoup therefor."

In *Collins v. Lewis* (1893) 53 Minn. 78, 19 L.R.A. 822, 54 N. W. 1056, the landlord was held liable to the tenant for breach of covenant of quiet enjoyment, the claim for damages being asserted as a counterclaim in an action by the landlord to recover rent, the breach being based upon a trespass upon the leased premises by a third party, acting under a contract with the landlord. The court said: "It is obvious that under a claim of title the landlord has interfered with the tenant's possession of the demised premises, and has prevented him from having the use and enjoyment of a part thereof. This amounted to a breach of the covenant for quiet enjoyment, and when such a condition exists, and an action is brought to recover for rent subsequently falling

due, the tenant may counterclaim and recover his damages."

In *Kansas Invest. Co. v. Carter* (1894) 160 Mass. 421, 36 N. E. 63, a breach of express covenant of quiet enjoyment was held to depend upon the question whether, a building upon the leased premises having been declared unsafe, the landlord must necessarily, for reasons of safety, tear it down, or whether it might be made safe and secure without disturbing the possession of the lessee. If the building was unnecessarily taken down, then the landlord would be liable for breach of the covenant.

In *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. (Eng.) 690, 19 Times L. R. 145, the liability of the landlord for breach of covenant was held to depend upon the finding of fact as to whether he authorized tenants of apartments in the same building as the plaintiff to use their apartments for immoral purposes. The case was presented by an application by the tenant for a declaration that the defendants were bound by the covenant for quiet enjoyment with plaintiff's assignor, and for an injunction restraining defendants from permitting any of the other flats in the building to be used so as to interfere with the quiet enjoyment by the plaintiff of his flat, and he also claimed damages.

In *Malzy v. Eichholz* (1916) 115 L. T. N. S. (Eng.) 9, 10 B. R. C. 231, Lord Cozens-Hardy said: "I apprehend that there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment—that is to say, that he has done anything which renders himself liable to damages under the covenant in respect of quiet enjoyment—merely because he knows of what is being done, and merely because he does not take any steps to prevent what is being done. There must be something much more than that. There must be something which can fairly amount to his doing the act complained of, or allowing the act complained of, either by actual participation by himself or his agents, or by what Lord Collins called active participation in that which was complained of."

And see also *TOY v. OLINGER* (reported herewith) ante, 1366, which holds that the tenant cannot diminish the amount of rental which the landlord is entitled to recover, by showing acts of a tenant of an adjoining apartment, which injured his business, without showing a responsibility of the landlord therefor.

It has been held that a trespass by the landlord does not necessarily amount to a breach of covenant.

Thus, in *Avery v. Dougherty* (1885) 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123, the court said: "The only remaining general question is whether the facts pleaded constitute a breach of covenant or a trespass. It is quite well settled that it is not every entry of the landlord, although wrongful, that constitutes a breach of covenant; a landlord may be a trespasser without breaking the covenant. An English writer says: 'Generally speaking, a covenant for quiet enjoyment, or a bond for the performance of such a covenant, extends to secure the enjoyment against lawful interruptions only, although the word "lawful" be not contained in the covenant, the law having provided an action of trespass as the means of redressing an unlawful entry or disturbance. An early case to the contrary has long since been virtually, if not expressly, overruled.' 2 Platt, Leases, 312. This however, is the rule only where a stranger enters. Where the lessor enters the rule is somewhat different. The author from whom we have quoted says: 'But a disturbance of the lessee by the lessor himself is not regarded with the same lenity as an eviction by a stranger, it being clear that the lessor exposes himself to an action on his covenant, although he enter wrongfully, notwithstanding the covenant provides against lawful evictions only; for, in such case, the court will not consider the word "lawful," or drive the plaintiff to his action of trespass, when by the general implied covenant in law the lessor has engaged not to avoid his own deed, either by a rightful or tortious entry. Indeed, it would hardly be consistent with reason to allow

the lessor to defeat the tenancy by pleading his own wrong.' 2 Platt, Leases, 313. Although the law is more strict against the lessor than a stranger, still, a mere entry, though wrongful and unlawful, will not constitute a breach of covenant. It is necessary that something more than an entry and injury be shown, for these are the elements of a trespass. It must also be shown that the entry was an assertion of right or title—in other words, was in the nature of a total or partial eviction. . . . The authorities to which we have referred lead to the conclusion that the answer states facts constituting a trespass, and not a breach of covenant, for the reason that it does not show an entry under an assumption of title."

d. To claim trespass or tort.

Where the landlord commits a trespass upon the leased premises, even though it does not amount to an eviction, he may be held liable to the tenant for the latter's damage caused by the trespass.

Alabama. — *Harden v. Conwell* (1920) 205 Ala. 191, 87 So. 673.

California. — *Parish v. Studebaker* (1920) — Cal. App. —, 195 Pac. 721; *Plotnik v. Rosenberg* (1921) — Cal. App. —, 203 Pac. 438.

Georgia. — *Shores v. Brooks* (1888) 81 Ga. 468, 12 Am. St. Rep. 332, 8 S. E. 429.

Illinois. — *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553; *Guinee v. Prouty* (1912) 175 Ill. App. 617; *Goodman v. Weinberger* (1914) 185 Ill. App. 167; *Vondra v. Felcman* (1916) 202 Ill. App. 136.

Indiana. — *Froot v. Hardin* (1877) 56 Ind. 165, 26 Am. Rep. 18.

Iowa. — See *Clark v. Strohbeen* (1921) 190 Iowa, 989, 13 A.L.R. 1419, 181 N. W. 430.

Louisiana. — *Woods v. Monteleone* (1907) 118 La. 1005, 43 So. 657.

Maine. — *Brock v. Berry* (1850) 31 Me. 293; *Bryant v. Sparrow* (1873) 62 Me. 546.

Maryland. — *Stanton v. Lapp* (1910) 113 Md. 324, 77 Atl. 672.

Massachusetts. — *Dickinson v. Goodspeed* (1851) 8 Cush. 119.

Michigan. — *Conlon v. McGraw* (1887) 66 Mich. 194, 33 N. W. 388; *Meney v. Lamphere* (1905) 139 Mich. 429, 102 N. W. 974.

Missouri. — *Barnard v. Weaver* (1920) — Mo. App. —, 224 S. W. 152.

Montana. — *Winterscheid v. Reichle* (1912) 45 Mont. 238, 122 Pac. 740.

New Hampshire. — *Evans v. Watkins* (1912) 76 N. H. 433, 41 L.R.A. (N.S.) 404, 83 Atl. 915.

New Jersey. — *Panglorne v. Weiss* (1914) 86 N. J. L. 286, 90 Atl. 1024.

New Mexico. — *De Palma v. Weinman* (1909) 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782.

New York. — *Domhoff v. Stier* (1913) 157 App. Div. 204, 141 N. Y. Supp. 825; *Collers Photo Supply Co. v. Davidson* (1918) 170 N. Y. Supp. 938; *Aguglia v. Bausch & L. Optical Co.* (1918) 172 N. Y. Supp. 666.

North Carolina. — *Krider v. Ramsay* (1878) 79 N. C. 354.

Ohio. — *Wilber v. Paine* (1824) 1 Ohio, 251.

Texas. — *Jenner v. Carpenter* (1898) — Tex. Civ. App. —, 48 S. W. 46.

Wisconsin. — *Jolly v. Single* (1862) 16 Wis. 280.

And the landlord may be held liable to the tenant, in an action of trespass on the case, for loss accruing from an unlawful entry upon the leased premises in making repairs upon a building located thereon. *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553.

Upon this point, in *Wood v. Monteleone* (1907) 118 La. 1005, 43 So. 657, the court said: "The execution of the alterations required the actual entry of the workmen engaged in making them into plaintiff's premises, as we have said, not only to her great inconvenience and discomfort, but to her pecuniary loss. The entry was an invasion of her rights of lawful and peaceable possession. The defendant, so far from causing his lessee to be maintained in the peaceable possession of the thing leased, as it was his legal duty to do under article 2692, Civ. Code, actively violated the rights which the plaintiff had acquired touching the possession of the property, not only as against the invasion

thereof by the general public, but as against the defendant himself. Having no legal right to enter the premises for the purposes he did, he stood, relatively to that fact and act, as any other member of the public would have stood, doing the same act. His ownership of the building gave him no vantage ground in that respect. On the contrary, his legal obligations as lessor made it more imperative upon him to respect her rights than would have been expected or exacted from a stranger. The entry as made upon the premises was not made in the interest of the plaintiff, or in the performance of any duty imposed upon him as lessor, in the exercise of any right reserved to himself, either by law or by contract, for the benefit of the party leasing the premises below, but for his own advantage and purposes."

In *Conlon v. McGraw* (1887) 66 Mich. 194, 33 N. W. 388, the act of the defendant in entering that portion of a building not leased to the plaintiff, and tearing it down to the extent of practically destroying the beneficial use of the premises, was held to constitute a trespass entitling the plaintiff to recover in an action in trespass on the case.

In *Kelly v. Easton* (1922) — Idaho, —, — A.L.R. —, 207 Pac. 129, the doctrine is asserted that "if the landlord interrupt the enjoyment of the leased premises by permitting his cattle to enter and destroy the tenant's crop, he should be liable for all the damage occasioned by such trespass."

III. Form of remedy.

a. In general.

As heretofore noted, where the beneficial enjoyment of the leased premises is substantially interfered with by or under the authority of the lessor, several different remedies are open to the lessee, dependent, however, upon the circumstances of the case, for these remedies are not necessarily correlative. A claim of actual partial eviction may, in some cases, be based upon acts which would amount to a breach of express or implied covenants, but a breach of covenant does not necessarily constitute such an

eviction; and even if the lessee might claim an eviction for breach of covenant, he is not necessarily limited to this remedy, but may assert the breach in recoupment or counterclaim, or rely upon it for the recovery of damages in an action against the lessor. In this regard it is to be noted that, if an eviction were successfully asserted, it would constitute a complete defense to the right of the lessor to recover any rental during the time of the eviction; at least, where the eviction was due to the acts, conduct, or negligence of the lessor, or through his sufferance. On the other hand, where the breach of the covenant is asserted in recoupment or counterclaim, the lessor is entitled to recover the difference, if any, between the agreed rental and the damages shown, or the fair rental in view of the breach complained of. In relying upon a breach of the covenant to constitute an actual partial eviction, however, the lessee takes the risk of an adverse determination of the claim of eviction, even though he establishes the breach. But this risk, apparently, may be obviated by relying upon the defense of eviction and also upon a recoupment or counterclaim. This is also true where, having abandoned the premises, he asserts a constructive eviction.

b. Set-off or counterclaim.

In an action by the lessor to recover the rental of premises, the lessee is entitled to offset, counterclaim, or recoup damages accruing to him by reason of the interference with, or deprivation by the lessor, or someone acting under his authority, of, the beneficial enjoyment by the lessee of the leased premises, and this right is not lost by the latter remaining in possession of the premises.

Arkansas.—*Smith v. Glover* (1918) 135 Ark. 531, 205 S. W. 891.

California.—*McAlester v. Landers* (1886) 70 Cal. 79, 11 Pac. 505; *Parish v. Studebaker* (1920) — Cal. App. —, 195 Pac. 721.

Illinois.—*Wade v. Halligan* (1855) 16 Ill. 507; *Chicago Legal News Co. v. Browne* (1882) 103 Ill. 317; *Keating v. Springer* (1893) 146 Ill. 481, 22

L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Rubens v. Hill* (1904) 213 Ill. 523, 72 N. E. 1127; *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462; *Harmony Co. v. Rauch* (1896) 62 Ill. App. 97; *Strum v. Berry* (1914) 185 Ill. App. 113; *Garrett v. Conner* (1910) 155 Ill. App. 161; *Globe Asso. v. Brega* (1914) 190 Ill. App. 60.

Indiana.—*Leavy v. Meier* (1881) 78 Ind. 393.

Iowa. — *Jones v. De Moss* (1911) 151 Iowa, 112, 130 N. W. 914.

Massachusetts. — *Boston & W. R. Corp. v. Ripley* (1866) 13 Allen, 421.

Minnesota. — *Goebel v. Hough* (1879) 26 Minn. 252, 2 N. W. 847.

Missouri.—*Thayer-Moore Brokerage Co. v. Campbell* (1912) 164 Mo. App. 8, 147 S. W. 545; *Barnard v. Weaver* (1920) — Mo. App. —, 224 S. W. 152.

New York. — *Ludlow v. McCarthy* (1896) 5 App. Div. 517, 38 N. Y. Supp. 1075; *Hirsch v. Ohmesdahl* (1902) 38 Misc. 757, 78 N. Y. Supp. 832; *Borchardt v. Parker* (1908) 108 N. Y. Supp. 585; *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685; *Hett v. Lange* (1910) 139 App. Div. 743, 124 N. Y. Supp. 573; *Cox v. Cryder* (1915) 168 App. Div. 625, 154 N. Y. Supp. 452; *Jacob New Realty Co. v. Noxall Shirt Co.* (1918) 105 Misc. 82, 171 N. Y. Supp. 376; *Schlechter v. Jones* (1919) 173 N. Y. Supp. 499.

Pennsylvania. — *Depuy v. Silver* (1843) 1 Clark, 385.

It has been asserted that the statute allowing counterclaims is a remedial statute, and should be construed liberally; thus construed, the provision describing one class of causes of action that may be the subject of counterclaim, as those connected with the cause of action, includes a cause of action in the tenant against his landlord for wrongfully interfering with his enjoyment of leased premises, when he is sued by the landlord for rent for a period including the time of such interference. *Goebel v. Hough* (Minn.) *supra*.

If, through any wrongful act of the lessor, or failure to perform anything required of him by the lease, the beneficial enjoyment of the tenant is diminished, he is still bound for the rent if

he continues to occupy the premises, and, if he does not abandon them, his obligation to pay the rent therefor remains; but he may show as a matter of defense in what manner such beneficial enjoyment of the premises was diminished by such act, or omission to act, by the lessor, and recoup against the rent damages, if any, he may show he has sustained by reason of the wrong complained of. *Chicago Legal News Co. v. Browne* (Ill.) supra; *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805; *Rubens v. Hill* (1904) 213 Ill. 523, 72 N. E. 1127.

In *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462, the court said: "Any acts of trespass of the landlord, or other acts which are unwarranted or negligently performed and occasion damage to the tenant in respect to the premises leased, may be recouped by the tenant in an action for rent. *Lynch v. Baldwin* (1873) 69 Ill. 210; *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805. The tenant may also recoup in such an action his damages for a partial eviction of the premises, or for any acts that amount to an eviction of a part of the premises. *Halligan v. Wade* (1859) 21 Ill. 470, 74 Am. Dec. 108. It is at all times to be understood, however, that no wrongful act of the landlord debars him from a recovery of the rent for the premises, if the tenant continues to occupy the premises. In such a case the tenant can only recoup such damage as he sustained from the unlawful acts of the landlord which cause damage to the tenant in respect to the premises leased. He may recoup for a partial eviction of the premises, but he cannot successfully claim an eviction as to the whole of the premises so long as he remains in possession of the same."

In *Wade v. Halligan* (1855) 16 Ill. 507, a distress proceeding by a landlord against his tenant, the court said: "The main question is as to the materiality of the evidence, and this involves the question of the right to set up, as a defense to the payment of rent, that the party was disturbed in his quiet and peaceable possession, was

evicted from part of the premises, and injured, and the value of the rent so diminished. We are of opinion he has a right to show such facts in defense, upon this inquiry and assessment, in cases where the lease provided for his protection, expressed or implied. It is a legitimate inquiry, as well as payment under the general issue, as to the amount of rent due, and could be made and tried in the action of replevin of the distress. For it was one of the peculiarities of a common-law distress that the tenant was forced to his replevin, in order to compel the landlord to prove his demand for rent, and enable the tenant to show payment, eviction, disturbance, or injury from the landlord's breach of the covenant in the lease."

As to recouping damages for any loss or injury sustained by the tenant, in *Lynch v. Baldwin* (Ill.) supra, the court said: "We have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value. It is not like a demand growing out of or owing on some other account, which, by the repeated decisions of this court, cannot be set off or recouped in a proceeding of this character; but damages growing out of a breach of the terms of the lease by the landlord may."

In *Hett v. Lange* (1910) 139 App. Div. 743, 124 N. Y. Supp. 573, in sustaining the right of a tenant, in a dispossession proceeding by the landlord, to counterclaim damages based upon the failure of the latter to furnish a water supply as required by the lease, the court said: A counterclaim may be interposed in summary proceedings in like manner as though the claim for rent in such proceedings was the subject of an action. . . . And, although the tenant may not have an affirmative judgment on his counterclaim, he can have his damages set off to the extent of the landlord's claim, . . . and when such damages have

been ascertained, set off, and the amount of unpaid rent determined, the tenant may pay the same into court at any time before the warrant is issued, and upon so doing the landlord's right to dispossess terminates, and the proceeding must be dismissed."

In *Cox v. Cryder* (1915) 168 App. Div. 624, 154 N. Y. Supp. 452, the court said that where, upon ascertaining defects in the premises which amounted to a breach by the landlord of his covenant, the lessee remained in possession, the remedy for such breach, not amounting to an eviction, was to counterclaim for damages, or to bring an action therefor.

In *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685, it is held that a barber is entitled to counterclaim damage in an action by the landlord to recover rent, the counterclaim being based upon the failure of the landlord to furnish heat and water according to the agreement.

In *Metropole Constr. Co. v. Hartigan* (1912) 83 N. J. L. 409, 85 Atl. 313, a tenant is held entitled to recoup damages for breach of covenant by the landlord in failing to furnish telephone service.

In *Leary v. Meier* (1881) 78 Ind. 393, where the tenant alleged an eviction, the court said that, where the lessee retains possession of the premises and refuses to surrender them, the most that he can claim from the interference with his beneficial enjoyment is a deduction from the rent equal to the damage sustained.

In *Boston & W. R. Corp. v. Ripley* (1866) 13 Allen (Mass.) 421, it was held, where a lessor interfered with the lessee's enjoyment of the use of the premises by building a high board fence around the boundary line so as to cut off access to the premises except over the land of a third person, that this would not constitute an eviction where the lessee retained possession of the land; but that he was only liable for use and occupation for such sum as his beneficial enjoyment of the estate was worth under the circumstances.

In *Strum v. Berry* (1914) 185 Ill. App. 113, the abstract of the decision

is to the effect that, if the acts of the landlord tend merely to diminish the beneficial enjoyment of the premises, the tenant remains bound for the rent if he continues to occupy the same, although he may show, as a matter of defense in an action for the rent, how much the beneficial enjoyment was diminished by the acts of the landlord, and recoup for whatever damages he may be able to show he has suffered thereby.

In *Garrett v. Conner* (1910) 155 Ill. App. 161, the court said that a tenant might recoup damages in an action for rent, which were the difference between the rental value for which the premises were contracted at the time of the lease and the rental value in the condition in which they were placed by the action of the landlord, the decrease, if any, in the rental value of the premises, being the true measure of damages. And that, as long as the lessee continued in the use and occupation of the premises, he could not offset, as against the rent contracted to be paid, any damages by reason of inconvenience to him in the use and occupation, and any act of the landlord which merely tended to diminish the beneficial enjoyment of the premises could not be offset as against the rent contracted to be paid.

In *Baumgardner v. Consolidated Copying Co.* (1892) 44 Ill. App. 74, it is held that a tenant may offset in an action for rent the damage accruing to him by reason of the failure of the landlord to remove from the demised premises chattels belonging to him, and not included in the lease.

A case of interest upon this point is *Avery v. Dougherty* (1885) 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123, wherein it is held that, under the practice of that state, the right to offset or counterclaim damages for wrongful disturbance by the landlord of the tenant's possession depends upon whether it is pleaded as defense founded on a breach of covenant or arising out of a trespass. If the former, it might be asserted as a defense, but not, if the latter; since a tort cannot be made to constitute a defense by way of set-off or counterclaim. But to make these

defenses available as an offset, counterclaim, or recoupment, they must be expressly pleaded.

Thus, in *Jackson v. Paterno* (1908) 128 App. Div. 474, 112 N. Y. Supp. 924, it was pointed out that the question of the right of the tenant to recoup damages for failure to heat the premises was not before the court, because the only defense was eviction, based upon the claim that the apartment without heat was of no value to the tenant.

So, in *Thomson v. Ludlum* (1901) 36 Misc. 801, 74 N. Y. Supp. 875, the tenant sought to avoid payment of rent on the ground of constructive eviction, due to the failure of the landlord properly to heat the leased premises according to contract, and to operate the elevator; inasmuch as the tenant had remained in possession, it was held that there was no eviction, either actual or constructive. The court said that if any reference to these matters of complaint was admissible, it could only be by proving a counterclaim to the landlord's demand; but there was no counterclaim pleaded, either before or during the trial, and the plaintiff in no manner acquiesced in treating the alleged defense as a counterclaim.

In *Green v. Brenner* (1918) 169 N. Y. Supp. 682, in a summary proceeding to dispossess a tenant for nonpayment of rent, the tenant interposed as a defense, and proved on the trial, that the landlord agreed to furnish sufficient heat for warmth at all times between certain months, and hot and cold water, and that he had sustained damages by reason of the landlord's breach of this agreement; he did not, however, plead this as a counterclaim, and it was held to be no defense, although it was conceded that, had he so pleaded it, he would have been entitled to counterclaim damages because thereof.

So, it has been held that, where an adjoining property owner lawfully removed a party wall between the demised premises and the adjoining building, this did not constitute an eviction from any portion of the leased premises, entitling the lessee to

an apportionment of the rent. The holding also seems to be based upon the ground that the defendant pleaded the general issue in an action to recover the rent, and that under this plea he could not show a partial eviction; the pleading under the circumstances should have been that of a partial failure of consideration. *Manville v. Gay* (1853) 1 Wis. 250, 60 Am. Dec. 379. The court said: "We do not think that the testimony offered to prove the removal of the stairs tended to show an eviction of the defendant from any portion of the premises demised, so as to entitle him to have the rent apportioned. But, if it was, it is doubtful whether the testimony was admissible under the plea. When a defendant has been prevented from occupying the demised premises, he is not obliged to pay any rent, because the consideration for the agreement to pay the rent has wholly failed. So, for the same reason, when the tenant has been evicted from the entire premises, he is not obliged to pay rent after the eviction. And, after an eviction from a portion of the premises demised, he would be liable only to pay rent for that portion which he continued to occupy; and it would seem, for the same reason, that the consideration for his agreement to pay the rent has in part failed. . . . But a partial failure of consideration cannot be given in evidence under the general issue."

c. Action for damages.

The lessee whose beneficial use and enjoyment of the leased premises are interfered with or destroyed, in whole or in part, by the lessor, or others acting under his authority, may maintain an action against the lessor to recover the damages occasioned him by the acts complained of, notwithstanding his continued occupancy of the premises.

Alabama. — *Abrams v. Watson* (1877) 59 Ala. 524; *Harden v. Conwell* (1920) 205 Ala. 191, 87 So. 673.

Arkansas. — *Lacy v. Morton* (1905) 76 Ark. 603, 89 S. W. 842.

California. — *McDowell v. Hyman* (1897) 117 Cal. 67, 48 Pac. 984; *Agoure v. Lewis* (1910) 15 Cal. 71, 113

Pac. 882; *Bowles v. Hickson* (1913) 22 Cal. App. 264, 133 Pac. 1149.

Delaware.—*Morris v. Hazel* (1910) 1 Boyce, 324, 77 Atl. 766.

Idaho.—*Frepons v. Grostein* (1906) 12 Idaho, 671, 87 Pac. 1004.

Illinois.—*Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553; *Cleveland, C. C. & St. L. R. Co. v. Wood* (1901) 189 Ill. 352, 59 N. E. 619; *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462.

Iowa.—*Boyer v. Commercial Bldg. Invest. Co.* (1900) 110 Iowa, 491, 81 N. W. 720.

Louisiana.—*Wood v. Monteleone* (1907) 118 La. 1005, 43 So. 657.

Massachusetts.—*Dexter v. Manley* (1849) 4 Cush. 14; *Brown v. Holyoke Water Power Co.* (1890) 152 Mass. 463, 23 Am. St. Rep. 844, 25 N. E. 966; *Smith v. Faxon* (1892) 156 Mass. 589, 81 N. E. 687.

Michigan.—*Ives v. Williams* (1883) 50 Mich. 100, 15 N. W. 33; *Prochaska v. Fox* (1904) 137 Mich. 519, 100 N. W. 746.

Missouri.—*Morse v. Maddox* (1853) 17 Mo. 569, subsequent appeals in (1854) 19 Mo. 451, and (1855) 21 Mo. 524; *Dolph v. Barry* (1912) 165 Mo. App. 659, 148 S. W. 196; *B. Roth Tool Co. v. Champ Spring Co.* (1907) 122 Mo. App. 603, 99 S. W. 827.

Montana.—*Blaustein v. Pincus* (1913) 47 Mont. 202, 131 Pac. 1064, Ann. Cas. 1915C, 405.

New Jersey.—*Whitcomb v. Brant* (1908) 76 N. J. L. 201, 68 Atl. 1102; *Ackerman v. Ellis* (1911) 81 N. J. L. 1, 79 Atl. 883.

New Mexico.—*De Palma v. Weinman* (1909) 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782.

New York.—*Paltey v. Egan* (1910) 200 N. Y. 83, 93 N. E. 267; *Williams v. Getman* (1906) 114 App. Div. 282, 99 N. Y. Supp. 977; *Egan v. Browne* (1908) 128 App. Div. 184, 112 N. Y. Supp. 689; *Paddell v. Janes* (1915) 90 Misc. 146, 152 N. Y. Supp. 948; *Cox v. Cryder* (1915) 168 App. Div. 624, 154 N. Y. Supp. 452; *Aguglie v. Bausch & L. Optical Co.* (1918) 172 N. Y. Supp. 666; *MacGlashan v. Marvin* (1918) 185 App. Div. 157, 173 N. Y. Supp. 603; *Sidney B. Bowman Auto Co. v. Strath-*

more Leasing Co. (1922) 201 App. Div. 360, 194 N. Y. Supp. 390.

Pennsylvania.—*Schienze v. Eckels* (1910) 227 Pa. 305, 76 Atl. 15.

Virginia.—*Hubble v. Cole* (1891) 88 Va. 236, 13 L.R.A. 311, 29 Am. St. Rep. 716, 13 S. E. 441.

Washington.—*Matzger v. Arcade Bldg. & Realty Co.* (1918) 102 Wash. 423, 173 Pac. 47; *Barnes v. Bickle* (1920) 111 Wash. 133, 189 Pac. 998; *Alexis v. Pittinger* (1922) — Wash. —, — A.L.R. —, 206 Pac. 370.

England.—*See Malzy v. Eicholz* (1916) 115 L. T. N. S. 9 [1916] 2 K. B. 308, 10 B. R. C. 231, 85 L. J. K. B. N. S. 1132, 32 Times L. R. 506, 60 Sol. Jo. 511; *Odell v. Cleveland House* (1910) 102 L. T. N. S. 602, 26 Times L. R. 410; *Alston v. Grant* (1854) 3 El. & Bl. 128, 118 Eng. Reprint, 1089, 2 C. L. R. 933, 23 L. J. Q. B. N. S. 163, 18 Jur. 332, 2 Week. Rep. 161.

Canada.—*Brown v. Garson* (1913) 42 N. S. 354; *Vidal v. Cauchon* (1910) Rap. Jud. Quebec 41 C. S. 1.

In *J. B. Sanborn Co. v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681, the court said: "The action, so far as it can be sustained, is not based upon any breach of covenants of the lease, or upon any contractual ground whatever, but upon an unwarranted interference with the possession of appellant. Inasmuch as the evidence fails to disclose any act upon the part of the Central Chicago Building Company, the Marquette Building Company, or Owen F. Aldis, which could be construed as an interference with the possession of appellant, and as no action upon contractual obligation is here involved, the ruling of the court, in directing a verdict of not guilty as to these appellees, was proper. But while the court was warranted in thus directing a verdict for the three appellees named, it was error to direct a like verdict for appellees Charles and Jeannette Schonlau, for the evidence shows that they did cause the acts to be done by which the appellant claims to have been injured. Nor does the right to a recovery depend alone upon the right of the Schonlaus to make alterations in the building, or to change it in part into a hotel. Al-

though the contract of leasing, to which the Schonlaus became party, imposed no limitation upon the lessors by which they were precluded from using a part of the premises for a hotel, and making such changes as were incident thereto and necessary, yet a recovery might be had for any wrongful invasion or interference with appellant's rights in the premises, done in the course of reconstruction of the building."

In *Conlon v. McGraw* (1887) 66 Mich. 194, 33 N. W. 388, the court said: "The declaration does not count upon an eviction or ouster from the tenancy, or the destruction of the leasehold. We think the last count substantially avers a destruction of the leasehold; and, although the plaintiffs saw fit to remain in the building instead of vacating the same, the testimony tends to show that there was no profit in their business after the removal of this front, and therefore no value in their holding. The defendant undoubtedly had a legal right to make any change or alteration he saw fit, in his portion of the building, which did not tend to impair or destroy the value of plaintiffs' leasehold; but he had no right to injure them in the possession or enjoyment of their property. If he did, it was a wrong for which they must have a remedy and a right of action. And it seems to me that it must be considered as a permanent wrong and a single one. The act of the defendant was equivalent to an eviction, and such was the manifest intention of it. The plaintiffs were obstructed in the beneficial use of the whole property held by them."

In *Aguglie v. Bausch & L. Optical Co.* (1918) 172 N. Y. Supp. 666, the court said. "An action by a tenant against a landlord may be based upon contract, negligence, nuisance, or wilful injury. This case is of the latter class, and in such cases all the damages which are the direct and proximate consequences of the wilful act may be recovered. Damages to health and incidental expenses are no exceptions, provided a direct and proximate connection can be shown. In an action on a lease such damages, in the ab-

sence of an appropriate covenant, would be too remote, and not in the contemplation of the parties (*Chadwick v. Woodward* (1883) 13 Abb. N. C. (N. Y.) 441, affirmed in (1884) 12 Daly, 399); but not so where the action is for a wilful wrong. The gist of the plaintiff's cause of action is that the defendant wilfully turned off the water in his tenement, which act made the plaintiff sick and caused him other damages. A landlord may not wilfully injure his tenant, any more than he may inflict such injury upon a third person."

In *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462, the court said that the lessee had his option, either to recoup damages for wrongful injury to the leased premises by the lessor, or to maintain an independent action to recover the damages thereby caused him.

And it has been held that the landlord, by taking possession of or using a portion of the leased premises, is liable to the tenant for the reasonable value of such use. *Efron v. Stees* (1911) 113 Minn. 242, 129 N. W. 374. The court said: "The lessor acquired no more right to occupy the room in which the stairway was situated, for storage purposes, than to occupy the front room. The lease makes no provision for the occupancy found to have taken place, and appellant acquired no right to occupy the rear room, or any part of it, by reason of his right of access to the basement. That instrument furnishes no remedy for such occupancy, and hence an action will lie on the implied contract to pay the reasonable value."

The breach of an agreement to keep demised premises in repair may give rise to a cause of action for damages, and it has also been held that it may go to the covenant of quiet enjoyment, and if it breaches this covenant it may justify the lessee in claiming an eviction. *Dolph v. Barry* (1912) 165 Mo. App. 659, 148 S. W. 196.

The liability of the lessor may be based upon acts of the landlord upon portions of the premises other than those leased to the plaintiff. For example, the landlord is liable for the

damages caused the tenant of the first floor of a building, by so negligently repairing and altering other floors as to injure the tenant's goods on the first floor. *Odell v. Cleveland House* (1910) 102 L. T. N. S. (Eng.) 602, 26 Times L. R. 410; *Smith v. Faxon* (1892) 156 Mass. 589, 31 N. E. 687. In the latter case the action by the tenant was in tort.

The fact that the relation of landlord and tenant is contractual, and the damages claimed have arisen by reason of the existence of the contract, does not preclude recovery of the damages sustained by the tenant in an action *ex delicto*, where they result from a trespass by the landlord upon the leased premises. *Wood v. Monteleone* (1907) 118 La. 1005, 43 So. 657.

An action in case may be maintained by a tenant against the landlord to recover damages for an unwarranted interference with the possession and enjoyment of the leasehold. *Chapman v. Kirby* (1868) 49 Ill. 211; *J. B. Sanborn Co. v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681; *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553; *Ives v. Williams* (1883) 50 Mich. 100, 15 N. W. 33, subsequent appeal in (1884) 53 Mich. 636, 19 N. W. 562.

In *Stanton v. Lapp* (1910) 113 Md. 324, 77 Atl. 672, the owner of leased premises was held liable in an action trespass *quare clausum fregit* for the damages to a tenant due to his entering upon the leased land and excavating thereon, rendering dangerous the access on approach to the rear of the building upon the leased premises used for business purposes, to the extent of practically destroying the tenant's trade by way of the rear of the building. And an action in trespass *quare clausum fregit* was also sustained against a landlord, in favor of his tenant, in *Morris v. Hazel* (1910) 1 Boyce (Del.) 324, 77 Atl. 766.

d. Injunction.

1. In general.

If the tenant has no adequate remedy at law to recover damage for an interference by the lessor with the leased premises, or for a deprivation of some right or privilege appurtenant

thereto, he is entitled to the aid of equity to enjoin the act or conduct complained of.

Arkansas.—*Fletcher v. Pfeifer* (1912) 103 Ark. 318, 146 S. W. 864.

Georgia.—*Anthony Shoals Power Co. v. Fortson* (1912) 138 Ga. 460, 75 S. E. 606.

Illinois.—*White v. Y. M. C. A.* (1908) 233 Ill. 526, 84 N. E. 658.

Louisiana.—*Hirsh v. Valloft* (1907) 121 La. 66, 46 So. 103.

Maryland.—*Belvedere Hotel Co. v. Williams* (1921) 137 Md. 665, 14 A.L.R. 622, 113 Atl. 335.

Massachusetts.—*Nelson Theatre Co. v. Nelson* (1913) 216 Mass. 30, 102 N. E. 926.

Michigan.—*Minnis v. Newbro Gallogly Co.* (1913) 174 Mich. 635, 44 L.R.A. (N.S.) 1110, 140 N. W. 980.

Missouri.—*Sultzman v. Branham* (1908) 128 Mo. App. 696, 108 S. W. 1074.

Montana.—*Wheeler v. McIntyre* (1918) 55 Mont. 295, 175 Pac. 892.

New Jersey.—*McGann v. LaBrecque Co.* (1919) 90 N. J. Eq. 526, 107 Atl. 175.

New York.—*Cooley v. Cummings* (1888) 49 Hun, 608, 16 N. Y. S. R. 947, 1 N. Y. Supp. 631; *Horton v. Carhart* (1888) 14 N. Y. S. R. 546; *Stevens v. Salomon* (1902) 39 Misc. 159, 79 N. Y. Supp. 136; *Stevens v. Taylor* (1906) 111 App. Div. 561, 97 N. Y. Supp. 925; *Harry Angelo Co. v. Improved Property Holding Co.* (1910) 137 App. Div. 308, 122 N. Y. Supp. 199.

Vermont.—*Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 582.

Wisconsin.—*Shaft v. Carey* (1900) 107 Wis. 273, 83 N. W. 288.

Canada.—*Tamblyn v. Austin* (1920) 48 Ont. L. Rep. 97, 54 D. L. R. 663.

Injunction will issue to enjoin the landlord from entering upon the leased premises and forcibly interfering with the tenant's possession, where such conduct of the landlord has been frequently repeated. *Nelson Theatre Co. v. Nelson* (Mass.) *supra*.

In *Cooley v. Cummings* (N. Y.) *supra*, in sustaining the right of a lessee of a portion of a building to restrain the interference by the landlord with his access to toilet and water

supply in another section of the building, the right of access being secured to the lessee by the terms of the lease, the court said: "No doubt whatever exists that the demise embraces the use of the Croton water and of the water-closets in the fifth story, or of the existence of a passageway leading from the premises of the plaintiff to the water-closet and Croton water privilege, or of the construction of the barrier across the passageway, preventing its use. Indeed, the erection of the gate proves that access could be had in that way. And these facts, when considered with the further allegation made, namely, that the gate wholly barred the plaintiff from the use of the water-closet and the Croton water, it becomes clear that a cause of action was stated. We are dealing now with the written instrument, and allegations of fact connected with it, and we are not permitted, therefore, to wander into the field of presumption and suppositions, but are confined to the limits just mentioned; non constat but that on the trial it would appear that the plaintiffs were not, as alleged, confined within the limits expressed, and that there were other modes of access to the water-closet on the third floor, and to the fifth floor, which they would have the right to employ. But that would necessarily be a matter of proof, to be given upon the trial. Under the allegations, as indicated, it would be improper to assume that other modes of access were given plaintiffs which they might have employed without inconvenience. The suggestion, therefore, that the complaint did not contain facts constituting a cause of action, is not sustained, nor is the proposition that the complaint does not contain facts calling for equitable intervention a good one. It certainly is not necessary to cite authorities to show that the continuous interference of a landlord with the rights of his lessee presents a subject for equitable cognizance."

Where the only means of heating a dwelling house or an apartment was by a furnace situated in a portion of the premises not included in the lease, the tenant is entitled to an injunction

to restrain the landlord from interfering with his use of the furnace, since this right passed to the tenant under the lease of the premises with the appurtenances thereto. *Stevens v. Taylor* (1906) 111 App. Div. 561, 97 N. Y. Supp. 925.

In *Anthony Shoals Power Co. v. Fortson* (1912) 138 Ga. 460, 75 S. E. 606, it is held that if the landlord undertakes to repudiate his lease by interfering with the tenant's possession to the extent of preventing him from exercising his privileges under the contract, and the tenant's damages are incapable of ascertainment, equity will enjoin such wrongful acts.

In *Horton v. Carhart* (1888) 14 N. Y. S. R. 546, the landlord was enjoined from trespassing upon a portion of the leased land and tilling the soil, on the ground that this unlawful conduct threatened irreparable injury to the tenant.

And see *Minnis v. Newbro-Gallogly Co.* (1913) 174 Mich. 635, 44 L.R.A. (N.S.) 1110, 140 N. W. 980, holding that a tenant is entitled to an injunction restraining threatened action by the landlord which will result in destroying the leased premises.

In *Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 582, a tenant whose beneficial enjoyment of the leased premises was being substantially interfered with by the landlord was granted injunctive relief and an accounting was ordered to be taken as to his damages.

In *Belvedere Hotel Co. v. Williams* (1921) 137 Md. 665, 14 A.L.R. 622, 113 Atl. 335, an injunction was issued restraining a hotel company from permitting the continuance of the operation of a barber shop on property constituting an adjunct to the hotel property, where the hotel company had previously leased another portion of the property for a barber shop, under circumstances held to give the lessee of the latter lease the exclusive right to operate a barber shop in the hotel property.

In enjoining a similar interference with a tenant's enjoyment of the exclusive right to sell liquors and cigars in a portion of premises, the balance of which was leased for hotel purposes

es, the court in *Shaft v. Carey* (1900) 107 Wis. 273, 83 N. W. 288, said: "It is evident from the terms of the lease that the proximity of the room leased to plaintiff to the adjoining rooms of the hotel was a matter of importance to the parties, and bore a direct relation to the value of the leasehold. When the lease was renewed in 1898, the plaintiff was entitled to the enjoyment of his leasehold interest with the appurtenances of ingress and egress as they then existed. In other words, when a person leases a room in a building, with doors and passageways so connected with other rooms as to be essential to the use and enjoyment of the one leased, the law implies a covenant that such use shall not be interfered with during the continuance of such term. The appurtenances of ingress and egress essential to use, and reasonably within the contemplation of the parties at the time of the leasing, are as much a part of the estate conveyed as the room itself, and any interference therewith is an invasion of the rights of the lessees for which the law affords a remedy. . . . If the door and passageway in question existed at the time the lease was renewed, and were essential to the proper use and enjoyment of the estate conveyed, the right to such use was more than a mere privilege or easement. It becomes a part and parcel of the leasehold interest, binding upon the lessor or his grantees."

In *Harry Angelo Co. v. Improved Property Holding Co.* (1910) 137 App. Div. 308, 122 N. Y. Supp. 199, a tenant was held entitled to an injunction restraining the landlord from violating a covenant in the lease to the effect that he would not lease any part of the building in which was located the leased apartment, to any firm or person handling a similar line of goods to that of the said lessee.

Compare with *Anderson v. Bloomheart* (1917) 101 Kan. 691, L.R.A. 1918B, 473, 168 Pac. 900, where injunction was denied the tenant upon the ground that the interference sought to be enjoined was not a matter which the tenant had the right to complain of.

Where the obstruction of a passageway used in connection with the leased premises is in derogation of the tenant's easement and rights under the lease, and will cause great and irreparable damage, it will be enjoined. *Sultzman v. Branham* (1908) 128 Mo. App. 696, 108 S. W. 1074.

It has been held that the attempt of the lessor of a building divided into different apartments to impose an additional burden upon a portion thereof by utilizing a cesspool under the floor, for the convenience of other apartments he was constructing, is unwarranted and will be enjoined. *Hirsh v. Valloft* (1907) 121 La. 66, 46 So. 103.

In *Stevens v. Salomon* (1902) 39 Misc. 159, 79 N. Y. Supp. 132, it was held that the tenant had such an interest in the light and air from the yard in the rear of the leased premises as to be entitled to enjoin the construction of a three-story construction in such yard, and where the landlord had completed the structure before the decree, a mandatory injunction would issue directing him to remove that part of the extension above the level of the tenant's rear windows. This relief was given, although it was assumed that the tenant was not entitled to the use of the yard wherein the extension was being made.

In *Stahl & Jaeger v. Satenstein* (1922) 233 N. Y. 196, — A.L.R. —, 135 N. E. 242, a tenant was held entitled to enjoin the act of the landlord in painting or permitting to be painted on the outside walls of that portion of the building occupied by the tenant, signs advertising some business other than that which the plaintiff was engaged in, although the plaintiff had himself covenanted with the landlord not to paint any signs on the outside walls of the portion of the building he occupied.

In *Tamblyn v. Austin* (1920) 48 Ont. L. Rep. 97, 54 D. L. R. 663, a tenant was held entitled to restrain the landlord from using the exterior of one of the walls of the demised premises as a support for an outside stairway as a means of access to a floor over the portion leased to the plaintiff.

In *Wheeler v. McIntyre* (1918) 55

Mont. 295, 175 Pac. 892, an injunction was issued in behalf of a tenant restraining the landlord from removing a building from the leased premises, the removal of which would be destructive of his estate. And in *McGann v. La Brecque Co.* (1919) 90 N. J. Eq. 526, 107 Atl. 175, a tenant was held entitled to enjoin a landlord from interfering by summary proceedings with his possession of the leased premises, provided he established his right to the possession and it further appeared that he would sustain damages to an extent not determinable.

However, in *Fletcher v. Pfeifer* (1912) 103 Ark. 318, 146 S. W. 864, it was held that even conceding that a landlord would be liable to a tenant for undermining or excavating under the walls of the leased premises, although by a system of underpinning, no damage resulted to the tenant, yet, under such circumstances, the tenant was not entitled to an injunction to restrain such action upon the part of the landlord, since the injury to him, even if regarded as a continuous trespass, was not irreparable.

In *Fuller v. Rose* (1905) 110 Mo. App. 344, 85 S. W. 931, an injunction sought by a tenant to restrain the landlord from having a sign printed on the exterior of one of the walls of the leased premises was denied, it appearing that the landlord had the right to use the outside walls, providing he did not use the same to the detriment of the tenant. The court pointed out that "the landlord . . . is required, in the use made by him of the wall, not to inflict damage upon his tenants. He covenanted to give them uninterrupted and peaceable possession of the respective premises, and therefore would have no right to place such advertising or other matter on the outside of his building as would tend to injure the business of any of his tenants. No such injury is proven or even claimed by plaintiffs. Esthetics lie beyond the cognizance of either equity or law in such cases. Damage of a more substantial nature must be involved. Offended taste will not support a cause of action."

In *White v. Y. M. C. A.* (1908) 233 20 A.L.R.—88.

Ill. 526, 84 N. E. 658, the court dissolved an injunction issued by the trial court, restraining the lessor of premises to be used for a restaurant from bringing an action to recover the rent, the lessee urging as a ground for the injunction that he suffered irreparable injury on account of the heat, odors, and other things affecting the patronage of the restaurant, resulting from failure of the lessor properly to ventilate the premises. The court said that if such damages are to be set off or recouped from the rent they are as easily ascertainable at law as in equity, and that hence equity had no jurisdiction; that the point was also made that the only ground on which the lessee could suffer irreparable injury would be removal from the premises, and this could not be irreparable injury unless the premises were of value to him; and the court said that, unless the agreement to ventilate was an agreement precedent, the default of the defendant only related to a part of the consideration, and the complainant, having continued to occupy the premises, could not refuse to pay rent because of the breach of the agreement.

In *Epstein v. Dunbar* (1915) 221 Mass. 579, 109 N. E. 730, the court entertained a bill by a tenant to have an entrance theretofore closed restored, and a doorway and a partition wall reopened, and to enjoin the lessors from evicting the tenant, and also retained the bill for the assessment of damages.

2. Damages in lieu of injunction.

It has been held that where air and light for demised premises depended to an appreciable extent upon a well or open space, and its use to secure light and air were necessary to the beneficial enjoyment of the leased premises, to prevent the substantial interference therewith by the lessor the lessee is entitled to injunctive relief, and where, before the final termination of the action, the lease expires, in lieu of injunctive relief, damages may be assessed in favor of the lessee. *Case v. Minot* (1893) 158 Mass. 577, 22 L.R.A. 536, 33 N. E. 700.

In *Epstein v. Dunbar* (1915) 221 Mass. 579, 109 N. E. 730, there was a substantial interference with the substituted means of access to the apartment of the lessee, the court said if the lessor had control of the substituted access injunctive relief would be proper, but that, in view of the fact that the lessor did not have such control, damages would be given in lieu thereof.

So, in *Hessler v. Schafer* (1897) 20 Misc. 645, 46 N. Y. Supp. 1076, the tenant who retained possession of the leased premises was held entitled to enjoin the lessor from adding additional stories to the leased premises, and where, before the termination of the injunction suit, such additional stories had been constructed, the tenant was held entitled to recover whatever damages he suffered by interference with his business through the erection of such stories; it also appearing that those additional stories were used in a business competing with that of the tenant, he was held entitled to an injunction requiring the landlord, as nearly as possible, to replace the tenant's signs and remove his own signs advertising a competing business; and he was also enjoined from using, or permitting the use of, such additional stories for a business competing with that of the tenant.

IV. Causes of complaint.

a. In general.

This division of the annotation is concerned only with cases in which the conduct of the landlord is complained of as an interference with the beneficial enjoyment of the leased premises; and is not concerned with cases where such conduct is made the ground of a claim as for independent wrong, e. g., an action for personal injuries or injury to property.

It may be said that any interference by the landlord with the tenant's beneficial use and enjoyment of the leased premises and the appurtenances, or any breach of agreement or covenant, constitutes an actionable

wrong, entitling the tenant to compensation for the loss or injury. The question as to what amounts to a constructive eviction if the tenant abandons the premises is, of course, excluded by the scope of the annotation, although some of the cases of that kind are referred to incidentally. It would seem clear, however, that any conduct on the part of the landlord that would have supported a claim of constructive eviction if the tenant had abandoned the premises would afford him a ground of complaint available in proper form if he retains possession.

b. Infestation of premises by vermin during tenancy.

In *Lumpkin v. Provident Loan Soc.* (1915) 15 Ga. App. 816, 84 S. E. 216, where the lessee undertook to avoid payment of rent on the ground that the premises were infested with rats subsequently to his entering into possession thereof, the court, in denying his right to make this defense, said: "The evidence showed, however, that he leased this office with full knowledge of its condition and arrangement, and remained there for more than a year without suffering any discomfort. And he cannot now complain of defects which were in existence, and known to him, at the time of the lease."

The presence of rats in great numbers in a building rented by several tenants, control of a portion of which is retained by the landlord, may constitute such a nuisance as to justify a tenant in abandoning the premises on the theory of a constructive eviction. *Barnard Realty Co. v. Bonwit* (1913) 155 App. Div. 182, 133 N. Y. Supp. 1050; *Batterman v. Levenson* (1917) 102 Misc. 92, 168 N. Y. Supp. 197. And the same has been held true as to bedbugs. *Streep v. Simpson* (1913) 80 Misc. 666, 141 N. Y. Supp. 263. It is to be noted, however, that in these cases the basis of the decision was the abandonment of the premises by the tenant on the theory of a constructive eviction, a class of cases not within the scope of this annotation.

c. Use to which other portions of leased premises are put.

1. By lessor.

It has been held that, without reference to the question whether the interference with the possession of the lessee amounted to an eviction, an unwarranted interference with the beneficial enjoyment of the premises by the lessee will constitute a ground of action against the lessor. *J. B. Sanborn Co. v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681. In this case the interference complained of was by obstructing or blocking the entrances to the block in which the lessee had office quarters, and in also encumbering and blocking the passageway, due to repair work. The lessee finally removed from the premises, but, as indicated, the case was disposed of upon the theory of an eviction.

In *Morris v. Hazel* (1910) 1 Boyce (Del.) 324, 77 Atl. 766, a landlord was held liable in trespass *quare clausum fregit*, for unlawfully entering upon the demised land and improperly trimming fruit trees. The jury were, however, told that if it was a custom that landlords might enter upon leased premises and trim fruit trees growing thereon, where the tenant failed to do so, then the landlord would not be liable, providing he did no more than the customary trimming.

In *Efron v. Stees* (1911) 113 Minn. 242, 129 N. W. 374, a lessee is held entitled to recover of the lessor the reasonable value of the use of a portion of the leased premises in which the lessor stored some of his goods.

An action may be maintained by a tenant to recover damages from the landlord for the wrongful interference with the plaintiff's peaceable enjoyment of the leased premises by remodeling other portions of the building, causing jarring and vibrations in plaintiff's portion, and the ceilings and walls to crack and become loosened, and part thereof to fall, and water and other substances to come through the ceilings upon the personal property and chattels of the plaintiff therein. *Sidney B. Bowman Auto.*

Co. v. Strathmore Leasing Co. (1922) 201 App. Div. 360, 194 N. Y. Supp. 390.

The rule that a covenant of quiet enjoyment, either express or implied, means that the tenant shall not be evicted or disturbed in his possession of demised premises, or some part thereof, does not extend to the wrongful act of a stranger or the lawful act of the landlord in making a different lawful and proper use of the property not demised; hence, where the premises, a portion of which are leased for offices, are subsequently leased for hotel purposes, this fact does not entitle a lessee of offices to claim damage for breach of covenant by the lessor, although the effect of the operation of the hotel was to make the offices less suitable for the business of the lessee. *Tucker v. DuPuy* (1904) 210 Pa. 461, 60 Atl. 4.

But in *Aldin v. Clark* [1894] 2 Ch. (Eng.) 437, Stirling, J., said that, "where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection."

And it has been held that where a tenant leased the room adjoining the office of a hotel owned by the lessor, and was given the exclusive privilege of selling liquors and cigars in the hotel block, he is entitled to restrain the landlord from selling similar articles in an annexed hotel adjoining the office, on the opposite side from the lessee's saloon. *Shaft v. Carey* (1900) 107 Wis. 273, 83 N. W. 288. And see *supra*, III. d.

2. By third person or other tenant with authority of landlord.

In *Agoure v. Lewis* (1910) 15 Cal. App. 71, 113 Pac. 882, the landlord is held liable to a tenant in an action to recover damages for breach of covenant of quiet enjoyment for injury by the live stock of another ten-

ant, who, however, had a right of pasturage superior to the complaining tenant.

In *Selz v. Stafford* (1918) 284 Ill. 610, 120 N. E. 462, the court said: "Where premises are leased for a hotel, and the landlord permits in the same building another business to be carried on that is well known by him to be hurtful to the business of a hotel, and has the same carried on contrary to the protests of his tenant, whether such business be the saloon business or any other business, in the absence of permission to carry on such business by the terms of the lease or otherwise, the landlord will be liable to the tenant for any damages so caused the tenant, by recoupment, when sued for rent."

So, in *Halligan v. Wade* (1859) 21 Ill. 470, 74 Am. Dec. 108, an action to recover rent during the time the tenant was in possession, after the acts complained of, the court said: "It was insisted . . . that a distinction existed between leasing the reserved portions of the premises for lawful or unlawful purposes. And that, as these leases were made for the purpose of carrying on lawful pursuits, the law gave defendant no right to complain. But it is believed that such a distinction does not exist. Suppose in this case the landlord had converted the rooms under this hotel into pigsties and horse and cattle stables, can anyone doubt that such an act would have been equally destructive to the business of the tenant as would almost any species of unlawful business that could be tolerated in any city, and yet they would be appropriated to lawful purposes. And it may be, and doubtless was, equally destructive to the business of keeping a hotel that those rooms were appropriated to the keeping of a low, noisy, and disorderly liquor saloon, and a tin shop. We think the evidence justified the jury in finding that there was such an eviction, or what had the effect of such an eviction, as released the defendant from the payment of this rent." Not inconsistent with the foregoing is *Chicago Legal News Co. v. Browne* (1882) 103 Ill.

317, holding that the rent is not suspended by the breach by the landlord of his agreement that he would not let any portion of the block of which certain of the leased premises was a part, for the sale of intoxicating liquors, and that for any damage to the lessee by reason of the breach of this agreement he is entitled to have the same offset against the rent, in diminution thereof. The court said that the lessee did not leave the demised premises, but remained therein and enjoyed them for the full term. "We fail to perceive that the performance of the agreement supposed, not to lease any other part of the building for a saloon, was a condition precedent to a right of recovery of rent, as the instruction makes it. The agreement was not made such a condition in terms. It did not go to the whole of the consideration, in which case such an agreement had been read as a condition. It should be taken to be but a stipulation, the breach of which only gave an action for damages to the lessee. . . . It is but the amount of the damages from the violation of the agreement which the defendant would be entitled to have. As it might have been much less than the rent it would be improper to instruct that there could be no recovery of rent for the time a part of the premises was leased contrary to the agreement. The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant, by such act, has been deprived, in whole or in part, of the possession, either actually or constructively, or the premises rendered useless."

And see *Wade v. Herndl* (1906) 127 Wis. 544, 5 L.R.A.(N.S.) 855, 107 N. W. 4, 7 Ann. Cas. 591, holding that the lessee of an upper story of a building for a studio is evicted where the landlord leases the lower floor of the building to be used by an automobile company for the storage and sale of automobiles, where, as a necessary part of such business, engines are tested, and the testing causes such a vibration of the floor of the upper story as to prevent the lessee from

properly carrying on her work as a dressmaker, and damages and destroys her paintings. Compare with *TOY v. OLINGER* (reported herewith) ante, 1366, being a decision by the same court.

In *Cushman v. Thompson* (1908) 58 Misc. 539, 109 N. Y. Supp. 757, the answer of the defendant to an action to recover rent due under a lease, held a good defense on the ground of eviction, contained allegations to the effect that the lessor rented other apartments in the premises to occupants for immoral and illegal purposes and for the resort of bad characters, men and women, and that the lessee notified the lessor of the immoral and illegal use of the premises, and requested him to take the necessary proceedings to evict such disorderly occupants, and that he unlawfully neglected to institute such proceedings or to cause such persons to be removed therefrom, but, on the contrary, suffered and permitted them to continue to occupy a portion of said premises for immoral purposes. This case cites as authority *Dyett v. Pendleton* (1826) 8 Cow. (N. Y.) 727, wherein it appeared that the lessee actually abandoned the premises. In the *Thompson* Case it does not appear whether or not the tenant vacated the premises.

The landlord is not liable for injury to a tenant by the manner in which a tenant of another portion uses his part, unless such use is with the consent and authority of the landlord. Thus, in *Malzy v. Eichholz* [1916] 2 K. B. 308, 10 B. R. C. 231, 85 L. J. K. B. N. S. 1132, 32 Times L. R. 506, 60 Sol. Jo. 511, 115 L. T. (Eng.) 9, a tenant was denied the right to recover damages for injury to his restaurant business by the conducting, by the tenant of an adjoining apartment of the same premises, of a fraudulent auction room in such a way as to constitute a nuisance. The right of recovery was based upon the ground of a breach of an express covenant of quiet enjoyment, and also that the acts complained of amounted to a derogation from the plaintiff's grant. It was held that in either case au-

thorization or participation by the landlord in the wrongful acts was essential to his liability; that it could not be based upon mere rental of the premises for use of an auction room, since such a use might or might not involve or create a nuisance.

In the foregoing case the court distinguishes *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. (Eng.) 690, 19 Times L. R. 145, on the ground that in the latter case there was evidence tending to show that the landlord authorized tenants of apartments in the same building to use their apartments for immoral purposes. The case was presented upon an application by the tenant for a declaration that the defendants were bound by his covenant for quiet enjoyment with plaintiff's assignor, and for an injunction restraining defendants from permitting any of the other flats in the building to be used so as to interfere with the quiet enjoyment by the plaintiff of his flat.

And see *TOY v. OLINGER* (reported herewith) ante, 1366, which denied the right of a tenant to recoup damages where based upon an injury to his business conducted in the leased building, due to the acts of a tenant of another portion of the building, the responsibility of the landlord for the acts of the latter tenant not being shown.

So, in *Bilicke v. Janss* (1910) 14 Cal. App. 342, 112 Pac. 201, it is held that a landlord is not liable to the tenant for disturbance to the business of the tenant due to the fact that a portion of the building in which the leased premises were located at the time of the lease in question was leased for use as a butcher shop, and that this use resulted in filling the leased premises with a stench and foul odors and offensive smoke, due, it was claimed, to a defective vent pipe, which, however, was not shown to have been defective by reason of any fault of the landlord. In this case the tenant sought to recoup damages in an action by the landlord for the rent. In denying the right to recover under the circumstances, the court said: "Not only was there no

covenant on the part of the landlord that the premises were fit and suitable for the purpose for which they were leased, but the storeroom was in use as a butcher shop and meat market, at the time the lease was executed to Raymond, and he must be deemed to have accepted the lease with full knowledge of the conditions existing by reason of conducting a meat market and butcher shop in close proximity to the premises so leased by him. The lease imposed no duty upon the landlord to heat and maintain either the leased or other premises in a condition fit and suitable for carrying on the business of a physician's institute. On the contrary, it is expressly provided that, in so far as other tenants and occupants of the building were concerned, the landlord should not be accountable for any damages sustained by the lessee by reason of the acts of such other tenant and occupant. Hence the finding that the leased premises were rendered unfit for the purposes for which they were leased did not in itself constitute an ouster. . . . Clearly, the landlord was not responsible for the acts of the tenant in smoking meat upon his own premises. If such acts of the butcher tenant constituted a substantial grievance, redress should have been had against the offending tenant, and not against the landlord."

In *Kent v. Ward* (1908) 111 N. Y. Supp. 743, it is held that, where the tenant knew of the location of a restaurant directly beneath the apartment leased by him prior to the execution of the lease, he cannot complain of the noisome odors or music, and charge responsibility to his landlord instead of the offending tenant; nor, assuming that these facts disclosed a constructive eviction by the landlord, could he remain in possession for some time, and until a convenient season for moving, and then assert his right to abandon the premises.

In *DeWitt v. Pearson* (1873) 112 Mass. 8, 17 Am. Rep. 58, the lessee claimed a suspension of rent on the ground of eviction based upon the

rental by the landlord to disorderly tenants of an adjoining portion of the leased premises. This contention was denied, on the ground that there had been no eviction from the premises, the defendant remaining in full occupation. Hence, there was no question for the jury as to the beneficial value of the premises to the defendant, and it was immaterial whether he had used due diligence in endeavoring to obtain other lodgings, since the doctrine of recoupment of damages, as established in that commonwealth, had no application.

It has also been held that a tenant in possession of a portion of the leased premises is not entitled to recoup, in an action by the landlord for rent, damages on account of a nuisance created and maintained by a cotenant on that portion of the premises in exclusive possession of such cotenant. *Adair v. Allen* (1916) 18 Ga. App. 636, 89 S. E. 1099.

In this connection, it is of interest to compare the foregoing decisions with the leading cases involving similar facts, with the exception that, in the cases to be referred to, the tenant abandoned the premises. As heretofore pointed out, cases of the latter character are not within the scope of this annotation, and the few referred to are merely for the purpose of comparison.

In *Dyett v. Pendleton* (1826) 8 Cow. (N. Y.) 727, the tenant vacated the premises, and hence the case is not strictly within the scope of the annotation; it was held, however, that he was justified in regarding the act of the landlord to constitute an eviction, where the landlord, who had retained the possession of a portion of the premises, brought into the rooms thus retained prostitutes and licentious women, and men who made loud noises and indulged in indecent conduct to such an extent as to bring the place into odium and bad repute. The doctrine is here stated that actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent. It is sufficient if there had been an obstruction to the beneficial enjoyment and a sub-

stantial diminution of the consideration of the contract by the act of the landlord, although those facts do not amount to a physical eviction. In the same case Colden, senator, took the position that no eviction had been shown, but that the facts relied upon did show an injury and loss of possession, which were not consequential and such as would support an action on the case for damages.

It has been held that if the unlawful conduct of other tenants amounts to a nuisance, and this nuisance is established or maintained with the consent and connivance of the landlord, and as a consequence a tenant is materially disturbed and interfered with, in his possession or enjoyment of the leased premises, he has a right to treat it as a constructive eviction. *Paterson v. Bridges* (1917) 16 Ala. App. 54, 75 So. 260.

In *Gray v. Gaff* (1880) 8 Mo. App. 329, the tenant, on the theory that he had been constructively evicted from the leased premises, abandoned the same, and it was held that the fact that the landlord, in violation of an oral promise not made a part of the lease, leased another portion of the premises for a restaurant, and the smoke and fumes from the restaurant made it unhealthy for the lessee to continue to occupy the premises leased to him for a livery stable, did not entitle him to regard the act of the landlord as a constructive eviction.

In *Seaboard Realty Co. v. Fuller* (1900) 33 Misc. 109, 67 N. Y. Supp. 146, 8 N. Y. Anno. Cas. 418, it is held that a tenant of a portion of an apartment house is not at liberty to abandon his apartment and cancel his liability under a lease, because his nervous sensibilities may be excited, or his rest disturbed, by the noise and prattle of children in another apartment in the same building. The court said that leases would not be worth the paper upon which they are written, if the engagements of parties could be set at naught upon such slight, trivial pretexts. To constitute a constructive eviction, there must be an intentional and injurious interference

by the landlord, which deprives the tenant of the beneficial enjoyment of the demised premises, or materially impairs such beneficial enjoyment. An eviction depends upon the materiality of the deprivation. If trifling, and producing no substantial discomfort, or serious inconvenience, it will be disregarded, and will not afford cause for the termination of the relation of landlord and tenant. It is further held in this case that, even if the right to abandon the premises had existed, it was waived because of delay in exercising it.

And see also *Sexton v. Juilliard* (1904) 46 Misc. 68, 91 N. Y. Supp. 348, which holds that constructive eviction is not established merely on the ground of annoyance by another tenant in the same apartment house playing upon musical instruments, although it was in the power of the lessor to have required the other tenant to desist and refrain from such musical exercises.

d. Use to which adjoining premises are put by or under authority of landlord.

The owner of land in possession of his tenant is liable to the latter for a nuisance created by him upon adjacent land, which affects injuriously the tenant's leasehold interest. *Alston v. Grant* (1854) 3 El. & Bl. 128, 118 Eng. Reprint, 1089, 2 C. L. R. 933, 23 L. J. Q. B. N. S. 163, 18 Jur. 332, 2 Week. Rep. 161.

In *Odell v. Cleveland House* (1910; K. B. Div.) 102 L. T. N. S. (Eng.) 602, 26 Times L. R. 410, the owner of premises, a portion of which was leased to the plaintiff, was held liable to the latter for damage to his goods by the act of the owner in employing a third party to tear down other portions of the premises to an extent to constitute a nuisance.

In *Smith v. Faxon* (1892) 156 Mass. 589, 31 N. E. 687, the landlord was held liable to the tenant for injury to the latter's goods due to flooding, caused by an excavation made by the landlord upon property immediately adjoining the leased property, and which he failed to cover and protect from a heavy rainstorm.

In *Ackerman v. Ellis* (1911) 81 N. J. L. 1, 79 Atl. 883, the landlord was held liable for injury to the tenant by a nuisance maintained by the former near the line of the leased premises. The nuisance was alleged to have been caused by the landlord planting in a careless, negligent, and improper manner, a row of poisonous or noxious trees, so close to the property line of the tenant that the roots, branches, limbs, and leaves grew, hung over, and fell upon the demised premises, rendering them barren and unfit for use.

It has been held that the landlord owes the duty not to disturb the tenant in his possession and enjoyment of the premises which he has leased to him, by conducting such building operations and excavations upon the adjoining premises as to injure the demised premises, and for his violation of this obligation he may be held liable, independently of any negligence. *Paltey v. Egan* (1915) 200 N. Y. 83, 93 N. E. 267.

So, in *De Palma v. Weinman* (1909) 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782, a landlord was held liable in an action against him by the tenant for trespass based upon an injury to the tenant's goods by the wrongful excavation by a third person on premises adjacent to the leased premises, where the latter acted under a contract with the landlord. The court said: "The party wall agreement amounted to a license or permission to another party to enter the leased premises and to excavate under the wall of the leased building in such a manner as to greatly endanger the goods and fixtures of his tenants, a fact which (the landlord) must have known; and it seems to us that, under the doctrine that he who commands or approves is equally guilty with him who performs the act, he was guilty of a trespass in conjunction with Barrett, with whom he contracted, permitting him to do the actual wrong."

And in *Freperis v. Grostein* (1906) 12 Idaho, 671, 87 Pac. 1004, a landlord was held liable for injury to the property and business of a tenant, due

to excavating upon premises adjoining the leased premises, and to the erection of a building therein.

In *Schneider v. Reeves* (1915) 98 Neb. 629, 154 N. W. 210, the landlord was held liable in an action for damages to a tenant for loss to the latter due to the landlord leasing premises adjoining the demised premises to a third person, who closed a road across the premises he leased, the use of which was essential to the full enjoyment by the plaintiff of the premises he leased. The landlord was held liable upon the ground that in making the subsequent lease, he did not reserve this roadway for the benefit of his tenant.

In *Bowles v. Hickson* (1913) 22 Cal. App. 264, 133 Pac. 1149, a landlord was held liable for an injury to the tenant's property, due to the negligence of the former in starting a fire upon the premises adjacent to the demised premises. The landlord was held liable notwithstanding an agreement by the tenant, in effect, that the landlord should not be responsible for any injury, by fire or otherwise, to the tenant's property.

e. Obstruction to access, air, or light.

1. Means of access.

An obstruction caused by the lessor to the means of access of the lessee to the leased premises, of a substantial character, has been held to constitute such a breach of the express or implied covenants of the lease as to render the lessor liable thereon.

United States. — *Wait v. O'Neil* (1896) 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408.

California. — *McDowell v. Hyman* (1897) 117 Cal. 67, 48 Pac. 984.

Illinois. — *J. B. Sanborn Co. v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681.

Massachusetts. — *Boston & W. R. Corp. v. Ripley* (1866) 95 Mass. 421; *Epstein v. Dunbar* (1915) 221 Mass. 579, 109 N. E. 730.

Michigan. — *Pridgeon v. Excelsior Boat Club* (1887) 66 Mich. 326, 33 N. W. 502.

Nebraska. — *Kitchen Bros. Hotel Co.*

v. Philbin (1902) 2 Neb. (Unof.) 340, 96 N. W. 487.

New York. — Hamilton v. Graybill (1897) 19 Misc. 521, 43 N. Y. Supp. 1079; Hall v. Irvin (1903) 78 App. Div. 107, 79 N. Y. Supp. 614; Lawrence v. Edwin A. Denham Co. (1908) 58 Misc. 543, 109 N. Y. Supp. 752.

Ohio. — Frankel v. Steman (1915) 92 Ohio St. 197, 110 N. E. 747.

South Dakota.—Edmison v. Lowry (1892) 3 S. D. 77, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 583.

A mere temporary inconvenience caused by a lessor, not by depriving his tenant of a right of way, but in rendering his access less convenient than it was, is not a breach of a covenant for quiet enjoyment. A temporary inconvenience which does not interfere with the estate, or title, or possession is not a breach of covenant. Manchester, S. & L. R. Co. v. Anderson [1898] 2 Ch. (Eng.) 394, 78 L. T. N. S. 821, 14 Times L. R. 489.

Obstructing and blocking the entrance to an office building is a breach of covenant rendering the lessor liable to the lessee for such damage as the latter may thereby sustain. J. B. Sanborn Co. v. Marquette Bldg. Co. (Ill.) supra.

The act of the landlord in building a high board fence around the boundary line of the leased premises, thereby cutting off access to the premises except over the land of a third person, renders him liable to the lessee. Boston & W. R. Corp. v. Ripley (Mass.) supra.

In Depuy v. Silver (1843) 1 Clark (Pa.) 385, where the tenant retained possession of the premises during the entire term, and the lease called for the free use of a good road for carts and to the water of a well in the vicinity, it was held that he was entitled to set up by way of set-off a breach of contract based upon the failure to give him the privilege of a good road and the use of the well.

In Kitchen Bros. Hotel Co. v. Philbin (1902) 2 Neb. (Unof.) 340, 96 N. W. 487, the lessee was held entitled to counterclaim for damage due to the act of the lessor in obstructing a hallway by a wooden partition, and

thus depriving the lessee of the use thereof, and of the back door opening into the hallway which led to the hotel rotunda, which was in a portion of the same building, the part occupied by the lessee being used for a ticket broker's office, and it appearing that a large portion of his business came from patrons of the hotel, who entered his office from the rotunda by this door and hallway. The court said: The "covenant for quiet enjoyment of the leased premises was implied from the demise. . . . Hence, any interference with the effective use of the part of the building demised which would amount to an eviction in whole or in part, as a breach of such covenant, would be available to the lessee by way of counterclaim when sued on his covenant to pay rent. The use of the back door and hallway was clearly included in the lease. . . . Considering the nature of defendant's business, which would make an office in the hotel building desirable because of its accessibility to travelers, patrons of the hotel, the fact that so large a part of defendant's business came from patrons of the hotel who entered his office from the hotel rotunda, and the fact that the room in question had been used for many years preceding as a ticket office, and had been reached from the rotunda by the hallway and door in question, it is evident that the use of the back door by defendant's customers was in contemplation of the parties quite as much as the use of the front door, and that this door and hallway were reasonably necessary to the effective use of the part of the building demised. This being so, the obstruction thereof by the lessor, so as to prevent the use by the lessee and his customers, was an eviction, which the lessee might treat as total or partial at his election. . . . The lessor could not insist that the lessee treat it as a total eviction; the latter might properly elect to remain and to sue for his damages upon the covenant for his quiet enjoyment."

It has been held that a covenant to pay rent for property abutting upon

a body of water is not enforceable where the lessor so interferes with the access to the land by water as to preclude a beneficial use of the premises. *Wait v. O'Neil* (1896) 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408.

So, in *Seigel v. Neary* (1902) 38 Misc. 297, 77 N. Y. Supp. 854, it is assumed, apparently upon the concession of counsel on both sides, that where, at the time a portion of premises was leased for saloon purposes, a door opened from the saloon into the hallway by which the tenant to the apartment of which the saloon formed a part entered the apartment, that the closing of this door by the landlord constituted an actual eviction, which suspended the payment of rent, although the tenant remained in possession.

Hamilton v. Graybill (1897) 19 Misc. 521, 43 N. Y. Supp. 1079, also holds that there had been an actual eviction from the premises, which suspended the duty to pay rent, although the tenant remained in possession, where, the leased premises being a part of an office building having two entrances, one to the general office and one to the private office, the landlord closed the entrance to the private office, making the only access to the offices by way of the entrance to the general office and through that to the private office. The court said that "the maintenance of the separate entrance to the private office may have been unnecessary, in the sense that it was not the only means of access, but it remains that, in view of the use to which the occupancy of the rooms was limited by the terms of the demise, the entrance was necessary to the full enjoyment of such use."

In *Kerrigan v. May* (1921) 188 N. Y. Supp. 774, it was held to constitute a partial actual eviction where the landlord, who had been using a workroom jointly with a tenant of the ground floor, removed from this workroom all the property of the tenant, and placed it in the tenant's sales room, and, at the same time, placed locks on certain doors, thereby depriving the tenant of access to and

the use of the workroom and of inside access to the hallway, where the toilet and the stairs to the upper floors were located.

In *Hall v. Irvin* (1903) 78 App. Div. 107, 79 N. Y. Supp. 614, the tenant of rooms in an office building was held entitled to defend a dispossessory action to recover possession of the rooms by showing that, owing to repairs and alterations made in the building, the entrance, hallway, stairs, elevators, floors, and lavatories, he was, as to them, put out of possession, and thus evicted from a material part of the premises; and therefore the rent during such period was not payable, and hence the dispossess proceeding could not be maintained. It was held that it was a question for the jury whether the interference complained of was of substantial character, and that if they found in favor of the tenant upon that question, it constituted an eviction, which suspended the rent, although the tenant remained in possession.

In *Lawrence v. Edwin A. Denham Co.* (1908) 58 Misc. 543, 109 N. Y. Supp. 752, a tenant of the second floor of a building, under a lease without conditions of any kind as to ingress and egress, was held to be partially evicted by the act of the landlord in depriving the tenant of an entrance to the building which the business affairs of the tenant required in the use of the premises. This was regarded as an actual eviction, as distinguished from a constructive eviction, and hence to suspend the rent and constitute a defense to an action, therefor, although the tenant remained in possession.

In *J. B. Sanborn Co. v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681, the lessor was held liable to the lessee for damages due to his obstructing or blocking the entrance to the block in which the lessee had office quarters, and in also encumbering and blocking the passageway, while doing repair work.

Remodeling and obstructing the general entrance to a building a portion of which is under lease, which substantially interferes with the enjoy-

ment of the leased premises, constitutes an actual eviction suspending the rent. *Frankel v. Steman* (1915) 92 Ohio St. 197, 110 N. E. 747.

The act of the landlord in obstructing the street in front of premises leased for a business purpose, and the taking possession of the same by depositing lumber and other building material thereon, constitutes an actual eviction of the lessee from an important part of the property leased, and during the continuance suspends the rent. *Edmison v. Lowry* (1892) 3 S. D. 77, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 583.

In *Pridgeon v. Excelsior Boat Club* (1887) 66 Mich. 326, 33 N. W. 502, it is held that rent is suspended by the act of the lessor of a water lot with the liberties and privileges belonging to the premises, in causing his propeller to be moored at the docks on either side of the slip in front of defendant's premises, completely shutting off ingress and egress to the same, thereby depriving the lessee of the particular and only use for which the premises were rented. The court said that in a case like the present, the technical rule which requires the elements either of absolute expulsion from the property by the landlord, or abandonment by the tenant, to be included in the act of eviction, does not and ought not to be applied. A party should be held evicted, when the act of the landlord is of such a character as to deprive the tenant, or has the effect of depriving him, of the beneficial use and enjoyment of the whole or any part of the demised premises, to the extent he is thus deprived.

It has been held that whether the interferences with the enjoyment of the premises of the tenant, such as doors, halls, stairs, floors, elevators, the use of wash basins, and closets, are so material and substantial in character as to amount to an eviction, is properly a question for the jury, as well as the question of how far they affect in a substantial way the tenant's enjoyment of the premises, and that if it is found in the tenant's favor upon this point an actual eviction may

be based thereon. *Hall v. Irvin* (1903) 78 App. Div. 107, 79 N. Y. Supp. 614. Upon this point the court, after remarking that the lease would entitle the tenant to whatever was attached to or used with the premises as incident thereto and convenient or essential to the beneficial use and enjoyment thereof, said: "There seems to be no necessity for arguing this general proposition, it being conceded that a tenant is entitled to have access through the door, halls, stairs, floors, and elevators, and the use of the wash basins and closet in order to enjoy the rooms he occupies, and these elements are factors in determining the sum to be paid as rent under the lease. If the tenant, deprived of such appurtenances, had moved out pending the repairs, and had then been sued for the rent, could it be held as a matter of law that he was liable therefor? The answer would depend on whether or not those appurtenances were a material and integral part of the demised premises, and whether the loss or deprivation to the tenant was substantial for a sufficiently long period of time, so as to constitute an eviction. If immaterial and temporary, the tenant could not retain possession and refuse to pay the rent. Upon the evidence we think that conflicting views might be taken as to whether the alterations were so material and substantial in character as to amount to an eviction, or whether they were of such an immaterial and temporary kind as not to affect injuriously the enjoyment of the demised premises. Unless the former conclusion had no basis for support in the evidence, there was properly a question for the jury. . . . It was testified that during the period access to the building and elevator and stairs was so interfered with that dangerous conditions existed down to the latter part of January; that the closet and wash basins were removed during the time, and not replaced till the latter part of January, and that the closet on the floor below was insanitary, owing to use by the workmen. The extent of the repairs,

the time consumed in making them, how far they affected in a substantial way the tenant's enjoyment of the premises, were all elements to be considered by the jury upon the question of facts presented as to whether or not the defendant's act constituted an eviction. The evidence bearing upon this subject, we think, supports the jury's verdict that they did."

It has been held that where the landlord closed an entrance from one street and opened it upon another, and thereafter closed it, forcing the lessee to use an inadequate rear entrance in his business, it constituted a partial eviction. *Epstein v. Dunbar* (1915) 221 Mass. 559, 109 N. E. 730.

However, in *Carey v. Tremont* (1912) 171 Ill. App. 604, the tenant claimed to have been evicted by the refusal of the landlord to permit the reconstruction of a brick oven which collapsed during the term of the lease, and also because, in constructing a sidewalk in front of the premises, certain land owned by the city, on which there was a stairway leading to the basement, could not again be used for such stairway, thus cutting off the means of access to the basement; the tenant, however, remained in possession of the premises for a considerable period of time following the event, and it is held that eviction was not shown, and the rule is stated that the tenant must have abandoned the premises, or surrendered the same, in order to claim an eviction.

A mere temporary obstruction of an important means of access to the leased apartments and of the view through such access will not entitle the tenant to rescind the contract. *North P. S. S. Co. v. Terminal Invest. Co.* (1919) 43 Cal. App. 182, 185 Pac. 205. In the foregoing case the trial court found that the continued existence of the open space and the right of way, and unobstructed view by passers-by, through and across the space, was a material part of the consideration for the obligation of the tenant, and constituted a material inducement to him to enter into the lease; but nevertheless, having found

that the obstruction had continued only for a period not exceeding twenty-one days, that it did not work a failure of any material or substantial part of the consideration to the tenant for the lease, and since he had sustained no substantial or material injury or damage by reason of the obstruction, a judgment was entered in favor of the landlord.

Where the landlord was compelled by municipal authorities to remove a stoop appurtenant to demised premises, which encroached on the sidewalk, this did not constitute a wrongful act entitling the lessee to claim a partial eviction, it appearing that as a matter of fact the change increased the rental value of the premises. *Duhain v. Mermod, J. & K. Jewelry Co.* (1914) 211 N. Y. 364, 105 N. E. 657, Ann. Cas. 1915C, 404.

The tenant of a lower floor, who is also given the use of a portion of the garret, cannot claim an eviction based upon the fact that the means of access to the garret are changed by the landlord during the term. *Giesen v. Metzler* (1917) 178 App. Div. 858, 166 N. Y. Supp. 114.

In *Pearce v. Hoyt* (1909) 136 Mo. App. 590, 118 S. W. 656, it is held that a tenant has no ground for complaint merely because a door to a stairway leading to his apartment was locked, it appearing that the door was locked by a subtenant of the lessee. The court said: "The rule invoked by defendant, 'that the tenant whose occupancy is prevented by a wrongdoer is not compelled to proceed against him, but may take his action against his lessor on his covenant to deliver possession,' . . . has no application here for the reason that no facts or circumstances have been adduced by defendant to support the conclusion that he was deprived of the stairway either by plaintiff or by the adjoining proprietor. He has proved nothing but the fact that, a year after he leased the premises, he found the street doors locked. This fact alone does not warrant the inference that he was excluded from the use of the stairway by plaintiff, the adjoining proprietor, or even by a wrongdoer."

Merely depriving a tenant of a portion of the easement for an alleyway, even though regarded as a partial eviction, cannot be taken advantage of by an assignee of the tenant, who subsequently accepts the premises and pays a rental therefor prescribed by the lease without objection. *Duncan v. Granas* (1915) 166 Cal. 41, 134 Pac. 979.

2. *Light and air.*

An obstruction by the lessor of the light or air of the lessee, if constituting a material deprivation of the latter's beneficial use of the leased premises, constitutes a breach of the covenants of the lease which will render the lessor liable.

Illinois. — *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 545, 37 Am. St. Rep. 175, 34 N. E. 805.

New York.—*Schulte Realty Co. v. Pulvino* (1919) 179 N. Y. Supp. 371.

Oregon. — *Hotel Marion Co. v. Waters* (1915) 77 Or. 426, 150 Pac. 865.

Pennsylvania.—*Schienze v. Eckels* (1910) 227 Pa. 305, 76 Atl. 15.

Washington. — *Matzger v. Arcade Bldg. & Realty Co.* (1918) 102 Wash. 423, 173 Pac. 47.

England. — *Tebb v. Cave* [1900] 1 Ch. 642, 69 L. J. Ch. N. S. 282, 82 L. T. N. S. 115, 48 Week. Rep. 318.

Canada. — *Vidal v. Cauchon* (1910) Rap. Jud. Quebec 41 C. S. 1.

In *Keating v. Springer* (Ill.) *supra*, it is held that, if interference by the lessor with the means for securing light resulted in damage to the tenant, he may recoup the same in reduction of the amount of recovery, and that he was not precluded from showing such damage by his failure to surrender possession at an earlier date.

So, in *Schulte Realty Co. v. Pulvino* (N. Y.) *supra*, it is held that erecting a wall, thereby closing a window, and erecting a floor above an air shaft, thereby interfering with the light and ventilation, constitute an eviction of the tenant from the beneficial enjoyment of part of the demise, which will suspend the rent.

Adolphi v. Inglima (1911) 130 N. Y. Supp. 130, holds that where the leased

apartment was very narrow, and the only light and ventilation from the rear were from two small windows, and the landlord erected an obstruction in the rear so that a large portion of one window was entirely cut off from the premises, and that window sealed, it constituted a partial eviction.

But in *Cochran v. Scherer* (1922) 117 Misc. 765, 192 N. Y. Supp. 199, it is held that a tenant cannot remain in possession of the leased premises and recover damages on the claim of a breach of warranty, or on the ground of fraud and rescission, where the basis of either claim is that the landlord represented that no building would be erected upon a vacant lot adjoining the leased premises, and subsequently there was a building erected upon this lot that cut off the tenant's view from his apartment, and also interfered with the light and air, making artificial light necessary.

In *Matzger v. Arcade Bldg. & Realty Co.* (Wash.) *supra*, the lessee of a portion of a building for business purposes was held entitled to recover damages accruing to him by reason of the interference by the lessor with the access of light and ventilation of the storeroom occupied by the lessee, this interference being by the construction of a bridge connecting the building occupied by the lessee with another building, also owned by the lessor. The lessee remained in possession of the premises until the termination of the lease, but was held entitled to recover damages based upon the diminished value of the use of the demised premises.

In *New York State Invest. Co. v. Wolf* (1914) 84 Misc. 66, 145 N. Y. Supp. 945, it was apparently assumed that the tenant would be entitled to treat as a constructive eviction the act of the landlord in erecting a pole in front of the leased premises, upon which there was placed an electric light, which during warm weather, when the tenant's shades were up, shone into his sleeping chambers to such an extent as seriously to interfere with his slumbers. The case, however, turned upon the point as to

whether or not the tenant had waived his right to claim an eviction.

An eviction cannot lawfully be claimed because of the loss of light through windows, due to the act of the adjoining owner in closing the windows in a party wall, and such act presents no legal excuse for the nonpayment of rent. *Holden v. Tidwell* (1913) 37 Okla. 553, 49 L.R.A.(N.S.) 369, 133 Pac. 54, Ann. Cas. 1915C, 394.

In *Solomon v. Fantozzi* (1904) 43 Misc. 61, 86 N. Y. Supp. 754, a tenant sought to defeat liability for rent accruing while in possession of the leased premises, on the ground of a constructive eviction, due to cutting off or deprivation of light and air, by the act of the landlord in building upon adjoining premises. The case was disposed of upon the ground that the light and air were not necessarily involved in the beneficial use of the premises by the lessee, and upon this ground relief was denied without considering the question of the right to claim a constructive eviction, although retaining possession of the leased premises.

The implied warranty of quiet enjoyment and possession arising from a lease of property for hotel purposes is not breached by the act of an adjoining owner in erecting a building upon the adjoining property, and using the party wall, although he uses the same under a contract with the landlord, and the effect of such use is to cut off the light and air from that side of the hotel property. *McMullen v. Moffitt* (1896) 68 Ill. App. 160.

It constitutes a breach of an express covenant for quiet enjoyment for the landlord to erect, upon adjoining premises, a block so much higher than the leased premises as to cause smoke to be driven down the tenant's chimney, substantially affecting the enjoyment of the premises. *Tebb v. Cave* [1900] 1 Ch. (Eng.) 642, 69 L. J. Ch. N. S. 282, 82 L. T. N. S. 115, 48 Week. Rep. 318.

In *Vidal v. Cauchon* (1910) Rap. Jud. Quebec (Can.) 41 C. S. 1, where a building erected by the landlord upon premises adjoining the leased premises so interfered with the tenant's light

and view as materially to alter and change the conditions existing at the time of the lease, the tenant was held entitled to rescind the lease and recover damages.

f. Active interference by lessor with lessee's possession or use of the leased premises.

It has been asserted that the landlord, without being guilty of actual disturbance of the tenant's possession, may yet do such acts as will justify the tenant in leaving the premises, or, if he does not leave, give an action for damages. *Boyer v. Commercial Bldg. Invest. Co.* (1900) 110 Iowa, 491, 81 N. W. 720, citing *Keating v. Springer* (1893) 146 Ill. 481, 22 L.R.A. 544, 37 Am. St. Rep. 175, 34 N. E. 805.

Thus, the owner of leased premises is liable to the tenant for damages due to entering upon the leased land and excavating thereon, rendering dangerous the access and approach to the rear of the building used for business purposes. *Stanton v. Lapp* (1910) 113 Md. 324, 77 Atl. 672.

So, in *Ives v. Williams* (1883) 50 Mich. 100, 15 N. W. 33, subsequent appeal in (1884) 53 Mich. 636, 19 N. W. 562, the landlord was held liable to a tenant for injury to the latter by interfering with his possession and occupation of the leased premises by putting in an elevator in another portion of the premises.

The act of the landlord in putting a water pipe through one corner of the building on the leased premises, and a pump and sink in an upper room thereof, may amount to a mere trespass, or it may amount to an eviction, the question being one for the jury. *Lynch v. Baldwin* (1873) 69 Ill. 210.

In *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553, a landlord was held liable for the act of workmen in entering upon the leased premises and tearing down a wall of the building occupied by the tenant, for the purpose of erecting a new one.

In *Briggs v. Hall* (1833) 4 Leigh (Va.) 484, 26 Am. Dec. 326, where a farm was let for a definite period of time, and the landlord entered upon a portion thereof within this time, and carried away hay without the consent

and against the will of the tenant, who, however, continued to occupy the farm during the balance of the term, the former was held to have lost the benefit of the entire contract, and hence not to be entitled to recover any part of the rent.

Whether the conduct of a person, acting under the authority of the lessor, in taking possession of a building on the leased premises and using it, constitutes a mere trespass or an eviction is a question for the jury. *Hayner v. Smith* (1872) 63 Ill. 430, 14 Am. Rep. 124.

The lessor is liable for disturbing the lessee in the enjoyment of the leased premises, where, in order to induce her to vacate the premises she is occupying as a rooming house, he threatens to throw her out and to excavate under the leased premises, and his employees pile lumber and other material around the building, so as to make it unsightly, and in other ways so annoy the lessee and her roomers that it breaks up and destroys her business. *Gray v. Linton* (1906) 38 Colo. 175, 88 Pac. 749.

The landlord is liable in damages for disturbing the tenant in his possession of land leased for agricultural purposes, by tearing down fences and laying out streets across the premises. *Thayer-Moore Brokerage Co. v. Campbell* (1912) 164 Mo. App. 8, 147 S. W. 545.

In *Collins v. Lewis* (1893) 53 Minn. 78, 19 L.R.A. 822, 54 N. W. 1056, it is held that where, under claim of right, the landlord has interfered with the tenant's possession of the demised premises, and has prevented him from having the use and enjoyment of a part thereof, this amounts to a breach of the covenant of quiet enjoyment.

In *West Chicago Street R. Co. v. Morrison, A. & A. Co.* (1896) 160 Ill. 288, 43 N. E. 393, a judgment for substantial damages was awarded against a landlord for wilfully, wantonly, and maliciously trespassing upon the leased premises. And see, to the same effect, *Jenner v. Carpenter* (1898) — Tex. Civ. App. —, 48 S. W. 86.

In *Ives v. Williams* (1883) 50 Mich. 100, 15 N. W. 33, the right to maintain

an action for damages to recover from the lessor for injury to the lessee's business, by interfering with his occupation of the premises, is sustained, although based upon the operation of an elevator in connection with the work of installing it in another part of the building than that occupied by the tenant.

In *Goebel v. Hough* (1879) 26 Minn. 252, 2 N. W. 847, the lessees were held entitled to counterclaim damages due to the interference by the landlord with their enjoyment of the leased premises, by entering thereon and making repairs without authority. The court said: "The most important question concerns the rule of damages upon the counterclaim, if it is established. Defendant's right to recover the actual damage to stock, for loss of rent of the room above, and for what they necessarily expended in restoring the room, sign, and awning to their former condition, cannot be questioned. . . . If no damages are claimed for injury to the business, but only for interference with the use of the store, and for loss of time of defendants and their employees, defendants must show to what extent they lost the use of the store, and the time of themselves and employees, and to that extent, only, can they in such case recover for these items. On the other hand, if damages are claimed on the basis of injury to the value of the business, then loss of use of the store, and of the time of defendants and their employees, are improper as distinct items of damage, for they are included in the estimation of injury to the value of the business."

In *Conlon v. McGraw* (1887) 66 Mich. 194, 33 N. W. 388, the lessee was held entitled to recover damages in an action in trespass on the case, for injury to his leasehold interest in a certain brick building owned by the defendant, the injury having been caused by third persons, acting for the defendant, taking out the doors and windows and the front to a portion of the premises. The portion interfered with, however, was not occupied by the plaintiff. Under these circumstances the contention was made that

the wrong complained of was not the abuse of the lessee's property, but a misuse of the defendant's property, which, even though a wrong to him, was not a trespass, but a continual nuisance made by the landlord upon his own premises; that the lessor did not touch the plaintiff's leasehold, but, by removing portions of his own building not rented by him, damaged the tenant's possession and business—consequently, no damages could be recovered accruing from the injury based upon any loss to his business. The court, however, said that the evidence showed a destruction of the leasehold, thereby ruining the premises so far as any valuable occupation thereof by the tenant was concerned.

In *McDowell v. Hyman* (1897) 117 Cal. 67, 48 Pac. 984, a landlord is held liable to a tenant of several floors of the building for damage due to repairing other floors. The court said: "The landlords, as the owners of the second floor, had an undoubted right to repair, alter, and improve that portion of their premises, but in so doing they were bound by their implied agreement to so conduct their operations as not to dispossess, or render uninhabitable the portion of the building they had demised to others, and if they failed in this duty they were liable to their tenants, irrespective of the question of negligence. As against third parties, they could take down the outer or inner walls of the building at will, subject only to such negligence and consequent injury as might render them liable to parties injured thereby; but as against their tenant, they could not do the same thing, even in a most careful manner, if the result destroyed the quiet enjoyment of such tenant."

In *Kansas Invest. Co. v. Carter* (1894) 160 Mass. 421, 36 N. E. 63, the liability of a landlord for disturbing the tenant in the possession of the leased premises, by tearing down a building thereon, was held to depend upon the question as to whether or not it was necessary for the landlord, for reasons of safety, to tear it down, or whether it might be made safe and

secure without disturbing the possession of the lessee.

In *Kiernan v. Bush Temple of Music Co.* (1907) 229 Ill. 494, 82 N. E. 410, the court said that, if the tenant could under any circumstances resort to a court of equity to set off against the rent damages sustained by reason of a violation of covenants, it would be necessary for the averments of the bill to show that his possession was disturbed by someone other than the public authorities under their police powers.

And see *Arafe v. Howe* (1917) 228 Mass. 46, 116 N. E. 971, wherein, in an equity action, it was held that if the tenant established his claim that the interference complained of, being a structure in the basement of the leased premises, was erected or maintained by the express or implied authority of the landlord, damages might be assessed in the tenant's favor.

The fact that the lessor gave to contractors who were to excavate for the lessor upon adjoining premises, a permit to go upon the leased premises, did not entitle the lessee to avoid payment of rent on the ground of eviction, since such a permit by the lessor did not authorize the contractors to enter upon the leased premises without the consent of the lessee, and hence, if they entered thereon, they were trespassers, and the lessor was not responsible for their conduct. *McKenzie v. Hatton* (1894) 141 N. Y. 6, 35 N. E. 929.

Where a wrongful entry by the landlord, at the most, constitutes a mere trespass for which the tenant may recover nominal damages in a suitable action, he cannot recover damages for a breach of covenant of quiet enjoyment. *International Trust Co. v. Schmann* (1893) 158 Mass. 287, 33 N. E. 509.

g. Existence of infectious disease.

Where there was no infectious disease in any portion of the premises part of which was leased to the defendant, at the time he took possession of the premises, and he remained in possession, the fact that, after the lease was executed and the defendant

had taken possession, persons on another floor of the building were stricken with smallpox, is no defense to an action for the rent. *Walker v. Newman* (1909) 146 Ill. App. 450.

The question whether such a condition would sustain an action or counterclaim based upon death or illness is beyond the scope of the annotation (see IV. a, *supra*).

h. Failure to repair.

Where based upon a covenant to keep the leased premises in repair, it is held in *Myers v. Burns* (1866) 35 N. Y. 269, that, where smoke and gas in the rooms in a hotel are due to defective flues, the lessee is entitled to counterclaim, as damage, loss due to such smoke and gas.

Bergman v. Papia (1908) 58 Misc. 533, 109 N. Y. Supp. 856, holds to amount to a partial actual eviction the fact that the walls of the leased apartment were cracked by the operation of cars in a barn in adjacent premises, causing the walls to fall and render the premises in part uninhabitable, where the landlord refused to allow the railway company at fault in the matter to enter upon the premises in order to repair the walls.

In *Dolph v. Barry* (1912) 165 Mo. App. 659, 148 S. W. 196, a lessee of several floors of a building sublet certain of the floors, and subsequently was obliged to abandon the floors personally occupied because they became untenable, due to the failure of the landlord to repair the premises according to his covenant. In an action by the landlord to recover the rent from the tenant, these facts were set up as an offset to the claim of the landlord, and the tenant was held entitled to an apportionment of rent.

In *Graecen v. Barker* (1911) 130 N. Y. Supp. 141, it is apparently assumed, the question not being raised, that constructive eviction may be based upon unendurable noises due to defective water pipes. The real question in this case was whether or not the fact that the lessee retained possession of the premises while an attempt was being made to repair the

pipes constituted a waiver of the objection, and it is held that under the circumstances it did not.

However, in *Taylor v. Finnigan* (1905) 189 Mass. 568, 2 L.R.A. (N.S.) 973, 76 N. E. 203, in holding that an express covenant of quiet enjoyment was not breached by the failure of the landlord to supply additional exits to a building not leased for any particular purpose, but used by the tenant for a theater until he was compelled to discontinue such use for the failure to supply additional exits, as required by public officials, the court said: "Having remained in occupation of the estate, the defendant's obligation under his covenant to pay rent is absolute, except so far as it may have been suspended by a breach on the part of the plaintiff of his covenant that, if the lessee pays the rent, he 'shall peaceably hold and enjoy the said rented premises without hindrance or interruption by the said lessor, or any person or persons whomsoever.' The lessor, however, did not engage to make even ordinary repairs, or to maintain the property in suitable condition for use and habitation as it was in at the date of the lease; and if the construction of additional exits was called for to make the building safe for the use of those attending the theatrical performances, and such alterations rightfully could be classed as repairs, the plaintiff was under no obligation to make them, as this burden was cast upon the lessee, and a failure to do so did not constitute a breach of the covenant for quiet enjoyment."

In *Roth v. Adams* (1904) 185 Mass. 341, 70 N. E. 445, the court remarked that even if the jury found that certain buildings adjoining the leased premises remained in the possession of the lessor, and that she permitted them to fall into a state of decay to the personal annoyance of the lessee, this did not necessarily prove such an interference with the occupancy of the demised premises as to amount either to an eviction or a breach of the covenant for quiet enjoyment; at least, where the tenant still continued in possession and use of them.

1. Failure to heat.

The breach by the landlord of an express covenant to heat the leased premises will entitle the lessee to maintain an action for damages for breach of the covenant, or to counterclaim or recoup such damages in an action by the landlord for the rent. *Harmony Co. v. Rauch* (1896) 62 Ill. App. 97; *Globe Asso. v. Brega* (1914) 190 Ill. App. 60; *Thomson v. Ludlum* (1902) 36 Misc. 801, 74 N. Y. Supp. 875; *Borchardt v. Parker* (1908) 108 N. Y. Supp. 585; *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685; *Jacob New Realty Co. v. Noxall Shirt Co.* (1918) 104 Misc. 82, 171 N. Y. Supp. 376; *McSorley v. Allen* (1908) 36 Pa. Super. Ct. 271.

The tenant is entitled to recoup the cost of heating the leased premises in an action to recover the rent, or he may sue upon the lessor's covenant to heat the same, where the lessor breaches it. *Globe Asso. v. Brega* (Ill.) *supra*.

In an action by the landlord to recover rent, the lessee is entitled to recoup damages based upon the breach by the landlord of his covenant to heat the leased premises. *Jacob New Realty Co. v. Noxall Shirt Co.* (N. Y.) *supra*.

The failure of the landlord to furnish heat and water may be relied upon to reduce the rent, although the lessee retains possession of the premises, and the default does not constitute an eviction. *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685.

In *Borchardt v. Parker* (1908) 108 N. Y. Supp. 585, it is also held that the fact that the tenant retained possession of the leased premises is no bar to her counterclaim for damages by reason of the landlord's breach of covenant to heat the apartment when necessary for comfort.

Harmony Co. v. Rauch (Ill.) *supra*, also holds that in an action to recover rent the lessee is entitled to recoup whatever damages he may have sustained on account of a breach by the lessor of his agreement to heat the leased premises.

So, in *McSorley v. Allen* (Pa.) *supra*,

in holding that where the landlord neglected and refused to furnish heat and light which his covenant required him to furnish, and the premises were thereby rendered unfit for occupancy, the tenant was not required first to pay the rent, and then to sue for damages suffered by the landlord's breach of his covenant, the court said that physical expulsion is not now considered necessary to constitute an eviction. Any act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under a lease will amount in law to an eviction, and suspend the rent.

It has been held that where the lease is silent as to the heating of the premises, being apartments in an apartment house, but the only mode of heating would be by a central plant operated by the landlord, the tenant is entitled to surrender the premises if the heat is not furnished, on the ground that he is not receiving what he contracted for; but, if he retains possession of the premises, he is not entitled to recover damages for breach of any implied covenant to heat, although damages might be recovered under such circumstances for breach of an express covenant. *Jackson v. Paterno* (1908) 128 App. Div. 474, 112 N. Y. Supp. 924.

It has been held that even though an apartment was not in fit condition for residence purposes, and that for this reason the tenant might have refused to take possession of it, or having taken possession, might have abandoned the same where the defect was a failure to heat; yet, having retained possession through the entire term, there was no implied covenant to heat, upon the breach of which the tenant could rely to support an action for damages. *Ibid.* The court said: "Considering the nature of the apartment, the method provided for heating it, and the use to which the apartment was restricted, it was rented as an apartment convenient for use as a dwelling for the family of the tenant. In this climate, during the winter months, an apartment without artificial heat of some kind cannot be oc-

cupied as a family dwelling. The premises were rented for a purpose which required that the apartment should be artificially heated. Unless the temperature, therefore, was maintained so that the apartment could be occupied for the purpose for which it was rented, they were not the premises that were leased and which the tenant was bound to occupy. It would seem, therefore, that after the lease was signed, and before the tenant had taken possession, if he had discovered that the heating appliances were insufficient to keep the apartment in such a condition that it could be occupied by the family, that he would have been justified in refusing to occupy the premises, and could have defended an action under the covenant to pay rent on the ground that the landlord had never furnished him with such an apartment as was contemplated by the lease. And so, after the apartment had been occupied, but upon the arrival of cold weather, if it was found that the heating apparatus was incapable of keeping the apartment at a temperature sufficiently high to enable it to be occupied by his family as a living apartment, the tenant would have been justified in surrendering possession, and could have defended an action for the rent on that ground. Plaintiff, however, retained possession of the premises as a residence for his family, and, although constantly complaining of the temperature maintained by the defendant, he continued to occupy them. If there had been a covenant to furnish heat, which defendant had broken, the plaintiff could have maintained an action for any damages that he had sustained (*Thompson-Houston Electric Co. v. Durant Land Improv. Co.* (1894) 144 N. Y. 34, 39 N. E. 7), but it seems to me that there was no such implied covenant for a breach of which an action for damages would lie. As before stated, the lease is entirely silent as to heating the apartment. What the landlord did was to lease an apartment to the plaintiff to use as a residence for himself and his family. He made no agreement as to the temperature of the apartment; there was no undertaking

on the part of the landlord to supply heat, or to keep the apartment at any particular temperature. If the defendant failed to comply with his lease and furnish to the plaintiff the apartment that he had leased to him, the tenant was under no obligation to occupy the apartment, but, having continued to occupy it during the whole of the term for which it was leased, he was bound to pay the rent reserved, and in the absence of a covenant of the landlord to supply sufficient heat to maintain a particular temperature, it seems to me that no action for damages would lie because the temperature was not that desired by the tenant. The obligation of the landlord of an apartment of this character, where the landlord retains possession of a large part of the building which is to be used in common by the tenants, undoubtedly imposes upon the landlord the duty of maintaining in good order and condition the portion of the building which the tenant has a right to use. For a violation of this duty, the landlord would be responsible to the tenant for any damage that was sustained by him. If the halls, stairways, or elevators of the building were not maintained by the landlord in a proper condition for use, or if the walls or roof of the building were allowed from lack of repair to leak so that the tenant's property was injured, there would undoubtedly be an action for damages against the landlord—not, as I understand, upon the breach of an implied covenant, but because the landlord had failed to perform a duty which he assumed when he leased the apartment, and was liable for the damage that resulted. But there was no evidence that this heating apparatus was not sufficient to heat the apartment. All that appears is that, for some unexplained reason, the temperature of the apartment was not maintained so as to make it a comfortable residence for the plaintiff's family during some portion of the winter; but, having continued to occupy the premises, he became liable for the rent, and for the mere discomfort which resulted from an insufficient temperature there was no cause of ac-

tion. If we assume, however, that there was a cause of action, and that the landlord was liable for any damages that resulted from his failure to maintain the temperature so that the apartment was what he rented,—an apartment suitable for occupation as a strictly private dwelling apartment,—there was no damage proved. The evidence that an apartment of that kind, without heat, was of no value, would not be a defense by the tenant to an action for rent, and would not justify a counterclaim, an action for damages, or an action to recover back the rent paid, as the tenant occupied the premises for the occupation of which he covenanted to pay the rent. All that was attempted to be proved was that an unheated apartment of this kind, with no method of heating it, was of no value. The defendant offered some evidence to show that this apartment could have been heated by gas stoves or gas heaters at an expense not exceeding \$5 a month. But as the tenant made no attempt to supply this deficiency of heat, and was, therefore, put to no expense in consequence thereof, he was not entitled to recover for an expenditure which he did not make, assuming that he might have made it, and so supplied the deficiency. As to the illness of his child, the evidence was not sufficient to justify a finding that this illness was caused by the low temperature, nor is there any evidence to show that the plaintiff had been put to any expense in consequence of it. The utmost that can be said in this case is that for some portion of this winter the premises were not maintained in the condition contemplated by the lease, which would have justified the tenant in treating it as a constructive eviction and surrendering the premises. But, in the absence of some covenant of the landlord to supply heat to the premises, an action for damages would not lie."

Where the only complaint of the lessee was the failure of the lessor properly to heat the premises in January, he cannot avoid payment of rent by abandoning the premises the following May. *California Bldg. Co. v. Drury* (1918) 103 Wash. 577, 175 Pac. 302.

In *Truman v. Reiss* (1912) 175 Ill. App. 351, in holding that a tenant is not entitled to recoup damages for failure of the landlord comfortably to heat the premises during the time that he remains in occupation thereof, the view is stated that, as long as a tenant continues in the use and occupation of the premises, he cannot offset, as against the rent contracted to be paid, any damages by reason of the inconvenience to him of such use and occupation; and any conduct of the landlord which merely tends to diminish the beneficial enjoyment of the premises cannot be offset as against the rent contracted to be paid.

j. Failure to furnish power or water.

Where the interference with the lessee's manufacturing business upon the leased premises was due to the failure of the landlord to furnish steam power to run the lessee's machinery, he is entitled to counterclaim his damages in an action by the landlord for rent. *Hirsch v. Olmesdahl* (1902) 38 Misc. 757, 78 N. Y. Supp. 832.

In *Brown v. Holyoke Water Power Co.* (1890) 152 Mass. 463, 23 Am. St. Rep. 844, 25 N. E. 966, it appeared that the plaintiff hired of the defendant a room in which were shafting and a pulley, connected by a belt with another part of the defendant's premises, in such a way as to furnish power for the running of machinery in the room leased. The room and power were let together in one contract, and the room was so situated with reference to the source of power, and so connected with it, that the right to the power, furnished through the belt in the ordinary way, was appurtenant to the room. Under these circumstances it was held that the act of the landlord in throwing off the belt and keeping it off, with a view to stop the tenant's business, and force him to vacate the room, was a breach of the landlord's covenant of quiet enjoyment, and an eviction of the tenant from an important part of the premises, entitling the latter to recover such damages as he suffered from the unlawful act.

In *Dexter v. Manley* (1849) 4 Cush. (Mass.) 14, a lease of real estate, con-

sisting of a factory, water power, tools, machinery, apparatus, etc., for the purpose of carrying on certain manufactories, contained a reservation in favor of the lessor, of the use of a saw. The lessee, claiming that the lessor so used this saw as to diminish the power necessary for the operation of his machinery, thereby rendering the use of the premises less beneficial to him than he was entitled to under the lease, brought an action to recover damage for breach of covenant, and his right to do so was sustained.

In *Morse v. Maddox* (1853) 17 Mo. 569, subsequent appeals in (1854) 19 Mo. 451, and (1855) 21 Mo. 524, the landlord was held liable to an action for breach of agreement, where he purposely closed the head gate which controlled the water supply of the lessee's manufacturing plant with water privileges, the effect of closing the head gate being to deprive the leased premises of water power.

In *B. Roth Tool Co. v. Champ Spring Co.* (1907) 122 Mo. App. 603, 99 S. W. 827, an action was sustained where it was sought to recover damages for the wrongful act of the landlord in turning off the steam from the premises, and declining further to provide it.

In *Egan v. Browne* (1908) 128 App. Div. 184, 112 N. Y. Supp. 689, it is held that a tenant is entitled to recover damages as for a tort based upon the act of the landlord in wantonly, wilfully, and maliciously depriving and cutting off from the lessee's premises and business all the steam power and live steam absolutely necessary for carrying on his laundry business, thereby breaking up and ruining the same. In so holding the court said: "It was held in *Denison v. Ford* (1882) 10 Daly (N. Y.) 412, that when a tenant is evicted he cannot sue the landlord for tort, so as to change the rule as to the measure of damages, but only for a breach of the covenant of quiet enjoyment, which, if not expressed, is implied in leases. But in the later case of *Snow v. Pulitzer* (1894) 142 N. Y. 263, 36 N. E. 1059, the tenant was allowed to pass the covenant by, and recover as for a tort. In that way he recovered for the breaking up of his business and the loss of

property caused thereby. In the present case the tenants hired a floor in a building which was furnished with steam power for business purposes by the landlord, and the lease was, in terms, not only of such floor, but of the steam power to run the plaintiffs' business. The complaint alleges that the defendants, the subsequent grantees of the lessor, 'unlawfully evicted the plaintiffs from the said premises, and the use and enjoyment thereof, by wantonly, wilfully, and maliciously depriving and cutting off from the plaintiffs' premises and business all the steam power and live steam absolutely necessary for carrying on said laundry business;' and it is alleged that the plaintiffs' business was thereby broken up and ruined, and they were unable to get another place equipped to carry on their business. The case seems to be the same as that of *Snow v. Pulitzer*, for the wrongful trespass of removing the support of a side wall, which caused it to fall, as was the fact in that case, and the wrongful trespass of disconnecting the shafts in the demised premises from the steam plant in the present case, are the same in principle and cannot be distinguished. Each was a trespass which destroyed the beneficial use for which the premises were leased."

In *Wurz v. Watts* (1911) 73 Misc. 262, 132 N. Y. Supp. 685, a landlord is held liable to a tenant for a failure to furnish heat and water according to agreement.

In *Hett v. Lange* (1910) 139 App. Div. 743, 124 N. Y. Supp. 573, it is held that a tenant is entitled to counterclaim damages growing out of the failure of the landlord to furnish a water supply according to agreement.

As against a demurrer a petition is sufficient by which it is sought to recover damages in behalf of the plaintiff, the lessee, due to the unlawful shutting off of steam from his apartment by the lessor, where such steam was necessary to furnish power to machinery on the leased premises, operated by the lessee. *B. Roth Tool Co. v. Champ Spring Co.* (1907) 122 Mo. App. 603, 99 S. W. 827.

In *Kiddie Art Novelty Co. v. Paneth, F. & W. Co.* (1921) 187 N. Y. Supp.

242, it is conceded that a partial eviction will suspend payment of rent, but it is held that an interruption in water supply every half hour did not constitute a partial eviction within this rule, it appearing that the defendant was a manufacturer of articles, and that it did not appear that he was unable to store sufficient water to last during the period of interruption.

k. Failure to furnish elevator or telephone service.

It has been held that failure of the lessor of premises, leased for residence purposes, to furnish necessary elevator service, may render him liable to the lessee in damages, although it would not sustain a claim of eviction. *Thomson v. Ludlum* (1902) 36 Misc. 801, 74 N. Y. Supp. 875.

And the elevator service may become so erratic and unfit as to constitute constructive eviction as to a tenant who relied upon such service to carry on his business in an upper story. *Lawrence v. Katcher* (1909) 117 N. Y. Supp. 876, *supra*.

In *Metropole Constr. Co. v. Hartigan* (1912) 83 N. J. L. 409, 85 Atl. 313, it is held that the continued possession by the tenant of premises was inconsistent with the claim of eviction based upon the breach by the landlord of his contract to furnish telephone service. The view, as expressed by the court, is that such a breach would not constitute constructive eviction, even if the lessee had vacated the premises, but that his remedy was by recouping damages for breach of covenant.

In *Metropole Constr. Co. v. Hartigan* (N. J.) *supra*, it is held that a breach by a landlord of his agreement to furnish telephone service constitutes a breach of covenant.

l. Miscellaneous.

It has been held that the fact that the lessor, after the execution of the lease, submitted to a decree in a pending proceeding to condemn a stream of water flowing through the leased premises, does not give the lessee a cause of action against the lessor on the theory of a partial eviction by the loss of the use of the water, since this proceeding could not affect the lessee's

right to the use of the water he acquired by and through the lease; hence, any claim he might have for the diversion of the water would be against the plaintiff in the condemnation proceeding, and not against the lessor. *Sullivan v. Beardsley* (1880) 55 Cal. 608.

In *VEYSEY v. MORIYAMA* (reported herewith) ante, 1363, it is held that it does not amount to a constructive eviction for the lessor of land for farming purposes, under a lease carrying with it as appurtenant to the premises certain shares of water stock, giving the lessee the right to use the water for irrigation purposes, to permit a portion of the shares of stock to be sold under an assessment, although the effect is substantially to decrease the amount of water to which the tenant is entitled, and hence to effect the purposes of his leasehold, the lessee, however, remaining in possession. Under these circumstances the court said: "So, in this case, conceding that a failure of the water supply on 10 out of 460 shares of water stock on a total acreage of 640 acres is sufficient to constitute a constructive eviction, the tenant cannot avoid his covenant to pay rent while he remains in possession of the entire premises, and continues to cultivate the whole thereof, and enjoy the benefits of the remaining water supply. He has ample remedy, under such circumstances, in recouping the damages he may sustain against the accruing rentals. *New York v. Mabie* (1855) 13 N. Y. 151, 64 Am. Dec. 538; *McCoy v. Oldham* (1890) 1 Ind. App. 372, 50 Am. St. Rep. 208, 27 N. E. 647."

In *Williams v. Getman* (1906) 114 App. Div. 282, 99 N. Y. Supp. 977, the lessee of the third floor of a building, to be used as a skating rink, was enjoined by the lessees of the first and second floors from using the third floor for a rink, on the ground that such use constituted a nuisance because of the noise occasioned thereby; the lessor was given notice of this action during its pendency, but did not make any dissent, and the defense made by the lessee was ineffectual. Under these circumstances, it was held that

the lessee was entitled to maintain an action against the lessor for damages due to being thus precluded from using the leased premises for the purpose for which they were leased. The court said: "The plaintiffs rented the hall for a particular business, fitted it up for that business, and were carrying on the business in a proper manner, with no more noise than is necessary and usual in that business. At the instigation of the lessor, they were perpetually enjoined from carrying on that business on the pretense that Weed and Willoughby were prior tenants of the floors below, and that the business carried on above was detrimental to their business, and an improper use of the hall. The fact that rent was paid for some months after the perpetual injunction was granted does not change the situation. The plaintiffs were deprived of the real benefit which they had intended to derive from the lease, and the defendant is responsible for such interference with their business."

A landlord's refusal to allow an undertenant to enter upon the premises, under threats of suit, whereby the lessee is deprived of underletting, is an interruption of the renter's right which amounts to an eviction. *Doran v. Chase* (1876) 2 W. N. C. (Pa.) 609.

In *Levitzky v. Canning* (1867) 33 Cal. 299, it was held to constitute a breach of the express covenant for the quiet enjoyment, for the landlord publicly to give out and pretend that the tenant had no right to the possession of the leased premises, and to bring actions to recover possession upon the pretense that the lease had expired, when in consequence the tenant was put to great expense in defending the actions, and his tenants quit the premises, and he was unable to obtain others. The court said that these acts were as much a molestation, disturbance, and invasion of the plaintiff's possession as a taking by the shoulders and a forcible eviction of the plaintiff's tenants would have been. The character of the act must be determined by the results which follow it, and, in view of the results which are alleged to have followed the acts of

the defendant, there can be no question that he disturbed and interrupted the possession of the plaintiff to his injury, which is precisely what he had covenanted not to do.

It has been held that where the lessor interferes with the cultivation of the leased land by the lessee, by procuring an injunction restraining such cultivation, the lessee may maintain an action to recover the damage accruing to him therefrom, based upon a breach of the covenants of the lease, even though he might have an action upon the injunction bond. *Hubble v. Cole* (1891) 88 Va. 236, 13 L.R.A. 311, 29 Am. St. Rep. 716, 13 S. E. 441.

So, a covenant in effect that the lessee is to enjoy the premises without any manner of let, suit, trouble, or hindrance from the landlord is breached by the act of the landlord in vexatiously, and without reasonable cause, bringing different actions of ejectment against the tenant, and the tenant is entitled to recover damages for a breach of the covenant, although remaining in possession of the leased premises. *Paddell v. Janes* (1915) 90 Misc. 146, 152 N. Y. Supp. 948.

In *Prochaska v. Fox* (1904) 137 Mich. 519, 100 N. W. 746, the sublessee of the bar privileges upon grounds leased for the display of fireworks for a period of two weeks was restrained by the lessee, by injunction, from selling intoxicating liquors upon the grounds. After this injunction was served the sublessee ceased to use the premises, and brought an action to recover for injury to his business on the theory of an eviction, and his right to recover was denied. The court said that clearly he could not recover the whole amount, for he had used the premises nearly half the time granted by the lease; that if the lessee had broken his covenant or agreement for quiet enjoyment with the sublessee, or if the latter had been evicted by paramount title, the declaration should have been special, and the measure of the damages would have been the value of the use of the land less the rent.

In *McDowell v. Hyman* (1897) 117 Cal. 67, 48 Pac. 984, it is held that a

tenant is entitled to recover damages from the landlord for disturbance of her possession of an upper floor of a building, by the acts of the landlord in repairing the lower floors, interfering thereby with the use by the lessee of the upper floor for the business in which she was engaged, in cutting off the water supply, injuring the furniture by dust and lime, and interfering with the ingress and egress to this floor. The court said: "The landlords, as the owners of the second floor, had an undoubted right to repair, alter, and improve that portion of their premises, but in so doing they were bound by the implied agreement to so conduct their operations as not to dispossess, or render uninhabitable the portion of the building they had demised to others, and, if they failed in this duty, they were liable to their tenant, irrespective of the question of negligence. As against third parties, they could take down the outer or inner walls of the building at will, subject only to such negligence and consequent injury as might render them liable to parties injured thereby; but as against a tenant they could not do the same thing, even in the most careful manner, if the result destroyed the enjoyment of such tenant."

A lessee of premises a portion of which was then under lease, who is required to pay damages to the prior lessee for going upon this portion of the premises, is entitled to recoup such damages against the landlord, in an action by the latter to recover the rent. *McAlester v. Landers* (1886) 70 Cal. 79, 11 Pac. 505.

In *Cleveland, C. C. & St. L. R. Co. v. Wood* (1901) 189 Ill. 352, 59 N. E. 619, it is held that a lessee can recover damages of the lessor due to the breach of a provision in a lease, by which a railroad company, in leasing land for a hotel, agreed to stop its trains so that the passengers might patronize this hotel.

It has been held that, where the landlord does not remove his goods from the leased premises, the tenant may remove them and hold the landlord for the expense thus caused.

Baumgardner v. Consolidated Copying Co. (1892) 44 Ill. App. 74.

In *Whitcomb v. Brant* (1908) 76 N. J. L. 201, 68 Atl. 1102, on subsequent appeal in (1908) 76 N. J. L. 246, 69 Atl. 1086, it is held that where the lessor wrongfully refused to consent to proposed improvements by the lessee, which were provided for in the lease, this constituted a breach of contract which conferred upon the lessee a right of action for damages.

But the lessee cannot base an eviction upon the refusal of the lessor to permit the reconstruction of an oven in the rear of the building, even though it is claimed that this oven is essential for the proper operation of the only business which can be run in the leased premises. *Carey v. Tremont* (1912) 171 Ill. App. 604.

In *Whitcomb v. Brant* (1908) 76 N. J. L. 201, 68 Atl. 1102, the lease contained a provision that the lessee might make alterations and improvements to the premises subject to the approval of the plans by the lessor, who refused his consent to proposed improvements by the lessee, which the latter claimed were necessary in order for him to use the premises for a restaurant, this being the purpose for which it was leased; it was held that the lessor's refusal to consent did not entitle the lessee to remain in possession and enjoy the premises without payment of any rent, but that, if this refusal constituted a breach, it merely conferred a right of action for damages against the lessor.

In *McAlester v. Landers* (1886) 70 Cal. 79, 11 Pac. 505, the landlord leased premises a portion of which he had already leased to another, and the second lessee was held liable in damages for going upon this portion of the leased premises. He subsequently refused to pay further rent to the landlord until it offset the amount of the damages which he had been required to pay, and, in an action by the landlord to recover the accrued rental, it was held that the tenant was entitled to offset against the rent, the amount that he had been compelled to pay in damages. A. G. S.

EDGELEY CO-OPERATIVE GRAIN COMPANY, Respt.,
v.

S. H. SPITZER, Appt.

North Dakota Supreme Court — October 17, 1921.

(— N. D. —, 184 N. W. 880.)

Gaming — sale for future delivery — hedge.

1. The sale by a producer for future delivery of his prospective crop at the market price at the time of contract, in order to realize the price for his crop when mature, is a hedge and is not illegal as a gambling transaction, although, because of crop failure, grain must be purchased to fill the contract or a loss settled in cash.

[See note on this question beginning on page 1422.]

— hedging operation.

2. In an action brought to recover on a promissory note in the sum of \$4,000, the defense of no consideration was pleaded and relied on. In that connection it was claimed the note was given for losses sustained in a gambling transaction, to wit, the buying and selling of grain options. The evidence shows that the loss was occasioned by what is termed a "hedging" transaction, conducted by the Pomona Valley Farmers' Elevator Company (of which the plaintiff is the successor, and now the owner of the note) for the defendant and at his request.

[See 6 R. C. L. 780 et seq.; 12 R. C. L. 752; 2 R. C. L. Supp. 204.]

Appeal — absence of error.

3. At the close of the testimony the

Headnotes 1-3 by GRACE, Ch. J.

court directed a verdict in plaintiff's favor, and it is held, for reasons stated in the opinion, that in this there was no error.

New trial — denial — unnecessary.

4. Defendant claims there is conflicting testimony with reference to the proper application of a certain sum of money, in amount \$1,710, which he claims he ordered to be applied on the note. The judgment has been directed to be modified, plaintiff having consented, so that any benefit he would have received if the money had been applied on the note, instead of otherwise, viz., on an account, was secured to him, and a new trial is therefore unnecessary. For reasons stated in the opinion, nothing would be gained by a new trial.

[See 2 R. C. L. 286.]

APPEAL by defendant from a judgment of the District Court for La Moure County (Graham, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Mr. John W. Carr, for appellant:

The question of whether or not the note was given in payment of a gambling transaction, and therefore uncollectable, should have been submitted to the jury.

John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60; Beidler & R. Lumber Co. v. Coe Commission Co. 13 N. D. 639, 102 N. W. 880; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Embrey v. Jemison, 131 U. S. 338, 23 L. ed. 175, 9 Sup. Ct. Rep. 776.

The question of whether the credi-

tor applied a payment otherwise than as directed by the debtor is one for the jury.

Root v. Kelley, 39 Misc. 530, 80 N. Y. Supp. 482; 30 Cyc. 1296.

Messrs. Hutchinson & Lynch, for respondent:

The court did not err in directing a verdict for the plaintiff on all the issues of the case.

Buchanan Elevator Co. v. Lees, 37 N. D. 27, 163 N. W. 264; John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950;

Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 74 Am. St. Rep. 463, 77 N. W. 970; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520, 18 N. W. 443; Hill v. Levy, 2 N. B. N. Rep. 180, 98 Fed. 94; Parker v. Moore, 125 Fed. 807; Ponder v. Jerome Hill Cotton Co. 40 C. C. A. 416, 100 Fed. 373.

The contracts were in accordance with the customs and usage of the Minneapolis Chamber of Commerce, and there was no evidence that delivery could not be legally exacted in any of the transactions involved.

Barnes v. Smith, 159 Mass. 344, 84 N. E. 403; Board of Trade v. L. A. Kinsey, 130 Fed. 507, 64 C. C. A. 669, 69 L.R.A. 59; John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

If an order to sell for future delivery is a gambling deal merely because the seller contemplates that he will later on buy the grain to fill the order, then "hedging" is impossible, and practically every trade on all the boards of trade in the country is illegal.

Ponder v. Jerome Hill Cotton Co. *supra*; Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

The burden of proof is upon the defendant to prove that the contracts were illegal. The law presumes that they are legitimate transactions.

John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

Grace, Ch. J., delivered the opinion of the court:

This is an action to recover on a promissory note in the sum of \$4,000, with interest thereon from the 20th day of April, 1917, to date of maturity, at the rate of 7 per cent per annum until due, and 10 per cent per annum thereafter. The issues of fact were presented to a jury.

At the close of the testimony the court directed a verdict in plaintiff's favor for the amount of the note and interest. Judgment was entered on the verdict, and this appeal is from the judgment.

The complaint states a cause of action in the ordinary form on a promissory note. The answer admits the execution and delivery of the note to the payee. It denies that it was executed or delivered for value received or any legal consideration, and further denies any indebtedness to the plaintiff in any sum whatsoever. In the answer it is further alleged that the sole and only consideration for the execution and delivery of said note by defendant was in substance as follows: That during the months of March and April, 1917, and subsequently thereto, this defendant, acting through the said Pomona Valley Farmers' Elevator Company, as his agent, engaged in the purchase and sale of grain options and in gambling and speculating upon the prices of grain upon various boards of trade, selected by said Pomona Valley Farmers' Elevator Company, and during said periods this defendant, acting through said Pomona Valley Farmers' Elevator Company, as his agent, bought and sold grain options, solely as gambling and speculative operations, it being at all times fully understood by the said Pomona Valley Farmers' Elevator Company, by this defendant, and by all others connected with said transactions, that said transactions were purely and solely gambling and speculative operations; and it was never understood by said Pomona Valley Farmers' Elevator Company, or by this defendant, or by anyone else connected therewith, that any actual grain was to be bought or sold, received or delivered, by defendant. And defendant alleges that neither this defendant nor Pomona Valley Farmers' Elevator Company, nor any other party connected with the transaction mentioned above, actually intended that there should be

any actual transfer, delivery, or receipt of the commodities covered by said options.

The answer is of too great length to be set out in full. The principal defense set forth in the answer is that the entire transaction with reference to the sale and purchase of 10,000 bushels of rye, the facts in reference to which will hereafter be set forth, was one of speculation and gambling. The defendant pleads a counterclaim in the sum of \$1,800, the alleged value of the number of bushels of rye delivered by him to the Pomona Valley Farmers' Elevator Company in the fall of 1917, and further claims that it agreed to give credit on the note for that amount, which it failed to do. A reply was interposed to the answer, averring payment to defendant of the amount of the actual rye delivered in the fall of 1917.

The material facts in the case are substantially as follows: The price of rye in March, 1917, was about \$1.49 per bushel. At that time Ernest Steel was the agent of the Pomona Valley Farmers' Elevator Company at Edgeley, North Dakota. During the month of March, and until April 20, 1917, the Pomona Valley Farmers' Elevator Company sold in the manner hereinafter described for defendant 10,000 bushels of rye at the market price of about \$1.49 per bushel. Between the time when defendant had, through the said elevator company, sold the rye, and the 20th day of April, 1917, rye on the market had advanced in price to such an extent that a loss of about \$4,000 had occurred on the transaction, and at that time for this amount the note in suit was taken. After the giving of the note, rye still continued to advance. The defendant in the month of July, 1917, through the elevator company, purchased 10,000 bushels of rye at \$2.05 per bushel. The loss on the entire transaction up to the time of the purchase last mentioned was approximately \$5,505.

The defendant owns and operates a farm of about 1,000 acres in the

vicinity of Edgeley. He also owns about 1,000 acres of land in Canada. Formerly he was engaged in the real estate business and had also seven years' experience as a grain buyer. He was a stockholder in the Pomona Valley Farmers' Elevator Company, which was later reorganized into the Edgeley Co-operative Grain Company, now the owner and holder of the note in suit.

In the fall of 1916, he sowed 800 acres of winter rye on his La Moure county, North Dakota, farm. In the spring of 1917 he endeavored to contract with the Pomona Valley Farmers' Elevator Company his prospective rye crop, which he estimated at about 12,000 bushels. Steel, the agent of the said elevator company, stated that he could not at that time contract to buy the rye, but that it might be handled as a "hedge."

The defendant desired to sell September rye. There were then no dealings in September rye, and the commission firm informed said elevator company to this effect. Steel again took the matter up with the commission firm, and they finally suggested that what is termed a trial sale for July might be undertaken, and, if that went through, the sale could be later transferred to September, when defendant could make actual delivery of the rye. Steel informed the defendant of this, and such a sale was made at \$1.49 per bushel. At this time he authorized the sale of 1,000 bushels, later of 4,000, and later still of 5,000 bushels, and sales thus authorized were made.

In the fall of 1917, the defendant delivered to the Pomona Valley Farmers' Elevator Company approximately 2,513 bushels of rye. On the 20th day of October, 1917, this was sold at \$1.67 per bushel, amounting to a total of \$4,196.85. Prior to the time the defendant delivered to the elevator company the above-mentioned number of bushels of actual rye, he agreed with it that it should pay him \$1 per bushel for each bushel of rye hauled to the ele-

vator, as he claimed it was necessary for him to have this amount to pay the threshing expenses, etc., the balance of the selling price of the rye so delivered to be applied on the loss to which reference has heretofore been made. The elevator company did make certain advances to the defendant, which, with interest, together with a note to the Nortonville Bank of \$150, aggregated \$2,486.85. This amount, deducted from the \$4,196.85, the selling price of the actual rye, left remaining \$1,710, \$1,505 of which was indorsed by the elevator company on the loss account which had occurred from the time of the execution and delivery of the note of \$4,000 until the transaction was finally closed in July by the purchasing on the market of the 10,000 bushels. The remaining \$205 was indorsed by the elevator company on the note.

The defendant's testimony in substance is that he directed the \$1,710 to be applied upon the \$4,000 note, while Steel testified in substance that it was to be applied first upon the loss account due to the rye transaction, and the balance on the note. The defendant testified in substance that he gave the plaintiff no direction to apply any of the money on the loss account, and that he knew of no charge or account against him except that represented by the note.

Defendant attempts to show that the loss at the date of execution and delivery of the note was \$3,000, while the testimony of Steel is that the losses equal the amount of the note. The testimony of each shows that the total loss was \$5,505, \$25 of which was commission charged by the Tenney Company.

The testimony of the defendant is to the effect that the whole rye transaction except where the actual rye was delivered was a speculation. It will serve no useful purpose to set forth any of the evidence in detail. There is only one assignment of error, which may be divided into two important contentions:

(1) That the court erred in grant-

ing plaintiff's motion for a directed verdict made at the close of the trial, and in not submitting the issues to the jury.

Gambling—
hedging
operation.

(2) That there was a direct conflict in the evidence on a number of material issues, and for this reason it is claimed that the facts of the case should have been submitted to the jury for determination. It is the defendant's contention that the entire transaction with reference to the 10,000 bushels of rye was purely a gambling transaction, and that for this reason there was no consideration for the note. His contention in this regard is entirely without merit. The testimony clearly shows that he expected that, if his rye crop was normal, he would have about 12,000 bushels. At the time of the transaction rye was about \$1.49 per bushel. The defendant expected rye to be a lesser price in the fall, when the rye crop would be ready for sale; hence he desired to contract the sale of it. About the time the transaction took place, the elevator company declined to contract for purchase of the prospective crop of rye.

The elevator company would, however, undertake to handle the transaction as a "hedge." The term "hedge" is well understood in connection with transactions on the grain market, and that term needs no further elucidation. If the transaction could be handled as a hedge, it would result in procuring for the defendant a price for his prospective crop of rye, at the time of marketing thereof, of not less than the amount for which the 10,000 bushels were sold on the market by the elevator company for defendant. In other words, the 10,000 bushels would represent a sale of defendant's prospective crop of rye which was then in existence, but which had yet not matured. When consummated, the transaction would be what is denominated a "hedge."

The elevator company was at all times acting for the defendant in

the hedging transactions. Defendant had the prospective crop of rye which, if normal, would exceed the number of bushels sold on the market for him by the elevator company, and which, we think, the record clearly shows was intended to be delivered to fulfil the contract of the sale of the 10,000 bushels above referred to. If this be true, and we think it is, the transaction was not a gambling one, but purely a hedging transaction, which is not unlawful, and does not partake of the nature of gambling.

—sale for
future delivery—
hedge.

It is not difficult to perceive that defendant authorized the sale of the 10,000 bushels so that he would be assured of a good price for his crop of rye when it was ready to market, and that he expected to have more than that amount of actual rye at the maturity of his crop. He evidently expected that rye would be a great deal lower in price at marketing time than it was in March, the time of the transaction, and by selling the 10,000 bushels, and by being able to transfer the same on the market from July to September, the time would then have arrived when he could deliver an amount of rye equal to that which he had sold; and if at the time of the delivery the market price of rye was only \$.75 per bushel, it is not difficult to see that he would have gained about \$.75 per bushel by the transaction. But, unfortunately for defendant, and contrary to his expectations, rye was not a lower price at the time he expected to market same, but continued to advance over the price for which he had sold the 10,000 bushels until it reached \$2.05 per bushel, when defendant desired, no doubt, to terminate the loss, and procured the elevator company to purchase 10,000 bushels on the market, at which time his loss had reached \$5,505. His prospective crop of rye did not materialize as he expected, and hence he could not deliver a sufficient number of bush-

els to cover the sale of the 10,000 bushels which he had made, and hence the only thing he could do to stop his loss was to buy rye in amount equivalent to the number of bushels which he sold. This he did.

It must also be noticed that the elevator company never received any benefit or profit from the transaction, and, as the transaction was handled, there was no way in which it could make a profit on it. Certainly it is unbelievable that it would entail a great loss on itself without expectation or any possibility of profit to it. It is clear that it was handling the matter for the defendant as a "hedge," and not otherwise.

Other transactions of the defendant on the grain market which occurred prior to the one in question, and which are claimed to have been speculation, need no consideration here, as they have no bearing on the issues here involved.

As to defendant's second contention that there was a conflict of evidence on material issues which should have been submitted to a jury, it is only necessary to say that such conflict, if any, related only to the alleged direction of defendant to the elevator company relative to the application of a portion of the money received for the rye actually delivered to the elevator company. A certain amount of this money the elevator company applied upon defendant's account with it, and the balance upon the note as above stated. The defendant's contention is that he directed such money to be applied upon the note, and because the issues in this regard were not submitted to the jury, he contends there should be a new trial. Assuming, however, that the defendant is correct in his contention, and assuming further that this is the only relief a new trial would give defendant, and we think this assumption is true, we are clearly of the opinion that, in the circumstances of this case, that would not

be sufficient reason for granting a new trial. Instead thereof, this court could, with consent of plaintiff, order the judgment modified so that the defendant would obtain benefit equal to that which he claims he would have received had the money been indorsed on the note instead of applied to the payment of the account.

The note bore 7 per cent interest before and 10 per cent after maturity. The account drew the legal rate of 6 per cent per annum. And assuming, but not deciding, that defendant directed the \$1,710, the balance of the price of rye sold to the elevator company, after deducting the amount it advanced him for expenses to which reference heretofore has been made, to be applied on the note, it is clear that he would be entitled only to a credit of the difference between the interest at the rate the note bore, and interest at the legal rate on the amount paid since the date of payment, and if the judgment is so modified there would be no issue remaining for a new trial. The plaintiff, on oral argument, consented that this modification might be made. Plainly, under the evidence the defendant is entitled to no other relief. The judgment is therefore directed to be

modified as above
denial—indicated, and so
unnecessary. modified it is affirmed. Respondent is entitled to

his costs and disbursements on appeal.

Bronson, Birdzell, and Robinson, JJ., concur.

Christianson, J., concurring:

I agree with Mr. Chief Justice Grace that the only question for the jury in this case was whether the defendant directed the plaintiff to apply the \$1,710 upon the note. Upon all other issues of fact there was no conflict in the evidence, and no room for different conclusions to be drawn by reasonable men. Furthermore the evidence was such that it is manifest that there could be no different result upon another trial.

In other words the disposition made of the case in the opinion prepared by the chief justice is the most favorable to the defendant that could possibly be made upon another trial. And upon the oral argument plaintiff's counsel stated that, in event this court should hold that the question as to the proper application of the \$1,710 was one for, and should not have been withdrawn from, the jury, that then the plaintiff, in order to terminate the litigation, would and did consent that the issue might be determined against it, and the judgment modified accordingly by this court. Hence I concur in the disposition made of this cause in the opinion written by the chief justice.

ANNOTATION.

Nature and validity of "hedging" transactions on the commodity market.

- I. Nature, 1422.
- II. Validity, 1424.

I. Nature.

"Hedging" and "hedging" contracts have been defined and explained in several cases.

Perhaps the most complete and elaborate explanation is the following, contained in the report of the master which forms part of the statement of facts in *Board of Trade v. L. A. Kinsey*

Co. (1904) 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507, affirmed in (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637: "The principals who are engaged in hedging transactions are, generally speaking, either grain merchants, millers, or manufacturers of grain products. The method of such principals is this: When they have bought grain in the country, or in city warehouses, which they propose

to hold for future sales to domestic or foreign purchasers, they at once sell in the pits of the complainant association an equal amount of grain; or, on the other hand, if they have sold to domestic or foreign purchasers grain or grain products for future delivery, they at once buy in the pits of the complainant association an equal amount of grain for future delivery at times corresponding with the times of their selling contracts. And thus, when they have contracts of purchase, they have contracts of sale, for future delivery in the pits, practically even with their purchases; and, if they have contracts of sale with domestic or foreign purchasers, they have contracts of purchase, for future delivery in the pits, practically even with such contracts of sale. The object of such hedging is to insure against loss by fluctuation in the market in the commodity which the principal is carrying, or which he has sold in advance of purchase and manufacture upon a time contract. A hedge must always be against a cash commodity. . . . The system of 'hedging' in the pits has a commercial influence which is favorable both to the interest of the producer and the consumer, in that the large cash grain houses, which conduct transactions in complainant's exchange hall, by reason of the risk to them from market fluctuations being decreased through 'hedges,' are able to take, and do take, a smaller margin of profit, and thus they pay to the producer a higher price and sell to the consumer at a lower price. The person taking the side of such hedging contract opposite of that to such grain house is the person who assumes the risk."

In *Board of Trade v. Christie Grain & Stock Co.* (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, the court said: "Hedging . . . is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the prod-

uct, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

And this statement is quoted and apparently approved in *Cleage v. Laidley* (1906) 79 C. C. A. 284, 149 Fed. 346, and in *Nash-Wright Co. v. Wright* (1910) 156 Ill. App. 243, although the transactions which the courts were then considering were not "hedges."

In *MacKay Teleg.-Cable Co. v. Bain* (1914) — Tex. Civ. App. —, 163 S. W. 98, the court said: "By 'hedging' contracts, as we understand them, is meant that, where a party buys a given number of bales of cotton at the price current on the date of purchase, and sells an equal number of bales for future delivery, or 'futures,' he thereby protects himself against loss due to fluctuation in the market; for if the price of cotton goes down he gains on futures, and if prices advance he loses on futures, but, in either event, he is secure in the profits he has gained on the price of the cotton at the time he purchased it. In common parlance, he sells futures to hedge against loss in the purchase of spots."

And in *Bolting v. Schoener* (1920) 144 Minn. 425, 175 N. W. 901, "hedging" as applied to grain transactions is explained as follows: "The price of grain varies from day to day, and the country buyer who pays the market price at the time he receives the grain stands to lose if the price should fall before the grain arrives at the place where he sells it. To guard against such loss a practice has grown up known as 'hedging.' Under this practice, in theory at least, when a buyer purchases grain in the country he also sells on the board of trade, for future delivery, a sufficient quantity to cover such purchase, so that whether the price goes up or down his gain on one transaction will offset his loss on the other. As sales for future delivery in the terminal markets are made for delivery on the last day of either May, July, September, or December, a country buyer, who is 'hedging,' usually sells his grain when it arrives at

the terminal market and then closes his previous sale for future delivery by buying back an equal quantity on the board of trade. One board of trade transaction thus cancels the other, and the gain or loss balances approximately the loss or gain on the actual grain bought, shipped, and sold, leaving the dealer his regular profit."

In *John Miller Co. v. Klovstad* (1905) 14 N. D. 435, 105 N. W. 164, the court, in discussing an agreement between a broker and the proprietor of a grain elevator by which the former was to loan the latter funds with which to purchase grain to be shipped to the broker and by him sold on commission, said: "It was talked over and understood that the speculative feature of the business, by reason of fluctuations of the market, should be obviated by a system of 'hedging,' which means that the defendant would, for all grain purchased by him, sell, or, in other words, obtain a contract through his said brokers to sell, a like amount to arrive or for future delivery. Selling to arrive and selling for future delivery have a well-defined meaning upon the board of trade and in the business world; the former expression meaning that the vendor has fourteen days in which to make delivery of the warehouse receipts, and the latter expression meaning that he has any day during some specified month in the future in which to make such delivery. This system of 'hedging' eliminates the risk of loss which otherwise might occur by a decline in the market price during the time necessarily consumed in transporting the grain to market. Of course, in order to make the 'hedge' perfect, the grain sold to arrive or for future delivery should at all times just equal the amount of grain purchased by defendant and unsold. As soon as the grain shipped arrives at its destination and is sold, the 'hedge' must be taken down; or, in other words, an equal amount of grain must be purchased for delivery at the same time as the grain which was sold for such future delivery is to be delivered, and thus one is made to balance or offset the other. Such 'hedging' transac-

tions are consummated through the broker upon the board of trade, upon instructions from the principal; and, when the shipment of grain against which there is a 'hedge' arrives and is sold, the custom, under the undisputed evidence, is for the broker to remove the 'hedge' if the shipment is not accompanied with instructions to the contrary; but, if the shipment is accompanied with instructions to sell on arrival, such instructions, under the universal custom, are equivalent to specific instructions to the broker not to apply such shipment on the outstanding sales for future delivery."

II. Validity.

"Hedging" transactions, as thus defined, have been sanctioned by the courts and their validity upheld or assumed in a number of cases, as against the objection that they are gambling transactions. See the following cases: *Board of Trade v. Christie Grain & Stock Co.* (1905) 198 U. S. 249, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; *L. A. Kinsey Co. v. Board of Trade* (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, affirming (1904) 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507; *Cleage v. Laidley* (1906) 79 C. C. A. 284, 149 Fed. 352; *Sampson v. Camperdown Cotton Mills* (1897) 82 Fed. 833; *Medlin Mill. Co. v. Moffatt Commission Co.* (1915) 218 Fed. 686; *Lamson Bros. & Co. v. Turner* (1921) 277 Fed. 680; *Nash-Wright Co. v. Wright* (1910) 156 Ill. App. 243; *State v. Clayton* (1905) 138 N. C. 732, 50 S. E. 866; *John Miller Co. v. Klovstad* (1905) 14 N. D. 435, 105 N. W. 164; *MacKay Teleg.-Cable Co. v. Bain* (1914) — Tex. Civ. App. —, 163 S. W. 98. And see the reported case (*EDGELEY CO-OP. GRAIN CO. v. SPITZER*, ante, 1417.)

Apparently, however, the courts do not mean to intimate that one may insure or protect an actual business transaction against fluctuations in the market by transactions in futures which do not measure up to the rule of the particular jurisdiction as to intention as regards delivery, as distinguished from settlement of price

differences; but merely that the fact that the transactions in futures were engaged in for the purpose of insurance and protection, rather than speculation, is a circumstance of considerable significance as tending to show that the parties—or one of them, if his intention alone would satisfy the local criterion—entertained the intention as to delivery essential to the validity of future transactions. The point is illustrated by *State v. Clayton* (1905) 138 N. C. 732, 50 S. E. 866, where the court, discussing a statute which condemns transactions in futures which are to be settled merely on the basis of price differences, without intention to deliver or accept the commodity, said that when a purchase for future delivery upon margin is by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, it is more reasonable to believe that such purchases are bona fide, and in such cases and as to such necessary articles the purchase upon margin is not made prima facie evidence of a gambling contract; but in the case at bar, as the court said, it was relieved from any difficulty as to the nature of the transaction by the finding in the special verdict that there was no intention to require actual delivery, but, on the contrary, an agreement that on a future date the loser should pay the winning party the difference between the market price on that day and the contract price; and the court accordingly upheld a conviction of a wholesale merchant for purchasing pork for future delivery upon a margin, although the purchase was to protect his contract with customers who had purchased pork from him for actual delivery at a future date; in other words, as the court said, “defendant had sold pork in the ordinary course of his business, to customers, to be delivered at future dates, and, to protect himself from loss by a rise in the price of such pork before the delivery dates, he had bought 5,000 pounds of pork on margin.” The court said in effect that in view of the special finding the contract was a gambling contract, and

20 A.L.R.—90.

the statute does not exempt the defendant from punishment therefor because he is a wholesale merchant and deals in such commodities in his ordinary business.

So, in *John Miller Co. v. Klovstad* (1905) 14 N. D. 435, 105 N. W. 164, *infra*, the court said that if there was no intention to deliver actual grain on “hedges,” but they were intended to be merely speculative and gambling transactions, they would be so invalid as not to support an action by the broker against the principal for losses resulting therefrom.

In *Board of Trade v. Christie Grain & Stock Co.* (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, *supra*, Justice Holmes, in vindicating the right of the Chicago Board of Trade to the protection of its quotations, speaks, by way of illustration, of “hedging” as “a serious business contract for a legitimate and useful purpose.” And in *Board of Trade v. L. A. Kinsey Co.* (involving the same question as in the *Christie Case* and affirmed by the same opinion of the supreme court) the circuit court of appeals said: “If we felt called upon by the necessities of this decision to give a definite opinion of hedging, the record might well lead us to find that hedging is a manufacturer’s or merchant’s insurance against price fluctuation of materials, and no more damnable than insurances of property and life, which in one sense are wagers that the property will not be destroyed during the term, and that the life will not fail in less than the expectancy in the actuaries’ tables.”

In *Lamson Bros. & Co. v. Turner* (1921) 277 Fed. 680, holding that the transactions in futures there involved were not gambling transactions according to the rule in *Illinois*, by the law of which they were governed, the court, in reply to the argument that the contracts of most of the customers of the plaintiff were speculative and resulted in no deliveries, said what others intended, and what others did, does not determine the bankrupt’s intention, and added: “As against these circumstances are the facts that the bankrupt was a milling company,

known to plaintiff to be a dealer and shipper of grain; that hedging by such dealers is a common and lawful practice."

In *Medlin Mill. Co. v. Moffatt Commission Co.* (1915) 218 Fed. 686, an action by a milling corporation to recover against brokers for funds which it alleged had been diverted by its officers, with the collusion of the defendants, for speculation on the rise and fall of future prices of grain, the court said: "Of course, grain may be bought in good faith for future delivery; and if so bought in good faith, hedging will be permitted to secure those who make contracts in advance against the fluctuations of the market even though it be expected that such purchases will be satisfied by set-off, instead of the actual delivery of the grain. . . . The Medlin Mill Company had the undoubted right to buy grain for future delivery, and to hedge such bona fide contracts when necessary to protect itself against the fluctuations of the market. It had no right under its charter to gamble in futures, as that term is used and understood in this discussion."

MacKay Teleg.-Cable Co. v. Bain (1914) — Tex. Civ. App. —, 163 S. W. 98, was an action for damages from an alleged erroneous transmission of a telegraphic message, in which it was urged as a defense that the transactions sought to be furthered and concluded by the message were illegal gambling transactions. The facts and the conclusion of the court are set forth in the opinion as follows: "The plaintiffs were engaged in buying and selling cotton in Houston, Texas. Cunningham & Henshaw were cotton buyers, doing business in Liverpool, England, and had an agent and representative in Dallas, Texas. Frequently plaintiffs, after they had bought cotton, would sell the same to Cunningham & Henshaw through their Dallas agent. The price of cotton thus sold by plaintiffs was fixed by the price at which futures could be sold in Liverpool, with an agreed number of cents per 100 pounds added, and the amount thus arrived at would be the price Cunningham & Henshaw

would pay plaintiffs. It was usual, when plaintiffs had on hand a number of bales of cotton which they desired to sell to Cunningham & Henshaw, to report by telegraph the number of bales to be sold; and if they desired the price to be then fixed they would add in the message, 'Cover and report early.' Upon receipt of such a telegram, the Dallas agent of Cunningham & Henshaw would, by cablegram, sell in Liverpool an equal number of bales, and the price for which the futures were sold, with certain points added, would fix the price. This character of transaction is what is generally known as 'hedging.' . . . It appears from the evidence that on September 22, 1911, plaintiffs had on hand 800 bales of cotton, which they desired to sell to Cunningham & Henshaw in accordance with the existing agreement, and, in pursuance thereof, plaintiffs on said day delivered to the defendant Telegraph-Cable Company, at its office in the city of Houston, for transmission and delivery to said Cunningham & Henshaw at their Dallas office, a message in the following language: 'Bought 800 bales, cover and report early.' This message was changed in transmission, so that when it was delivered to the addressee it read as follows: 'Bought 800 bales, come and report early.' . . . Appellant contends that, as the dealings in futures where there is no intention of making actual delivery are against public policy and illegal, one who negligently prevents the consummation of such illegal act cannot be held liable for any damages that may result from the failure of the illegal transaction to result in profit. . . . Articles 536 and 539 of the Penal Code prohibit the dealing in futures in this state; and under this statute a purchase of cotton to be delivered in future, when it was not the bona fide intention of the purchaser at the time of the transaction that the cotton should be delivered, is expressly prohibited. But it is only to such transactions as are to be performed within this state that the statute applies; for, by article 543, Penal Code, it is expressly provided that it may be shown in defense

of any prosecution for violation of this law that the transaction out of which such prosecution arose was a hedging contract between the parties in this state and a party or parties without this state. . . . These ‘hedging’ contracts are not permitted by law to be made within this state, but are excepted by article 543 where the transaction is between a party in this state and a party without this state; hence, as we construe the law, it was not illegal for Cunningham & Henshaw, doing business in this state, to hedge against loss on cotton bought by them in this state by the sale of futures in Liverpool; and, this being true, the act of appellees in advising them by telegram to cover was not in furtherance of a transaction denounced by our laws. It cannot be said to be in violation of public policy, because the legislature has declared the public policy of this state in that regard by expressly exempting from prosecution parties engaged in such transactions.”

In *John Miller Co. v. Klovstad* (1905) 14 N. D. 435, 105 N. W. 164, upholding the validity of a hedging transaction, the court said: “The argument . . . that the parties in fact settled such ‘hedge’ contracts by purchasing a like amount of grain for December delivery and making one contract offset the other, instead of producing the actual wheat, is unsound. . . . The test is, Did the parties have the legal right to demand and receive or deliver the actual wheat, or did they contemplate and agree that no actual wheat should be delivered? What the parties may have done, or what they may have contemplated doing, in the matter of delivery of actual grain, is not controlling, but, rather, what they believed and contemplated they had a legal right to do under the contract in this regard is the test. Any other rule would greatly hamper the millions of legitimate transactions taking place every week in the business world, and would do away with the great convenience of the clearing houses. The essence of a gambling transaction is that the particular transaction shall

contemplate no delivery, without reference to the making of any other deal. If the sales were to be mere bets on the market price, there was no occasion for a counter transaction, but all that would remain to be done would be for the parties to settle according to the price at the time specified in the contract. If an order to sell for future delivery is a gambling deal merely because the seller contemplates that he will later on buy the grain to fill the order, then ‘hedging’ is impossible, and practically every trade on all the boards of trade in the country is illegal.”

And in *Sampson v. Camperdown Cotton Mills* (1897) 82 Fed. 833, it was held that a series of transactions by which a cotton manufacturing company purchased cotton futures with the intention of disposing of them as spot cotton was purchased from time to time for use in the mill, the purpose being to fix the cost of the cotton as a basis of the price for advance sales of the finished goods, were valid so as to support a mortgage given to secure moneys borrowed for the purpose of carrying on such transactions, provided they were entered into bona fide and were not a mere cover for speculation in the rise and fall of cotton on the exchange, with an intent to settle by payment of differences.

“Hedging” is not made invalid by the mere fact that the party may contemplate closing his “hedge” by offset instead of by actual receipt on delivery of the commodity itself. Thus, in *State v. Clayton* (1905) 138 N. C. 732, 50 S. E. 866, *supra*, the court held that when “a person engaged in business buys or sells ‘futures’ with a view not to take, but to avoid, risks in his business by reason of possible fluctuations in the commodities which he must need in the ordinary course of that business, and he retains bona fide the right to call for delivery, and there is no intention not to exact delivery, this is a valid contract, though he may think it probable that he will not need to call for delivery if it shall turn out (as he may expect) that he can buy these commodities from time to time nearer

home, and thus save freight, being secured against loss by his purchase of futures. The difference is that in this last case the party will need actual delivery from someone, of the very articles and quantity bought at 'futures' for the ordinary purposes of his business, that there is, therefore, no gambling feature in the dealing, and though he may expect, indeed think it probable, that he may secure the actual delivery from time to time from others, there is no intention that he will not, in any event, call for delivery upon his purchase of 'futures;' but, on the contrary, there is the positive intention to call for such delivery if he cannot get the articles elsewhere, and more advantageously, as needed."

In one opinion, at least (*Board of Trade v. O'Dell Commission* (1902) 115 Fed. 574, where the application of a board of trade for an injunction to restrain the use of its quotations was denied on the ground that the transactions on the board were themselves in the nature of bucket-shop operations), the fact that transactions are hedging transactions seems to be considered as tending to characterize them as gambling transactions rather than the contrary. Thus, the court said with reference to such transactions, and to the knowledge of the president of the board of trade in respect thereto: "And he knows that as a rule the 'hedging' deal is made by one who at the time has the commodity on hand, and who makes the deal to cover possible losses, and the expense of carrying and delivering the commodity, when it is actually sold, whether at home or abroad, and who settles the pretended sale or deal on the exchange by a pretended purchase or deal there, and the payment or receipt of the difference between the prices. The 'hedging' deal usually is an appeal to chance for indemnity against the expenses and possible losses from an actual transaction."

But the effect of the O'Dell Case is destroyed by the later cases of *Board of Trade v. Christie Grain & Stock Co.* (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; *L. A. Kinsey Co.*

v. Board of Trade (1905) 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, affirming (1904) 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507, which involved similar questions.

In *Ascher v. Moyse* (1911) 101 Miss. 36, 57 So. 299, in reply to the contention that the proviso exempting transactions by mail or wire between persons within and without the state, without a local intermediary, from the condemnation of dealings in futures when the intention is to settle by receiving or paying differences, was for the protection and in the interest of the local spot cotton buyer who protects his sales and purchases by transaction upon the future board, the court said: "We confess that we see very little force in this suggestion. We fail to appreciate the spirit which encourages the doing of an act in one, and prohibits it in another, class of persons. The purpose was to suppress the traffic as to all persons, to shut out entirely the evil; and the more reasonable construction to place upon this portion of the act is to say that it was inserted by the legislature upon the erroneous idea that the insertion of such a provision was necessary to preserve the constitutionality of the act."

In *Bolfing v. Schoener* (1920) 144 Minn. 425, 175 N. W. 901, where the court assumed for the purposes of the case, though without deciding the question, that "hedging" transactions were lawful, it was held that many of the transactions between the parties were not true "hedges," but were purely wagering contracts, and hence invalid. In particular it was said: "Defendant suggests that the options in September wheat may have been bought merely as a means of closing out the options in July wheat; that Bolfing, instead of closing out his 'hedge' by buying back July wheat, may have bought September wheat to cover it, and that this is a common practice, where the price has changed so that a heavy loss would be sustained by closing out the 'hedge' at the usual time, and the price of later futures looks more favorable. It is difficult to see why one who indulges in

this practice is not speculating rather than 'hedging.' . . . The record also discloses that Bolfig sometimes gave an order for a purchase or sale of an option, and at the same time directed that it should be closed out whenever the market rose or fell a certain amount, and that he sometimes gave an order for the purchase or sale of an option at the specified price in case the market should rise or fall, as the case might be, to that point, and that defendant executed these orders. Such transactions indicate that Bolfig was speculating rather than 'hedging.' ”

And in *Burney v. Blanks* (1911) — Tex. Civ. App. —, 136 S. W. 806, an action on a contract for the sale of cotton for future delivery, the plaintiff, in attempting to avoid the defense that the contract involved a gambling transaction and was therefore void, testified as follows: “Sometimes I have a contract to deliver spot cotton in the future, at a certain price, and protect that contract against fluctuation. If I see the market is going against me, I hedge it. If I have some cotton bought and on hand, or bought and to be delivered at a future time,—for instance, if I have bought 100 bales of cotton, to be delivered to me during October, November, or December,—and I see the market is going against me, I jump out and hedge it. If I have some cotton bought and got a good profit on it, then I will hedge it to secure that profit, and not take any further chances on it. The law gives us the right to do that. As to whether or not it was the purpose of this contract to hedge a sale, it was,

if I wanted to. It was my purpose, as soon as I got a profit in it, to hedge it. Of course, it was a speculation; if the price went down I made money, and if it went up they made money. If I had felt that the price of cotton was going up, I would not have gone out and hedged the contract with the bucket shop; I don't deal with bucket shops at all. I would carry the contract myself. I would either buy or sell to protect myself, if I had felt like it was necessary.” The court said: “We think it appears from the appellee's own testimony, as well as that given on behalf of the appellants, that the defendants sold to the plaintiff 133 bales of cotton at the market price of cotton at the time and place of the sale, and that the parties then and there agreed that, if the same grade of cotton should advance in price between that date and the 30th day of April, following, the defendants would have the right, upon demand, to collect from the plaintiff the difference between the price of such cotton at the time the demand was made, and the price which the plaintiff had paid the defendants for it. And, on the other hand, if no such demand was made by the defendants, and on the 30th day of April the market value of the grade of cotton referred to was less than the amount the plaintiff had paid for it, then he should have the right to collect the difference from the defendants. It is conceded in appellee's brief that the amount paid was the market value of the cotton at that time. If this is what the transaction was, we are unable to distinguish it from a bet or wager.” M. A. L.

CLARENCE IDELL, by Next Friend, et al.,
v.
ELBERT O. DAY, Appt.

Pennsylvania Supreme Court—February 6, 1922.

(— Pa. —, 116 Atl. 506.)

Automobile — negligence in turning to wrong side of road.

1. One driving an automobile upon a public highway at night may be

found to be negligent in turning abruptly to the wrong side of the road, in the path of a coasting sled, although his excuse was that he thought he saw pedestrians on the road in front of him.

[See note on this question beginning on page 1433.]

Highway — coasting as nuisance.

2. Coasting on a public street which is not put to extensive public use, if not expressly prohibited by ordinance, is not necessarily a nuisance or negligence per se.

[See 13 R. C. L. 302.]

Trial — question for jury — negligence in coasting.

3. Whether or not one coasting on a public highway is exercising the care

and diligence to avoid danger which should be expected of a reasonably careful and prudent man under like circumstances is a question for the jury where the evidence as to the danger is conflicting and the inferences to be drawn not clear.

Highway — sled as vehicle.

4. A hand sled is not a vehicle within the meaning of a law requiring vehicles to carry lights after dark.

(Schaffer, J., dissents.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County (Stern, J.) in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

- Mr. Lincoln L. Eyre for appellant.

Mr. M. J. McEnery, for appellees:

The question of the violation of the act of assembly by the minor plaintiff in the operation of the sled without the display of a light, and granting that a sled is a vehicle within the contemplation of the act, and that, upon the night in question, by reason of a white light not appearing upon the sled, plaintiff had violated the act, the question still remains whether the violation of the act of assembly was the efficient cause of the injury.

Stubbs v. Edwards, 260 Pa. 75, 103 Atl. 511; McIlhenny v. Baker, 63 Pa. Super. Ct. 385; Christner v. Cumberland & E. L. Coal Co. 146 Pa. 67, 23 Atl. 221; Hardie v. Barrett, 257 Pa. 42, L.R.A.1917F, 444, 101 Atl. 75, 16 N. C. C. A. 485.

Coasting upon a street which is not put to much public use, when not expressly prohibited by ordinance, is not necessarily a nuisance, nor is it an unlawful act, nor is it per se negligence.

Feldman v. Riccardino, 58 Pa. Super. Ct. 114.

The question of the conduct of the defendant in the operation of his automobile under the circumstances as narrated by him, and which narration in effect is his answer to the injuries caused by him to the plaintiff, becomes solely a question for the jury.

Reaney v. Jones, 75 Pa. Super. Ct. 355.

Kephart, J., delivered the opinion of the court:

This is an action of trespass for personal injuries to Clarence Idell, a minor of seventeen. The accident happened on the evening of January 23, 1920, at about 10 o'clock, while young Idell, in company with eight others, all minors, was sled riding on a roadway in Germantown known as Lincoln drive. Their sled collided with defendant's automobile. Verdicts for the minor and father were recovered in the court below, but as appellant took but one appeal, instead of two, which the law requires, he was compelled to elect which judgment he would contest; by paper filed, he abandoned his objection to the father's judgment, and assigned as error to that of the minor the refusal of the court to give binding instructions in favor of defendant.

Lincoln drive, in the suburban section, is an 80-foot-wide street, 50 feet from curb to curb, with 15-foot sidewalks. The houses are built back 25 feet from the house line, and at Carpenter street, which

intersects Lincoln drive, there is an unobstructed view down the latter for at least 800 feet. The occupants of the sled had come some distance before reaching the scene of the accident, which was 300 feet south of Carpenter street, on the right side of the road. Here there is little or no grade, and the sled was merely drifting, its momentum having been spent in the distance passed over, beyond which, as the boys described it, the hill was steeper and the coasting better. When they reached Carpenter street, going south, they were traveling possibly from 5 to 8 miles an hour, and the automobile could be seen coming north upon the right side of the road, the sled being on its proper side—8 to 10 feet from the west curb line of the road. There were no lights on the sled, but warning from a klaxon horn was sounded by the boys at all crossings, or whenever necessary to attract the attention of pedestrians who happened to be on the highway. There was an arc light at Carpenter street and gas lamps along the sides of Lincoln drive,—one immediately at the place of the accident. From the evidence, the night was clear enough that the persons on the drive could be seen for a distance of from 800 to 1,000 feet.

The sled continued past Carpenter street, and was between the latter and West View street, going about as fast as a man could run, on the proper side of the road, when defendant, without any notice or warning, within the space of 30 feet, suddenly turned his car from the right to the left hand side of the road, and crashed into the sled, injuring this minor and others.

Defendant, returning from a professional call, endeavoring to excuse his action by showing it was a misty night, and, being deceived by shadows of the trees, imagined he saw objects along the road which he mistook for pedestrians, going in the same direction as his car; he turned out of the road to avoid them, not

knowing the boys were sled riding, though it appears they had been doing so for some time.

Coasting on a public street, which is not put to extended public use, and not expressly prohibited by ordinance, is not neces-

Highway—
coasting as
nuisance.

sarily a nuisance, nor is it an unlawful act or negligence per se. *Burford v. Grand Rapids*, 53 Mich. 98, 103, 51 Am. Rep. 105, 18 N. W. 571; *Faulkner v. Aurora*, 85 Ind. 130, 133, 44 Am. Rep. 1; *Lynch v. Public Service Corp.* 82 N. J. L. 712, 715, 42 L.R.A. (N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514; *Farrington v. Cheponis*, 84 Conn. 1, 8, 78 Atl. 652; *Feldman v. Riccordino*, 58 Pa. Super. Ct. 114, 117.

Where, under the undisputed facts, coasting upon a street is clearly and manifestly dangerous, it may be the duty of the court to so declare as a matter of law; but where the evidence is conflicting, and the inferences to be

drawn are not clear, the question whether plaintiff has exercised care and diligence to avoid danger while coasting, such as to be expected of a reasonably careful and prudent man under like circumstances, is for the jury. *Meyers v. Central R. Co.* 218 Pa. 305, 306, 67 Atl. 620.

Trial—question
for jury—negli-
gence in coast-
ing.

We have had several cases before us of right-angle collisions between sleds and vehicles; as to such circumstances, where there is no testimony to justify a finding that a driver knew or had reasonable ground for knowing boys were sled-ding, or likely to be sledding, on a hill at the time of passing, and a sled, not under control, comes rapidly, without warning or opportunity to apprehend its approach, and a collision takes place, there is no liability for damages to children who may be injured, as was the case in *Eastburn v. United States Exp. Co.* 225 Pa. 33, 35, 73 Atl. 977; but where a driver could see

children at least 50 feet away from the crossing, or knew they were riding on the hill, he is required to give warning of his approach and take other reasonable means to guard against accident consistent with the circumstances. *Yeager v. Gately & Fitzgerald*, 262 Pa. 466, 471, 106 Atl. 76.

Here we have an accident between crossings where the driver deliberately passes to the wrong side of the street, immediately in the face of impending traffic. The speed of the car did not cause the accident; while the sled was not in a fixed position, the accident was bound to result when the car was turned directly in front of it within a few feet of its approach. It would have happened to any vehicle traveling in the same direction as the sled, under the circumstances here detailed. The doctor's acts imperiled the lives of everyone who might be traveling, as the sled was, on the opposite side of the street. His excuse received all the consideration it was entitled to by the court below; for what the headlight mistakenly revealed to him, as he says, could not have been true, and, if it was, should he not have made reasonably certain that people were actually ahead? He could have had his illusion dispelled by driving within 50 feet of the supposed pedestrians, when the shadows would have disappeared in the brilliancy of his headlights, and if he could see these supposed people walking, why could not he see the boys coming slowly along with their sled? If he had suspected there was something on the road in front of him, he should, as any prudent man would, have gone close enough to it to find out. Shadows are quickly neutralized in the glare of an electric headlight, and his suspicions would have been quickly dissipated had he followed a reasonable course.

We are not satisfied the use of the highway by traffic on this occasion was of a nature to cause coasting on this street to be declared a nuisance

by us. The court below did not commit error in submitting the case to the jury, either on the ground of defendant's negligence or plaintiff's contributory negligence. This case is easily distinguishable from *Leslie v. Catanzaro*, 272 Pa. 419, 116 Atl. 504.

*Automobile—
negligence in
turning to
wrong side of
road.*

There is one other question. A hand sled is not a vehicle within the contemplation of the Act of June 12, 1919 (P. L. 451; Pa. Stat. 1920, §§ 19,630–19,636), which requires at least one white light from one hour after sunset until one hour before sunrise. It may be such conveyance or vehicle as would have the right to use the cartway of a street. *Stevenson v. United States Exp. Co.* 221 Pa. 59, 128 Am. St. Rep. 725, 70 Atl. 275. This act does not require a light on such sleds,—therefore, its absence not being in violation of an act of assembly, it is not, for this reason, the efficient cause of the injury, nor is its absence, moreover, such lack of ordinary care as would justify the court in declaring its contributory negligence as a matter of law, preventing a recovery.

The judgment of the court below is affirmed.

Schaffer, J., dissenting:

I would hold that the words "every vehicle" in the Act of June 12, 1919, comprehend sleds such as the one involved in the accident in this case, and when running at night upon a highway like Lincoln drive, one of the main arteries of travel in suburban Philadelphia, they must display a light as provided in that act. In the absence of such statutory requirement, it seems to me that due and ordinary care demands that those using such a sled on such a highway at night must give warning of its presence by the means other vehicles use. As I view the testimony, the fault here was not with the defendant, but with the plaintiff, and there should be no recovery permitted; therefore I dissent.

ANNOTATION.

Injury to one while coasting in the street.

- I. In general, 1433.
- II. Effect of ordinance against coasting, 1434.
- III. Applicability of law of road and road regulations, 1435.
- IV. Collisions with automobiles, 1435.

I. In general.

It is generally held that the fact that a person who was injured while coasting was pursuing this sport on a public street will not necessarily preclude a recovery, if he was not guilty of contributory negligence, and negligence by another causing the injury is made to appear. *Farrington v. Cheponis* (1911) 84 Conn. 1, 78 Atl. 652; *Roennau v. Whitson* (1920) 188 Iowa, 138, 175 N. W. 849; *Strutzel v. St. Paul City R. Co.* (1891) 47 Minn. 543, 50 N. W. 690; *Terrill v. Virginia Brewing Co.* (1915) 130 Minn. 46, L.R.A.1915E, 1028, 153 N. W. 136, Ann. Cas. 1917C, 453, 16 N. C. C. A. 648; *Weber v. United R. Co.* (1919) 201 Mo. App. 685, 213 S. W. 535; *Lynch v. Public Service Corp.* (1912) 82 N. J. L. 712, 42 L.R.A.(N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514; *Meyers v. Central R. Co.* (1907) 218 Pa. 305, 67 Atl. 620; *Feldman v. Riccardino* (1914) 58 Pa. Super. Ct. 114; *Nevins v. Delaware & H. Co.* (1918) 261 Pa. 32, 103 Atl. 1017; *Yeager v. Gately & Fitzgerald* (1919) 262 Pa. 466, 106 Atl. 76.

And in *Roennau v. Whitson* (1920) 188 Iowa, 138, 175 N. W. 849, where it was held that coasters on a hill had an equal right on the highway with a traveler in a horse-drawn carriage, the court said: "While not in terms denying the lawfulness of the use of a country highway for coasting purposes under ordinary circumstances, appellant's argument, in many of its assumptions and inferences, seems grounded on the thought that, as between the defendant driving an ordinary wheeled carriage drawn by horses and the party of coasters moving over the same public road on a sled propelled by their own weight, the superiority of right is

- V. Collisions with horse-drawn vehicles, 1437.
- VI. Collisions with street cars, 1439.
- VII. Collisions with steam cars, 1440.
- VIII. Collisions with obstructions, 1440.
- IX. Injury from kick by animal, 1440.

with the former. 'Surely,' say counsel, 'the defendant had a right to drive up the hill in the beaten or traveled way upon this public road.' This may be conceded, but it by no means answers or avoids the plaintiff's complaint if, as a matter of law, she was also clothed with a like right to come down the hill 'in the beaten or traveled way.' The right which any person has to use the public road in going from place to place is a right which he holds in common as one of the public. Each and every person exercising a common or public right is bound to do so with reasonable regard to the safety of others lawfully claiming a like privilege. So far as the highway is concerned, the law recognizes no favorites in its use. The titled traveler, with his 'coach and six' and outriders, has no higher or better right in the public road than has the patient squaw with her pony dragging the primitive travois, which bears her load of blankets. And, barring only the reservation that the vehicle shall not be of a kind destructive of the public use of the road or otherwise constituting a nuisance, the law, in the absence of statute at least, does not close the road against any form or method of travel or transportation known to man. Nor does the law limit such public right to the use of the highway as a mere artery or conduit of business or commerce. More and more as the years go by are the public ways crowded with those who walk or ride or drive for the mere pleasure of it, or as a restful change from their labors, or as a matter of exercise taken for the promotion of health. No practicable motive power has yet been developed which is in itself unlawful for use upon the highway. The subjection of steam, gas,

and electricity to such uses is already an accomplished fact. Nor is gravity, that most universal and potent of all nature's forces, overlooked. The bicycle rider coasts down the hills, and the automobile driver does the same, and utilizes the momentum thus acquired to carry him far up the opposite slope, and in so doing neither of them abuses his lawful right to the use of the road. Nor is the right lost or forfeited because the use being made of the road is merely one of the movements in some amusement or sport."

And it has been held that coasting on a public street not put to extended public use, where it is not expressly prohibited by ordinance, is not necessarily a nuisance, or an unlawful act, or negligence per se. *IDELL v. DAY* (reported herewith) ante, 1429; *Feldman v. Riccordino* (1914) 58 Pa. Super. Ct. 114.

In *Lynch v. Public Service Corp.* (1912) 82 N. J. L. 712, 42 L.R.A. (N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514, it was held that one coasting in a public street, who was injured by another's negligence, was not prevented from recovery for the injury because his own act constituted a public nuisance.

And in *Jackson v. Castle* (1888) 80 Me. 119, 13 Atl. 49, an action for damages alleged to have been occasioned by reason of the negligence or wrongful act of defendant, who was coasting, it is said that sliding in a street, accompanied with boisterous conduct, is not necessarily unlawful, nor is it necessarily a public nuisance.

But it has been said that a large sled loaded with several persons coasting down an icy street after dark endangers the safety of every traveler upon the highway in its course, and is inconsistent with the purposes for which the street was made and for which it is used, and is per se a nuisance. *Reusch v. Licking Rolling Mill Co.* (1904) 118 Ky. 369, 80 S. W. 1168.

And in *Eastburn v. United States Exp. Co.* (1909) 225 Pa. 33, 73 Atl. 977, it was said that it cannot be doubted that for seven boys to come

down a steep hill on one sled, at such a high rate of speed as would necessarily follow, and to run into a city street at the foot of the hill, would be a wrongful act.

And in *McCarthy v. Portland* (1877) 67 Me. 167, 24 Am. Rep. 23, a case of injury to a horse while racing in the streets of a city, it is said that, like racing or playing ball, sliding downhill is not an unlawful exercise or game, but that the streets are not proper places for such recreation, although one engaged in it is passing along the highway, in one sense, as any traveler would.

It is held that where, under the undisputed facts, coasting upon a street is clearly and manifestly dangerous, it may be the duty of the court to so declare as a matter of law, but that, where the evidence is conflicting and the inferences to be drawn are not clear, the question whether plaintiff has exercised care and diligence to avoid danger while coasting, such as to be expected of a reasonably careful and prudent man under like circumstances, is for the jury. *Feldman v. Riccordino* (1914) 58 Pa. Super. Ct. 114; *IDELL v. DAY* (reported herewith) ante, 1429. Other cases on the question of contributory negligence will be found in subsequent subdivisions.

II. Effect of ordinance against coasting.

See also *Sturm v. Tri-City R. Co.* (1920) 190 Iowa, 387, 178 N. W. 525, *infra*, VI.

In *Farrington v. Cheponis* (1911) 84 Conn. 1, 78 Atl. 652, it was held that the fact that one was violating an ordinance against coasting would not bar a recovery for an injury, unless such violation was a proximate cause of the injury.

And in *Sturm v. Tri-City R. Co.* (Iowa) *supra*, it was held that one who was injured while coasting was not necessarily guilty of contributory negligence because he was injured while violating the law against coasting, but that such violation did not constitute negligence unless the breach of law, in some manner, di-

rectly contributed to the injury sustained.

In *Fluckiger v. Seattle* (1918) 103 Wash. 330, L.R.A.1918F, 780, 174 Pac. 456, it was held that a failure of the police department to enforce an ordinance forbidding coasting in the city streets did not render a municipality liable for an injury to one who was violating the ordinance.

III. Applicability of law of road and road regulations.

In *Roennau v. Whitson* (1920) 188 Iowa, 138, 175 N. W. 849, it was held that the law of the road is applicable in cases of coasters. The court said: "Counsel argue that this statute (Code, § 1569) prescribing the so-called law of the road, which makes it the duty of persons on horseback or vehicles meeting upon the highway to give one half of the road by seasonably turning to the right, can have no application to a meeting on the road between the rider of a sled or coaster and a person who is operating a vehicle of any other description. We see no valid ground on which to draw this distinction, or to justify us in judicially ingrafting upon the statute an exception which the legislature did not make. The statute makes no attempt to classify vehicles or to include within its terms one or more to the exclusion of others. We have held that a bicycle is to be considered a vehicle, and its rider is entitled to the benefit of the law of the road (*Cook v. Fogarty* (1897) 103 Iowa, 504, 39 L.R.A. 488, 72 N. W. 677), and, if we once concede that any particular vehicle may be lawfully used on a public road its inclusion within the effect of the 'law of the road' is clearly inevitable. It is quite possible that this may, at times, work an apparent hardship as between a comparatively slow-moving vehicle and one which moves swiftly or more silently; but such inconveniences or disadvantages are inevitable unless we destroy the equality of right which makes the highway about the only place left where every man, no matter how humble, is the peer of every other man, no matter how ex-

alted. The universality of this right and use makes it incumbent on each person to exercise it with a reasonable degree of vigilance to avoid interference with others. This duty observed, collisions and accidents will be few, even though annoyances multiply with the multiplication of methods of transportation and locomotion."

And in *Terrill v. Virginia Brewing Co.* (1915) 130 Minn. 46, L.R.A.1915E, 1028, 153 N. W. 136, Ann. Cas. 1917C, 453, 16 N. C. C. A. 648, a statute requiring all vehicles to keep to the right was held applicable, but a statute regulating the speed of motor vehicles approaching a curve was held not to apply.

And in the reported case (*IDELL v. DAY*, ante, 1429) it was held that a hand sled is not a vehicle within the contemplation of an act requiring at least one white light from one hour after sunset until one hour before sunrise.

IV. Collisions with automobiles.

It is held that, where the driver of a motor vehicle is aware of the presence of children coasting on a hill, he is bound to exercise unusual care and watchfulness. *Yeager v. Gately & Fitzgerald* (1919) 262 Pa. 466, 106 Atl. 76.

In *Leslie v. Catanzaro* (1922) — Pa. —, 116 Atl. 504, it was held that, although it is the duty of the driver of an automobile to keep his car under control so as to be able to stop within a reasonable time in case of an emergency, the evidence in the case showed that the defendant had exercised reasonable care in endeavoring to remove his car from the path of a sled on which the plaintiff was riding, where there was no clear evidence that the defendant was aware that coasters might be met at the place of collision, and the evidence also showed that as the defendant came toward an obstruction at a corner he sounded his horn, and as he rounded the obstruction, and observed plaintiff's sled approaching 15 or 25 feet distant, in the emergency he turned his car to the left and mount-

ed the sidewalk, so that it was about 4 feet beyond the curb when it was stopped, practically within its own length.

And in *Sund v. Smisek* (1921) 105 Neb. 602, 181 N. W. 529, there was held to be no evidence supporting an allegation of negligence, where the testimony showed that the hill on which the deceased nine-year-old boy was coasting was steep, icy, and dangerous for coasting; that his sled was a fast one, and that he descended so rapidly that it was beyond his control; that the sled dashed out so swiftly from between the banks of an alley which hid defendant's view that the driver of a car running at a moderate rate of speed, in the exercise of ordinary care, under the circumstances, could not have prevented a collision with the sled, which struck the rear wheel of the defendant's automobile.

And in *Wetherill v. Showell, F. & Co.* (1919) 264 Pa. 449, 107 Atl. 808, it was held that there was no negligence shown, where there was no evidence that the driver of defendant's automobile was not heeding what he was doing as he approached a blind crossing, or that he knew that boys were in the habit of sliding on a certain street, or that the grade would permit them to do so, and there was evidence that the plaintiff's deceased child, as defendant's vehicle approached the crossing, also approached on an intersecting street at a high rate of speed, and that he attempted to avoid a collision by passing to the rear of the automobile, but was unable to steer his sled and struck the back wheel.

And in *Post v. Richardson* (1922) — Pa. —, 116 Atl. 531, in which a recovery was sought for the death of a coaster who collided with an automobile, the evidence was held to establish no negligence on the part of the defendant, where the testimony in substance was that the accident occurred at about 9:30 at night; that there was a turn in the road part way down the hill on which the deceased was coasting, which hid the view of the lower part until travelers had rounded the turn; that the sled was

going from 15 to 25 miles an hour, and traveling on the south, or right, side as it made the curve; that the occupants of the sled noticed defendant's automobile ascending the hill, also on the south side of the road, about 175 or 200 feet from the place of collision; that as the vehicles neared each other the deceased, evidently thinking there was not room to pass the automobile on the right, suddenly turned to the left, and at the same instant the defendant, obeying the rule of the road, turned his car to the right; that deceased, evidently noticing the change, suddenly swerved his sled to the right, but did not clear the automobile; and that the defendant's automobile, when first seen by the coasters, had been turned to the left in order to pass groups of coasters who were drawing their sleds up the hill.

In *Yeager v. Gately & Fitzgerald* (Pa.) supra, the question of negligence on the part of the driver of a motor vehicle which collided at a street intersection with a boy who was coasting was held for the jury, where there was evidence that the accident occurred between 2 and 3 o'clock in the afternoon; that the boy was coasting on the sidewalk, on the right side of the street, and traveling 6 or 8 miles an hour; that defendant's truck was traveling at about the same speed on the left or wrong side of a street which intersected at right angles that on which the boy was coasting; that the collision occurred practically at the instant the child's sled left the sidewalk and entered the crossing; that the driver knew children were coasting at the place where the accident happened; that he might have seen the boy, and that he failed to give any warning as his truck approached the intersection.

And it will be observed that in the reported case (*IDELL v. DAY*, ante, 1429) the question of negligence and contributory negligence were held for the jury, where the plaintiff's sled was traveling slowly on the proper side of the street and was run into at night by the defendant's automobile, which he turned on the wrong

side, as he testified, to avoid objects on the road which he took for pedestrians.

In *Goldberg v. Berkowitz* (1921) 173 Wis. 603, 181 N. W. 216, the plaintiff was held guilty of contributory negligence as a matter of law where there was evidence that he was an intelligent boy nine and one-half years of age, and that he coasted down a hill, lying on his stomach on a sled, with his face downwards and his hands placed so that he could guide the sled; that as he proceeded he did not look up to see if the course was clear, but held his head down between the sled runners, and that he did not see or hear defendant's automobile until they met near the curb opposite from the side where he entered onto the street.

In *Disher v. Kincaid* (1922) — Iowa, —, 186 N. W. 666, where a recovery was sought for injuries sustained by one who was coasting when he collided with an automobile, it was held that the evidence did not justify a submission of the case to the jury upon the theory of the "last clear chance" doctrine, the court holding that too much was left to the speculation of the jury, where the two occupants of the automobile denied that they saw the sled until approximately the instant of the collision, although there was testimony that the driver was signaled, and that, had he looked, he could have seen the sled some distance from the street intersection.

In *Kammer v. Loschke* (1922) — Mo. App. —, 238 S. W. 1088, the jury was held justified in finding that the driver of the truck which collided with plaintiff's bobsled violated the humanitarian rule, where there was evidence that plaintiff had stationed a man at the intersection of a street over which he would pass to see that the way was clear; that after the sled, which started on a signal that the way was clear, was part way down the hill, the guard discovered defendant's truck approaching at a speed of 20 or 25 miles an hour on the intersecting street, and realizing that the sled could not be stopped, he frantically endeavored, by voice and gesture, to

have the truck stopped; that as the sled got about 10 feet from the edge of the intersection, traveling northwesterly, the plaintiff saw the truck approaching from the eastward; that he turned the sled to the left, and turned in as narrow a circle as possible in an endeavor to avoid the truck, which was 150 to 200 feet away; that, notwithstanding the warnings given by the guard and the sight of the sled, the driver came on without slackening speed or making any effort to avoid the collision until he was within 40 feet of the point of collision, when he applied his brakes, and when the car and sled came together he swerved to the right; that the driver of the truck at all times had the means of stopping or slowing his truck, had he been observing and careful, while he knew that the sled could not be stopped. And the evidence in the case was held to justify an instruction that if the plaintiff was in a position of imminent peril, or entering a position of such peril, arising from danger of being run into by the truck, and the driver knew, or in the exercise of ordinary care could have known, that the plaintiff was in a position of imminent peril, or entering such a position, and thereafter the driver, in the exercise of ordinary care, could have stopped the truck, slackened its speed, or swerved the same, and thereby could have avoided the collision, and he failed to do so, then he was guilty of negligence, and if as a direct result of such negligence the plaintiff was injured, a recovery could be had. And the instruction was held not objectionable on the ground that it did not include a proviso that the truck driver could have stopped, slackened speed, or swerved the truck, "with due regard to his own safety," since the evidence raised no such issue. And it was held that an objection that the instruction should have required the jury to find whether or not the plaintiff was oblivious of his peril should not be upheld, in view of the facts, as obviousness was held immaterial.

V. Collisions with horse-drawn vehicles.

The fact that children are standing

with their sleds near a crossing in the roadway at the foot of a hill, in a safe place, will not put a driver of a wagon upon notice that a large sled is likely to run into his wagon at great speed, and require him to take steps to avoid that possibility. *Eastburn v. United States Exp. Co.* (1909) 225 Pa. 33, 73 Atl. 977.

Neither is the sound of boy's voices in the streets on Saturday sufficient warning to require a driver to stop his team and make inquiry as to the location of the sounds and as to whether they come from boys coasting. *Ibid.*

And the fact that a person, when walking on a street one day, sees children sledding on a particular hill, cannot charge him, when driving a wagon along that street on a later day, with negligence, because his wagon is struck in the side by a sled; nor is he under a duty when arriving at the corner to stop his team and wait until all the children coasting down that hill shall arrive safely at the bottom. *Ibid.*

And even if a driver, upon arriving at a corner, can see boys at a considerable distance up the hill upon the cross street coasting down towards him, he is not obliged to anticipate the possibility of their steering their sled into his wagon. *Ibid.*

And where a sled with seven boys upon it was coming down a steep hill in the daytime, and appeared "like a shot out of a cannon" to the driver of a wagon upon a cross street, and a collision resulted, and there was nothing to show that he had knowledge that the boys were sledding on the hill, or that they were likely to be at that time, a verdict based upon the negligence of such driver is not warranted. *Ibid.*

And in *Hoff v. Ward Baking Co.* (1918) 70 Pa. Super. Ct. 235, it was held that the defendant was not chargeable with negligence because he was driving at a gallop across a street intersection at which a collision occurred with a sled on which the deceased and another boy were coasting, where the latter, who was steering, testified that there was suffi-

cient space for the sled to have passed back of the wagon, but that, on account of the sled being overloaded, he was unable to deflect its course so as to escape the wagon.

In *Roennau v. Whitson* (1920) 188 Iowa, 138, 175 N. W. 849, a finding of negligence on the part of the driver of a buggy was held supported by the evidence, where there was testimony that he was warned of the danger from coasters while still at the foot of a hill; that he saw a flash light carried by those on a coaster descending the hill, when 200 feet away; that the coasters were making outcries for a clear way, which were audible at the foot of the hill; that, notwithstanding the darkness and the fact that he was driving a fractious team, he drove steadily ahead, occupying nearly all the traveled track, until an instant before the collision with the coaster, which descended the hill with the right sled runner in the right-hand wheel track.

In the *Roennau* Case the question of contributory negligence was held for the jury, where there was evidence that they had placed watchers at the foot of the hill to give warning; that they displayed a flash light, which was visible for the whole length of their course; and that they gave warning by shouts, which were audible at the foot of the hill.

And in *Terrill v. Virginia Brewing Co.* (1915) 130 Minn. 46, L.R.A.1915E, 1028, 153 N. W. 136, Ann. Cas. 1917C, 453, 16 N. C. C. A. 648, where the plaintiff's child, while coasting down a city street, was killed while attempting to avoid the defendant's wagon, which was proceeding on the left side of the street, it was held that it could not be said as a matter of law, that the boy was guilty of contributory negligence, but that the question was for the jury.

But in *Stoll v. Laubengayer* (1913) 174 Mich. 701, 140 N. W. 532, the act of the deceased in starting her sled down an incline after the defendant had left his team standing over a path into which the sled turned, resulting in a collision with the team,

was held the proximate cause of the accident, and a recovery was denied.

VI. Collisions with street cars.

In *Sturm v. Tri-City R. Co.* (1920) 190 Iowa, 387, 178 N. W. 525, it was held that the defendant railway company was under no duty to anticipate that the plaintiff would violate an ordinance against coasting, merely because the right existed to use the street in a lawful manner.

If the driver of a street car has seen young boys sliding down to the track so frequently that he has reason to apprehend that they will be encountered there, it is culpable negligence on his part to approach the crossing without looking to see if they are there, unless his inattention is in some way excused; and if he actually sees a boy thus sliding, it is his duty to be careful so to control the motion of the car as to avoid the apparent danger; and in either case, the fact that coasting in the street is unlawful does not excuse him from the duty of carefulness. And where a boy nearly six years old was struck by a horse car in the daytime, at a crossing over which for several days boys had been in the habit of coasting, and at a place where the driver of the car, if he had looked, could have seen the boy in time to have avoided the accident, he being accustomed to pass the place about every hour of the day, it was held that the question of his negligence was properly left to the jury, and their verdict of substantial damages was affirmed. *Strutzel v. St. Paul City R. Co.* (1891) 47 Minn. 543, 50 N. W. 690.

In *Weber v. United R. Co.* (1919) 201 Mo. App. 685, 213 S. W. 535, it was held that, under an ordinance providing that persons in charge of street cars shall keep a vigilant watch for vehicles and persons on the track, or moving toward the car, and that it shall be stopped in the shortest possible time and space on the first appearance of danger, and, even aside from such ordinance, a motorman who had an unobstructed view for a long distance should have seen plaintiff's

intestate, who was coasting down a hill, and first came towards the front of the car, and as it turned came towards its side and collided with it, and that nothing less than gross negligence would be attributed to the motorman in failing to see the deceased and another boy who crossed the track on his sled ahead of the latter, directly in front of the car, and there was held substantial evidence warranting the submission of the case to the jury.

But a street railroad company is not liable for injuries to a boy eight years old while coasting in the daytime down a steep street, crossing at right angles the street car track, where the injury occurs by reason of the fact that the motorman suddenly stops the car to avoid striking another boy who is preceding the one injured down the hill, and who undertakes to cross in front of the car, and in so doing the motorman upsets the plans of the injured boy, who is intending to cross behind the moving car, and who as a result comes in contact with the rear wheels. *Kiley v. Boston Elevator R. Co.* (1911) 207 Mass. 542, 31 L.R.A. (N.S.) 1153, 93 N. E. 632.

In *Lynch v. Public Service Corp.* (1912) 82 N. J. L. 712, 42 L.R.A. (N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514, it was held that the jury must determine whether or not a motorman in charge of a street car was negligent in accelerating the speed of his car when attempting to cross a street on which he knew children were coasting, after he had been warned that sleds were approaching the point of intersections.

And, in the *Lynch Case*, the question whether or not a child was guilty of negligence in attempting to coast on a street crossing a street railway track, when persons were stationed at the point of intersection to warn coasters and car operators in order to prevent collisions.

The evidence in *Rassman v. Shore Line Electric R. Co.* (1913) 87 Conn. 701, 87 Atl. 271, which is not set out, was held not to establish the neglect by the defendant of any duty owed to

the plaintiff's intestate, but to show negligence by the latter in attempting to coast across the defendant's track in front of a car, without observing its approach.

And in *Flintoff v. Muskegon Traction & Lighting Co.* (1919) 208 Mich. 527, 175 N. W. 438, a bright, intelligent boy over seven years of age who was killed by a street car was held guilty of contributory negligence where he slid down a steep hill onto the car track, riding feet foremost and lying upon his stomach upon the sled, knowing that cars were running upon the track at frequent intervals.

VII. Collisions with steam cars.

In *Meyers v. Central R. Co.* (1907) 218 Pa. 305, 67 Atl. 620, the questions of negligence and contributory negligence were held for the jury where there was evidence that a thirteen-year-old boy while coasting was struck at night by an engine at a public crossing, which was dangerous and was ordinarily protected by a watchman and gates; that there was no such protection at the time of the accident; and that the engine, which was running backwards, gave no warning of its approach; and that there was a considerable stretch of level ground before the track was reached, on which the boy could have stopped or turned to one side.

VIII. Collisions with obstructions.

It has been held that one who has placed a large wagon upon a street, and has left it to stand there over night, is not liable for damages to one injured by reason of running against it while coasting in the street after dark, although the street may have been used for coasting for many evenings preceding, for it is said that the owner of the wagon is under no obligation to exercise care for the protection of one thus improperly using the street. *Reusch v. Licking Rolling Mill Co.* (1904) 118 Ky. 369, 80 S. W. 1168.

In *Brightenburg v. Mulcahy* (1920) 104 Neb. 794, 178 N. W. 623, where it was alleged in substance that the defendant unlawfully maintained a

fence extending into the public thoroughfare, and that the plaintiff was coasting downhill, and that his sled was crowded over the curb when near the fence, which caused him to run into the fence where it was unlawfully maintained, it was held that the question of what was the proximate cause of the injury was for the jury. The court said: "As to how far, or whether at all, acts of the parties coasting was the proximate cause, would be a matter of defense, hence a question for the jury. The situation then is a question of concurring or successive acts of negligence of numerous persons combined which caused plaintiff's injury. As a matter of law, he may recover of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. See also *Williams v. San Francisco & N. W. R. Co.* (1907) 6 Cal. App. 715, 93 Pac. 122; *Rev. Stat.* 1913, § 8845. It would seem clear that one negligently causing an unlawful obstruction in the highway where someone is injured when in lawful pursuits, the party guilty of the obstruction might be held as liable in damages. Anyhow, such a situation constitutes a question for the jury."

And in *Feldman v. Riccordinio* (1914) 58 Pa. Super. Ct. 114, the question of negligence and contributory negligence was held for the jury where there was evidence that for a month the defendant had, in violation of an ordinance, maintained a pile of scrap iron in the cartway of the street, extending from the curb, a distance of 10 or 12 feet across the cartway, which was only 29 feet wide, and the evidence was conflicting as to whether a light had been placed on the obstruction, and as to whether the plaintiff, who collided with the iron while coasting, had knowledge of the obstruction, and a verdict for the plaintiff was held sustained by the evidence.

IX. Injury from kick by animal.

In *Nevins v. Delaware & H. Co.* (1918) 261 Pa. 32, 103 Atl. 1017, the

questions of negligence and contributory negligence were held for the jury in an action to recover for the death of a boy who was kicked by a mule when coasting, where there was evidence that the mule, to the defendant's knowledge, was of a vicious and bad disposition and had kicked per-

sons before, and that he was being led by one riding on another mule, and there was evidence that the boy was coasting with others on a bobsled which was steered by another boy, and that they waited three or four minutes for the mule to get out of the way.
J. T. W.

PEOPLE OF THE STATE OF CALIFORNIA

v.

MIGUEL MANRIQUEZ, Appt.

California Supreme Court (In Banc)—April 4, 1922.

(— Cal. —, 206 Pac. 63.)

Criminal law — permitting withdrawal of plea of guilty — discretion.

1. That one believed, or was led to believe, that by pleading guilty his punishment would be lighter than would otherwise be inflicted, is no ground for the exercise of discretion in permitting withdrawal of the plea when the belief proved to be unfounded.

[See note on this question beginning on page 1445.]

Appeal — failure to follow statute — dismissal.

2. An appeal from a judgment not taken in the manner prescribed by statute will be dismissed.

[See 2 R. C. L. 100, 167; 1 R. C. L. Supp. 196, 422.]

Criminal law — plea of guilty — when properly made.

3. A statute requiring a plea of guilty to be made by accused himself is complied with by his statement that "he had been guilty all the time," when the arraignment was translated to him by the interpreter, although, before he could answer, his attorney stated that the plea was guilty, and consented to the entry of the plea after it was made.

— waiver of time for sentence.

4. Accused may, by counsel, waive a statutory provision that, after a plea of guilty, the court must set a time for pronouncing sentence which shall not

be less than two days after the plea, so as to permit sentence on the day following the entry of the plea.

Homicide — first-degree murder — attempted robbery.

5. Murder committed by one of several persons attempting to commit robbery, who is stationed by the others to guard the victim while the robbery is committed, by the discharge of the gun by which the victim is covered when the latter grabs for it, is within a statute making murder in an attempt to perpetrate robbery murder in the first degree.

[See 13 R. C. L. 776.]

Appeal — review of discretion in refusing leave to withdraw plea.

6. The exercise of discretion by the trial court in permitting or refusing leave to withdraw a plea of guilty is not reviewable on appeal except in cases of clear abuse.

[See 8 R. C. L. 112; 2 R. C. L. Supp. 551.]

APPEAL by defendant from an order of the Superior Court for Imperial County (Conkling, J.) denying his motion to set aside a judgment convicting him of murder in the first degree and for leave to withdraw his plea of guilty and substitute a plea of not guilty. *Affirmed.*

The facts are stated in the opinion of the court.

20 A.L.R.—91.

Messrs. Harry B. Ellison and M. A. Thomas for appellant.

Messrs. E. R. Simon, U. S. Webb, Attorney General, and J. Charles Jones for the People.

Waste, J., delivered the opinion of the court:

The defendant was charged with the crime of murder. After the entry of a plea of "guilty" the court determined the degree of the crime as murder in the first degree, and, on July 22, 1921, imposed the death penalty. Thereafter the defendant interposed a motion to set aside the judgment and for leave to withdraw the plea of guilty and to substitute a plea of not guilty instead. The motion was denied on September 28, 1921. There appears, in the clerk's transcript of the proceedings in the court below, what purports to be a notice of appeal to this court from the judgment of conviction, "and from an order made on the 28th day of September, 1921, after judgment affecting the substantial rights of the defendant." It does not appear that any appeal from the judgment was taken by the defendant in open court, in the manner prescribed by § 1239 of the Penal

Appeal—failure to follow statute—dismissal.

Code at the time the judgment was rendered, or by filing a written notice of appeal within two days thereafter. Consequently the appeal from the judgment must be, and is, dismissed.

Several contentions are advanced in support of the appeal from the order denying the motion to set aside the judgment and to permit the withdrawal and substitution of the plea. The motion was made upon the ground, in substance, first, that no plea of guilty was put in by the defendant himself in open court, as required by § 1018 of the Penal Code, and that the entry of any such purported plea was without his express consent. Passing over the provision of the statute which requires that application for permission to withdraw a plea of guilty, and to substitute a plea of not guilty, must be made before judgment (Penal Code, § 1018), a point not

raised by the attorney general, we are convinced that there is no merit in appellant's position.

From the record of the proceedings on arraignment, and no attempt is made to impeach the verity of the reporter's transcript, it appears that the appellant is a Mexican who does not speak or understand the English language. When he came into court for arraignment, an interpreter was duly appointed and sworn to interpret the proceedings. By direction of the court, the information was then translated to the appellant by the interpreter, a copy of the information was handed to the defendant at the time, and the court informed him of his right to be represented by counsel before being arraigned. Upon appellant stating that he had none, and no money with which to pay one, the court appointed a member of the local bar to represent the defendant, and continued the arraignment until the following morning. When the case was called the next day, the attorney appointed by the court appeared with appellant. At his request the information was read by the district attorney and then translated to the defendant by the interpreter. The court thereupon arraigned the defendant, but, at the request of his counsel, continued the matter another day to take the plea.

At that time the following proceedings were had:

The court: Are you ready for plea?

Mr. Ellison (defendant's counsel): Yes, sir.

The court: Is the interpreter in court? Translate the proceedings to the defendant, please, Mr. Interpreter. Miguel Manriquez, you have been heretofore arraigned upon this information, charged with the crime of murder; to this information what is your plea?

Mr. Ellison: The plea is guilty to the charge of murder.

The defendant: I have been guilty all the time.

Mr. Ellison: The plea of guilty may be entered.

The court: My recollection is, I have to take evidence to determine the degree.

Mr. Simon (the district attorney): I think that is true. If the court please, I assume the burden will be on us to show the degree.

Mr. Ellison: I am willing it should be shown by the defendant himself.

The court thereupon proceeded to take the testimony of several witnesses, including the defendant, who took the stand at his counsel's suggestion, and determined the crime committed to be murder in the first degree. Section 1018 of the Penal Code provides that a plea of guilty can be put in by the defendant himself only in open court, and the point now made on behalf of the appellant is that he "himself" offered no plea when arraigned. He relies upon the statement in *People v. Thompson*, 4 Cal. 238, to the effect that a defendant must plead guilty in person, and his attorney is not allowed by the law to admit away his life or liberty. It is true, as was said in *People v. McCrory*, 41 Cal. 458, 461, that a plea of a defendant confessing himself guilty of crime should not be entered except with the express consent of the defendant, given by him personally in direct terms in open court, and his confession of guilt should be explicitly made. We are satisfied that there was a positive and literal compliance with such requirement in this case. The foregoing extract from the record and the transcript of the proceedings on the motion to set aside clearly and most conclusively confirm that view. The mere fact that the attorney for the defendant announced to the

Criminal law—
plea of guilty—
when properly
made.

court what the plea would be, before the defendant was able to answer

through the interpreter, and consented to the entry of the plea after it was made, is an unimportant matter in view of the independent ac-

tion of the defendant himself. There is no merit in the contention that the answer of the appellant cannot be held to constitute a plea except by implication. The statement was a direct and explicit confession of guilt, and was properly received by the court and entered as the plea in the case. The form of the plea is not of vital importance, provided the admission of guilt is clear, definite, and unconditional. 16 C. J. 401.

Another ground upon which the appellant based his motion for vacation of the judgment was that his plea of guilty was entered without due deliberation, and with the hope and expectation that the punishment to which he might be exposed would be mitigated. Even if such were the case, the fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel, or others, to hope or believe, that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. *People v. Dabner*, 153 Cal. 398, 403, 95 Pac. 880; *People v. Miller*, 114 Cal. 10, 16, 45 Pac. 986; *People v. Lennox*, 67 Cal. 113, 115, 7 Pac. 260, 6 Am. Crim. Rep. 542.

—permitting
withdrawal of
plea of guilty—
discretion.

Appellant's last contention in support of his motion to vacate the judgment is that the court violated the provisions of § 1191 of the Penal Code in that it pronounced judgment upon him the day following the entry of his plea. The section provides that, after a plea of guilty, the court must appoint a time for pronouncing judgment, which must be not less than two nor more than five days after the entry of the plea. A sufficient answer to the contention is that the appellant through his counsel, at the time he made his plea, expressly waived time, and, with the consent of the

court and district attorney, requested the court to impose the sentence on the day following. It

—waiver of time for sentence. has long been settled that one may

waive a right created by statute for his benefit, and that the rule applies to the time for pronouncing the judgment of the court in criminal cases. *People v. Robinson*, 46 Cal. 94, 96; *People v. Mess*, 65 Cal. 174, 3 Pac. 670, 5 Am. Crim. Rep. 592; *People v. Johnson*, 88 Cal. 171, 174, 25 Pac. 1116.

Although the appeal from the judgment has of necessity been dismissed, we have carefully read the entire record of the evidence submitted to the trial court, to enable it to determine the degree of the crime, before passing sentence. The homicide resulted from the attempt of the appellant and two others to rob a store at El Centro, kept by a Chinese. The three men went together to the store for the purpose of committing the robbery. According to the appellant, who took the stand at the instance of his own counsel, one of his accomplices directed Quon Sue, one of the Chinese, to hold up his hands and told the appellant "to hold him there." He "put his gun on him," and "as soon as I did it he tried to grab it. . . . When the Chinaman grabbed at me, the pistol went off, and he went down, and I ran out, and I don't know what the others did."

There was other testimony that Quon Sue was killed instantly, and the evidence of the autopsy surgeons tended very strongly to indicate that the killing was not in the manner described by the appellant.

Homicide—first-degree murder—attempted robbery. Be that as it may, the homicide was committed in an attempt to perpetrate robbery, and was murder in the first

degree. Penal Code, § 189. The evidence was of such a nature as to support no other conclusion. Having determined this matter, as was its duty to do upon the entry of the plea of guilty (Penal Code, § 1192), nothing further remained for the trial court but to pronounce judgment. That it approached the performance of this difficult task with due regard for the serious consequences which might attend the appellant is evidenced by the careful manner in which it considered and determined the degree of the crime committed. That it saw fit to impose the extreme penalty fixed by the law is a matter resting within the exercise of the judicial discretion with which the trial court is vested by the supreme power of the state.

The granting or denying of permission to withdraw a plea of guilty, and to substitute a plea of not guilty, is a matter within the sound discretion of the trial court, and its

Appeal—review of discretion in refusing leave to withdraw plea.

action must be upheld unless an abuse of such discretion clearly appears. There are no such peculiar or unusual circumstances in this case as to enable us to say the trial court should have acted differently in the matter. *People v. Bostic*, 167 Cal. 754, 760, 141 Pac. 380; *People v. Dabner*, supra.

No legal questions are presented by the appeal which call for the intervention of this court. It follows, therefore, that the order appealed from must be affirmed. It is so ordered.

We concur: Shaw, Ch. J.; Lawlor, J.; Wilbur, J.; Shurtleff, J.; Sloane, J.; Richards, Justice pro tem.

ANNOTATION.

Right to withdraw plea of guilty.

- I. General rule, 1445.
- II. Time of withdrawal, 1447.
- III. Circumstances justifying grant of leave to withdraw, 1450.

I. General rule.

When a defendant has pleaded guilty in a criminal case, it is within the discretion of the trial court to permit the plea to be withdrawn.

United States. — *United States v. Billingsley* (1917) 242 Fed. 330, affirmed in (1918) 161 C. C. A. 339, 249 Fed. 331.

Arkansas. — *Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477; *Joiner v. State* (1910) 94 Ark. 198, 126 S. W. 723; *Cox v. State* (1914) 114 Ark. 234, 169 S. W. 789; *Duncan v. State* (1916) 125 Ark. 4, 187 S. W. 906. See also *Wolfe v. State* (1912) 102 Ark. 295, 144 S. W. 208, Ann. Cas. 1914A, 448.

California. — *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880; *People v. Bostic* (1914) 167 Cal. 754, 141 Pac. 380; *People v. Brown* (1918) 38 Cal. App. 46, 175 Pac. 85; *People v. Bellon* (1919) 180 Cal. 706, 182 Pac. 420; *People v. Breshi* (1919) 44 Cal. App. 307, 186 Pac. 361; *People v. Cosgrove* (1920) — Cal. App. —, 192 Pac. 165. And see the reported case (*PEOPLE v. MANRIQUEZ*, ante, 1441).

Connecticut. — *State v. Maresca* (1912) 85 Conn. 509, 83 Atl. 635.

Florida. — *Pope v. State* (1908) 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972; *Britton v. State* (1914) 68 Fla. 438, 67 So. 142; *Clay v. State* (1921) — Fla. —, 89 So. 353.

Idaho. — *State v. Raponi* (1919) 32 Idaho, 368, 182 Pac. 855.

Illinois. — *Krolage v. People* (1906) 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235; *People v. Walker* (1911) 250 Ill. 427, 95 N. E. 475; *People v. Stamatides* (1921) 297 Ill. 582, 131 N. E. 197.

Indiana. — *Conover v. State* (1882) 86 Ind. 99; *Myers v. State* (1888) 115 Ind. 554, 18 N. E. 42; *Monahan v. State* (1893) 135 Ind. 216, 34 N. E. 967; *Peters v. Koepke* (1901) 156 Ind. 35, 59 N. E. 33; *Meyers v. State* (1901) 156

IV. Circumstances justifying refusal of leave to withdraw, 1454.

V. Effect of withdrawal, 1458.

Ind. 388, 59 N. E. 1052; *Dobosky v. State* (1915) 183 Ind. 488, 109 N. E. 742; *Atkinson v. State* (1920) — Ind. —, 128 N. E. 433.

Kansas. — *State v. Yates* (1894) 52 Kan. 566, 35 Pac. 209; *State v. Pyle* (1894) 52 Kan. 569, 35 Pac. 210; *State v. Garrett* (1908) 78 Kan. 882, 98 Pac. 219.

Kentucky. — See *Little v. Com.* (1911) 142 Ky. 92, 34 L.R.A.(N.S.) 257, 133 S. W. 1149, Ann. Cas. 1912D, 241.

Louisiana. — *State v. Delahoussaye* (1885) 37 La. Ann. 551; *State v. Jamerson* (1897) 49 La. Ann. 597, 21 So. 728; *State v. Boudreaux* (1915) 137 La. 227, — A.L.R. —, 68 So. 422; *State v. Dunham* (1922) 149 La. 1013, 90 So. 387.

Massachusetts. — *Com v. Hagarman* (1865) 10 Allen, 401; *Com v. Mahoney* (1874) 115 Mass. 151; *Com v. Ingersoll* (1888) 145 Mass. 381, 14 N. E. 449; *Com v. Wakelin* (1918) 230 Mass. 567, 120 N. E. 209.

Minnesota. — *State v. Olson* (1911) 115 Minn. 153, 131 N. W. 1084; *State v. Strum* (1911) 115 Minn. 533, 131 N. W. 1086.

Mississippi. — *Mastronada v. State* (1882) 60 Miss. 86; *Deloach v. State* (1900) 77 Miss. 691, 27 So. 618; *Turner v. State* (1919) 121 Miss. 68, 83 So. 404.

Missouri. — *State v. Stephens* (1880) 71 Mo. 535.

Montana. — *State v. Nicholas* (1912) 46 Mont. 470, 128 Pac. 543.

New Hampshire. — *State v. Cotton* (1851) 24 N. H. 143.

New Jersey. — *Clark v. State* (1895) 57 N. J. L. 489, 31 Atl. 979; *Clark v. State* (1895) 58 N. J. L. 383, 34 Atl. 3.

North Carolina. — *State v. Branner* (1908) 149 N. C. 559, 63 S. E. 169.

Oklahoma.—*Jenkins v. State* (1914) 11 Okla. Crim. Rep. 168, 145 Pac. 500.

Oregon.—*Curran v. State* (1909) 53 Or. 154, 99 Pac. 420.

Pennsylvania. — *Com. v. Joyce* (1898) 7 Pa. Dist. R. 400. See also *Com. v. Stephenson* (1899) 9 Kulp, 561.

Vermont.—*State v. Martin* (1895) 68 Vt. 91, 34 Atl. 40.

Washington. — *State v. Cimini* (1909) 53 Wash. 268, 101 Pac. 891; *State v. Wilmot* (1917) 95 Wash. 326, 163 Pac. 742; *State v. Scott* (1918) 101 Wash. 199, 172 Pac. 234; *State v. Anderson* (1919) 109 Wash. 161, 186 Pac. 266.

West Virginia.—*State v. Stevenson* (1908) 64 W. Va. 392, 19 L.R.A. (N.S.) 713, 62 S. E. 688.

Wisconsin.—*Barton v. State* (1869) 23 Wis. 587.

England.—*Rex v. Plummer* [1902] 2 K. B. 339, 4 B. R. C. 917, 71 L. J. K. B. N. S. 805, 86 L. T. N. S. 836, 51 Week. Rep. 137, 66 J. P. 647, 20 Cox, C. C. 249, 18 Times L. R. 659.

The court said in *State v. Garrett* (Kan.) *supra*: "It has been announced so often that if a defendant in a criminal case enter a plea of guilty it is within the discretion of the court whether it will allow the plea to be withdrawn and a plea of not guilty to be entered, that the proposition does not need reiteration."

Some courts hold that this discretion is an absolute one, the exercise of which will not be reviewed. *Com. v. Hagarman* (Mass.) *supra*; *Com. v. Mahoney* (1874) 115 Mass. 151; *Com. v. Ingersoll* (1888) 145 Mass. 381, 14 N. E. 449; *Clark v. State* (N. J.) *supra*.

The better rule, however, is that the exercise of the discretion is subject to review, and that a reversal will be granted where an abuse of discretion is shown.

Arkansas.—*Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477; *Cox v. State* (1914) 114 Ark. 234, 169 S. W. 789.

California.—*People v. McCrory* (1871) 41 Cal. 458; *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880; *People v. Bostic* (1914) 167 Cal. 754, 141 Pac. 380; *People v. Cosgrove* (1920) — Cal. App. —, 192 Pac. 165.

Connecticut.—*State v. Maresca* (1912) 85 Conn. 509, 83 Atl. 635.

Florida.—*Pope v. State* (1908) 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972.

Idaho.—*State v. Raponi* (1919) 32 Idaho, 368, 182 Pac. 855.

Indiana.—*Myers v. State* (1888) 115 Ind. 554, 18 N. E. 42; *Monahan v. State* (1893) 135 Ind. 216, 34 N. E. 967; *Atkinson v. State* (1920) — Ind. —, 128 N. E. 433.

Kansas.—*State v. Yates* (1894) 52 Kan. 566, 35 Pac. 209; *State v. Pyle* (1894) 52 Kan. 569, 35 Pac. 210.

Louisiana.—*State v. Dunham* (1922) 149 La. 1013, 90 So. 387.

Mississippi.—*Turner v. State* (1919) 121 Miss. 68, 83 So. 404.

Montana.—*State v. Nicholas* (1912) 46 Mont. 470, 128 Pac. 543.

Oregon.—*Curran v. State*, *supra*.

Washington.—*State v. Cimini*, *supra*.

West Virginia.—*State v. Stevenson*, *supra*.

As was said in *Pope v. State* (Fla.) *supra*: "The law favors trials on the merits; and if the discretion of the trial court is abused in denying leave to withdraw a plea of guilty and to go to trial on the merits, the appellate court may interfere."

The correct rule as to permitting the withdrawal of a plea of guilty was said, in *State v. Raponi* (Idaho) *supra*, to be that "the matter is discretionary with the trial court, that the discretion should be liberally exercised, and that a refusal of such permission can be reviewed only as to the question of whether the trial court has exercised judicial discretion as distinguished from arbitrary action."

But the trial court's discretion will not be disturbed unless it clearly appears to have been abused. *Joiner v. State* (1910) 94 Ark. 198, 126 S. W. 723; *Conover v. State* (1882) 86 Ind. 99; *Pattee v. State* (1887) 109 Ind. 545, 10 N. E. 421.

It will be observed, of course, that the court has no discretion to withhold a request for the withdrawal of a plea of guilty where it is acting without jurisdiction of the offense charged (*Gretsch v. United States* (1917) 155 C. C. A. 485, 242 Fed. 897, which has writ of certiorari denied in (1917) 245

U. S. 654, 62 L. ed. 532, 38 Sup. Ct. Rep. 12); or where the plea is conditioned in an invalid agreement (*Wolfe v. State* (1912) 102 Ark. 295, 144 S. W. 208, Ann. Cas. 1914A, 448).

In the case last mentioned the court said: "The law does not authorize any such agreements as here entered into with the prosecuting attorney, and pleas of guilty cannot be accepted on condition that the fines imposed by statute as a result of a violation of the law will be pretermitted provided the offenders do not commit similar offenses in the future. There is no authority in the statute 'for a plea of guilty to be entered and received on any kind of condition, or for judgment to be suspended on condition.' . . . Under the law a party is either guilty or not guilty; and when he enters a plea of guilty upon the indictment under a statute which he has violated, the law fixes the punishment, which it is not in the discretion of the court to withhold unless the plea of guilty is withdrawn. . . . While it is within the discretion of the court to permit a plea of guilty to be withdrawn, it is not within the power of the court to withhold the punishment if the plea of guilty is not withdrawn. Kirby's Dig. § 2296. In the case, since the court finds that the appellant's pleas of guilty were entered upon condition, it results that they were not such pleas of guilty as the law authorizes or contemplates, and therefore the court was not justified in inflicting punishment upon such pleas. . . . Here the question is as to whether or not the court has the discretion to allow a plea of guilty to be entered upon a condition, and thereafter render a judgment against and impose a punishment upon the party entering such plea, because he had failed to comply with the conditions upon which the plea was entered. The whole proceeding was without authority of law and void. The court should have granted appellant's motion for a new trial and have allowed him to enter his plea of not guilty, as requested. It was not within the discretion of the court, upon the

showing made in this record, to withhold such request."

In Michigan, it is provided by statute (Comp. Stat. 1915, § 15,830, subsec. 1) that whenever a judge shall have reason to doubt the truth of a plea of guilty, "it shall be his duty to vacate the same, direct a plea of not guilty to be entered, and order a trial of the issue thus formed." *People v. Utter* (1920) 209 Mich. 214, 176 N. W. 424; *People v. Merhige* (1920) 212 Mich. 601, 180 N. W. 418.

On a motion to withdraw a plea of guilty, the state may introduce evidence in regard to the matters presented thereby, and may call and cross-examine persons who have made and filed affidavits in support of the motion. *Conover v. State* (1882) 86 Ind. 99.

In Georgia by statute a plea of guilty may be withdrawn as a matter of right at any time before sentence is pronounced, while in Iowa by statute, withdrawal is of right before judgment. See the following subdivision of this note.

II. Time of withdrawal.

The holding of the various courts are not uniform as to the time of the withdrawal of a plea of guilty. In some jurisdictions the rule obtains that the court may permit the withdrawal of a plea of guilty at any time before judgment or sentence. *Greene v. State* (1908) 88 Ark. 291, 114 S. W. 477; *Joiner v. State* (1910) 94 Ark. 198, 126 S. W. 723; *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880; *Curran v. State* (1909) 53 Or. 154, 99 Pac. 420; *State v. Cimini* (1909) 53 Wash. 268, 101 Pac. 891.

Other courts hold that the plea may be withdrawn either before or after judgment or sentence. *State v. Raponi* (1919) 32 Idaho, 368, 182 Pac. 855; *Sanders v. State* (1882) 85 Ind. 318, 44 Am. Rep. 29; *Myers v. State* (1888) 115 Ind. 554, 18 N. E. 42; *Meyers v. State* (1901) 156 Ind. 388, 59 N. E. 1052; *State v. Olson* (1911) 115 Minn. 153, 131 N. W. 1084; *State v. Strum* (1911) 115 Minn. 533, 131 N. W. 1086; *State v. Kring* (1880) 71 Mo. 551; *Swang v. State* (1865) 2 Coldw. (Tenn.) 212, 88 Am. Dec. 593.

In England the plea may be withdrawn after verdict has been rendered. *Reg. v. Clouter* (1859) 8 Cox, C. C. (Eng.) 237. But the right to withdraw the plea after judgment has been denied by the English courts. *Reg. v. Sell* (1840) 9 Car. & P. (Eng.) 346; *Rex v. Plummer* [1902] 2 K. B. (Eng.) 339, 4 B. R. C. 917, 71 L. J. K. B. N. S. 805, 86 L. T. N. S. 836, 51 Week. Rep. 137, 66 J. P. 647, 20 Cox, C. C. 243, 18 Times L. R. 659.

And this seems to be the rule in Kentucky, subject to the qualification that, to authorize its withdrawal after verdict, there must exist such reasons as would be sufficient to justify the granting of a new trial. *Mounts v. Com.* (1889) 89 Ky. 274, 12 S. W. 311.

In Texas a plea of guilty may be withdrawn at any time before the retirement of the jury. *Alexander v. State* (1912) 69 Tex. Crim. Rep. 23, 152 S. W. 436. And such course should be followed when the evidence offered to enable the jury to fix the punishment shows a state of case under which, if true, the accused would not be guilty of any crime, as, for instance, the insanity of the accused. *Taylor v. State* (1918) 88 Tex. Crim. Rep. 470, 227 S. W. 679.

Where the defendant, after having pleaded guilty, has moved in arrest of judgment, and that motion has been denied, it is within the discretion of the court to allow the plea to be withdrawn. *State v. Cotton* (1851) 24 N. H. 143. And under these circumstances, should justice require, the court should permit a withdrawal of the plea of guilty and the substitution of the plea of not guilty. *State v. Stephens* (1880) 71 Mo. 535.

It has been held that where a defendant pleads guilty in a municipal or police court, and appeals from the sentence, he cannot of right claim a trial by jury, but may be sentenced on his original plea in the court below, unless he is given leave to plead anew. *Com. v. Mahoney* (1874) 115 Mass. 151; *Com. v. Ingersoll* (1888) 145 Mass. 381, 14 N. E. 449; *Com. v. Crapo* (1912) 212 Mass. 209, 98 N. E. 702. Accordingly, where a defendant pleaded guilty to a charge of assault

and battery, in a municipal court, and appealed from the sentence pronounced to the superior court, it was held that the superior court properly refused a withdrawal of the plea, inasmuch as the defendant stated no reason and offered no evidence in support of his request. *Com. v. Winton* (1871) 108 Mass. 485.

To the same effect, see *Com. v. Crapo* (Mass.) *supra*.

And in *State v. Martin* (1895) 68 Vt. 91, 34 Atl. 40, wherein the defendant entered a plea of guilty in a justice's court, and appealed to the county court, it was held that it was within the discretion of the county court to allow the plea to be withdrawn or to enter judgment thereon, and that it was not error to refuse a withdrawal, even though the defendant offered testimony that such had been the settled practice of the county courts for a number of years.

It was held in *Com. v. Hagarman* (1865) 10 Allen (Mass.) 401, wherein the defendant pleaded guilty before a magistrate and was duly sentenced, that his admission of guilt in the court below and the proof of the admission in the record were competent and sufficient to authorize a verdict against him.

The action of the circuit court in dismissing an appeal from the justice's court was held proper in *Stokes v. State* (1916) 122 Ark. 56, 182 S. W. 521, and in *Duncan v. State* (1916) 125 Ark. 4, 187 S. W. 906, wherein it appeared that the defendant pleaded guilty before the justice and permission to withdraw the plea had been refused.

On the other hand, it has been held, under a statute authorizing appeals from judgments of justices of the peace in criminal cases, that the defendant, as a matter of right, may withdraw, in the circuit court, a plea of guilty entered in the court below. *Holtman v. Com.* (1908) 129 Ky. 710, 112 S. W. 851; *People v. Richmond* (1885) 57 Mich. 399, 24 N. W. 124, 7 Am. Crim. Rep. 541. And the same result has been reached in the absence of statute. *Anonymous* (1809) 1 Overt. (Tenn.) 437. In *People v.*

Richmond (Mich.) *supra*, it is said: "In all cases of appeal from a criminal conviction on a plea of guilty, we think it is the right of the accused to withdraw his plea of guilty and have the case retried upon the merits. We think the object of the law granting a right of appeal in case of conviction was for the purpose of according to the accused a retrial in the circuit or appellate court. This end would be defeated if it rests in the discretion of the appellate court to permit a withdrawal of the plea of guilty for the purpose of pleading to the merits. Under the construction we give to the statute the accused was entitled, as matter of right, to withdraw his plea of guilty and interpose the plea of not guilty. This construction, we think, is in accord with the principles of justice and the manifest intent of the legislature."

In Georgia, under a statute (§ 971 of the Penal Code of 1910) declaring that "at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,'" he has the right to withdraw his plea of guilty before sentence is pronounced, but after sentence is pronounced it ceases to be a right of the prisoner, and then may be allowed in the discretion of the court. *Davis v. State* (1856) 20 Ga. 674; *Griffin v. State* (1913) 12 Ga. App. 615, 77 S. E. 1080; *Woodward v. State* (1913) 13 Ga. App. 130, 78 S. E. 1009; *Bearden v. State* (1913) 13 Ga. App. 264, 79 S. E. 79; *Polston v. State* (1915) 15 Ga. App. 632, 83 S. E. 1101; *Nobles v. State* (1915) 17 Ga. App. 382, 86 S. E. 1073; *Sanders v. State* (1916) 18 Ga. App. 786, 90 S. E. 728; *Farley v. State* (1919) 23 Ga. App. 151, 97 S. E. 870; *Walker v. State* (1921) — Ga. App. —, 107 S. E. 898; *Smith v. State* (1921) — Ga. App. —, 108 S. E. 121.

In *Woodward v. State* (1913) 13 Ga. App. 130, 78 S. E. 1009, *supra*, the defendant pleaded guilty and asked the court to postpone sentence until a subsequent day, which request was granted. On the last day of the term, when sentence was to be imposed, the defendant moved that he be permitted

to withdraw his plea of guilty and to enter a plea of not guilty, which was refused. It was held that the defendant had the absolute right to withdraw the plea. The court said: "The right which the statute gives to the prisoner to withdraw his plea of guilty before judgment is pronounced is without qualification. If, however, the trial judge should be satisfied that the prisoner is endeavoring to perpetrate a fraud upon the court by first pleading not guilty and then withdrawing that plea and then pleading guilty, and then again withdrawing the latter plea and again pleading not guilty, for the purpose of delaying his trial, or of taking advantage of the fact that the juries for the term have been discharged and the witnesses for the state have been excused, the judge would be justified in not allowing the prisoner to exercise this right; but this would require very clear and strong proof of misconduct on the part of the prisoner or his counsel. The fact that, if the prisoner is allowed to withdraw his plea of guilty, his case cannot be tried at the term in which this occurs, or that the state's witnesses have been discharged, and that the case would have to be continued, would not be sufficient to deprive the prisoner of this statutory right. It should further appear that this situation has been brought about designedly by the prisoner, for the purpose of misleading or deceiving the court in the manner indicated. The record does not show that this was the purpose of the prisoner or his counsel, and it will not be assumed that such was the purpose. The prisoner had only once entered a plea of guilty, and counsel had asked that sentence be postponed, presumably for the purpose of allowing him to procure exculpatory statements or affidavits in behalf of his client. While the record does not show the fact, it is fair to presume that between the entering of the plea of guilty and the day for imposition of sentence, the attorney for the prisoner, or the prisoner himself, may have discovered evidence in his favor. It is not the purpose of the law to

invite pleas of guilty by persons charged with crime, but rather is it the purpose of the law to guarantee to all persons charged with crime a trial by a jury. Before depriving a man of his liberty or his property, trial judges would prefer to hear all the evidence and to have the support of a verdict of a jury upon that evidence, rather than impose sentence based upon a plea of guilty."

In *Sanders v. State* (1916) 18 Ga. App. 786, 90 S. E. 728, wherein it appeared that sentence had been pronounced orally, it was held that the defendant could not thereafter, as a matter of right, withdraw his plea of guilty. The court said: "Pronounce means to utter formally, officially, or solemnly; to declare or affirm; and it has been held that as used in a statute providing that when a defendant has been convicted in two or more cases, and the punishment in each is confinement in the penitentiary, the judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, it means to utter formally and solemnly the judgment of the court and order the same to be carried into execution. . . . To permit a person to withdraw his plea of guilty after the presiding judge has informed him orally what his written sentence will be would be trifling with the law, unless some fraud or intimidation was practised upon him to secure such plea."

The Iowa statute providing that "at any time before judgment the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted," has been held to be mandatory; and under this statute it is error to deny a motion for the withdrawal of a plea of guilty if the motion is made at any time before final judgment is formally pronounced. *State v. Hortman* (1904) 122 Iowa, 104, 97 N. W. 981. Where a defendant entered a plea of guilty to an indictment for a nuisance, he was allowed to withdraw the plea before judgment. *State v. Oehlshlager* (1874) 38 Iowa, 297. But where it appeared that there was no agreement as to what the pun-

ishment of defendant would be, the mere fact that he was surprised at the extent thereof was held not to be a good ground for withdrawal of the plea after sentence. *State v. Buck* (1882) 59 Iowa, 382, 13 N. W. 342.

Under the foregoing statute and a further provision, regulating appeals from justices of the peace in criminal cases, that "the cause when thus appealed should stand for trial, as an issue of fact on an indictment in the district court," it has been held error for a district court, on appeal, to refuse the withdrawal of a plea of guilty entered in a justice's court. *State v. Kraft* (1860) 10 Iowa, 330; *State v. Farlee* (1888) 74 Iowa, 451, 38 N. E. 155, reversing on rehearing (1887) — Iowa, —, 31 N. W. 952.

It has been held that the judgment understood in the statute first quoted has reference to the pronouncement by the court, rather than to the entry thereof in the records. *Beatty v. Roberts* (1904) 125 Iowa, 619, 101 N. W. 462. Where a defendant pleaded guilty to a violation of a permanent decree of injunction restraining the illegal sale of liquor, it was held that such plea could not be withdrawn after judgment pronounced in the written opinion of the court. *Ibid.* See also *State v. Reiningham* (1876) 43 Iowa, 149.

III. Circumstances justifying grant of leave to withdraw.

As the withdrawal of a plea of guilty is within the discretion of the court, and as this discretion is exercised on the facts of each particular case, it is difficult to lay down a general rule covering all the circumstances under which a plea of guilty may be withdrawn. However, it has been held that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place, and that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty. *State v.*

Williams (1893) 45 La. Ann. 1357, 14 So. 32.

The plea of guilty to a serious criminal charge should be freely and voluntarily made and entered by the accused, without a semblance of coercion, and without fear or duress of any kind, and the accused should be permitted to withdraw a plea of guilty entered unadvisedly when application therefor is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty. *Clay v. State* (1921) — Fla. —, 89 So. 353.

It was held in *Deloach v. State* (1900) 77 Miss. 691, 27 So. 618, that the court erred in refusing a withdrawal of a plea of guilty, it appearing that the defendant submitted his own affidavit of innocence and the testimony of several persons in his favor, one of whom testified that he considered him insane, and the others of whom testified that he was weak-minded.

So, in *People v. Scott* (1881) 59 Cal. 341, wherein the evidence was sufficient to raise a doubt respecting the condition of the defendant's mind at the time his plea of guilty was interposed to a charge of the crime of incest, it was held error to deny a motion, made before judgment was pronounced, for leave to withdraw the plea.

So, where the defendant had been arraigned before a city police judge in the presence of a large crowd, that he was very much excited, and was not asked whether he wanted an attorney or given an opportunity to secure one, and that the judge construed an admission of the defendant that he had sold beer in original packages as a plea of guilty to a charge of violating the liquor laws of the city, and that was done so hurriedly and under so much excitement that the defendant did not know what was going on or being done, and was not aware that he had had a hearing until he sent for and procured counsel, it was held in *Salina v. Cooper* (1890) 45 Kan. 12, 25 Pac. 233, that the district court, on appeal, erred in

denying the defendant's motion to withdraw his plea of guilty.

In *State v. Nicholas* (1912) 46 Mont. 470, 128 Pac. 543, the defendant, while protesting his innocence, entered a plea of guilty on the urgent representations of his counsel that he was certain to be convicted and would receive a milder sentence if he pleaded guilty. The evidence taken at the time of sentence raised a serious doubt of the defendant's guilt. It was held that it was an abuse of discretion to deny a request to withdraw the plea of guilty.

It was held to be reversible error in *Little v. Com.* (1911) 142 Ky. 92, 34 L.R.A.(N.S.) 257, 133 S. W. 1149, Ann. Cas. 1912D, 241, not to permit a plea of guilty to be withdrawn where it appeared that the defendant was induced to enter the plea because he believed, and was so advised, that it was the only means by which he could escape being taken from the jail and hung by a mob.

In *Batchelor v. State* (1920) 189 Ind. 69, 125 N. E. 773, the court said: "It appears that the court advised appellant, before he entered his plea, that, if he pleaded guilty, that would give the court the right to punish him according to law; but it is not shown that the court told him what penalty the law authorized the court to inflict. After the plea and before accepting it, the court asked appellant if he understood that it became the duty of the court to impose the penalty as provided by law; but the court at no time informed him that if he pleaded guilty to murder in the first degree it would be the duty of the court to impose on him the penalty of death or that of imprisonment for life, and that the court in its discretion would determine whether the penalty to be imposed should be death or the lesser penalty of imprisonment for life. He was not informed that, in case he was tried by a jury and found guilty of murder in the first degree, the jury, in its discretion, would have the right to decide whether the penalty to be imposed should be death or imprisonment for life, and that by pleading guilty he waived the right to have a

jury exercise its discretion as to that matter. Under such circumstances, it cannot be said that appellant voluntarily entered his plea of guilty with full and perfect knowledge of the consequences of such a plea." To the same effect, see *Bielich v. State* (1920) 189 Ind. 127, 126 N. E. 220.

In *People v. McCrory* (1871) 41 Cal. 458, wherein there was nothing to show that the application of the defendant to withdraw a plea of guilty was not made in good faith, or that the entry of the plea and motion to withdraw it was a mere artifice, intended for delay, and where it appeared that the trial court improperly denied the defendant's motion for a continuance and forced him to trial in the absence of his witnesses, it was held that the defendant should have been allowed to withdraw the plea, and that, in denying his motion for leave to do so, the trial court abused its discretion.

Likewise, a plea of guilty should be permitted to be withdrawn where it has been entered under a total misapprehension of the defendant's rights through official misrepresentation or fraud (*Swang v. State* (1865) 2 Coldw. (Tenn.) 212, 88 Am. Dec. 593; see also *Com. v. Gerrity*, 1 Lack. Leg. Rec. (Pa.) 430); as, where the trial court or the prosecuting attorney induces the defendant in a criminal prosecution, by threats or promises, to enter a plea of guilty, and the defendant is thereby overreached or deceived, even in respect to the quantum of punishment. *People v. Walker* (1911) 250 Ill. 427, 95 N. E. 475; *People v. Byzon* (1915) 267 Ill. 498, 108 N. E. 685; *Myers v. State* (1888) 115 Ind. 554, 18 N. E. 42; *Mounts v. Com.* (1889) 89 Ky. 274, 12 S. W. 311; *State v. Stephens* (1880) 71 Mo. 535; *State v. Kring* (1880) 71 Mo. 551.

In *People v. Walker* (Ill.) supra, the court said: "It must be presumed . . . that the court discharged its duty. . . . But independently, entirely, of this question, it was a matter within the sound legal discretion of the judge to vacate the judgment and permit the plaintiff in error to withdraw his plea of guilty and allow

him to submit his case to a jury if it appeared that such plea had been entered unadvisedly or through a misapprehension, in consequence of the misrepresentation of his counsel. If, as he testifies in his affidavit, his attorney had assured him that he had arranged with the state's attorney that the bigamy charge was to be dropped, it is not unreasonable that the plaintiff in error would follow the advice of his counsel and enter a plea of guilty, expecting and believing that in some way he would not be imprisoned on said charge."

In *People v. Byzon* (1915) 267 Ill. 498, 108 N. E. 685, wherein it appeared that the defendant was induced to plead guilty by a policeman, under the belief that he would be released on probation, it was held an abuse of discretion not to permit the withdrawal of the plea, although the court fully advised the defendant of the consequences of his plea. The court said: "It is urged on behalf of the people that when the court, as required by statute, fully advised the defendant, on a plea of guilty, of the consequences of such plea, the explanation by the court was sufficient to advise the defendant that any previous representations made to him or any hope he may have entertained of securing leniency by reason of such plea would not avail. While this is true, it is provided by the probation law, on which plaintiff in error relied, that any defendant who has never been convicted of any crime or misdemeanor, who has entered a plea of guilty or been found guilty by the verdict of a jury or the finding of a court of certain offenses enumerated in the act, and nothing remains to be done by the court except to pronounce sentence, may request the judge who presided at his trial to be admitted to release on probation. In any way that we look at this case, it is apparent from the record that the plaintiff in error was not sufficiently advised of his rights or the method of procedure to request the court to be admitted to release under the probation law. Under such circumstances, the fact that the court fully advised plaintiff

in error of the consequences of his plea was not enough to remove the misapprehension under which he pleaded guilty."

In *People v. Joyce* (1886) 4 N. Y. Crim. Rep. 341, wherein an application to withdraw a plea of guilty was denied by the judge, under a misapprehension of the facts, it was held to be an abuse of his judicial discretion, and error.

So, the court should permit a plea of guilty to be withdrawn, where it was entered by mistake. *Davis v. State* (1856) 20 Ga. 674; *State v. Williams* (1893) 45 La. Ann. 1357, 14 So. 32; *State v. Coston* (1904) 113 La. 717, 37 So. 619; *Reg. v. Clouter* (1859) 8 Cox, C. C. (Eng.) 237.

Thus, in *Davis v. State* (Ga.) *supra*, wherein it appeared that a defendant, on arraignment, pleaded guilty by mistake to one of several indictments against him, when he intended to plead to another, it was held that the error could be corrected, even though an entry of the plea had been made on the indictment and on the minutes of the court.

And permission to withdraw the plea should be granted where it was entered through fear. *Sanders v. State* (1882) 85 Ind. 318; *Swang v. State* (1865) 2 Coldw. (Tenn.) 212, 88 Am. Dec. 593. It was said in the case first cited: "All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost a mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promissory note because of fear is entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law

they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress; for here the officers of the law—judge, sheriffs, and jailers—were inspired with fear of violence; counsel of age and experience, influenced by the appearance of danger which surrounded their client, secured from him a reluctant acquiescence to the plea of guilty. More than this, the accused, if not at the time absolutely insane and incapable of understanding what he did, was weak and enfeebled in mind, and, as his counsel express it, 'lost and bewildered.'"

That a plea of guilty was entered under a misconception of the nature of the charge has been held to justify the granting of leave to withdraw. *State v. Maresca* (1912) 85 Conn. 509, 83 Atl. 635; *Farley v. State* (1919) 23 Ga. App. 151, 97 S. E. 870; *Gardner v. People* (1883) 106 Ill. 76; *Reg. v. Clouter* (Eng.) *supra*.

Thus, in *Gardner v. People* (1883) 106 Ill. 76, *supra*, wherein a young man between nineteen and twenty years of age, who was charged with the crime of murder, and who was unable to speak or understand the English language, pleaded guilty through an interpreter, who stated to the court that the accused did not understand his situation or "the relation of things," it was held error to refuse a withdrawal of the plea.

To the same effect, see *State v. Maresca* (Conn.) *supra*, wherein the court said: "If the accused . . . pleaded guilty, without fully understanding the significance and effect of his answers, and of his plea of guilty, the judgment and sentence should, under the circumstances, have been opened and the accused permitted to withdraw his plea of guilty. . . . The accused was an illiterate Italian, having but an imperfect knowledge of our language. The trial judge can hardly have intended by his finding,

to say that the accused fully realized the difference between an assault with intent to kill and an assault with intent to murder, or the different punishments which might be imposed for the commission of a first and of a second offense. . . . In view of the serious character of the charge in the information, and its punishment, the trial court, upon the facts and circumstances disclosed by the record, should have granted the motion of the defendant's counsel, and should have opened the judgment and permitted the accused to withdraw his plea of guilty."

In *Farley v. State* (1919) 23 Ga. App. 151, 97 S. E. 870, it was said: "Where a defendant in a criminal case has entered a plea of guilty, and sentence has been pronounced thereon, he cannot as a matter of right withdraw the plea. His motion to be allowed to do so is addressed to the sound, legal discretion of the court, and the judgment thereon will not be controlled unless a manifest abuse of such discretion appears. Where, however, in such a case the accused, during the same term of court, files a written motion to be allowed to withdraw his plea of guilty, and, from uncontradicted evidence in support of the motion, it appears that the plea was entered under a misapprehension by him as to the offense to which he was pleading guilty, and that he thought he was pleading guilty to another offense, refusal to grant the motion is an abuse of discretion."

Under a statute providing that "at any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted," it has been held to be error to refuse the withdrawal of a plea of guilty after the introduction of evidence by the state, where it appears that the plea was entered upon the idea that the court would require the commonwealth to observe the custom prevailing in the court not to introduce evidence on a plea of guilty. *Williams v. Com.* (1904) 25 Ky. L. Rep. 2041, 80 S. W. 173.

On the trial of two persons indicted for forgery, where one of them

withdrew a plea of not guilty and entered a plea of guilty under a misconception of the nature of the charge, the plea of guilty and the verdict of the jury pronounced thereon were permitted to be withdrawn. *Reg. v. Clouter* (1859) 8 Cox, C. C. (Eng.) 237.

Similarly, where, on the trial of three persons charged with conspiracy, two of them were acquitted, it was held to be error to refuse to allow the withdrawal of a plea of guilty entered by the third defendant. *Rex v. Plummer* [1902] 2 K. B. (Eng.) 339, 4 B. R. C. 917, 71 L. J. K. B. N. S. 805, 86 L. T. N. S. 836, 51 Week. Rep. 137, 66 J. P. 647, 20 Cox, C. C. 243, 18 Times L. R. 659.

In *United States v. Dixon* (1807) 1 Cranch, C. C. 414, Fed. Cas. No. 14,968, wherein the prisoner was charged with a capital offense, the court explained to him the nature of his offense and its punishment. He withdrew a plea of not guilty, and pleaded guilty. Later, when the prisoner was brought up for sentence, the court again explained the nature of the penalty and offered the privilege of withdrawing his plea of guilty, which the prisoner accepted.

IV. Circumstances justifying refusal of leave to withdraw.

As the presumption is in favor of the ruling of the trial court, its denial of an application to be permitted to withdraw a plea of guilty and to plead not guilty and defend will, as a rule, be sustained, where the record discloses no ground for the application, or where it appears from the record that the court's ruling was based on conflicting evidence which it was compelled to weigh to reach a conclusion. *Dobosky v. State* (1915) 183 Ind. 488, 109 N. E. 742; *Atkinson v. State* (1920) — Ind. —, 128 N. E. 433.

In *Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477, wherein the defendant pleaded guilty to several indictments for violations of the liquor law "upon condition that he should pay a fine of \$500, in one case, and that no fine should ever be assessed against him in the other two cases unless he again should be convicted of

violating the liquor laws of the state," and he was subsequently convicted for the same offense, it was held that it was no abuse of the court's discretion to refuse to allow the plea to be withdrawn, and that judgment could be entered against him on his plea. To the same effect, see *Joiner v. State* (1910) 94 Ark. 198, 126 S. W. 723.

In *United States v. Bayaud* (1883) 21 Blatchf. 217, 23 Fed. 721, it appeared that four indictments were found against certain persons for violations of the internal revenue laws. Two of these indictments were consolidated by order of the court. On the trial, before the entry of a plea of guilty, it was understood between the counsel for the prisoners and the prosecuting officer that in case the defendants should plead guilty to the consolidated indictments, the prosecuting officer would enter a *nolle prosequi* on the other two indictments, and would not move for sentence on the consolidated indictments until the prisoners had had an opportunity to make an effort to effect a compromise of their case in Washington. It appeared that the plea of guilty was not made under any misapprehension or mistake, and that the suggestion of such a plea came to the prosecuting officer from the defendants' counsel, without suggestion, promise, or inducement by him. Under these circumstances it was held that the promise to quash the other indictments did not afford inducement to the plea of guilty of such a character as to make it proper for the court to refuse to receive it, and that the plea could not be withdrawn.

Where it appeared that in pleading to an indictment containing two counts, one for burglary and the other for larceny, the defendant pleaded guilty of larceny, and it was apparent from the record that when he entered the plea he could not have been mistaken as to what he was doing, it was held that he would not be allowed to say that he acted in error. *State v. Crane* (1908) 121 La. 1039, 46 So. 1009.

Unless the evidence is of doubtful sufficiency to support a conviction, the

fact that a defendant, knowing his rights and the consequences of his act, hopes or believes, or is led by his counsel, or others, to hope or believe, that he will receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. See the reported case (*PEOPLE v. MANRIQUEZ*, ante, 1441).

Thus, where a defendant, who was of the age of eighteen years, had contrary to the advice of his counsel, but in accordance with the wishes of his father, and in the hope of securing leniency in the infliction of punishment, pleaded guilty to a charge of murder, and all the facts showed that the crime was without extenuating circumstances, it was held that it was no abuse of the court's discretion to refuse permission to withdraw the plea when the defendant came to the bar for sentence and after he had discovered that death would be the penalty. The court said: "It thus appears that the defendant was given five days for deliberation as to his plea; that during this time he had the counsel and advice of three attorneys, all urging him to plead not guilty; that he was fully informed by them as to the difference in the procedure if he pleaded guilty, from that to be had if he pleaded not guilty, and that the court also explained to him the course of procedure. His own testimony taken in these proceedings indicates that he is a young man of at least ordinary intelligence and quickness of apprehension, while that of others tended to show that he was possessed of considerable shrewdness and cunning. It must be conceded that the court justly concluded that the defendant made his plea after ample time for deliberation, and not in ignorance of the law or facts, nor of the course of procedure to be followed, and with full knowledge thereof. Doubtless he was prompted by the hope that he would escape death and be condemned only to imprisonment, and he seems to have been in-

duced to indulge this hope largely by the suggestions and advice of his father. But we do not think this fact of sufficient force to have required the court to permit a withdrawal of this plea after the event had proven that his hope was vain. If this were so, then the punishment upon a plea of guilty must always be something less than the greatest allowed by law, for the defendant, in pleading guilty, always hopes for less, and if his disappointment was sufficient to give the right to withdraw the plea, it would, in such a case, always be withdrawn. It was not until the court had declared that the penalty would be death, and after a subsequent delay of six days, that the defendant applied to withdraw and change his plea." *People v. Dabner* (1908) 153 Cal. 398, 95 Pac. 880.

Likewise, where it appeared that the defendant, who was of the age of sixteen years, had pleaded guilty to the charge of larceny, having been induced thereto by the statement of a third person having no authority to speak that his punishment would be suspended during good behavior under this plea, and it further appeared that the defendant had had ample opportunity to withdraw the plea after having knowledge that he would receive punishment and after having been told by the trial judge what the punishment would be, it was held no abuse of the court's discretion to refuse permission to withdraw the plea after sentence had been pronounced. *Monahan v. State* (1893) 135 Ind. 216, 34 N. E. 967.

And, where a defendant was induced to enter a plea of guilty to a charge of violating the liquor law, as the result of a conversation between his friends and the prosecuting attorney, but without any definite promise of a lesser punishment being made by the prosecuting attorney, and the prosecuting attorney was not guilty of bad faith, it was held no abuse of the court's discretion to refuse to allow the plea to be withdrawn after sentence had been pronounced. *State v. Yates* (1894) 52 Kan. 566, 35 Pac. 209; *State v. Pyle* (1894) 52 Kan. 569, 35 Pac. 210.

So, where a prisoner, acting under the advice of counsel and with the knowledge of his rights and of the consequences of his act, withdraws a plea of not guilty to a charge of murder and enters a plea of guilty, it is within the discretion of the court to refuse to permit him to withdraw the latter plea; and this discretion will not be revised on appeal where it does not appear from the evidence received for the purpose of determining the degree of the crime that a lesser punishment was called for than that which the trial court imposed. *People v. Lennox* (1885) 67 Cal. 113, 7 Pac. 260, 6 Am. Crim. Rep. 542; *People v. Miller* (1896) 114 Cal. 10, 45 Pac. 986. To the same effect, see *Mounts v. Com.* (1889) 89 Ky. 274, 12 S. W. 311.

A like conclusion was reached where the defendant withdrew a plea of not guilty and substituted a plea of guilty, speculating on the anticipated clemency of the trial judge, and, upon learning that his expectation in that behalf would not be realized, attempted to retract his plea of guilty. The court said: "The motion was addressed to the discretion of the court, and, under the circumstances of the case, it not being shown that there was any abuse of discretion, the action of the court must stand." *People v. Brown* (1918) 38 Cal. App. 46, 175 Pac. 85.

Where, on a motion to withdraw a plea of guilty, the defendant's affidavit did not aver that he was innocent, but showed that he was an old offender and that the plea had been induced by reason of the fact that a mild penalty had been inflicted, under a plea of guilty, on a previous occasion, and where it appeared that the only reason for a withdrawal was that the defendant was alarmed by a rumor that he was to be more severely dealt with than before, it was held that there was no error in refusing to permit defendant to withdraw his plea, the court saying: "The action of the court probably and properly taught him that the infliction of the lowest penalty for a first offense, instead of conferring a vested right to the same measure of punishment for

a second, rather suggests the propriety of so increasing the penalty that it may effectually deter from a recurrence of a third." *Mastronada v. State* (1882) 60 Miss. 86.

Similarly, where the defendant made no request for the court to appoint counsel for him, and, on his motion to set aside the plea of guilty, did not offer to introduce any testimony tending to prove his innocence of the crime charged, and his testimony was not sufficient to show that he was induced to enter a plea of guilty under a misapprehension of the facts, it was held that there was no abuse of the court's discretion. *Cox v. State* (1914) 114 Ark. 234, 169 S. W. 789.

If a defendant, on entering a plea of guilty, states his version of the facts, and such facts do not constitute a justification or excuse, there is no abuse of discretion in refusing to permit the withdrawal of the plea unless it clearly appears that the statements were made under duress or mistake or other cause sufficient to satisfy the trial court that the statement made on entering the plea was untrue. *Turner v. State* (1919) 121 Miss. 68, 83 So. 404.

Where it did not appear that a plea of guilty had been put in by the defendant through any mistake, surprise, or misapprehension of his rights or in relation to the facts of the case, it was held that the plea could not be withdrawn upon a mere request of counsel, made after sentence had been pronounced, even though the record of the court had not been read and signed by the judge. *Griffith v. State* (1871) 36 Ind. 406.

So, if there was no misapprehension as to the nature of the charge against the defendant, and it appeared that a considerable length of time had elapsed since the day of arraignment, that the jury had in the meantime been discharged, and that the relief prayed for would practically have operated as a continuance of the cause to a future term of the court, it was held that a motion to withdraw the plea of guilty was made too late, and was properly denied. *State v. Dela-*
20 A.L.R.—92.

houssaye (1885) 37 La. Ann. 551; *State v. Williams* (1893) 45 La. Ann. 1357, 14 So. 32; *State v. Jammerson* (1897) 49 La. Ann. 597, 21 So. 728.

A motion to set aside a plea of guilty and the judgment thereon has been held to have been properly overruled, where it appeared that the defendant did not enter the plea of guilty under the belief that he would receive a lighter punishment than that imposed, and was not misled by anything said or done by the prosecuting officer. *State v. Richardson* (1889) 98 Mo. 564, 12 S. W. 245.

In a case where the defendant entered a plea of guilty to a charge of violating the Sunday law, and judgment thereon was suspended pending the outcome of a test case against another offender, it was held that there was no error in denying the defendant's motion to be allowed to withdraw his plea, made a year after such plea had been entered. *Territory v. Cook* (1893) 7 N. M. 248, 33 Pac. 1022.

Where a defendant pleaded guilty, at one term of court, to an indictment for a violation of the liquor law, it was held that a denial of an application to withdraw the plea, made at the next term of court, was proper, as coming too late. *State v. Shanley* (1893) 38 W. Va. 516, 18 S. E. 734.

Where a defendant pleaded guilty to several indictments for forgery and was sentenced on one of the indictments, judgment on the others being suspended, and subsequently, after being pardoned, he moved for leave to withdraw his pleas to the indictments pending and to file a plea of a former conviction for the same offense, it was held that the withdrawal was properly denied. *Barton v. State* (1869) 23 Wis. 587. See also *Tate v. State* (1898) — Tex. Crim. Rep. —, 45 S. W. 707.

In *State v. Boutte* (1907) 119 La. 134, 43 So. 983, the complaint urged by counsel for and on behalf of the defendant was that the district judge had improperly refused to allow the accused to withdraw a plea of guilty to "cutting and stabbing with a dangerous weapon with intent to kill," which the accused had been permitted to enter in lieu of his original plea of

not guilty to a charge of "wilfully, feloniously, and of his malice aforethought cutting and stabbing . . . with intent to kill and murder," and to allow him to enter a plea of not guilty, in order to be tried by a jury. The plea sought to be withdrawn had been accepted by the district attorney and the court. The motion to withdraw the plea was not signed by the accused himself nor did it state that he had any legal defense. The ruling of the trial judge was sustained. The court said: "Where, however, the accused does not plead guilty to the charge as made, but pleads guilty to a lesser offense, which places him in a position of safety and security relatively to the more serious offense, and where the district attorney and the district judge accept that plea, and by so doing substantially and practically abandon the greater charge, courts should exercise very great caution lest they themselves, by acceding to the wishes of counsel (under their sanguine expectations that the ultimate result of the trial will be the acquittal of their client), place the accused in a worse condition than he held before. In matters of that character courts should have before them positive evidence from the accused parties themselves that they are willing to take the chances of a trial on the higher charge, and they should themselves set out and sustain the grounds upon which they ask the withdrawal of their plea of guilty. To require less than this would, in our opinion, tend to impair the proper administration of justice."

V. Effect of withdrawal.

The admissibility in evidence of a plea of guilty, after its withdrawal and the substitution therefor of a plea of not guilty, for the purpose of establishing the fact that the defendant, at a prior time, made a claim inconsistent with his innocence, has been the subject of conflict in the authorities. In a Kentucky case, *Com. v. Ervine* (1839) 8 Dana (Ky.) 30, wherein it appeared that a conviction on a plea of guilty had been reversed and a plea of not guilty had

been entered on a second trial, without objection by the commonwealth, it was held that the former plea of guilty was properly admitted, but was not conclusive of the guilt of the accused.

With two judges dissenting, a like conclusion was reached in the Connecticut case of *State v. Carta* (1916) 90 Conn. 79, L.R.A.1916E, 634, 96 Atl. 411, wherein the court apparently followed the Kentucky case, *supra*. In the majority opinion it was said: "Where an accused person has pleaded guilty in a justice or other inferior court, and has taken an appeal, or been bound over to a higher court, he is there always permitted to plead anew, and it has always been the rule in this state that, upon the trial there, the fact that he pleaded guilty in the lower court might be put in evidence either by the record or by testimony of witnesses who were present and heard the accused when he entered the plea. This is not conclusive upon the accused, and is insufficient to warrant a conviction without other evidence to prove the corpus delicti. This is the rule in a majority of the other states, although some have held that the confession in the lower court is a judicial confession and sufficient, without independent evidence of the corpus delicti, to warrant a conviction. It would seem that the same principle which admits the admission or confession of the accused in the lower court to be introduced against him in the upper court should admit, with the same consequences, his confession by a plea of guilty, afterward withdrawn, in the upper court. The plea of guilty, as was said in *State v. Willis* (1898) 71 Conn. 293, 308, 41 Atl. 820, 'is conviction,' until the plea is withdrawn. The withdrawal of the plea withdraws the evidence of conviction, but it does not withdraw the fact that such a plea was entered. It is as competent to give evidence of that fact as to give evidence that a similar fact occurred in the justice or magistrate's court. Neither is conclusive upon the accused. The evidence in each case establishes a fact which is inconsis-

ent with his later claim before the jury that he is innocent." In the minority opinion, Wheeler, J. (dissenting), said: "Considerations of fairness would seem to forbid a court permitting a plea to be withdrawn for cause, and at the next moment allowing the fact of the plea having been made to be admitted in evidence, with all its injurious consequences, as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong. The majority hold that the fact that the former plea may be explained will be a sufficient protection to the accused. Such a ruling places upon him a burden of disproving a fact which does not exist, for the withdrawal eradicated it. It brings him before the jury under the heavy cloud of suspicion created by his plea of guilty, when he is entitled to come before the jury with the presumption of innocence shielding him. It makes him prove again that his plea was wrongly entered, when that fact has already been judicially ascertained and settled by a court of competent jurisdiction, and cannot be opened unless a higher court finds an abuse of that court's discretion."

So, in *State v. Meyers* (1889) 99 Mo. 107, 12 S. W. 516, wherein the court refused to accept a plea of guilty, and on the trial permitted the prosecution to prove the fact that the indictment had been read to the accused and that he had pleaded guilty thereto, it was said: "Such testimony should not have been admitted. The confession, being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. . . . Consequently, the trial court might have proceeded at once to pass sentence upon the accused. But this fact surely did not authorize the reception of the plea of guilty in evidence, after the court had refused to receive that plea, and had placed the defendant upon his

trial. No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually go upon record or not; in either case, it must, if received in evidence, be conclusive of the defendant's guilt. Like the previous question in parliamentary bodies, evidence of such a plea, having been made before a tribunal competent to try the party making it, cuts off debate and determines all issues. The course therefore pursued by the trial court, in this regard, was plainly inconsistent; the plea of the defendant should either have been received, and sentence passed accordingly, or that plea should never have been heard of again. By refusing to receive the plea and granting the defendant a trial, this of necessity meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the state desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time, and then use it against him at another."

Under the California statute providing that "the court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted," it has been held that the plea of guilty is not admissible in evidence against the accused, such plea being *functus officio*. *People v. Ryan* (1890) 82 Cal. 617, 23 Pac. 121. In support of its holding, the court said: "We do not think that the legislature, in passing the law under which the defendant was allowed to nullify and render *functus officio* his plea of guilty by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty."

Where a principal was permitted to

withdraw a plea of guilty to a charge of larceny, it was held, on the trial of an accessory, that there was no error in instructing the jury that the plea of guilty, which was filed and entered by the principal before the trial of the accessory began, was still before them, and might be considered by them only to show that fact, but that it was not conclusive evidence of the guilt of the principal, and that they should consider other evidence, outside of that furnished by the record, to establish this fact. *Groves v. State* (1886) 76 Ga. 808.

But it has been held that a court goes too far in indulging a defendant, an accessory, when the principal is

allowed to withdraw his plea of guilty pending the trial of the accessory, and the court offers the defendant an opportunity to withdraw his case, and on that account to have a mistrial declared. *Ibid.*

Where a defendant withdrew a plea of guilty of murder in the second degree, before sentence was pronounced, and substituted therefor a plea of not guilty to an indictment for murder, it was held that the withdrawal of the plea of guilty operated as a waiver of the implication, which existed so long as the plea remained, of an acquittal of murder in the first degree. *People v. Cignarale* (1888) 110 N. Y. 23, 17 N. E. 135. A. S. M.

E. RAY MYERS et al., Appts.,

v.

CLARENCE E. SHIPLEY.

Maryland Court of Appeals — January 25, 1922.

(— Md. —, 116 Atl. 645.)

Automobile — liability of parents for injury by negligent driving of child.

1. A father maintaining an automobile for general family purposes is not liable for an injury caused by the negligent driving of the car by his adult son, who is a member of his family, and who has taken the car for a purpose of his own without the father's express knowledge or consent, but with implied general authority to make use of the car.

[See note on this question beginning on page 1469.]

Principal and agent — liability for acts of agent — tort.

2. To hold one responsible for the tortious acts of another not committed by his order, on the ground of ratification, the admission of liability must

be explicit and with full knowledge of the facts.

[See 26 R. C. L. 767.]

— **disaffirmance of ratification.**

3. A person may disaffirm a ratification of the acts of his agent made before he knew the material facts.

[See 21 R. C. L. 929.]

APPEAL by defendants from a judgment of the Circuit Court for Carroll County (Moss, J.) in favor of plaintiff in an action brought to recover damages for injury to plaintiff's property, for personal injuries to himself, and loss of services and expenses incurred for injuries sustained by his wife, alleged to have been caused by the negligence of the defendant son. *Affirmed as to defendant son; reversed as to defendant father.*

The facts are stated in the opinion of the court.

Messrs. F. Neal Parke, James A. C. Bond, and Edward O. Weant for appellants.

Messrs. Ivan L. Hoff and Guy W. Steele, for appellee:

Where the head of a family makes it

his business to provide recreation and pleasure for the family and its several members, and to that end furnishes an automobile for their use, he is responsible for its negligent operation by any one of the family having his permission to drive it.

Plasch v. Fass, 144 Minn. 44, 10 A.L.R. 1446, 174 N. W. 438; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59, note; Ulman v. Lindeman, 44 N. D. 36, 10 A.L.R. 1442, 176 N. W. 25; Vannett v. Cole, 41 N. D. 260, 170 N. W. 663; Hutchins v. Haffner, 63 Colo. 365, L.R.A.1918A, 1008, 167 Pac. 966; McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417; Farnham v. Clifford, 116 Me. 299, 101 Atl. 468; McNeal v. McKain, 41 L.R.A.(N.S.) 775, note; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; King v. Smythe, L.R.A.1918F, 297, note; Boes v. Howell, 24 N. M. 142, L.R.A.1918F, 288, 173 Pac. 966; Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595; Johnson v. Smith, 143 Minn. 350, 173 N. W. 675; Griffin v. Russell, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; Hiroux v. Baum, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 354; Stowe v. Morris, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 53; Landry v. Oversen, 187 Iowa, 284, 174 N. W. 255; Collinson v. Cutter, 186 Iowa, 276, 170 N. W. 421; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Miller v. Weck, 186 Ky. 552, 217 S. W. 904; 20 R. C. L. 629; Doran v. Thomsen, 76 N. J. L. 759, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; King v. Smythe, 140 Tenn. 217, L.R.A. 1918F, 293, 204 S. W. 296.

Plaintiff having proved the ownership of the car, the presumption arose that the person driving it was the servant or agent of the owner, and the burden is cast on him to show he was not.

Vonderhorst Brewing Co. v. Amrhine, 98 Md. 406, 56 Atl. 833; Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202.

It is only when the servant abandons his duty and wilfully becomes a wrongdoer that the master is exempt from all responsibility for his wrongful acts.

Western U. Teleg. Co. v. Rasche, 130 Md. 126, 99 Atl. 991.

Boyd, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment obtained by the appellee against Howard E. Myers, the owner of an automobile, and E. Ray Myers, his adult son who was driving it when an accident occurred, due to the alleged negligence of the latter. This suit was for the destruction of the plaintiff's buggy, injury to his horse, and for personal injuries to himself and the loss of the services of his wife, and expenses incurred by him for injuries sustained by her. Another suit by Mrs. Shipley resulted in a judgment for her, and the parties agreed that the record in that case should not be transmitted to this court, but that the judgment therein rendered should abide the result of this appeal. In addition to the usual allegations in such cases, it is alleged "that thereafter the defendant Howard E. Myers adopted and ratified said act, reckless, careless, and negligent operation of said automobile, by his said ——— or son, the defendant E. Ray Myers, whereby the plaintiff and his wife were damaged and injured as aforesaid, and assumed liability and responsibility for it."

The only bill of exceptions in the record is one presenting the rulings of the court in rejecting the defendants' prayers 1 and 1½, but the appellants' attorneys in their brief concede that prayer 1½ was bad under what we said in *Firor v. Taylor*, 116 Md. 69, 84, 81 Atl. 389, 2 N. C. C. A. 551. The only one for our consideration, therefore, is the first, which is "that under the pleadings there is no legally sufficient evidence from which the jury may find that the defendant Howard E. Myers was responsible in any way for the injury on account of which recovery is sought in this suit, and the verdict of the jury must be for the said Howard E. Myers."

Apparently the appellants were under the impression, by reason of

what was said and done in *Firor v. Taylor*, supra, and *Ewing v. Rider*, 125 Md. 149, 156, 93 Atl. 409, that, as there was a joint judgment against the two, there must be an affirmance or reversal of that joint judgment under the first prayer; but, since those decisions, Acts 1920, chap. 229, adding § 22B to article 5 of the Code, was passed, providing that "if, on appeal, it shall appear to the court of appeals that said judgment should be affirmed as to all said defendants or should be reversed as to all said defendants or should be affirmed as to one or more of said defendants and should be reversed as to one or more of said defendants, then the said court of appeals may so direct."

As there is no valid exception in favor of E. Ray Myers, the only question, therefore, before us, is whether the judgment against Howard E. Myers should be affirmed or reversed.

Howard E. Myers owned the car which is alleged to have caused the injuries complained of. He was called as a witness by the plaintiff, and it appears in his testimony that he had six children, E. Ray Myers being the second one. He got this car in April or May, 1920, and had one before, which he traded and got this one. He was asked:

Q. Is this car used for your family?

A. Yes, sir.

Q. Who had been running the car; your son?

A. Yes, sir; both of them; the boy next to him, and the older boy before he left home.

Q. All of them had a right to use it for family use?

A. Yes, sir.

On cross-examination he testified that his son Ray was twenty-two years old, that he employed him on the farm, and paid him wages by the month, and he was so employed at the time of the accident. He said, if the boys were out, and wanted gasoline or oil, they got it, and, if anything happens, like spark plugs

or something like that, they get them and pay for them. He said he did not know anything about the accident at the time it happened; that he did not know anything about his son taking the car out that night, or for what purposes he took it; that the night of the accident the car was at a garage in Westminster, where it had been for a day or two. He was asked:

Q. What was it there for?

A. For some little repairs; I don't know. I think maybe battery trouble. I don't pay much attention to the car myself.

He said he did not know anything about his son going for the car that night, and he had not told him to go. He was asked by the attorney for the plaintiff:

Q. Of course, Mr. Myers, your son, as you have stated, had perfect authority to get that car that night and use it?

A. If it was done, he had. I didn't tell him nothing about it.

Q. You didn't tell him not to do it?

A. No, sir.

Upon being asked by his attorney:

Q. It was not for any purpose of yours that he would go down the road to an oyster supper?

A. I wouldn't think so; he didn't bring me any oysters back.

The defendant E. Ray Myers said the automobile had been at the garage a day or two; that he went to town that night on the train (they lived 3 or 4 miles from Westminster), and did not have any conversation with his father in reference to the automobile; that they had said at the garage that they expected it would be finished, and he went for it; that Earl Shaffer got in the car with him, and they were going to an oyster supper at a village called Gamber. Earl Shaffer corroborated him. It is a five-passenger Paige car, and they expected to get two girls to go with them, but had not when the accident happened.

We come now to the question left unanswered in the case of *Whitelock v. Dennis*, 139 Md. 557, 116 Atl. 68, decided at this October term, whether the owner of an automobile provided by him for the use of his family is liable to a party injured by the negligence of his son when the car was being used wholly for purposes of the son, and not for those of the owner. In the case of *Whitelock v. Dennis* we said: "We are not willing to commit ourselves to the doctrine that an owner of an automobile is responsible for injuries sustained by a third party by reason of the negligence of a minor son in running the car, if the car was at the time being used by the son for his own purposes, and not for those of his father, even if he had the permission, express or implied, of his father so to use the car."

And we said that the defendant's third prayer, which in substance announced that rule, should have been granted. Of course, we were careful to confine the rule to such facts as we then had before us, which did not show that the use of the car by the son necessarily or probably involved unusual danger, and there was no evidence of his being reckless or incompetent to drive a car. That son was only eighteen years of age, but he had a state license to operate a car. As there was a conflict of evidence in that case as to whether it was being used for the father, we held that the case should go to the jury.

There is an unfortunate conflict in the decisions bearing on this subject. Many of them have been made by courts of high standing and have been supported by forcible and exceptionally able opinions, presenting the views of the respective sides, if we may use that term, of the controversy. We cannot but be impressed, however, with the conviction that some of them have disregarded principles of law applicable to the relations of principal and agent and master and servant, which before the days of automo-

biles, and especially before they had become so numerous on our streets and other highways, were supposed to be as firmly fixed as any principles known to the common law.

There have been some attempts to separate the decisions of the courts in the different states into two main classes,—those holding the owners of cars purchased for the use of their families responsible for injuries sustained by the negligent driving of their sons, or other members of their families, and those holding that they were not liable,—but, as many of them depend upon the facts of the particular cases, it is necessary to examine them critically in order to ascertain how they can be properly classified. In this case, as an adult son, living with his father, was driving the car for his own purposes, without the knowledge of his father that he was using it on that occasion, but undoubtedly with implied authority so to use it, we will refer to such of the authorities as may be of use in support of the position we will announce for this court. One of the fullest discussions we have found on the subject is in the case of *Hays v. Hogan*, 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286, Ann. Cas. 1918E, 1127. There the case of *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, which is often cited in support of the view that the owner is liable, was expressly overruled, as was *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125. The supreme court of Missouri held that "the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had the father's special or general permission to so use the car is wholly immaterial."

Of course, the fact that the son is an adult does not lessen, but some-

times may strengthen, the reasons for the rule. In *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150, an eighteen-year-old son took his father's automobile for his own uses, without the father's knowledge, but by his implied general permission, and it was held that the son was not the agent of the father, and the latter was not liable for the negligence of the former in operating the car. The court said the doctrine that the pleasure of the family is the business of the father "has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity and his reasonable care for the pleasure, or even the well-being of his children, by imposing a universal responsibility for the acts."

In *Spence v. Fisher*, 184 Cal. 209, 14 A.L.R. 1083, 193 Pac. 255, it was said, in reference to the theory that the son was engaged in the business of his father in such cases: "Of course, it is true that every good father makes it his 'business,' in a certain sense of that word, to furnish, so far as he can, for use by the members of his family, all those things that will contribute to their convenience and pleasure. But to our minds his doing this cannot, by any sound reasoning, warrant a conclusion that, in the subsequent use of the thing by a member of the family solely for his own convenience or pleasure, while engaged exclusively on a mission of his own, such member of the family is engaged on the father's business, or in any way acting as his agent or servant."

That case overruled *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595.

The case of *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, is a leading one in favor of the doctrine that the father is not responsible for the negligence of a son or daughter while using the car for his or her own purposes, and

not those of the father, although used with the permission of the father. The court said that the mere fact of the relation of parent and child would not make the child the servant of the parent, and held that his liability in such a case depended upon the relation of master and servant. It said: "She was not even driving other members of the family. She was using the machine as a means of recreation and pleasure for herself and her own friends, and it would seem impossible to draw the conclusion that she could be regarded as the agent or servant of her father upon that occasion."

It then went on to say that, assuming the relation of master and servant existed generally between the father and daughter, yet it did not appear that on the occasion in question she was acting as such within the scope of her employment, and repeated the well-known doctrine that the master was "not responsible if the negligence was committed by the servant when engaged in some private matter of his own." It is contended that the doctrine of that case has been very much modified, if not reversed, by that court in *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322. In that case Hayes had purchased a car for the general uses of his family, and it was for that purpose habitually operated by the owner and his two sons, sometimes with and sometimes without his express consent and direction. At the time of the accident one of the sons was driving the car, and in it were the wife and daughter of the father and two guests. The court said in the *Doran* Case: "No other members of the father's family were in the car. The only element in the case tending to show that the daughter was acting as the servant of the father was the bare fact that the father owned the automobile, which, being personal property, was presumably, in the absence of evidence to the contrary, in his possession or the possession of his servant at the time of the accident; possession being the

badge of ownership of personal property. This presumption, however, in that case, was overcome by the uncontradicted proof that in fact the automobile was not in the possession of the owner or his servant, but that, on the contrary, it was in the possession of a third party (who happened to be his daughter), who was using it for her own pleasure and the pleasure of her friends, and not upon the owner's business."

The court then went on to say that in the Hayes Case there were the father's immediate family and their guests: "This fact constituted affirmative evidence that the automobile was being used in the father's affairs or business. It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation, just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways. It cannot be said, therefore, that in this case there was no evidence of possession except a mere presumption which could be overcome by proof of inconsistent facts. Here there was affirmative proof of the fact of possession, quite apart from any presumption."

The court said that there was also evidence that the son invited his mother and sister to take a ride as his guests on a trip which he was taking for his own pleasure or business, and that they were doing so as such, and not as members of his father's family, and hence it became a question for the jury to decide, and added: "We think the question was one of fact, and that it was properly submitted to the jury." But the case of *Doran v. Thomsen* was not overruled, but expressly affirmed.

There seems to be some misunderstanding about the doctrine adopted in Maine. In *Farnham v. Clifford*, 116 Me. 299, 101 Atl. 468, the court did not hold that the father was responsible because he

bought the machine for the pleasure of himself and family, but the motion for a new trial, which was then being reviewed, was distinctly overruled on the ground that after the accident, with full knowledge of the facts, the father admitted his liability, and when he went upon the stand he did not deny that he had so admitted, and did not contradict or explain the statement alleged to have been made by him, but allowed it to pass as true and unchallenged. The court said that that authorized the jury to find that he knowingly made the admission, and that his admission was true. In *Farnum v. Clifford*, 118 Me. 145, 106 Atl. 344, the court said that an instruction was without error which said: "Liability cannot be cast upon the defendant in this case because he owned the car, or because the driver at the time of the accident was his son, or because he permitted his son to use the car. There must be the further relation of master and servant between them, and the son, at the time of the accident, must have been using the car in the business of the defendant."

In *Pratt v. Cloutier*, 119 Me. 203, 10 A.L.R. 1434, 110 Atl. 353, it was held, quoting for convenience from the syllabus in the *Atlantic Reporter*: "A father who furnishes an automobile for the pleasure of his family, and allows his minor son to drive whenever he desires, is not responsible to a third person for the son's negligence while using the car solely for his own pleasure."

That case reviewed a number of others, and pointed out that the citation of *Farnham v. Clifford*, 116 Me. 299, 101 Atl. 468, by the court in *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675, in support of the Minnesota doctrine, was not justified. It also cited the case of *Mad-dox v. Brown*, 71 Me. 432, 36 Am. Rep. 336, to show that in Maine the doctrine then being applied to automobiles was announced in the case of a minor son taking his father's horse and carriage, which he had been allowed to use without restric-

tion. In the case of *Van Blaricom v. Dodgson*, 220 N. Y. 111, L.R.A. 1917F, 363, 115 N. E. 443, the court of appeals of New York, in speaking of the doctrine that the father is liable in such cases, says: "This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use and occasionally permits a capable son to use it for his individual convenience ought to be regarded as having undertaken the occupation of entertaining the latter and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question."

After saying that an affirmative answer had been given by the courts of some states (citing *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Griffin v. Russell*, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; and two cases of Missouri appeals which have been overruled by the supreme court of that state), that court said: "But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principle every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct, which, so far as we are aware, has never been applied to other articles than an automobile."

But we will extend this opinion to an unreasonable length if we continue to quote from the cases. We will content ourselves by referring to some others maintaining the views of those referred to above, such as: *Arkin v. Page*, 287 Ill. 420, 5 A.L.R. 216, 123 N. E. 30;

Smith v. Weaver, — Ind. App. —, 124 N. E. 503; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; *Knight v. Cossett*, 102 Kan. 764, 172 Pac. 533; *Watkins v. Clark*, 103 Kan. 629, 176 Pac. 131; *Stafford v. Noble*, 105 Kan. 219, 182 Pac. 650; *Weiner v. Mairs*, 234 Mass. 156, 125 N. E. 149; *Woods v. Clements*, 113 Miss. 720, L.R.A.1917E, 357, 74 So. 422; id. 114 Miss. 301, L.R.A.1917E, 358, 75 So. 119; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096; *Heissenbuttel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087; *Elms v. Flick*, 100 Ohio St. 186, 126 N. E. 66; *McFarlane v. Winters*, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876; *Blair v. Broadwater*, 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632.

There are quite a number of cases which are generally classed with the courts taking the view that the owner is liable under the circumstances referred to above, in which the child was driving the car with or for other members of the family. It was said in *Pratt v. Cloutier*, supra: "Few, indeed, of the many cases cited, will be found to go so far as to hold a father liable when a son, alone in the father's car, seeking only his own pleasure and entertainment, and while so engaged, injures a third party. The reason for finding the father liable in the cases so holding is usually founded on the fact that one other member of the family, at least, accompanied the driver, thus raising the questions which in each case have gone to the jury."

The appellee contends that there can be no valid distinction made between such cases, and those in which a son was driving wholly for his own purposes, without having any other member of the family with him; but courts of standing have made such distinctions, as shown by the cases, and when they have done so they have generally held that, when there is another member of the family being driven

by one, it is for the jury to determine whether the driver was acting for himself alone, or for his father. In this case it is shown that there was no other member of the family with the son, and hence we need not discuss the effect, if any, of such difference in the facts. The appellants state in their brief that *Benton v. Regeser*, 20 Ariz. 273, 179 Pac. 966; *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575; *Boes v. Howell*, 24 N. M. 142, L.R.A.1918F, 288, 173 Pac. 966; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A. (N.S.) 775, 126 Pac. 742; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487, and *Denison v. McNorton*, 142 C. C. A. 631, 228 Fed. 401, were cases in which the child was driving with or for other members of the family, but we have not thought it necessary to examine to see whether those courts have passed on the question when the driver was the only member of the family in the car. The states of Kentucky, Minnesota, Tennessee, and Washington have not made such distinctions, and hence it must be conceded that there is conflict between the authorities, although some cases in several of those states would seem to be more in favor of the appellants' contention than that of the appellee. The cases of *King v. Smythe*, 140 Tenn. 217, L.R.A.1918F, 293, 204 S. W. 296, and *Birch v. Abercrombie*, supra, have perhaps presented the views of those holding the father liable as forcibly as any of the others, and seem to be leading cases. In chapter 26 of *Berry on Automobiles*, 3d ed., beginning on page 1072, § 1160, and *Huddy on Automobiles*, 5th ed., beginning with § 656, on page 849, and continuing to § 662, on page 863, most of the cases are cited in the notes, but it would take a good-sized volume to discuss all of them fully, and point out wherein they differ with other decisions. In Michigan, where the courts were also in accord with the view we have announced as to this question, the rule has been changed by statute, which would seem to us

to be a far preferable way, if it be deemed best to adopt the other rule, rather than to run counter to well-established principles in reference to master and servant and principal and agent which cannot stand in their integrity if some of the automobile cases we have found are to be followed. It is said in *Hatter v. Dodge Bros.* 202 Mich. 97, 167 N. W. 935: "As the law now stands, it is not a prerequisite for recovery to prove that the motor vehicle causing an injury was being operated in the business of the owner, for his use and enjoyment, or by his servant or employee."

If many legislatures adopt such a rule as that, it will probably be because so many automobilists seem to forget at times that they do not have the right to the exclusive use of the highways, but it would be better to pass and enforce stricter laws in the use of the highways than simply provide for recovery of damages, which cannot restore life, or always compensate for injury.

While our decisions have not hitherto definitely settled the main question herein involved, they have approached it in some respects, and they place us more in line with the courts which have held that, under such facts as we have in this case, the plaintiff cannot recover. The opinion in *Whitelock v. Dennis*, 139 Md. 557, 116 Atl. 68, filed December 2, 1921, is the last one on the general subject, and we need not dwell on *Symington v. Sipes*, 121 Md. 313, 47 L.R.A. (N.S.) 662, 88 Atl. 134, and *State use of Debelius v. C. B. Benson & Co.* 129 Md. 693, 100 Atl. 505, therein referred to at some length. It may be well to say that in *Buckey v. White*, 137 Md. 124, 111 Atl. 777, we said enough to show that, but for the technical reason therein stated why we could not do so, we would have reversed that judgment on the ground that there was not enough in the record to show that the father was liable, although it was shown that the car was purchased by him and used in his business, and from time to time

for the convenience of his family. It was being driven by his son, Earl Buckey, who was then about twenty-two or twenty-three years of age, lived with his father, and assisted him in his business. At the time of the accident the son, who had the privilege of using the car whenever he wished, was driving friends to a dance. In *Charles v. Baltimore* (decided May 13, 1921) 138 Md. 523, 114 Atl. 565, we said agency cannot be inferred merely from the relationship of husband and wife; that Mr. Charles was using the machine (which belonged to his wife), not for any business of his wife, but in connection with his own occupation, and the use of it was merely a permissive use.

There can be no difficulty about the question of the alleged adoption of the act of E. Ray Myers by Howard E. Myers. The general rule is thus stated in 1 Am. & Eng. Enc. Law, 2d ed. 1185: "The doctrine of ratification applies as well to torts when done to the use or for the benefit of him who subsequently adopts them as to matters of contract. . . . But, to hold one responsible for the tortious act of another not committed by him or by his order, the adoption must be explicit and with a full knowledge of the facts."

In addition to the fact that the alleged wrong was not done in the interest, or for the use or benefit, of the father, as required to make him liable (1 Cooley, Torts, 3d ed. 214, 217; 1 Poe, Pl. & Pr. 481, 525; *Hammond v. Du Bois*, 131 Md. 116, 154, 101 Atl. 612), the alleged ratification was far from being explicit and with a full knowledge of the facts.

The plaintiff testified that the next morning after the accident, in the presence of his son, Howard E. Myers said to him that "if his son was to blame, he was willing to 'daddy' the blame." Raymond Day-

hoff testified that the day after the accident he said, "if his son had done any damage to the plaintiff's 'automobile,' he would stand all expenses or damages." As the plaintiff had no automobile in the accident, there is manifestly some mistake in that testimony. Carroll Owings said he told him that, "if his boy did it, he was willing to 'daddy' it, and, if he didn't do it, he don't feel that he ought to do it." It could hardly be said that there was an explicit adoption of the act of the son, and the father showed by his testimony that he did not have a full knowledge of the facts when he said what he did. He went on the stand in rebuttal and denied that he then said what Mr. Dayhoff testified to, and in answer to what he said to the plaintiff he testified: "I told Mr. Shipley before I left home, I told him at home, that if the boys were the cause of this, I would stand by them. After I went out there I found there was another car, and I told Mr. Shipley I wouldn't daddy the other fellow's dirt."

There is no contradiction of that, and, if a person ratifies an act of his agent before he knows the material facts, he may afterwards disaffirm. Adams Exp. Co. v. Trego, 35 Md. 47; *Bannon v. Warfield*, 42 Md. 22. Mr. Myers did what the court said in *Farnham v. Clifford*, 116 Me. 299, 101 Atl. 468, the defendant in that case should have done, and he could not have been held liable on the ground that he had made such qualified statements as it is claimed he did make.

We are of the opinion that the defendants' first prayer should have been granted. We said in *Whitelock v. Dennis*, supra, the presumption arising from such facts as we referred to in *Stewart Taxi-Service Co. v. Roy*, 127 Md. 70, 95 Atl. 1057, can be rebutted, and we referred to the fact that in *Symington v. Sipes*, and *State use of Debelius v. Benson*, supra, we had approved prayers

Automobile—
liability of
parents for
injury by negli-
gent driving of
child.

Principal and
agent—liability
for acts of agent
—tort.

—disaffirmance
of ratification.

which instructed verdicts for defendants on the ground that the drivers were not acting within the scope of their employment, notwithstanding the presumption referred to. We will only add to that what was said by Judge Thomas, in speaking for the court, in *Dearholt Motor Sales Co. v. Merritt*, 133 Md. 323, 330, 105 Atl. 316. After referring to *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, 56 Atl. 833, *Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202, *Stewart Taxi-Service Co. v. Getz*, 118 Md. 171, 84 Atl. 338, *Symington v. Sipes* and *State use of Debelius v. Benson*, supra, and *National Mechanics' Bank v. National Bank*, 36 Md. 5, he said: "The effect of the Maryland cases referred to is that, where the evidence in the case, whether produced by the plaintiff or by the defendant, is uncontradicted and clearly shows that the

person in possession of the vehicle or machine was not, at the time of the accident, the servant or agent of the owner, there can be no recovery against the owner, and that the case should be withdrawn from the jury."

He then went on to show that *Stewart Taxi-Service Co. v. Roy*, 127 Md. 70, 95 Atl. 1057, did not establish a contrary rule.

It follows that the judgment against Howard E. Myers must be reversed, and, as there could be no recovery, a new trial will not be awarded, but, for reasons stated above, the judgment against E. Ray Myers must be affirmed.

Judgment against E. Ray Myers affirmed, and judgment against Howard E. Myers reversed, without a new trial, one half of the costs above and below to be paid by E. Ray Myers, and the other half by the appellee.

ANNOTATION.

Liability of owner under "family purpose" doctrine for injuries by automobile while being used by member of his family.

Where child is driving with other members of family.

(Supplementing annotations in 5 A.L.R. 222; 10 A.L.R. 1450; 14 A.L.R. 1088; and 19 A.L.R. 387.)

On a subsequent appeal of *Tyree v. Tudor* (1921) 181 N. C. 214, 106 S. E. 675, which is cited in the annotation in 14 A.L.R. 1088, in (1922) — N. C. —, 111 S. E. 714, the owner of an automobile was held liable for the death of a sixteen-year-old girl, due to the reckless driving of the car, which was apparently one of two kept for family use, by his sixteen-year-old son, where with knowledge of the reckless character of his son as a chauffeur he permitted him to use the car to take the deceased and another son to a dance. There was evidence in the case relating to the driver's negligence, and also that the sons had liquor in the car, and had partaken of it, and the court stated that the father was responsible for the son's negligence, both on the ground of having placed

his son in charge of the machine and by reason of his liability for the negligence of his agent.

Where the car is being used by child alone.

(Supplementing annotations in 5 A.L.R. 228; 10 A.L.R. 1450; 14 A.L.R. 1088; and 19 A.L.R. 388.)

In *Jones v. Cook* (1922) — W. Va. —, 111 S. E. 828, the "family purpose" doctrine was adopted and applied where a father furnished an automobile for the pleasure of his family, including his stepdaughter, and while the latter was driving it with her friends, with his permission, she negligently ran into the plaintiff's automobile. The court said: "We see no possible ground of difference concerning the owner's liability, whether there be but one member of the family or all members of the family in the automobile at the time of the negligent injury. If the father makes it his business or affair to furnish members

of his family with an automobile for family use, and he maintains it for that purpose, just the same as it is his business to furnish them with food and clothing, or to minister to their health in other ways, then he is in the furtherance of that business just as surely, when a single member of the family is driving it for his own pleasure and convenience, as if all the family were riding in it. Counsel for defendant say that defendant is not liable for the negligence of the step-daughter in the operation of the automobile in the present case, because it was none of his affair; but we hold that he made it his affair by maintaining the automobile for the very purpose for which she was using it at the time of the injury. He owned the machine and had the right to say where, how, and by whom it might be used, and impliedly, if not expressly, authorized the use to which it was put when the accident occurred. The doctrine of agency is not confined to merely commercial business transactions, but extends to cases where the father maintains an automobile for family use, with a general authority, expressed or implied, that it may be used for the comfort, convenience, pleasure, and entertainment or outdoor recreation of members of the owner's family. This view was also applied in cases of horse-drawn vehicles, decided before the introduction of the automobile. *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. St. Rep. 875, 30 N. W. 922; *Lashbrook v. Patten* (1864) 1 Duv. (Ky.) 316. It is not a new graft on the law of agency. It is merely applying old principles to new conditions. There are practical considerations involved to which courts cannot close their eyes. This doctrine puts the financial responsibility of the owner behind the automobile, while it is being used by a member of the family (who is likely to be financially irresponsible) in furtherance of the business and purposes for which it is maintained." Poffenbarger, P., in dissenting, said: "Although sustained by an apparent weight of authority, this decision, in my opinion, contravenes fundamental

principles of the laws of agency, and master and servant, and the rule 'respondeat superior.' In running an automobile for his or her own pleasure, a son, daughter, or other member of a family cannot legally be the servant or agent of another person, even though such other person be the head of the family and owner of the car. Action by one person for his own benefit or pleasure is legally incompatible with service or agency for another, in the performance of the act. Service necessarily implies the doing of something for another, not for the actor. It involves two persons, the master and the actor. Agency generally involves three—the actor, the person for whom he acts, and the person affected by the act authoritatively done. Both relations have their legal limitations. One acting for himself alone can be neither servant nor agent of another. That the head of the family, or some other member of it, owns and keeps the car for the use of the family and permits all members thereof to operate it at their pleasure, or that he purchased and maintains it for such purpose, and one member thereof occasionally or generally drives it with others riding in it, cannot change the principles of law. When he alone is driving it and riding in it, for his own pleasure or about his own business, he cannot be serving or acting for anybody but himself. If, while he drives it, the car carries other members of the family, he may be. How he obtained the use of some other person's car, or the motive of such other person in its purchase, ownership, or maintenance, is entirely too remote to affect the question of agency or service. These circumstances and the close relationship of the parties add to and emphasize the probative force and effect of evidence of service or agency, but they are not of themselves such evidence. The same observation is true of the relation of master and servant. If the driver is the chauffeur of the owner or other employee in charge of his car, there may be a rebuttable presumption that he was using it in his master's business, but nothing more. On proof

that he was not, the relation may reinforce evidence that he was, but beyond that, it signifies nothing. Such is the uniform holding in cases in which close relationship of parties is invoked, as evidence of fraud."

It will be observed, as pointed out in the annotation in 19 A.L.R. p. 388, that the court in the reported case (*MYERS v. SHIPLEY*, ante, 1460) refused to adopt the "family purpose" doctrine so as to hold a father liable for the negligent operation of his car, kept for family use, by his adult son, who was using it for his own pleasure with the implied consent of his father. And the same conclusion was reached by the court in *McGowan v. Longwood* (1922) — *Mass.* —, — A.L.R. —, 136 N. E. 72.

And in *Markle v. Perot* (1922) — *Pa.* —, 116 *Atl.* 542, it was held that there was nothing shown which would charge the father for the negligence of his adult son in operating the father's automobile, where it appeared that the car was used at times for the pleasure of the family, of which the son was a member, and that the son, with his father's permission, was using the car at the time the accident occurred for the purpose of attending a meeting of a fraternal organization of which he was a member.

And where a nineteen-year-old son who was practically manumitted was

permitted by his father to drive a car kept for the family pleasure to a certain place to see about a position, it was held that the father was not liable for an injury resulting from the son's negligent operation of the car, since he was not engaged in the father's business or pleasure, and since the fact that the latter was interested, in a sense, in the son's trip, was not sufficient ground for holding him liable. *Kunkle v. Thompson* (1917) 67 *Pa. Super. Ct.* 37.

Liability where spouse of owner is using car.

(Supplementing annotations in 5 A.L.R. 232; 10 A.L.R. 1452; 14 A.L.R. 1088; and 19 A.L.R. 390.)

In *Hill v. Jacquemart* (1922) — *Cal. App.* —, 203 *Pac.* 1021, it was held that a husband could not be held liable for damages resulting from the negligent operation by his wife of his automobile, which was kept for the use, comfort, and enjoyment of his family. The court stated that in *Spence v. Fisher* (1920) 184 *Cal.* 209, 14 A.L.R. 1083, 193 *Pac.* 255, it had refused to hold the owner of an automobile liable for an injury occurring while a member of his family was using the car for such member's enjoyment, on the ground that the car was kept for family pleasure, and was being used with his consent when the injury occurred. J. T. W.

SAM H. JONES, Appt.,

v.

WILLIAM HENDERSON.

Kentucky Court of Appeals—October 26, 1920.

(189 *Ky.* 412, 225 *S. W.* 34.)

Attorney and client — recovery of money paid as fee for compounding felony.

1. A client cannot recover from an attorney a fee paid for services to be rendered in compounding a felony.

[See note on this question beginning on page 1476.]

Contract — to compound felony — validity.

2. An agreement by an attorney to use money placed in his hands by a client to compound a felony with the

commission of which the client is charged, or to suppress evidence which might result in a conviction, is void.

[See 6 *R. C. L.* 755, 757 et seq.]

Money had and received—recovery of money advanced to compound felony.

3. No action lies to recover money placed by a client in the hands of an attorney to be used in compounding a

felony with which the client is charged, although the effort is not successful, and the attorney agrees, when receiving the money, to return what is not used by him.

[See 2 R. C. L. 790.]

APPEAL by plaintiff from a judgment of the Circuit Court for Ballard County in favor of defendant, and from an order denying a new trial, in an action brought to recover money placed by plaintiff in defendant's hands to be used in compounding a felony. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. B. Wickliffe for appellant.

Mr. John E. Kane, for appellee:

Contracts entered into for the purpose of stifling or defeating trials or prosecutions of persons charged with crime are contrary to public policy, and will not be enforced at the instance of either of the parties to such contracts.

Swan v. Chandler, 8 B. Mon. 97; Gardner v. Maxey, 9 B. Mon. 90; Kimbrough v. Lane, 11 Bush, 556; American Nat. Bank v. Madison, 144 Ky. 152, 38 L.R.A.(N.S.) 597, 137 S. W. 1076; Johnson v. McMillion, 178 Ky. 707, L.R.A.1918C, 244, 199 S. W. 1070.

Settle, J., delivered the opinion of the court:

The appellant, Sam H. Jones, sued the appellee, William Henderson, in the court below, seeking to recover of him \$1,000, which, as alleged in the petition, had been placed in his hands by appellant for the purpose recited in the following writing, executed by appellee when the money was received by him:

Rec'd of Sam H. Jones \$1,000, same to be used in settlement of suit or case against him in circuit court, Ballard county, or so much as needed; balance to be returned to him. This December 24, 1917.

Wm. Henderson, Attorney.

It was alleged in the petition that appellee failed to compromise or settle the case referred to in the above writing, and that same was prosecuted against appellant to a final judgment; also, that the writing was without consideration, and that the consideration expressed therein failed, because of appellee's failure to carry out his promise made therein to settle the case

against appellant by the use of the \$1,000 paid him by the latter, or any part thereof; and, finally, that he refused to return or repay any part of the \$1,000 to appellant, though the whole thereof had been demanded of him by the latter.

Appellee filed an answer and counterclaim, containing four paragraphs, in the first of which he admitted receiving of appellee the \$1,000 in question for the purpose of settling the case against him in the Ballard circuit court, as stated in the writing, but denied the misappropriation of the money charged in the petition, or that appellee was entitled to the return of some or any part thereof.

In the second paragraph of the answer and counterclaim it was alleged that on September 28, 1917, appellant was arrested under a warrant issued by L. M. Wilford, a justice of the peace of Ballard county, charging him with the crime of unlawfully detaining a woman, Elizabeth Bennett, with the intent to have carnal knowledge of her against her will; that, upon appearing on that date before the justice of the peace, appellant waived an examination upon the charge, and was held on bond to appear in the Ballard circuit court, at its succeeding term, to answer any indictment the grand jury might return against him for the crime mentioned, and that the \$1,000 delivered to appellee by appellant, and for which the writing of December 24, 1917, was executed by way of a receipt, was received by the former as attorney of the latter, for use in compromis-

ing or otherwise settling the case or prosecution referred to, which was then pending against him in the Ballard circuit court.

In paragraph 3 it was alleged that \$900 of the \$1,000 thus received of appellant by appellee was paid by the latter in compromise and settlement of the pending prosecution against appellant in the Ballard circuit court, to J. W. Bennett, father of the prosecutrix, Elizabeth Bennett, for the benefit of himself and daughter, appellee in good faith believing at the time, from what he regarded reliable information, that the commonwealth's attorney of the judicial district, including Ballard county, would consent to such compromise and settlement and dismiss the prosecution against appellant; but that, as the prosecution was for a felony, the furnishing of the \$1,000 by appellant to appellee for the purpose of effecting the attempted settlement and dismissal of the prosecution, as well as the payment by appellee of \$900 thereof to the father of the prosecutrix, as a means to that end, was contrary to the public policy of the state, and therefore unlawful, for which reason appellant was and is estopped to sue for or recover the \$1,000, or any part thereof, of the appellee, or of the Bennetts, father or daughter, any part of the \$900 received by them.

In the fourth and final paragraph of the answer and counterclaim it was alleged that, immediately following appellant's arrest under the warrant charging him with the crime stated, he employed appellee, who is an attorney at law, to represent him in any effort that might be made to compromise and settle the case, and also to defend him, both in the justice's and circuit courts, in any prosecution that might be instituted against him for the crime, and agreed to pay appellee for the professional services thus to be rendered by him, a fee of \$100; that appellee, pursuant to such employment, did faithfully represent appellant in the justice's

20 A.L.R.—93.

court, and in the attempt to procure the compromise and settlement of the case, and did in like manner defend him in the circuit court on his trial for the crime charged; and that for the services rendered by him for appellant in the two courts mentioned he was entitled to be paid, and did retain as a reasonable fee, \$100, of the \$1,000 received by him of the latter, which was all that remained in his hands after payment of the \$900 to J. W. Bennett.

By agreement of the parties all affirmative matter of the answer and counterclaim was controverted of record, and on the trial of the case, following such completion of the issues, the circuit court, at the conclusion of appellant's evidence, peremptorily instructed the jury to return a verdict for the appellee, which was accordingly done. Appellant was refused a new trial, complaining of which, and of the action of the trial court in directing a verdict for the appellee, he prosecutes this appeal from the judgment of that court approving the verdict and dismissing the action.

The only evidence introduced in appellant's behalf on the trial of the case in the court below was furnished by his own testimony as a witness, which fully establishes the following facts: (1) His arrest under a warrant issued by a justice of the peace, charging him with the felony named in the pleadings, and that on appearing in the court of the justice he waived an examination under the warrant, and was held under a bond, then executed by him, to answer in the Ballard circuit court such indictment as might be returned against him by the grand jury for the crime charged; (2) that, after being thus held over to the circuit court, appellant furnished appellee \$1,000 for use by the latter in effecting through the young woman upon whom he was charged to have committed the crime, or her father, a settlement and dismissal of the prosecution then pending against appellant for the crime charged, and that no part

of the \$1,000 was ever returned to him by appellee; (3) that appellee did not succeed in effecting such settlement or dismissal of the prosecution; (4) that the commonwealth's attorney of the judicial district did not consent to such settlement, and refused to dismiss the prosecution, and that appellant was indicted for the crime charged by the grand jury, and tried under the indictment.

In giving his testimony appellant did not deny the employment of appellee as attorney to procure for him the dismissal of the prosecution by means of the \$1,000 furnished him, or the payment by appellee of the \$900 to J. W. Bennett for that purpose; nor did he deny the employment of appellee to make his defense to the prosecution, or that the latter did defend him in both the justice's and circuit courts. It is fairly inferable, however, from his testimony, that, notwithstanding the payment to Bennett of the \$900 by appellee, and the agreement by the former and his daughter to settle or dismiss the prosecution, its dismissal was prevented by the refusal of the commonwealth's attorney to be a party to such a compounding of a felony.

It does not appear from appellant's testimony, or from any pleading in the case, how his trial under the indictment in the circuit court resulted. We are, therefore, unable to learn from this record whether he was convicted or acquitted of the crime charged. We are, however, judicially advised by the opinion of this court in *Henderson v. Com.* 185 Ky. 232, 215 S. W. 53, of the reason for the silence of the record on this point, as it therein appears that by the payment to J. W. Bennett and his daughter of the money, or the greater part thereof, furnished him by appellant, appellee, as a means of preventing them from appearing in court or giving their testimony against the former regarding the crime committed by him on the daughter, induced them to leave Ballard county and remain away for at least two terms of the Ballard

circuit court; and while the opinion in *Henderson v. Com.* supra, does not so state, the failure of the prosecutrix and her father to appear and testify against appellant doubtless caused his acquittal of the crime charged, or, if he was not tried, prevented the finding of an indictment against him. Appellee suffered, however, for his procurement of the absence of the two witnesses named, as by reason thereof he was indicted in the Ballard circuit court for the common-law offense of obstructing justice, and, on his trial in that court, convicted by verdict of a jury, which inflicted upon him, by way of punishment, a fine of \$1,000, the judgment entered upon which was, on appeal, affirmed by this court.

It is patent from the language of the writing evidencing the agreement under which appellee received the \$1,000 furnished him by appellant, as well as the admissions of the pleadings and appellant's testimony respecting the use to which it was to be applied, and in fact was applied, by appellee, that it, and the resulting transactions from beginning to end, had for their object the compounding of a felony, or the suppression of evidence to unduly prevent or end a criminal prosecution then pending against appellant, either or any of which rendered the agreement in question illegal and void. In 9 Cyc. 500, the doctrine we have in mind is thus declared: "Agreements calculated to impede the regular administration of justice are void, as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. Within the condemned category are agreements to compound a crime or a penal action; agreements involving champerty or maintenance; agreements to refer

Contract—to
compound felony
—validity.

to arbitration; agreements to procure a witness to swear to a particular thing, or to procure evidence of any kind; agreements to induce a witness to testify, or to abstain from testifying, or suppress evidence, or to influence the testimony of a witness in any way; agreements to stifle or prevent a criminal prosecution, or to unduly influence its termination; agreements involving the evasion of the service of judicial process; agreements to conceal the fact that a party is breaking the law; agreements interfering with the proper discharge of the duties of a judicial officer or other person charged with the enforcement of the law. . . . All agreements, it is said in a recent case, relating to proceedings in court, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, although not open to the charge of actual corruption, and regardless of the good faith of the parties, or of the fact that no evil resulted therefrom." *Kimbrough v. Lane*, 11 Bush, 556; *Barclay v. Breckinridge*, 4 Met. (Ky.) 374; *Gardner v. Maxey*, 9 B. Mon. 90; *Swan v. Chandler*, 8 B. Mon. 97; *Miller v. Payne*, 7 Ky. L. Rep. 288 (abstract); *Wheeler & W. Mfg. Co. v. Hord*, 4 Ky. L. Rep. 240.

As the agreement in question was and is void, it is unenforceable as to either of the parties to it, or any

Money had and received—
recovery of
money advanced
to compound
felony.

person intended to be benefited by it. Nor can either party have a right of action against the other for a breach of any of its stipulations. There can be no doubt of appellant's knowledge of the illegal, even criminal, use to which the \$1,000 he furnished appellee was to be applied by the latter, for its object is stated in the writing executed by him as a receipt for the money, and also admitted by appellant in giving his testimony. As said in *Johnson v. McMillion*, 178 Ky. 707, L.R.A.1918C, 244, 199 S. W. 1070, quoting with approval

from 6 R. C. L. 969: "It undoubtedly is a correct principle, it has been said, that one who furnishes funds to another, who he knows or has every reason to believe intends to devote them to the perpetration of crime, and seeks to procure them for that purpose, will not be allowed to maintain an action on his contract."

In *Johnson v. McMillion*, supra, the action was upon a note executed for money a part of which, with the knowledge of the payee, was furnished and used to procure the absence and suppress the testimony of a witness against one charged with murder. It was held there could be no recovery upon the note, even for such part of the money due thereon as was not used for the illegal purpose of suppressing the testimony of the witness whose absence from the trial was procured. The opinion based this conclusion on the following well-known rule: "If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise." 9 Cyc. 566.

The above rule, stated in varying terms, is supported by the following cases, cited in the opinion: *Brown v. Langford*, 3 Bibb, 500; *Kimrough v. Lane*, 11 Bush, 556; *Bugg v. Holt*, 29 Ky. L. Rep. 1208, 97 S. W. 29; *McLain v. Dixon*, 30 Ky. L. Rep. 683, 99 S. W. 601; *Smith v. Corbin*, 135 Ky. 729, 123 S. W. 277; *Newport Rolling Mills Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522, Ann. Cas. 1918B, 917.

In *American Nat. Bank v. Madison*, 144 Ky. 152, 38 L.R.A.(N.S.) 597, 137 S. W. 1076, a married woman and her husband executed certain notes aggregating \$2,500, secured by a mortgage upon her land, to a former employer of their son, for the payment of money embezzled by the latter. The notes

were sold and assigned by the payee to the bank, which brought suit upon them when due. The payers resisted a recovery on the grounds that the notes were executed under duress and to prevent the prosecution of their son for embezzlement; the answer being made a cross petition against the employer of the son, against whom a judgment was asked for the amount of the notes, in the event of a recovery by the bank against the payers. The circuit court, holding that the bank was an innocent purchaser of the notes, gave it judgment against the payers of the notes, and the latter judgment on their cross petition against the employer of the son. On the appeal of the case, we affirmed the judgment against the payers and reversed the judgment of the payers against the son's employer, holding that, while the bank was protected by the law as an innocent purchaser of the notes, as the consideration passing between the employer of the son and payers was unlawful, as constituting the compounding of a felony, the latter were not entitled to recover of the former what was recovered of them by the bank. In the opinion it is said: "It was clearly an illegal contract, one which the law would not enforce, nor against which will it afford relief. If appellee, instead of executing her notes and mortgage, had paid to Claypool the

\$2,500 in cash, and then thereafter sought to recover of him this money, on the ground that it was paid for the purpose indicated, the law would have afforded her no relief. She is in no better position as to the notes, by reason of the unlawful, vicious, and void contract into which she entered. The law will not lend its aid to the enforcement of such a contract, but simply leaves the parties where it finds them."

The principle announced in the case, *supra*, and others above cited, must be applied in the instant case. A part of the consideration of the contract involved being vicious, the whole contract is void. This conclusion makes it unnecessary to consider the question whether appellee has a right to retain \$100 of the \$1,000 furnished him by appellant as a fee. The contract under which the former received of the latter the \$1,000 being void, he could not have recovered of appellant a fee; and for a like reason appellant cannot recover of him the \$100 he retained for that purpose. Whether the contract is against public policy, or otherwise void, being a question to be determined by the trial court, the giving of the instruction directing a verdict for the appellee was not error.

Attorney and client—recovery of money paid as fee for compounding felony.

Wherefore the judgment is affirmed.

ANNOTATION.

Agreement or understanding between attorney and client to use money for unlawful purposes as affecting their rights *inter se*.

In condemning an agreement between an attorney and his client, providing for the use by the attorney of money supplied by the client for an illegal purpose, and denying to the client a remedy to recover it back, the court in *JONES v. HENDERSON* (reported herewith) ante, 1471, applied principles long established and universally recognized in respect to unlawful and illegal contracts.

The general doctrine was stated by Wilmut, Ch. J., of England, long ago, as follows: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again." *Collins v. Blantern* (1767) 2 Wils. 347, 95 Eng. Reprint, 850. This doctrine has been consistently adhered to in this country, and

applied to contracts to stifle criminal prosecutions, to suppress evidence in a judicial proceeding, or to procure testimony to bring about a given result in such a proceeding, or to control, defeat, or impede in any way the administration of justice.

The denial of relief to one in *pari delicto* is also related to the maxim, "*ex dolo malo non oritur actio.*" These principles are too well known to need the citation of authorities thereon in this connection.

The cases in which agreements between attorneys at law and their clients to use money to carry out unlawful purposes came up for judicial action do not appear to have been numerous. An extended and thorough search for such uncovered only a few. And among these some contrariety of judicial opinion is disclosed.

In Ohio, it was held that a contract by attorneys at law to prevent the finding of an indictment against a person accused or suspected of a crime was absolutely void, and that the compensation stipulated to be paid for services rendered thereunder could not be recovered, notwithstanding the parties to it honestly believed in the innocence of the one suspected or accused of the impending charge, and in spite of the fact that nothing unlawful was done under or pursuant to the condemned contract. *Weber v. Shay* (1897) 56 Ohio St. 116, 37 L.R.A. 230, 60 Am. St. Rep. 743, 46 N. E. 377. (In this connection, see annotation in 17 A.L.R. 325, as to innocence of person threatened as affecting rights or remedies in respect to contracts to prevent or suppress criminal prosecution.)

In Pennsylvania, a contract by an attorney at law to bring about the abandonment or dismissal of a criminal prosecution for an offense of the grade of a misdemeanor for a contingent fee was held contrary to and one upon which no recovery could be had, public policy and void, notwithstanding the occurrence of the contemplated contingency without the use of any unlawful means. *Ormerod v. Dearman* (1882) 100 Pa. 561, 45 Am. Rep. 391.

In Kansas, the court denied a recovery upon an agreement between an attorney and client which contemplated future violations of law by the latter, and services in defending him by the former, on the ground that the contract was contrary to public policy and void. *Bowman v. Phillips* (1889) 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230.

In Michigan, the contract of a person charged with receiving stolen property knowing it to have been stolen, to pay a lawyer a sum of money to obtain the release of the thief from jail, and to make sure that he would not appear as a witness, was adjudged an illegal and criminal agreement, which no court of justice would enforce. *Crisup v. Grosslight* (1890) 79 Mich. 380, 44 N. W. 621. The court was markedly severe in condemning this transaction. It said: A more shameful statement of a disreputable and criminal bargain, sought to be enforced in a court of justice, has seldom, if ever, been presented. And, it added, if the plaintiff's statement of his cause of action be true, he ought never again to be permitted to appear in the police court, or any other, as an attorney.

It is to be noted that the contract of an attorney to use his client's money in connection with a criminal prosecution must be inherently vicious to be a nullity and not recoverable upon.

Thus, the recipient from a lawyer retained to defend an alleged embezzler of bank funds, of the proceeds of checks contributed by friends of the accused, to be used in paying the fees and necessary expenses of the defense or to settle the debt due the accuser, under an agreement to hold such proceeds until after the then next term of the court, and then, if the criminal prosecution should be dismissed or continued generally, to pay over the money to a designated bank, otherwise to return it to the lawyer to be used by him for the purposes for which the checks were placed in his keeping, was not allowed to escape liability to the lawyer for the sum he received, in the latter's suit to recover the money after the event contemplated had happened,

on any theory that the claimant obtained it for an unlawful purpose and under an agreement contrary to public policy and void. *Shuck v. Hawkins* (1915) — Mo. App. —, 180 S. W. 1034.

The argument does not appear to have been made in the reported case (*JONES v. HENDERSON*, ante, 1471) that an attorney at law and his client, when parties to an illegal contract to stifle a criminal prosecution of the latter, do not stand in *pari delicto*, since the public interest demands that the former be held to a higher ethical standard in his professional conduct.

But in *Irwin v. Curie* (1902) 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161, the New York court of appeals held that the parties to a contract between an attorney at law and a layman, which was contrary to public policy because by statute the attorney was forbidden to make it, did not stand in *pari delicto*, and consequently that the layman might recover from the lawyer for a breach of such contract.

On the other hand, the Minnesota supreme court afterwards held that the parties to a contract between a lawyer and a layman, relating to transactions contrary to public policy and therefore void, were in *pari delicto*, and that neither of them could re-

cover from the other upon such contract. *Holland v. Sheehan* (1909) 108 Minn. 362, 23 L.R.A.(N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687. The Minnesota tribunal in that case criticized the New York decision cited next above, on the ground that in making it the court had lost sight of the important consideration that the layman was bound to know that the law forbade the lawyer to make such a contract, and that guilty intent was not essential to put both parties in *pari delicto*. The critic esteemed it very clear that, when two persons conspired to do together an act forbidden by law to one of them, the doing of it by joint agreement constituted a violation of law by both.

The conflict between these leaves the effect of the maxim "*in pari delicto*," as between attorney and client, still unsettled..

It is obvious that, since attorneys at law are licensed and authorized to assist courts in administering justice and enforcing the laws, they, above all other persons, should refrain from doing anything which might seem to encourage a violation of law. On this point, see *Bowman v. Phillips* (1889) 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230. J. B. G.

S. C. BISSETT, Appt.,

v.

TOWN OF LITTLETON et al.

West Virginia Supreme Court of Appeals — October 5, 1920.

(87 W. Va. 127, 104 S. E. 289.)

Municipal corporation — regulation of business hours of pool rooms.

A municipality chartered and exercising authority under and by virtue of chapter 47 (§§ 2382-2494) of the Code is given no specific or implied authority, by § 28 (§ 2409) thereof, or otherwise, and has no inherent power, to regulate by ordinance the time of opening and closing places where billiard and pool tables are kept for public use and resort, nor to impose penalties upon persons for violations thereof to whom state licenses have been issued pursuant to the several provisions of chapter 32 of the Code, as amended by chapter 102, Acts of 1919.

[See note on this question beginning on page 1482.]

Headnote by MILLER, J.

APPEAL by plaintiff from a decree of the Circuit Court for Wetzel County, in Chancery, dissolving a preliminary injunction and dismissing a bill filed to enjoin defendants from enforcing or attempting to enforce an ordinance regulating the hours of opening and closing pool rooms. *Reversed.*

The facts are stated in the opinion of the court.

Mr. M. H. Willis, for appellant:

While the common council of a town, chartered under chapter 47 of the Code, may possibly tax an occupation as a revenue measure, under our present laws it cannot prohibit the operation of a pool room. The laws of our state have changed the matter of a license tax upon occupations, from an exercise of the police power to a mere exercise of the taxing power.

10 Enc. Dig. 167, 169, 174; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197; *State ex rel. Hatfield v. Porter*, 84 W. Va. 399, 99 S. E. 508; *State ex rel. Sampson v. Sheridan*, 25 Wyo. 347, 1 A.L.R. 955, 170 Pac. 1.

Even if such authority and power were granted, the ordinance in question is void because it is unreasonable, unjust, oppressive, and destructive of the lawful business of the plaintiff.

Freund, Pol. Power, §§ 63, 158; *McQuillin*, Mun. Ord. p. 79; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Dill*, Mun. Corp. § 325; *Johnson v. Philadelphia*, 94 Miss. 34, 19 L.R.A. (N.S.) 637, 47 So. 526, 19 Ann. Cas. 103; *Crittenden v. Booneville*, 92 Miss. 277, 131 Am. St. Rep. 520, 45 So. 723.

Even if such council had such power, and such ordinance was not unreasonable, it could not be enforced, because it is a regulation attempted after the business was authorized by the state.

State v. Pamperin, 42 Minn. 320, 44 N. W. 251.

Mr. James D. Parriott, for appellees:

Under the police powers of a municipality organized under chapter 47 of the Code, the common council can regulate a merely commercial business, vicious in its nature, so as to remove, as far as possible, its objectionable features, and so as to conserve the morals and industry of the youth of such municipality.

Burlingame v. Thompson, 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64; *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991, 10 Cal. App. 683, 103 Pac. 174; *Shreve-*

port v. Schulsinger, 113 La. 9, 36 So. 870, 2 Ann. Cas. 69; *Ex parte Murphy*, 8 Cal. App. 440, 97 Pac. 199; *Ex parte Meyers*, 7 Cal. App. 528, 94 Pac. 870; 19 R. C. L. 818; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; *State ex rel. Dawson v. Atchison*, Ann. Cas. 1916B, 502, note; *State v. Karstendiek*, 39 L.R.A. 524, note.

Whether an ordinance is unreasonable, and hence void, is for the court; but, in determining the question, it must regard the circumstances of the municipality, and the objects sought to be attained, and the necessity existing for the ordinance.

Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830; *State v. Starkey*, 112 Me. 8, 90 Atl. 431, Ann. Cas. 1917A, 197; *Pierce Oil Corp. v. Hope*, 127 Ark. 38, 191 S. W. 405, Ann. Cas. 1918E, 143; *Coal-Float v. Jeffersonville*, 112 Ind. 15, 13 N. E. 115; 28 Cyc. 375; *Burlingame v. Thompson*, *supra*; *Clearwater v. Bowman*, 72 Kan. 92, 82 Pac. 526; *Sikes v. State*, 67 Ala. 77; 19 R. C. L. 805; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; *Greenville v. Kemmis*, 58 S. C. 427, 50 L.R.A. 725, 36 S. E. 727.

Even if § 5 of the ordinance should be held void, the court may so hold without destroying the entire ordinance.

19 R. C. L. 816; *Southern Operating Co. v. Chattanooga*, 128 Tenn. 196, 159 S. W. 1091, Ann. Cas. 1914D, 720.

Miller, J., delivered the opinion of the court:

The final decree appealed from dissolved the preliminary injunction and dismissed plaintiff's bill, and plaintiff appeals. The purpose of the bill was to enjoin defendant, its mayor, and common council from enforcing or attempting to enforce against plaintiff, by prosecution or otherwise, an ordinance adopted by the council on July 21, 1919, pur-

porting to regulate the operation of pool rooms in said town, § 2 of which is as follows: "Any place of business where such tables are kept for public use and resort shall be and remain open for business only between the hours of 7 o'clock A. M. and 8:30 o'clock P. M. each day in the week except Saturday and Sunday; but on Saturday such place may remain open until 10 o'clock P. M., and on Sunday shall remain closed the entire day."

Section 4 imposes quite drastic penalties upon those found guilty of the violation of the ordinance, and with which, the bill alleges and the record shows, plaintiff was threatened.

Prior to the commencement of the license year beginning July 1, 1919, and the passage of the ordinance complained of, plaintiff had applied for and obtained from the clerk of the county court of Wetzel county a license to operate a pool room in said town for the ensuing license year, and had paid the license tax thereon. He also subsequently obtained from the town authorities a license for the same purpose, and paid the license tax imposed thereon. He commenced business July 1, 1919.

The proposition relied on to reverse the decree and to obtain perpetuation of the injunction is that so much, at least, of the ordinance as purports to regulate the opening and closing time of places of business where such pool tables are operated, is void and unenforceable, no such power or authority being vested in town or council by chapter 47 (§§ 2382-2494) of the Code, under which the municipality was incorporated.

In support of his contention, counsel for plaintiff refers us first to chapter 102, Acts 1919, amending and re-enacting certain sections of chapter 32 of the Code 1916, particularly §§ 1 and 10 thereof. Section 1, as amended by said act, as did § 1 of chapter 32 (§ 1113) of the Code, inhibits the keeping for public use or resort a bowling alley,

pool table, billiard table, etc., without a state license therefor. As amended by the Act of 1919, the businesses upon which license taxes may be imposed are very much enlarged and extended. Prior to the amendment of said section, such licenses were issuable only when authorized by the county court; now by the amendment thereof they are issued by the county clerk upon proper application filed with him, but revocable by the county court for good cause shown upon petition and notice to the licensee, and an opportunity to be heard, as provided by § 34 as amended. And prior to the amendment of § 10 by the Act of 1919, when the business was to be carried on in an incorporated city, town, or village, such license was permitted only when authorized under the charter of the city, town, or village by the council or license court thereof, as well as by the county court. So, we see these amendments worked a very decided and important change in the law respecting licenses.

It is conceded that, with this state license so obtained, plaintiff has absolute right to carry on his business in the town of Littleton. But on behalf of the defendants we are referred first to § 33 of chapter 47 (§ 2418), providing that "whenever anything for which a state license is required, is to be done within such city, town, or village, the council may require a city, town, or village license therefor, and may impose a tax thereon for the use of the city, town or village."

Here is authority for imposing a license tax on such businesses, but not to regulate or tax the same out of business, unless this power has been taken away or modified by the recent amendments to said chapter 32. As the plaintiff did not deny the power of the town of Littleton to impose the tax, but applied for and obtained a municipal license and paid the tax imposed, the same as that imposed by the state, we need not further consider this question, for no point is made thereon.

For authority to regulate in the manner provided by the ordinance, we are next referred to § 28, chapter 47 (§ 2409), as follows: "The council of such city, town or village, shall have plenary power and authority therein . . . to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; . . . to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance; . . . to protect the persons and property of the citizens of such city, town or village, and to preserve peace and good order therein."

The police power of the state is also invoked as being inherent in the municipality. The police power of the state is conceded, but a municipality, in the exercise thereof, must always find the power of the state specifically delegated, or necessarily implied from the power specifically granted. *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197; *Bluefield Waterworks & Improv. Co. v. Bluefield*, 69 W. Va. 1, 6, 33 L.R.A. (N.S.) 759, 70 S. E. 772; *State ex rel. Hatfield v. Porter*, 84 W. Va. 399, 99 S. E. 508. But can the power to regulate be extracted from the authority conferred by said § 28? "To prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome," is the first classification of the statute. It is not believed that the power to regulate the business of operating pool tables can, by any rule of construction, be referred to this power.

The next is "to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance."

Can it be said that operating a pool table, a business for which a license is authorized as a revenue measure, is or could be a nuisance, or within reason declared so by the council? Pool and billiard tables are now installed and operated in Y. M. C. A. buildings, in social clubs, and in the private homes of many

of the people, and they are sometimes installed in the social rooms of the churches. Used as places of recreation and amusement, pool rooms are not nuisances. They may become nuisances when kept and resorted to for gambling, but they are not per se so. Other statutes of the state against gambling, against allowing pool rooms to be visited by persons under eighteen years of age, and the like, must have been regarded by the legislature as sufficiently regulatory of the business of operating pool and billiard tables for public use. In *State ex rel. Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185, we held that the common council of a municipality has no power to suppress gambling. Sections 28 of chapter 47, prescribing the power of the council prior to that decision, contained no such authority, but by the amendment of this section, chapter 53, Acts 1905, this power was expressly conferred. Such, however, is not the scope or purpose of the ordinance in question, and the power claimed is not referred to that section of the Code. Authority to suppress gambling will not warrant an ordinance forbidding the keeping of billiard and pool tables for hire. *State, Breninger, Prosecutor, v. Belvidere*, 44 N. J. L. 350. Establishments where billiard and pool tables are kept are more properly to be regarded as places of amusement than gambling establishments. 2 Dill. Mun. Corp. 5th ed. § 731, and cases cited. The third and last of the powers conferred, and relied on, is: "To protect the person and property of the citizens of such city, town or village, and to preserve peace and good order therein."

How can it be said that the power to regulate the hours of operating pool and billiard tables is lodged in the council by this provision? Certainly it is not so expressed in the language. General statutes to protect property and for preserving peace and good order fully cover these subjects, and there may be ordinances of the municipality for

that purpose, but we cannot deduce from the language of § 28 any power to regulate the time of opening and closing pool rooms. If it be said that the business of pool rooms has a tendency to bring about breaches of the peace, so it was said in *Judy v. Lashley*, supra, with reference to carrying pistols; but as there held,

**Municipal corporation—
regulation of
business hours
of pool rooms.**

so we hold in this case, the police power of the state in relation thereto must be specifically conferred before it can be exercised by a municipality. The case of *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202, cited and relied on by defendants' counsel, involved the validity of an ordinance regulating the time of closing billiard halls. In that case the ordinance was held valid, not alone under the power to preserve peace and good order, but because the charter specifically authorized the council to regulate the business of operating billiard tables, etc. A municipality cannot by ordinance make any law in violation of a statute. *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826. The *Tarkio Case*, supra, institutes a distinction between useful businesses and businesses, though lawful, for amusement, in the application of the power of regulation; but, as that case held, interference with the liberties of the people must find lodgment in specific authority. As said in 28 Cyc. 711, even express authority for such ordinances must be strictly construed in passing on their validity.

In all the cases cited by counsel for defendants in support of the ordinance, we find the power exercised was specifically conferred by the charter or by some general law. In no instance was municipal legislation sustained by the courts unless the power was so given. Some of the cases cited are, *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991, and *Tarkio v. Cook*, supra. There is no inherent power in a municipality to enact police regulations; and, as already said, a municipality can exercise only such police powers as are fairly included in the grant of power by its charter or some general law. 19 R. C. L. 800.

Conceding the power to regulate, it is insisted the ordinance in question would be an unreasonable regulation of a lawful business. It is said, and the evidence tends to show, that the time when the ordinance requires the closing of pool rooms, is the time when many who would resort thither are released from their daily work, and that plaintiff could not succeed and pay his license taxes under such regulations; that he would be bound to quit the business because his patronage does not fairly begin until business at other places ends. There is much force in this argument of unreasonableness, but we need not go into that question, because we find the charter does not warrant the regulation imposed by the ordinance.

Our conclusion is to reverse the decree below, reinstate the injunction, and make the same perpetual.

ANNOTATION.

Licensing and regulation of pool and billiard rooms and bowling alleys.

I. In general, 1483.

II. Licensing and regulating:

- a. Power of legislature or of municipality acting under legislative authority, 1483.
- b. Authority conferred upon municipality, 1484.
- c. Reasonableness of license fee, 1485.

II.—continued.

d. Conditions of granting license:

1. In general, 1485.
2. Qualifications, 1486.
3. Requiring permission of others, 1486.
- e. Location, 1486.
- f. Forbidding other business on premises, 1486.

II.—continued.

- g. As to minors, 1487.
- h. As to hours, 1487.
- i. Who required to take out license, 1488.
- j. Right to refuse license, 1489.

III. Prohibiting or suppressing:

- a. Power of legislature or of municipality acting under legislative authority:
 - 1. In general, 1489.
 - 2. As denial of equal protection of laws, 1490.
 - 3. As discriminatory, 1491.

I. In general.

The common opinion as to the demoralizing tendency of public pool and billiard rooms has found expression in judicial opinion.

Thus, in *Burlingame v. Thompson* (1906) 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 604, it was said that some of the most enticing games are reported as "gentlemen's games," in playing which the nicest decorum is observed. Still, the consequent tendency to become disorderly may be but one of the faults of a small-town pool room. It may be vicious and not be loud.

A pool room in a village is apt to degenerate into a trysting place for idlers and a nidus for vice. *Morgan v. State* (1902) 64 Neb. 369, 90 N. W. 108.

Playing pool and billiards is fraught with some dangers to the morals of those who play, even when the playing is done under the most favorable surroundings, in the atmosphere and under the restraining influence of the home or in the privacy of a club room. The danger is greatly increased when the playing is done at a public resort, where all who can pay the price are at liberty to come and play. There is more danger of playing in such places leading to gambling and other vices. The legislature might have prohibited playing at such places altogether. *Thomas v. Foster* (1917) 108 S. C. 98, 93 S. E. 397.

The dangerous tendency of these places is the subject of comment in the recent case of *State ex rel. Sayles v. Superior Ct.* (1922) — Wash. —, 206 Pac. 966.

III. a—continued.

- 4. As in destruction of property rights, 1491.
- 5. Statutes authorizing local option, 1491.
- b. Authority conferred upon municipality, 1492.

IV. Taxation, 1494.

V. As nuisance:

- a. In general, 1495.
- b. Power to declare as nuisance per se:
 - 1. Legislative power, 1496.
 - 2. Municipal power, 1496.
- c. Right to enjoin, 1496.

*II. Licensing and regulating.**a. Power of legislature or of municipality acting under legislative authority.*

Those occupying useful trades and occupations do not occupy the same relation to society as those engaged solely in giving amusement to the public. Keepers of billiard tables are not recognized by the state as exercising a useful occupation, so they are subjected to police regulation by the state, and by cities under powers granted them by the state. *Tarkio v. Cook* (1894) 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202.

A statute which requires every person operating any pool or billiard table outside of an incorporated city or town to pay an annual license was held in *Thomas v. Foster* (1917) 108 S. C. 98, 93 S. E. 397, to be clearly within the police power of the state, and so constitutional, since it deals with a business potential of evil.

And an ordinance to regulate, passed in pursuance of charter provisions providing that the city shall have authority, by ordinance, to license the keeping of billiard tables, nine pin and ten pin alleys, and bowling alleys, is a proper exercise of the police power. *State v. Pamperin* (1890) 42 Minn. 320, 44 N. W. 251.

The legislature may authorize town boards to issue licenses for billiard halls, pool halls, and bowling alleys within their respective townships. *State v. Sherow* (1912) 87 Kan. 235, 123 Pac. 866, Ann. Cas. 1913D, 1050. The court stated that such a statute was within the police powers of the state, and denied the contention that

the statute conferred upon the township board judicial, ministerial, and legislative powers in violation of the Constitution.

So, too, the legislature may legally delegate to a village the authority to license or prohibit billiard and pool tables at a public resort. *Atwood v. Otter* (1921) 296 Ill. 70, 129 N. E. 573.

Although the legislature cannot prohibit anyone from making or purchasing a billiard table, because it is an article of property, and, under the Constitution, anyone may lawfully acquire, possess, and protect it as such; yet the legislature may, by law, so regulate or restrict the use of such table as to prevent any injury to the public morals or public interest therefrom, in precisely the same manner that the use of other property generally may be regulated or restricted. *Stevens v. State* (1840) 2 Ark. 291, 35 Am. Dec. 72.

And see *State v. Hangar* (1844) 5 Ark. 413; *State v. Hiner* (1844) 5 Ark. 417.

A statute which¹ authorizes town boards to issue licenses to pool halls, billiard halls, and bowling alleys is not invalid because it confers upon the boards discretionary powers in issuing the permit. *State v. Sherow* (Kan.) *supra*.

And a statute that provides that a license to maintain a billiard table for public use, outside of any incorporated city or town, shall not be granted except with the approval of the county commissioners, is not unconstitutional as granting arbitrary power. *Brunswick-Balke-Collender Co. v. Mecklenburg County* (1921) 181 N. C. 386, 107 S. E. 317. The court stated that "it is fully recognized that these billiard and pool tables, when kept open for indiscriminate use by the public, may, and not infrequently do, become the source of disorder and demoralization, and that it is absolutely essential that the power should be lodged in some governmental body to withhold or revoke the license in such cases; and the proviso in the statute is very far from conferring arbitrary powers on the commissioners, but they are to give these applicants for license a public

hearing after full notice, and decide the question according to sound discretion, and their action may be reviewed when it shows that it has been palpably arbitrary and unjust."

Nor is such statute unconstitutional as discriminating between town and country. *Brunswick-Balke-Collender Co. v. Mecklenburg County* (N. C.) *supra*. The court said that the fact that in the country the operation of these tables is, as a rule, without the instant police supervision that usually prevails in the city, is a good reason for the distinction, and of itself affords sufficient basis for the classification objected to.

A by-law of a town limiting the number of pool rooms in the town to one was held in *Re Stewart* (1915) 34 Ont. L. Rep. 183, 8 Ont. Week. N. 509, 24 D. L. R. 26, not to offend the municipal act providing against the creation of monopoly.

b. Authority conferred upon municipality.

Statutory authority to villages to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the village, and to regulate the same by ordinance, confers upon the village ample power by ordinance to license and regulate billiard and pool rooms. *Morgan v. State* (1902) 64 Neb. 369, 90 N. W. 108.

So, too, statutory authority given to villages to license and regulate amusements confers authority to license and regulate billiard and pool rooms. *Ibid*.

And charter power to suppress and restrain bowling alleys authorizes a city to permit them to exist on the taking out of a license and paying a tax. *Smith v. Madison* (1855) 7 Ind. 86.

The imposition upon the mayor, by ordinance, of the duty of issuing licenses to conduct a billiard hall, is clearly within the authority conferred upon the common council to enact ordinances to restrain and prevent and suppress disorderly and gaming houses, billiard tables, and all instruments and devices for gaming. People

ex rel. Economus v. Coakley (1920) 110 Misc. 385, 180 N. Y. Supp. 886.

While an ordinance authorizing the licensing of pool rooms in a place where liquor is sold is invalid where the city's charter contains a general power authorizing the licensing of a pool table, and further special prohibitory provisions that no pool table shall be kept in a house where liquor is sold, and makes the violation of such provision an indictable offense, yet a pool table kept in connection with a barroom or drinking saloon, but not in the same house with the barroom or drinking saloon, or in the same house where liquors are sold, is not within such prohibition, and so a municipality is authorized to require a license for such a pool table. *Bailey v. Opelika* (1906) 146 Ala. 171, 40 So. 968.

So, too, the right of one to keep a billiard or pool table within his own home, for his own private entertainment or recreation, is not affected by a statute conferring upon municipalities the power to license, tax, regulate, restrain, or prohibit, *inter alia*, billiard and pool tables. *Ex parte Rowe* (1912) 4 Ala. App. 254, 59 So. 69.

c. Reasonableness of license fee.

A license, as distinguished from a tax for the purpose of raising revenue, of \$125 on the first table, \$100 on the second table, and \$75 on the third, and each additional table kept in the pool room for public entertainment, is *prima facie* valid. *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

And in *Smith v. Madison* (1855) 7 Ind. 86, it was held that an ordinance fixing a license fee of \$50 per year for the keeping and operating of a bowling alley might be enacted under an authority to suppress or to restrain, the court considering such license requirement as being imposed as a restraint upon the business.

And, in *Wysong v. Lebanon* (1904) 163 Ind. 132, 71 N. E. 194, it was held that, under authority to regulate, restrain, license, or prohibit pool tables for hire, the imposition of a \$250 license fee for each table was within the range of the discretion of the common council.

Three hundred dollars for a billiard license has been regarded as not being excessive in *Re Neilly* (1875) 37 U. C. Q. B. 289.

Nor is \$100 a table, for keeping billiard tables, excessive and prohibitive. *Re Foster* (1910) 22 Ont. L. Rep. 26, affirmed in (1910) 22 Ont. L. Rep. 342.

But in *Crookston v. Miller* (1912) 3 West. Week. Rep. (Can.) 10; 7 D. L.R. 771, a conviction for operating a pool hall without a license was quashed on the ground that the license fee was unreasonably high, and that its imposition was in absolute prohibition of the business of pool rooms. The fee provided for by the town by-law was \$300 for the first table and \$200 for each subsequent table, and the population of the town was only 1,100 inhabitants.

d. Conditions of granting license.

1. In general.

Municipalities may require as a condition precedent to one's engaging in the business of keeping a pool room, the making of a written application and the granting of a license thereon, the giving of a solvent bond conditioned to keep an orderly house or room, to observe the ordinances of the city and the regulations prescribed for such business, and to pay all fines imposed for the violation of municipal ordinances. *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

And municipal authorities clothed with charter power may provide that any violation of the ordinance under which a license to operate a pool room for public use is granted shall *ipso facto* revoke the license to conduct such business. *Ibid.*

A municipal ordinance exacting a license fee of \$10 for each public pool or billiard table, and forbidding the operation of such table without a license, to be granted after investigation and upon recommendation by a committee of the city council, there being a provision for notice and hearing before revocation of the license, but none for any hearing upon the original application, was upheld in *State ex rel. Sayles v. Superior Ct.* (1922) — Wash. —, 206 Pac. 966, as against

the objection that it denied due process of law, raised by one who had been refused a renewal of his license.

2. *Qualifications.*

In order that one may obtain a license to operate a pool room, he must be a person of good moral character, law-abiding, and of good repute, and if he has a reputation as a pool-room operator that reputation should be good, and his place must be a suitable one, that is, not so near a church, school, or residence as to interfere with others in the pursuit or enjoyment of matter-of-course rights. *State ex rel. Oetker v. Johnson* (1919) — Mo. App. —, 211 S. W. 682.

An ordinance providing that no license to operate a pool table shall be granted to a person who is not a citizen of the United States was held in *State ex rel. Balli v. Carrel* (1919) 99 Ohio St. 285, 124 N. E. 129, to be valid and constitutional.

3. *Requiring permission of others.*

A city ordinance prescribing that "no person, firm, or corporation shall be permitted to establish a pool or billiard room or tenpin alley to be operated for hire, without first obtaining written permission of both the landlords and tenants nearest such place on either side, and no license will be granted until such permission is obtained," is not void on the ground that it is an unreasonable restriction upon business of the character therein dealt with. *Trammell v. Yancey* (1914) 142 Ga. 553, 83 S. E. 114 (syllabus No. 1 by the court).

e. *Location.*

The business of conducting pool or billiard rooms for public entertainment may, under the usual general welfare clause of a municipal charter, be confined to reasonable territorial limits within the municipality. *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

And in *Caraway v. State* (1920) 143 Ark. 48, 219 S. W. 736, a statute which prohibited the operation of pool or billiard rooms within a certain distance of a school or church in

certain counties was held constitutional as against the contention that it violated the constitutional provision which denies to the general assembly the right to grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally apply to all citizens. The court said: "All persons affected by the act are affected in the same manner. No citizen living in or out of the county named in the act can operate a billiard room within the prohibited area; but any of the citizens in that area have the right any other citizen of the state has to operate billiard halls in territory where their operation is not prohibited."

Nor was it invalid as arbitrary and unreasonable in that it would result in the practical confiscation of property used in a business which had been licensed pursuant to an ordinance which was valid at the time it was passed, and upon which the city license tax and Federal war tax had been paid. *Ibid.*

But the power to regulate tenpin alleys, given by the general statute to a city, does not authorize an ordinance forbidding the location of such alleys within the fire limits of the city or within 100 yards of any private residence or business house, where the only place within the corporate limits and outside of the prohibited points at which such an alley could be located would be 600 yards from the business center and in a portion of the city remote from any thoroughfare or public place, since the power to regulate does not include the power to suppress or prohibit. *Ex parte Patterson* (1900) 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011.

f. *Forbidding other business on premises.*

A provision of a municipal ordinance making it unlawful for any person to sell or offer for sale any article of merchandise in a pool room, or to carry on or conduct any other business, trade, or calling at such place, is not an unreasonable exercise of the police power. *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

g. As to minors.

An ordinance prohibiting minors from visiting or remaining in a public billiard hall or pool room is not unconstitutional, notwithstanding such places do not constitute a nuisance per se. *Ex parte Meyers* (1908) 7 Cal. App. 528, 94 Pac. 870.

An incorporated musical society which operates bowling alleys for the benefit and amusement of its members, and for profit of itself, is an "establishment" within the meaning of a statute prohibiting the employment of any child under the age of fourteen years. *McElhone v. Philadelphia Quartette Club* (1913) 53 Pa. Super. Ct. 262.

h. As to hours.

A municipality, under the usual general welfare clause of its charter, may provide that pool rooms conducted for public entertainment within the city shall not be kept open between the hours of 7 P. M. and 6 A. M., or on Sundays or holidays, or "such days as the mayor and council shall direct." *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

So, too, a city which has power to pass such ordinances as may be expedient to maintaining the peace, good government, health, and welfare of the city, and expressly to regulate billiard tables on which games are played for amusement, has the power to pass an ordinance relating to and regulating not only the tables upon which the games of billiards are played, but also the halls or rooms in which they are kept and used, and so is authorized to pass an ordinance requiring that billiard halls shall close at 9 o'clock in the evening. *Tarkio v. Cook* (1893) 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202.

Also, under charter authority to regulate billiard and pool halls within the municipal limits, and to enact police regulations in regard thereto, a city is authorized to enact and enforce an ordinance closing pool halls from 12 o'clock at night until 5 o'clock the next morning. *Ex parte Brewer* (1913) 68 Tex. Crim. Rep. 387, 152 S. W. 1068; *Ex parte Pitchios*

(1913) — Tex. Crim. Rep. —, 152 S. W. 1074.

And in *Com. v. Colton* (1857) 8 Gray (Mass.) 488, it was held to be clearly within the police power of the legislature to prohibit a bowling alley from keeping open after 6 o'clock on a Saturday afternoon.

An ordinance which provides that all persons, firms, or corporations that own or carry on a cigar store, soft-drink parlor, billiard or pool parlor, restaurant, and other like places of business that deal in soft drinks or bottled goods, shall close at midnight and remain closed until 5 A. M., is, where it affects only those persons, firms, and corporations owning or conducting places of business that deal in soft drinks or bottled goods, and affects all that class alike, a valid ordinance. *Churchill v. Albany* (1913) 65 Or. 442, 133 Pac. 632, Ann. Cas. 1915A, 1094.

An ordinance requiring billiard halls to be closed at 9 o'clock in the evening is not unreasonable or in derogation of any common rights. *Tarkio v. Cook* (Mo.) *supra*.

And as to the reasonableness of regulations requiring pool halls and billiard rooms to remain closed between midnight and 5 o'clock in the morning, the court, in *Ex parte Brewer* (1913) 68 Tex. Crim. Rep. 387, 152 S. W. 1068, said: "Experience has shown that during the hours between midnight and daylight were the hours in which the lawless element, to a great extent, would gather in and around saloons and breed crime. Consequently, the legislature, in the exercise of the police power, closed the saloons during those hours. Since the saloons have closed, these elements have gathered around pool and billiard halls in the cities, and the same reasoning, perhaps, which caused the legislature to close the saloons during these hours, would move the legislative bodies of the cities and of towns to close the pool and billiard halls during the same hours."

But a town ordinance which undertakes to limit the opening of pool halls till 9 o'clock in the evening is in direct conflict with a state statute

under which pool halls and billiard tables may run or keep open during the twenty-four hours, since there is no limit placed by the statute upon the hours of opening and carrying on the business, and so is invalid. *Ex parte Farley* (1912) 65 Tex. Crim. Rep. 405, 144 S. W. 530.

And while, under charter authority to license billiard rooms, the license ordinance may impose reasonable conditions and terms as a consideration of the granting of the license, yet after the issue of the license no new terms and conditions can be imposed. So, where a license was issued imposing no conditions as to the hours of closing, excepting that the billiard hall should not be open on Sunday, a new ordinance providing that billiard halls shall remain closed during the hours of 11 o'clock at night and 6 in the morning was inoperative as to existing licenses issued under the former license ordinance. *State v. Pamperin* (1890) 42 Minn. 320, 44 N. W. 251. The court stated that if the power to regulate had also been conferred by the charter, then new and additional police regulations in respect to the same matter might have been made and enforced.

The power that a city has to decide the hours during which billiard and pool rooms may be open depends upon its charter. *Ex parte Perkins* (1920) 88 Tex. Crim. Rep. 309, 226 S. W. 411.

So, a city is without authority to regulate the hours during which pool and billiard rooms licensed by the state may be kept open, where the terms in which the city's charter is framed exclude the idea that it was intended thereby to confer the power to regulate amusements licensed by the state and not named in the city charter. *Ibid.*

1. Who required to take out license.

See also *infra*, IV. (Taxation).

A bowling alley kept by the proprietor of a watering place, solely for the exercise and amusement of his guests, no charge being made against those who played upon it, is within the meaning of a statute requiring alleys

to be licensed. *Spaight v. State* (1856) 29 Ala. 32.

So, too, a billiard table kept by the proprietor of a cigar store, though used solely by his patrons and without charge to them or profit to himself, is within the meaning of a statute which provides that one who maintains a billiard table for public use shall procure a license. *State v. Shotts* (1910) 143 Mo. App. 346, 128 S. W. 245.

A billiard table operated in a bar-room, with the understanding that the losers in games played on the table must treat the winning players at the bar, is kept for public use, and is a source of profit to the owner, and the owner must take out a license therefore. *Schmetzer v. State* (1884) 63 Md. 420. So, one is required to take out a license for a billiard table who, although he does not charge any specific sum for the use of the table, does require that the loser should treat at his bar those who played with him and must pay for as many drinks as there were players, whether such players wished to drink or not. *Clarke v. State* (1873) 49 Ala. 37.

Possession of a municipal license to keep billiard tables is no defense to a prosecution for failure to take out a state license, where there is nothing whatever in the terms of the act requiring a state license to indicate a legislative intent to exempt the keepers of billiard tables in the city from the necessity of obtaining a state license, but the contrary design is clearly apparent from the whole course of legislation. *Weber v. State* (1911) 116 Md. 402, 81 Atl. 606.

And that one had paid an occupation tax imposed upon the business of conducting a billiard hall and pool room was held in *McCarter v. Lexington* (1908) 80 Neb. 714, 115 N. W. 303, to be no defense for failure to take out a license as required by an ordinance passed subsequent to his having paid the occupation tax.

A private club which provides bowling alleys on the club premises, and collects due from its members for games played thereon, does not own or keep bowling alleys for hire or profit within the meaning of acts requiring a

license. *Rex v. Dominion Bowling & Athletic Club* (1909) 19 Ont. L. Rep. 107, 15 Can. Crim. Cas. 105.

J. Right to refuse license.

Where, by statute, a county court is vested with power to license and tax billiard and pool tables, it is vested also with discretion to refuse such license for cause. *State ex rel. McClanahan v. Dewitt* (1911) 160 Mo. App. 304, 142 S. W. 366.

In *State ex rel. Bayless v. County Ct.* (1916) 193 Mo. App. 373, 185 S. W. 1149, the Kansas City court of appeals held that the county court has no authority to refuse a license to keep a pool hall merely for the reason that it thinks that pool halls are not a good thing for any community, and that there is a strong sentiment against them in the county, and that they are a nuisance. And following that case as authority, the Springfield court of appeals in *State ex rel. Oetker v. Johnson* (1919) — Mo. App. —, 211 S. W. 682, held that the county court was not justified in refusing such a license, neither the applicant nor the location being unsuitable, because of a remonstrance by numerous citizens, protesting against the issuance of such licenses to any persons, and a resolution of the city council to the same effect. But a contrary position is taken by the Springfield court of appeals in the recent case of *State ex rel. Hawkins v. Harris* (1922) — Mo. App. —, 239 S. W. 564, which expressly characterizes those decisions as erroneous, and holds that the county court may refuse billiard or pool room licenses, without basing their conclusion on anything other than the determination that such an institution in the community is a nuisance. The statute (Mo. Rev. Stat. 1919, § 644) under which the county court acts in granting such licenses merely provides that the county court "shall have power to license the keepers of billiard tables," there being no provision for a hearing or a remonstrance, and, in the opinion of the court in this case, nothing directing that the county court shall do anything in connection with an application filed before it.

20 A.L.R.—94.

And one is within the meaning of a statute requiring a license for conducting a pool hall for hire who, although he advertises that the use of the tables is free to all, posts signs that donations will be thankfully received, and places a box near one of the tables, in which patrons deposit their donations. *Ida Grove v. Smith* (1918) — Iowa, —, 167 N. W. 188.

And a city which, by a general ordinance, has provided for the licensing of pool and billiard halls and pool and billiard tables, has no right to make an arbitrary discrimination in granting licenses; it cannot grant the same to favored ones and refuse another who has, in all respects, complied with the statutes of the state and ordinances of the city, so one who has brought himself strictly within the requirements regulating the licensing power may compel, by mandamus, the corporate authorities to grant him a license when he is refused through mere caprice. *Nicodemus v. State* (1921) 82 Okla. 152, 198 Pac. 847.

Where one has secured a county license authorizing him to conduct a pool and billiard room within a city of the first class, such city has no power to refuse a city license to such person upon presentation of his county license and payment of the fee required by the city ordinance for a city license. *Nicodemus v. State (Okla.) supra.*

However, the arbitrary refusal to issue a license to conduct a pool room for hire will not authorize one to conduct the business in defiance thereof, since, if it is the legal duty of a mayor to issue a license, proper steps to compel him to do so should be taken. *Ida Grove v. Smith* (1918) — Iowa, —, 167 N. W. 188.

III. Prohibiting or suppressing.

a. Power of legislature or of municipality acting under legislative authority.

1. In general.

"Any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits

of industry, is a legitimate subject for regulation or prohibition by the state. On this principle it is concededly within the police power of the state to suppress gambling in all its forms including . . . pool tables for hire." 6 R. C. L. p. 207.

So, too, it cannot be held as a matter of law that a pool table operated for the public, and not for a mere private pleasure or amusement, has not a tendency to invite to idleness and vice, and that it is not a subject which, under the law, should be so placed in the jurisdiction of municipalities as that, if they see proper, they may prohibit them altogether. Conditions existing in one municipality may be such that certain things which such municipality may, if it sees proper, lawfully prohibit, may be permitted to exist without injurious effect, while in another municipality the conditions may be such that, if such things are permitted to exist, public injury will, in all probability, actually result. *Ex parte Rowe* (1912) 4 Ala. App. 254, 59 So. 69.

The legislature may confer upon municipal authorities the power to prohibit outright the keeping of pool rooms for public use within the limits of the city. *Trammell v. Rome* (1914) 142 Ga. 602, 83 S. E. 221; *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241.

And this is true although the legislature may have imposed a license or tax for the purpose of raising revenue upon the business of keeping pool rooms for public use. *Purvis v. Ocilla* (Ga.) *supra*.

And in *Burlingame v. Thompson* (1906) 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64, it was held that, in authorizing a city of the first class to prohibit the operation of pool tables for hire, the legislature did not transcend its power.

And subsequent to the decision in *State ex rel. McMonies v. McMonies* (1906) 75 Neb. 443, 106 N. W. 454, *infra*, the legislature delegated to boards of trustees of villages the power which they did not previously possess; that is, the right to prohibit billiard and pool halls. This delega-

tion of power was held to be constitutional in *Cole v. Culbertson* (1910) 86 Neb. 160, 125 N. W. 287, the court stating that the statute was probably passed as the result of the decision in the *McMonies Case*.

The provision of a city charter authorizing the general council to prohibit by ordinance the keeping of billiard or pool tables for the public within the municipality, and an ordinance making such prohibition, are not void on the ground of special legislation in a case provided for in existing general law. *Trammell v. Rome* (1914) 142 Ga. 602, 83 S. E. 221. In this case it was contended that the charter provision and the ordinance prohibiting billiard and pool rooms were in conflict with the general tax act imposing a tax on the keeper of billiard and pool tables kept for public use. The court said: "It was not the object of the general tax to give to every person who paid the tax the right to maintain and operate for public use billiard and pool tables. . . . It was not designed as an exemption from the state's police power, so as to prevent the state from expressly permitting a municipality to exclude the carrying on of the business of operating billiard or pool tables within the limits of that municipality."

A general statute conferring upon municipalities the power to prohibit billiard and pool tables does not violate the constitutional provision that the legislature shall have no power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the state, although there is a general law punishing the keeping of such a table without a license. *Ex parte Rowe* (1912) 4 Ala. App. 254, 59 So. 69.

2. *As denial of equal protection of laws.*

The statute which provides that "if any keeper of a public house or retailer of spirituous liquors, in this state shall establish, keep, or permit, to be kept upon his or their lot or premises, any ball or ninepin alley, or shall in whole or in part be interested in any ball or ninepin alley upon the lot or

premises of another, he or they shall [etc.],” was held in *Koepke v. State* (1903) 68 Neb. 152, 93 N. W. 1129, to be constitutional as against the contention that it forbids a retailer of intoxicants or the keeper of a public house from keeping or being interested in a bowling alley anywhere in the state, and is therefore an unreasonable restriction upon individual freedom and a violation of the right of every citizen to the equal protection of the laws. The court stated: “Under counsel’s construction, the statute as a whole would, perhaps, be indefensible; but we are not disposed to think it was designed to exclude innkeepers and saloon keepers from a business in which all other citizens are permitted to engage, but rather to prevent evils supposed to result from running a bowling alley in connection with a saloon or hotel. It is rather to be presumed that the legislature failed to express itself clearly, than that it intended to enact an unconstitutional law.” The court added that if it were to accept the view that the prohibition against keeping a bowling alley or being financially interested in one was subject to no implied limitations, it would not follow that the judgment was wrong; since the enactment of a law prohibiting the running of a bowling alley in connection with a saloon or hotel was a legitimate exercise of legislative power, and the prohibition is valid, even if it be regarded as embraced within a broader prohibition which is void to the extent that it is broader.

A municipal ordinance forbidding the keeping of billiard or pool tables for hire or public use does not deny the equal protection of the laws because hotel keepers are permitted to maintain a billiard or pool room in which their regular and registered guests may play. *Murphy v. California* (1912) 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

3. As discriminatory.

An ordinance which prohibits the operation of pool tables for hire is not

void in that it discriminates in favor of a private pool table kept for the owner’s own amusement and benefit. *Burlingame v. Thompson* (1906) 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64.

And in *Cole v. Culbertson* (1907) 86 Neb. 160, 125 N. W. 287, it was held, citing *Burlingame v. Thompson* (Kan.) *supra*, with approval, that an ordinance is not void as being discriminatory in that it prohibits the keeping of a billiard or pool hall or the maintaining of tables for hire, while it does not attempt to prohibit keeping them for private or free use.

4. As in destruction of property rights.

The proprietor of an existing billiard and pool room is not deprived of his property without due process of law, contrary to the Federal Constitution, 14th Amendment, by the passage of a municipal ordinance prohibiting the keeping of billiard or pool tables for hire or public use. *Murphy v. California* (1912) 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

Nor is an ordinance enacted pursuant to legislative authority prohibiting and suppressing pool tables for hire unconstitutional in that it suppresses tables lawfully in use at the time the ordinance is enacted. *Burlingame v. Thompson* (1906) 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64.

And the fact that such an ordinance may suppress pool tables which are conducted in a decent and orderly manner does not affect the validity of the ordinance. *Ibid*.

But a general ordinance of a municipality prohibiting all pool rooms or billiard tables in the town is void as being in destruction of property rights. *Crittenden v. Booneville* (1908) 92 Miss. 277, 131 Am. St. Rep. 518, 45 So. 723.

5. Statutes authorizing local option.

Roper v. Lumpkins (1914) — Tex. Civ. App. —, 163 S. W. 110, Ex parte Francis (1914) 72 Tex. Crim. Rep. 304, 165 S. W. 147, and *Winn v. Dyess* (1914) — Tex. Civ. App. —, 167 S. W. 294, — which held that the Texas stat-

ute providing for local option elections in counties and other subdivisions to determine whether or not pool rooms should be prohibited does not delegate legislative powers, and so is constitutional, and is a valid law where it has been adopted by a majority vote of a county or other designated political subdivision — are overruled by *Ex parte Mitchell* (1915) 109 Tex. 11, 177 S. W. 953, which held such statute to be unconstitutional. See also *Lyle v. State* (1917) 80 Tex. Crim. Rep. 606, 193 S. W. 680, and *Roper & Gilley v. Lumpkins* (1921) — Tex. —, 230 S. W. 144.

b. Authority conferred upon municipality.

Pool halls or billiard parlors not being nuisances per se, a town council is without authority to prohibit their maintenance unless that authority was conferred by express legislative enactment or unless their maintenance was made unlawful by the laws of the state. *Dardanelle v. Gillespie* (1915) 116 Ark. 390, 172 S. W. 1036.

So, too, in the absence of express legislative authority, municipal authorities cannot prohibit the keeping of public pool rooms within the municipality; and this is true although the charter, in addition to the general welfare clause, contains a provision expressly authorizing the authorities to license or tax pool rooms. *Purvis v. Ocilla* (1920) 149 Ga. 771, 102 S. E. 241. The court stated that under the rule recognized in this state the authority to license and regulate does not imply the power to prohibit, but rather implies that the business is to be allowed to continue under such reasonable regulations as the authorities may adopt.

A statute providing that the mayor and board of aldermen of every city, town, and village shall have power to regulate, control, and suppress, and impose a privilege tax on all, billiard tables, bowling alleys, ten pin alleys, authorizes the enactment of an ordinance providing that "all pool rooms and billiard halls . . . are declared to be a public nuisance, and it shall be unlawful for any person . . .

to operate, within the limits of said town for gain or for gambling purposes any pool or billiard tables or maintain any public hall or room where such games may be played." *Eros v. Powell* (1915) 137 La. 342, 68 So. 632. It was contended in this case that the power conferred by statute to suppress billiard tables did not include the power to suppress pool tables; in other words, that the word "billiards" did not comprehend the word "pool." But the court stated that it was of opinion that, though pool, pool tables, pool rooms, and pool halls are not specifically mentioned in the statute, they were included in the term "billiard tables," which is use; since pool tables are billiard tables with pockets, which have been appropriated in the particular game or form of billiards called pool, even though the game of billiards proper, which was formerly played upon such tables, is now played upon tables without pockets. Moreover, the court added, the paragraph in question, after the completion of its enumeration, concludes with the words "and other like things," and the operation of pool tables "for gain or gambling purposes," and the "maintenance of public halls where such games may be played," are ejusdem generis as the things which are enumerated, and hence fall within the same prohibition.

The power to suppress the keeping of a public place for billiards, irrespective of gambling, was held in *Shreveport v. Dale* (1921) 149 La. 439, 89 So. 408, to be conferred by a municipal charter which, after expressly conferring power to prevent persons from gaming for money or property with billiards, confers authority to regulate (or suppress) billiard tables.

A statute which gives a city council power to suppress billiard tables, enacted at a time when a billiard table was similar to the later-day pool table, is sufficiently comprehensive to authorize an ordinance forbidding the maintenance of a public pool table. *Clearwater v. Bowman* (1905) 72 Kan. 92, 82 Pac. 526.

And it was held in *Ex parte Murphy*

(1908) 8 Cal. App. 440, 97 Pac. 199, followed and approved in (1909) 155 Cal. 322, 100 Pac. 1134, that an ordinance prohibiting the maintenance of a pool room or billiard hall within a city was sustainable under a power to make and enforce such local police, sanitary, and other regulations as were not in conflict with the general laws, notwithstanding such places do not constitute a nuisance per se. The court said that no one possesses an inherent right to conduct for-profit a place intended purely for the amusement of its patrons, where the tendency thereof is immoral or vicious; and a public billiard hall or pool room may, by reason of its environment or conditions existing in some communities, constitute a menace and endanger the morals and well-being of the public, and therefore become the subject of regulation or absolute prohibition under the police powers of the state or municipality. For a later phase of this case, see *Murphy v. People* (1912) 222 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697, cited in this note.

But a village, under its statutory authority to license and regulate billiard and pool halls, has no authority to prohibit or suppress them. *State ex rel. McMonies v. McMonies* (1906) 75 Neb. 443, 106 N. W. 454; *Re McMonies* (1906) 75 Neb. 702, 106 N. W. 456.

And under a statute conferring upon town councils the power to license, regulate, tax, or suppress billiard tables or other instruments used for gaming, the town council is without authority to pass an ordinance suppressing billiard tables which are not operated for the purpose of gaming. *Dardanelle v. Gillespie* (1915) 116 Ark. 390, 172 S. W. 1036.

So, too, statutory authority given to a municipality "to regulate, suppress, and impose a privilege tax on all . . . billiard tables, pool rooms," does not carry with it the power to prohibit, unless it is in the exercise of the police power to suppress a nuisance. *Crittenden v. Booneville* (1908) 92 Miss. 277, 131 Am. St. Rep. 518, 45 So. 723. The court said: "The

municipality may regulate; that is to say, it may provide the hours during which these places may keep open, etc., and if the conduct of the owner is such as to warrant so doing, or if the business is conducted in a boisterous or immoral way so as to become a nuisance, it may suppress altogether. But the power to regulate and suppress when the business has become a nuisance is one thing, and the power to pass a general ordinance prohibiting the operation of a pool room, which has been legalized by the statute, is another thing. The first alone it has the power to exercise."

In *Ex parte Rowe* (1912) 4 Ala. App. 254, 59 So. 69, the statute, in terms, conferred authority to "prohibit." The court distinguished *Crittenden v. Booneville* (1908) 92 Miss. 277, 131 Am. St. Rep. 518, 45 So. 723, which held that a municipality in that state had no power to prohibit by ordinance public pool tables, stating that the ordinance in that case was adopted under a statute of Mississippi known as one of its nuisance statutes, and authorized towns and cities to regulate and suppress pool rooms, and so there was room for such a judicial construction of the statutes as was placed upon them by the supreme court of Mississippi. "Suppress" as used in the connection in which it was used in the Mississippi statute might well have been, as in fact it was, construed as meaning to abate, but in the statute under consideration in the *Rowe Case* the word in the statute to be construed is not "suppress," but "prohibit;" and the word "prohibit" means to prevent, and as used in this statute means that a municipality may, if it seems proper to do so, prevent the exhibition of public pool tables within its jurisdiction entirely.

And in *Corinth v. Crittenden* (1908) 94 Miss. 41, 47 So. 525, it was held that an ordinance of the city of Corinth prohibiting the operation of pool rooms and billiard tables was valid, since the city of Corinth operated under a special charter, wherein the city was given power to restrain or prohibit the keeping of billiard tables, pool tables, etc., within its borders.

The case of *Crittenden v. Booneville* (Miss.) supra, denying the power of the municipality to prohibit, was distinguished upon the ground that the municipality in that case was acting under Code provisions, empowering municipalities to "regulate, suppress, and impose a privilege tax," *inter alia*, upon billiard tables and pool rooms, it being held in that case that the power to regulate and suppress does not carry with it the power to prohibit unless it is in the exercise of the police power to suppress a nuisance.

An ordinance which is passed under the guise of one to regulate billiard halls, but which is in fact intended to be one for the suppression of that business is void. *Bryan v. Malvern* (1916) 122 Ark. 379, 183 S. W. 957.

And if such an ordinance did not operate to accomplish the result of suppressing pool-room business in the city it would be, in effect, a revenue measure, and so void. *Ibid*.

The mayor of a town is without authority to issue a license to keep and operate pool tables where there is an ordinance of the town prohibiting any person from keeping a pool hall or operating a pool table, and one to whom such license has been issued can claim no immunity under the license issued by the mayor. *Dardanelle v. Gillespie* (1915) 116 Ark. 390, 172 S. W. 1036.

IV. Taxation.

The legislature has a perfect right to levy an occupation tax on a pool table run in connection with a saloon, regardless of any profit or payment whatever to the owner of such table. *Wright v. State* (1899) 41 Tex. Crim. Rep. 200, 53 S. W. 640.

So, a statute levying an occupation tax on any pool table run for profit, or on any pool table used in connection with any drinking saloon or other place of business where intoxicating liquors are sold or given away, requires the tax to be paid regardless of any profit, where the pool table is kept in a saloon. *Ibid*.

And a club organized for social and literary purposes which keeps a bil-

liard table for the use of members and invited guests only, the members alone paying for the use of the table, and then only a nominal sum which does not meet the expense of keeping up and maintaining the table, is liable to a tax imposed upon the keeper of a billiard table. *The Germania v. State* (1854) 7 Md. 1.

And under a statute providing that every man who "erects and keeps" a billiard table is made liable to a tax, one who maintains a billiard table for purposes of amusement only is liable to the tax. *Sears v. West* (1809) 5 N. C. (1 Murph.) 291, 3 Am. Dec. 694.

But it has been held that a social club is not "the keeper of a billiard or pool room for purposes of profit" within the meaning of a statute requiring such to pay a tax. *Union League v. Ransley* (1908) 39 Pa. Super. Ct. 514.

And in *Tarde v. Benseman* (1868) 31 Tex. 277, the court stated that a billiard table which was simply kept for amusement, and not for profit, would not be a proper subject of taxation under a statute which requires a license tax of \$50 for each and every person or firm keeping a billiard table.

So, too, a club which maintains billiard and pool tables for the free use of its members and invited guests is not within the meaning of a statute levying an occupation tax upon "every billiard or pool table or anything of the kind used for profit . . . any such table used in connection with any drinking saloon or other place of business where intoxicating liquors . . . or other things of value are sold or given away or upon which any money or other thing of value is paid shall be regarded as used for profit." *State v. Country Club* (1910) — Tex. Civ. App. —, 173 S. W. 570.

A statute imposing a tax for the privilege of keeping a billiard table was held in *Stevens v. State* (1840) 2 Ark. 291, 35 Am. Dec. 72, to be unconstitutional and void.

And in *Washington v. State* (1853) 13 Ark. 752, and *State v. Hines* (1853) 13 Ark. 764, it was held that so much of an act as prohibited any person from setting up a billiard table or ten pin alley without paying a sum of money

into the state treasury as a license therefor was repugnant to the Constitution, and void because there was no power to do that indirectly which could not be done directly, and the license was none the less a tax for the privilege of setting up such a table or alley because collected or enforced by means of criminal prosecution.

But the court was of the opinion that the constitutional provision concerning revenue was intended to apply to state revenue only, and not to taxes levied for county purposes, and so the general assembly might well, by legislation, authorize counties and incorporated towns to impose a tax upon billiard tables, ten pin alleys, etc., for municipal purposes and as a police regulation for the preservation of good order. *Ibid.*

As the act considered in the Washington Case provided for a state tax as well as authorizing a county tax, it was held that the whole act must be declared void, as the whole scope and provisions of the act were so intimately blended that the court did not feel warranted, by any rule of judicial interpretation, to separate the provisions in order to give to a part of the act any effect which it could not presume was intended.

V. As nuisance.

a. In general.

Bowling alleys appear to have been early regarded as analogous in character to stages for rope dancing, probably because they produced similar results. *Hall's Case* (1671) 1 Mod. 76, 86 Eng. Reprint, 744. Chief Justice Hale is reported to have said in that case "that in the eighth year of Charles I. Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's Church, and had it." It appears that a writ was issued in the case referred to by Lord Hale to abate the bowling alley as a nuisance. 1 Vent. 169, 86 Eng. Reprint, 115.

So, bowling alleys were held at common law to be nuisances per se where they were run for gain and were open to the public generally, not only because they were considered great

temptations to idleness, but also because they were apt to draw together great numbers of disorderly persons, which could not keep from being very inconvenient to the neighborhood. 1 Hawk. P. C. chap. 75, § 6; *Rex v. Hall* (1671) 2 Keble, 846, 84 Eng. Reprint, 535.

And in several early cases in the United States the law on this subject which obtained at common law was recognized as still the law. *Tanner v. Albion* (1843) 5 Hill (N. Y.) 121, 40 Am. Dec. 337; *State v. Haines* (1849) 30 Me. 65.

So, also, in *Updike v. Campbell* (1855) 4 E. D. Smith (N. Y.) 570, the same view of bowling alleys was entertained as prevailed in the *Tanner Case* (N. Y.) *supra*, and a contract leasing certain premises for the purpose of conducting a bowling alley therein was held to be void because the leasing was for an illegal purpose, although Judge Woodruff said that he was by no means satisfied with the correctness of the decision in the *Tanner Case*.

And in the early case of *State v. Haines* (Me.) *supra*, a conviction under an indictment charging that defendant was keeping a bowling alley for gain and common use was sustained, the basis of the decision being that a bowling alley was a common nuisance.

And in *Tanner v. Albion* (N. Y.) *supra*, it was held that, under authority to adopt by-laws relating to nuisances, a municipality might prohibit the keeping of a bowling alley for hire.

But the modern view is the one held in *State v. Hall* (1867) 32 N. J. L. 158, that a bowling alley kept by the owner with a view to profit, for the public amusement, not in itself prohibited by law, cannot be held to be a nuisance, unless such consequences attach from the mode in which it is kept; the mere keeping of a ten pin alley is not a nuisance per se.

And to the same effect are *Harrison v. People* (1902) 101 Ill. App. 224; *Bloomhuff v. State* (1846) 8 Blackf. (Ind.) 205; *Hackney v. State* (1857) 8 Ind. 494; *State v. Noyes* (1855) 30

N. H. 279; and *Pape v. Pratt Institute* (1908) 127 App. Div. 147, 111 N. Y. Supp. 354.

But a bowling alley kept for hire, while not a nuisance *per se* everywhere, may become such in some places (*Harrison v. People* (Ill.) *supra*), or by the mode in which it is kept (*Bloomhuff v. State* (1846) 8 Blackf. (Ind.) 205; *Hackney v. State* (1856) 8 Ind. 494).

So, bowling alleys and moving picture theaters, while not nuisances *per se*, may become so when they create a disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood. *Hamilton Corp. v. Julian* (1917) 130 Md. 597, 7 A.L.R. 746, 101 Atl. 558.

Keeping a billiard room is not a nuisance at common law (*People v. Sergeant* (1828) 8 Cow. (N. Y.) 139), unless it be in a tavern, where it is made a nuisance by statute. *Ibid.*

And keeping a billiard table even though the loser pays for its use is not keeping a gambling table within the statute. *Ibid.*; *People ex rel. Healey v. Forbes* (1889) 52 Hun, 30, 4 N. Y. Supp. 757; *People v. Commissioner of Excise*, cited in *People ex rel. Healey v. Forbes* as decided in November, 1887.

But see *State v. Book* (1875) 41 Iowa, 550, 20 Am. Rep. 609, 1 Am. Crim. Rep. 234, which held that one is guilty of maintaining a house for purposes of gambling where he operates billiard tables upon which the players play with the understanding that the loser shall pay for the games, and they are in fact so played.

b. Power to declare as nuisance per se.

1. Legislative power.

While a bowling alley is not of itself a nuisance, since it may either remain unused or it may be used only as a place of innocent amusement, and its injurious character depends upon the improper use alone, yet the legislature may determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited. *State v. Noyes* (1855) 30 N. H. 279.

2. Municipal power.

Pool halls which may become nuisances by being improperly conducted may be so regulated by a city council that they may not become a nuisance. *Bryan v. Malvern* (1916) 122 Ark. 379, 183 S. W. 957.

The operation of a billiard hall or a pool room for gain is not recognized by law as necessary or useful, or a business which a person has an inherent right to engage in; and so a municipal ordinance declaring them a nuisance, and forbidding them, passed under statutory authority to declare what shall constitute a nuisance and to prevent the same, is valid. *Re Jones* (1910) 4 Okla. Crim. Rep. 74, 31 L.R.A. (N.S.) 548, 140 Am. St. Rep. 655, 109 Pac. 570.

So, if by the general terms of a village charter, the trustees are authorized to make by-laws relative to slaughterhouses and nuisances generally, and pursuant to such authority they passed a by-law declaring the keeping of the tenpin alley for gain to be a nuisance, such ordinance is valid even though the owner thereof has printed rules posted therein relative to the game, and forbidding, abating, and prohibiting the use of the alley by minors or boys, such enterprise having no useful end. *Tanner v. Albion* (1843) 5 Hill (N. Y.) 121, 40 Am. Dec. 337.

And a municipal corporation having power to declare what shall constitute a nuisance, and to prevent the same, may lawfully prohibit as public nuisances billiard and pool rooms operated for gain, although such rooms are not nuisances *per se*. *Re Jones* (Okla.) *supra*.

But a private bowling alley cannot be singled out by a common council and declared to be a nuisance until after a full hearing of both parties has been had. *Shreveport v. Leiderkrantz Soc.* (1912) 130 La. 802, 40 L.R.A. (N.S.) 75, 58 So. 578.

c. Right to enjoin.

If town authorities adopt a statute making bowling alleys a nuisance,

such statute has a binding effect upon such town, and therefore such alleys, when situated within a certain distance from a dwelling house, become a nuisance within the meaning of such statute, which may be abated by the public authorities. *State v. Noyes* (1855) 30 N. H. 279.

But where bowling alleys have been licensed by the municipal authorities, their operation will not be enjoined as a nuisance where they are built in the same manner as such alleys are usually constructed, and contain certain pads or cushions designed to deaden the noise caused by the dropping or rolling of the balls, even though the operation of the alley disturbs the neighbors. *Levin v. Goodwin* (1906)

191 Mass. 341, 114 Am. St. Rep. 616, 77 N. E. 718.

And equity will not grant a perpetual injunction to restrain the owner of a bowling alley from permitting anyone to play upon it, and from permitting loud and boisterous noises to be made by persons there. *Wende v. Socialer Turn Verein* (1896) 66 Ill. App. 591.

But the fact that one who operated a bowling alley for hire was convicted under an indictment charging a nuisance did not authorize the court to issue an order for the abatement of the ball alley, since it was not the ball alley itself which was the nuisance. *Bloomhuff v. State* (1846) 8 Blackf. (Ind.) 205. J. H. B.

SYLVINA E. WALL, Exrx., etc., of John L. Wall, Deceased, Respt.,
v.

ALEXANDER HESS, Appt.

New York Court of Appeals — February 3, 1922.

(232 N. Y. 472, 134 N. E. 536.)

Landlord and tenant — duty of tenant to pay taxes — change of municipal charter.

Taxes which are imposed within the term by amendment of the municipal charter are within the operation of a lease requiring the tenant to pay all taxes imposed within the term, although they are not payable until after the expiration of the lease, and the tenant is thereby required to pay a tax falling due at the close of his term for a year only part of which is covered by his lease, and when the lease was executed the taxes were imposed later in the year.

[See note on this question beginning on page 1502.]

(Crane, Hogan, and Andrews, JJ., dissent.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Trial Term for New York County, setting aside a verdict for plaintiff and granting a new trial in an action brought to recover unpaid rent of premises and taxes thereon, according to the terms of a written lease. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. David Cohen, with Messrs. Hedges, Ely, & Frankel, for appellant:

The defendant, under the terms of the covenant contained in the lease, was not obligated to pay and dis-

charge those taxes which did not become due and payable, or a lien upon the premises, during the continuance of his lease.

Ward v. Union Trust Co. 224 N. Y.

73, 3 A.L.R. 1154, 120 N. E. 91; Morris v. Suerken, 88 Misc. 262, 151 N. Y. Supp. 817.

Messrs. Norwood & Walsh, for respondent:

The lessee's covenant was to pay when due and payable, or sixty days thereafter, every tax assessed or imposed upon the premises during the term. That was an absolute, unqualified obligation to pay, but as to the time for making the payment, he had an indulgence of sixty days after such taxes became due and payable. The money to be paid was the sum in dollars and cents of tax assessed during the term of the lease.

Ogden v. Getty, 100 App. Div. 430, 91 N. Y. Supp. 664; Re Sherwoods, 127 C. C. A. 304, 210 Fed. 754, Ann. Cas. 1916A, 940; Amory v. Melvin, 112 Mass. 83; Craig v. Summers, 47 Minn. 189, 15 L.R.A. 236, 49 N. W. 742; Walker v. Whittemore, 112 Mass. 187; Richardson v. Gordon, 188 Mass. 279, 74 N. E. 344; Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303; New York v. Cashman, 10 Johns. 96; Ward v. Union Trust Co. 224 N. Y. 73, 3 A.L.R. 1154, 120 N. E. 91, reversing 172 App. Div. 569, 159 N. Y. Supp. 54; Welch v. Phillips, 224 Mass. 267, 112 N. E. 651; Waterman v. Harkness, 2 Mo. App. 494; Strohmeier v. Zeppenfeld, 28 Mo. App. 268; Terry v. Lucas, 66 Misc. 346, 123 N. Y. Supp. 770; Blythe v. Gately, 51 Cal. 236; Elliot v. Gantt, 64 Mo. App. 248; Blake v. Baker, 115 Mass. 188.

Pound, J., delivered the opinion of the court:

This is an action against a tenant to recover unpaid rent of premises in the city of New York and taxes thereon according to the terms of a written lease. On the trial the court directed judgment for the plaintiff, but afterwards set the verdict aside and ordered a new trial because plaintiff refused to stipulate to reduce the recovery by \$1,472.53, being the amount of taxes for the year 1917, with interest. The appellate division reversed the order and reinstated the verdict.

The lease was for a term of fifteen years, eight months, from the 1st day of September, 1901, ending on the 30th day of April, 1917, at 12 o'clock midnight.

It contained the following clause: "First. That the said party of the second part [defendant] shall and will pay and discharge when due and payable, or within sixty days thereafter, all and every tax and taxes, Croton water or other water rates, charges for placing, replacing or repairing water meters upon said premises, rents, charges, assessments, duties and other impositions whatsoever, as well ordinary as extraordinary, which shall be assessed, levied, or imposed upon the said premises, or any part thereof, by any government, power, or authority whatsoever during the said term, except that the parties of the first part [plaintiff's testator] covenant and agree to pay all taxes, assessments or other charges which may become a lien and charge on said premises in the year 1901; but the party of the second part covenants and agrees to pay the water rates or rents chargeable against or to said premises or any part thereof after September 1, 1901."

The taxes for the year 1917 were fixed and levied on the 28th day of March, 1917. At the date of the lease, May 6, 1901, and thereafter until January 1, 1912, when chapter 455 of the Laws of 1911, amending the city charter (Laws 1901, chap. 466), took effect, taxes were assessed on the 15th day of September in each year, were payable on the 1st day of October thereafter, and became liens on the real estate affected thereby on the days when they became due and payable. It follows that if no change had been made in the charter the tenant would have been under no obligation to pay the taxes in suit, for they would have been neither assessed nor payable during the term, but under the change in the charter the taxes were assessed but not payable during the term.

The appellate division, in resolving the question of liability for taxes in favor of the landlord, relied upon Ogden v. Getty, 100 App. Div. 430, 91 N. Y. Supp. 664, in which it was held: "Where a lease of prem-

ises, located in the city of New York, for a term of twenty-one years, expiring October 1, 1903, provides that the lessee shall pay all taxes 'laid, levied, assessed or imposed' on the demised premises during the term, the lessee is required to pay a tax levied by the city of New York upon the demised premises, the amount of which becomes finally and unalterably fixed and imposed on September 15, 1903, notwithstanding that such tax cannot be paid nor a bill therefor be obtained prior to October 5, 1903."

This court had recently before it *Ward v. Union Trust Co.* 224 N. Y. 73, 3 A.L.R. 1154, 120 N. E. 81, in which the provisions of the lease were, with the important exception hereinafter noted, substantially the same as herein. The *Ward* lease expired at noon on May 1, 1914, and contained a covenant as follows: "Provided always and the lessee hereby covenants to pay said rent punctually, and to pay and discharge all annual taxes as shall during said term be imposed on said premises hereby demised, as soon as they become due and payable, and to pay the Croton and all other water charges as soon as the same shall become due, and to keep said demised premises free, clear, discharged, and unencumbered from all such taxes and Croton and other water charges during said term."

The lessee was held liable, not for the taxes for the year 1914 which had been assessed against the premises during its term, but for the one half thereof which became due and payable and a lien on the demised premises on May 1, 1914, a few hours before the expiration of the lease. The expression of the intention of the parties that this sum only should be paid was, however, found entirely in the words "keep said demised premises free, clear, discharged, and unencumbered from all such taxes during said term," which are not in the lease we are now considering. Chase, J., said: "Reading the covenant as a whole, the promise of the tenant in-

cludes the general taxes imposed and becoming due and payable within the term. The demised premises became encumbered with one half of the tax of 1914 on May 1, 1914. The lessee could not leave the demised premises free, clear, discharged, and unencumbered from taxes during said term if the taxes so actually due and payable on the date of the expiration of the lease were left unpaid." 224 N. Y. 78.

The gist of the decision plainly is the clause as to encumbrances, which is treated as evidencing the intention of the parties to the lease, and not as making a general rule. The landlord was to receive his rent during the term, and was to be subject to no expense on account of the demised premises for taxes which became due and payable and liens during said term. The landlord covenanted to receive the premises unencumbered, and the duty of the tenant was discharged when it so delivered them.

That is not this case. The obligation of this defendant was to pay all taxes that might be *assessed, levied, or imposed* against the premises during the term. No escape is possible from the conclusion that the taxes for the year 1917 were finally and unalterably fixed and imposed against the demised premises during the term of the lease, although not payable until after the expiration of such term.

We should not let the tenant out of his promise because the change in the charter increases his burdens in this regard. Landlords as a class are not lacking in sagacity when it comes to contemplated changes in the tax laws. They properly endeavor to draw their leases with sufficient definiteness to protect themselves from such contingencies. I fail to see what more the landlord could have done to protect himself in this case. We should not add the words "during the term of this lease" to the words of the parties, in order to give what may seem to us a fairer meaning to the contract than can be found in the words

chosen. The words are not there. That is not the meaning of the lease in legal contemplation. The duty of the tenant to pay the 1917 taxes is absolute. The Ward Case states an exception to the general rule, amply recognized and stated by Chase, J. The exception should not be extended beyond the circumstances which moved the court in that case to find for the tenant in part on the terms of the lease before it.

The judgment appealed from should be affirmed, with costs.

Hiscock, Ch. J., and Cardozo and McLaughlin, JJ., concur.

Crane, J., dissenting:

By written instrument under seal, Jacob Wall and John L. Wall leased to the defendant certain premises situated in the southeasterly corner of Sixth avenue and Twenty-first street in the city of New York, known as No. 338 Sixth avenue.

The term of the lease was fifteen years and eight months, commencing on the 1st day of September, 1901, and ending on the 30th day of April, 1917, at 12 o'clock midnight of that day. The rental was \$10,500 a year, payable the 1st day of each and every month. Said lease contained the following clause: "First. That the said party of the second part shall and will pay and discharge when due and payable, or within sixty days thereafter, all and every tax and taxes, Croton water or other water rates, charges for placing, replacing or repairing water meters upon said premises, rents, charges, assessments, duties, and other impositions whatsoever, as well ordinary as extraordinary, which shall be assessed, levied or imposed upon the said premises, or any part thereof, by any government, power, or authority whatsoever during the said term, except that the parties of the first part covenant and agree to pay all taxes, assessments, or other charges which

may become a lien and charge on said premises in the year 1901; but the party of the second part covenants and agrees to pay the water rates or rents chargeable against or to said premises or any part thereof after September 1st, 1901."

The interest of Jacob Wall was assigned to John L. Wall, and, the latter having died, the plaintiff, his duly appointed executrix, brings this action for moneys claimed to be due under the lease.

The only question is whether the tenant is liable for the taxes becoming due and payable on May 1, 1917, the day after the expiration of the lease. The trial term held that the defendant was not liable to pay these taxes, but this conclusion has been reversed by the appellate division, two of the justices dissenting.

By the Greater New York Charter in force and effect in 1901, the assessment roll of each borough of the city was to be delivered to the receiver of taxes on or before the 15th day of September (§ 911), and the taxes became due and payable on the first Monday of October (§ 914). This evidently explains the provision in the above clause of the lease, that the party of the first part covenants and agrees to pay all taxes and assessments which may become a lien and charge on the premises in the year 1901. The lease commencing September 1st, the taxes under the charter would become due and payable October 1st, and it was agreed that the owner should, therefore, pay the taxes for the year 1901. Section 911 was amended by chapter 455 of the Laws of 1911 by changing the date when the assessment rolls should be finally completed and delivered to the receiver of taxes, to the 28th day of March. The date for payment of taxes was changed so as to make one half of the taxes upon real estate due and payable on the first day of May and the remaining and final half payable on the first day of November. All taxes, it was provided, should be and become liens on the real estate affected on

the respective days when they became due and payable, and should remain liens until paid.

The lease was for a long term,—fifteen years and eight months,—and it seems reasonable to suppose that the parties contracted with a view to those things which would happen during the term of the lease. In my opinion, the wording of the clause does not warrant a construction which would require the tenant to do something which did not happen to the premises until after his term had expired and he had ceased to have anything to do with the property. This clause, above quoted, states that the lessee shall and will pay and discharge, when due and payable, all and every tax upon said premises which shall be assessed. The taxes in this case under the amendment of the charter, as above stated, did not become due and payable until May 1, 1917. At that time the lease had expired. The defendant had ceased to have any interest in the property. During his term, which was up to midnight of April 30, 1917, he could not pay the taxes assessed even if he desired to do so. They were not payable. The provision of the lease regarding the payment of taxes must have been written with a view to each one of the years that the lease had to run,—each one of the fifteen years. It was not made, having in mind solely the date of expiration. In fact, the changes in the law shifting the date of payment and of lien did not occur until after the making and execution of the instrument. Had the law remained as it was when the parties made the lease, the lessee's term would have expired many months before the taxes became due on October 1st. It cannot be said, therefore, that the parties contemplated that the taxes would be assessed before and become due and payable after the expiration of the lease, and made their provisions accordingly. It is for this reason that I am of the opinion that the parties used these words, intending them to apply to the

things which would happen during the term of the lease, i. e., that the lessee was to pay the taxes which became due and payable while his lease was in force and effect, not those which became due and a lien upon the property after the expiration of his term. In effect this is what the clause means. If more than that had been intended, specific provision would have been made for it. This construction of the lease seems to be in harmony with our decision in *Ward v. Union Trust Co.* 224 N. Y. 73, 3 A.L.R. 1154, 120 N. E. 81. The lease in that case contained a covenant as follows: "Provided always and the lessee hereby covenants to pay said rent punctually, and to pay and discharge all annual taxes as shall during said term be imposed on said premises hereby demised, as soon as they become due and payable, and to pay the Croton and all other water charges as soon as the same shall become due, and to keep said demised premises free, clear, discharged, and unencumbered from all such taxes and Croton and other water charges during said term, and to put and keep the said premises in good order and repair, and in all respects promptly comply with and execute all the laws, orders, and regulations of the state and municipal authorities applicable to said premises; except as hereinafter provided with respect to the widening of Fifth avenue."

One half of the amount of taxes in that case became due and payable on the day on which the term of the defendant's lease expired. It was properly held that he should pay this half because the taxes became due and payable while he was in possession. As Judge Chase said: "Reading the covenant as a whole, the promise of the tenant includes the general taxes imposed and becoming due and payable within the term. The demised premises became encumbered with one half of the tax of 1914 on May 1, 1914. The lessee could not leave the demised premises free, clear, dis-

charged, and unencumbered from taxes during said term if the taxes so actually due and payable on the date of the expiration of the lease were left unpaid. The payment of the tax comes precisely within the terms of the contract made by the lessee, and we can only consider and enforce it." 224 N. Y. 75, 78.

So, in this case, reading the covenant as a whole, the promise of the tenant included merely the payment of the general taxes imposed and becoming due and payable within the term. The fact that in the Ward Case the covenant also was to keep the demised premises unencumbered was not the determining feature, and is not a distinguishing element between that case and this. The effect is the same in this case. By the charter provision, above referred to, the taxes became a lien on the day when they became due and payable. It is the due date, the time when the parties must act, not the city officials, which was in the minds of the lessor and lessee. When the taxes were assessed was a matter of no importance. It could be weeks or months prior to the

time of payment. This was a mere matter of detail, of bookkeeping, of administrative work on the part of the city government. What the landlord and tenant had in mind was the thing which affected them; it was the date when payment had to be made by one or the other; when the real property became charged with a lien. The assessment did not affect either of them until, by operation of law, it touched the property and became a payable tax. Therefore emphasis in both these cases, by reason of the phraseology used, comes upon the words "due and payable," and indicates that the tenant was to pay all such charges which matured during the term of his lease.

For this reason I am of the opinion that the judgment of the Appellate Division should be modified by deducting therefrom the amount of taxes due and payable on May 1, 1917, to wit, the sum of \$1,313 and interest, and as so modified affirmed, without costs.

Hogan and Andrews, JJ., concur in dissent.

ANNOTATION.

Change in time for assessment or payment of taxes as affecting provision for payment of taxes during term of lease.

The reported case (*WALL v. HESS*, ante, 1497) apparently is the only one that has passed upon the question under consideration since the compilation of the note in 3 A.L.R. 1159, wherein the earlier cases are treated. In this case it was held that as a general rule a tenant is not relieved from the payment of taxes levied during his term, notwithstanding he would not have had to pay such taxes if the time of levying the same had not been changed, and this although the taxes in question were not payable until after the expiration of the lease. In reaching this conclusion the majority of the court (vote was four to three) expressly limited the decision in the earlier case of *Ward v. Union Trust*

Co. (1918) 224 N. Y. 73, 3 A.L.R. 1154, 120 N. E. 81, which is set out in the annotation in 3 A.L.R. 1159, to the facts of that case, saying that it formed an exception to the general rule, and that it should not be extended beyond the circumstances which were under consideration therein, and which it had been held relieved the tenant, in part, from the payment of taxes, the time for the levying of which had been advanced so as to fall within the tenant's term.

Another recent case which, while not in point in the present annotation, may be of interest because of the fact that it involves a statute which effects a change in the method of pay-

ANNO.—COVENANT TO PAY TAXES IN LEASE—CONSTRUCTION. 1503

ment of taxes which, under a lease, were a charge upon the tenant, is *Mascall v. Reitmeier* (1920) 145 Minn. 214, 176 N. W. 486, wherein it was held that a statute changing the law

so as to make road taxes payable in money, instead of optional in labor or money, did not relieve a tenant from his contract obligation to pay such taxes. G. J. C.

JOSEPH DROBNER, by Guardian ad Litem, Respt.,
v.
AUGUST L. PETERS, Appt.

New York Court of Appeals—December 6, 1921.

(232 N. Y. 220, 133 N. E. 567.)

Infant — action for injury before birth.

A child has no right of action for injury negligently inflicted upon it while it is in its mother's womb.

[See note on this question beginning on page 1505.]

(Cardozo, J., dissents.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County denying his motion for judgment on the pleadings in an action brought to recover damages for prenatal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion of the court.

The question certified to the court for review is as follows: Does the complaint herein state facts sufficient to constitute a cause of action?

Messrs. William Dike Reed and William B. Shelton for appellant.

Mr. J. M. Cohen, with Mr. David Batt, for respondent:

At law, the plaintiff is considered born for all purposes that are for his benefit, and he has such rights as would enable him to maintain this action through his guardian.

Long v. Blackall, 7 T. R. 100, 101 Eng. Reprint, 875, 4 Revised Rep. 73; *Thellusson v. Woodford*, 4 Ves. Jr. 227, 31 Eng. Reprint, 117, 4 Revised Rep. 205, 1 Eng. Rul. Cas. 498; *The George & Richard*, L. R. 3 Adm. & Eccl. 466, 24 L. T. N. S. 717, 20 Week. Rep. 246, 1 Asp. Mar. L. Cas. 50; *Quinlen v. Welch*, 69 Hun, 584, 23 N. Y. Supp. 963; *Herndon v. St. Louis & S. F. R. Co.* 37 Okla. 256, 128 Pac. 727; *Galveston, H. & S. A. R. Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. 1051; *Cooper v. Heatherton*, 65 App. Div. 561, 73 N. Y. Supp. 14; *Nugent v. Brooklyn Heights R. Co.* 154 App. Div. 667, 139 N. Y. Supp. 367; *Shearm. & Redf. Neg.* § 116; *Lipps v.*

Milwaukee Electric R. & Light Co. 164 Wis. 272, L.R.A.1917B, 334, 159 N. W. 916, 13 N. C. C. A. 1113; *Kirk v. Middlebrook*, 201 Mo. 245, 100 S. W. 450; *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773; *Norton v. Randolph*, 176 Ala. 381, 40 L.R.A.(N.S.) 129, 58 So. 283, Ann. Cas. 1915A, 714; *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 43 S. W. 429; *Erickson v. Schmill*, 62 Neb. 368, 87 N. W. 166; *O'Brian v. State*, 14 Ind. 469; *Masters v. Marsh*, 19 Neb. 461, 27 N. W. 438; *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427, 76 Ill. App. 441.

Pound, J., delivered the opinion of the court:

Defendant negligently permitted a coalhole in the sidewalk in front of his premises to remain uncovered. Plaintiff's mother fell into it. Plaintiff, in his mother's womb,

sustained injuries. Born eleven days after the accident, he now brings this action. It is contended that at the time of the injury he was not a person, but was a part of the body of his mother, and that, as the injury was to his mother, he has no cause of action.

Mr. Justice Holmes said in 1884, in *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242, that no case, so far as he knew, had ever decided that an infant could maintain an action for injuries received in the mother's womb. The great weight of authority is still against

**Infant—action
for injury before
birth.**

the plaintiff's contention that the unborn child has a right of immunity from personal harm (*Allaire v. St. Luke's Hospital*, 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427; *Walker v. Great Northern R. Co.* Ir. L. R. 28 C. L. 69; *Gorman v. Budlong*, 23 R. I. 169; 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704, 10 Am. Neg. Rep. 188; *Buel v. United R. Co.* 248 Mo. 126, 45 L.R.A. (N.S.) 625, 154 S. W. 71, Ann. Cas. 1914C, 613, 4 N. C. C. A. 129; *Lipps v. Milwaukee Electric R. & Light Co.* 164 Wis. 272, L.R.A.1917B, 334, 159 N. W. 916, 13 N. C. C. A. 1113), although much judicial argument has been advanced to support a contrary ruling (*Nugent v. Brooklyn Heights R. Co.* 154 App. Div. 667, 139 N. Y. Supp. 367; dissenting opinion, *Boggs, J., Allaire v. St. Luke's Hospital*, supra; *Beven*, Neg. 3d ed. 73, 76).

In *Quinlan v. Welch*, 69 Hun, 584, 23 N. Y. Supp. 963, it was held that a child born after the father's death was a child at the time of the injury which caused the death, within the meaning of the Civil Damage Act (Laws 1873, chap. 646), and as such was entitled to maintain an action for injury in means of support against the person who sold intoxicating liquors to the father; but this court, on appeal (*Quinlan v. Welch*, 141 N. Y. 158, 165, 36 N. E. 12), carefully

declined, as unnecessary to the decision, either to approve or disapprove the views expressed by *Haight, J.*, below.

The reasons given to defeat recovery in such a case are: Lack of authority; practical inconvenience and possible injustice; no separate entity apart from the mother, and therefore no duty of care; no person or human being in esse at the time of the accident. They are not absolutely conclusive against the infant en ventre sa mere.

"The law in many cases hath consideration of him in respect of the apparent expectation of his birth." *Bedford's Case*, 7 Coke, 8b, 77 Eng. Reprint, 424.

By a legal fiction or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after his birth (*The George & Richard*, L. R. 3 Adm. & Eccl. 466, 24 L. T. N. S. 717, 20 Week. Rep. 246, 1 Asp. Mar. L. Cas. 50), but not for purposes working to his detriment (*Villar v. Gilbey* [1907] A. C. 139, 145, 1 B. R. C. 568, 76 L. J. Ch. N. S. 339, 96 L. T. N. S. 511, 23 Times L. R. 392, 7 Ann. Cas. 130). By the criminal law, such being the solicitude of the state to protect life before birth, it is a great crime to kill the child after it is able to stir in the mother's womb, by any injury inflicted upon the person of the mother (Penal Law, § 1050), and it may be murder if the child is born alive and dies of prenatal injuries (*Clarke v. State*, 117 Ala. 1, 67 Am. St. Rep. 157, 23 So. 671). If the mother, with the intent to produce her own miscarriage, produces the death of the quick child whereof she is pregnant, she may be guilty of manslaughter. Penal Law (Consol. Laws, chap. 40) § 1052. If the child is not quick, it may be felony to produce a miscarriage. Penal Laws, §§ 80, 81. If a female convict under sentence of death is quick with child, she may not be executed. Code Crim. Proc. §§ 500, 505. Many authorities are collected in the comprehensive prevailing opin-

ion below. While they tend to cloud the real issue, they are not controlling. Rights of ownership of property do not connote a duty of personal care to the inchoate owner, nor does the crime of causing the death of an unborn child connote liability to the child for personal injuries. When justice or convenience requires, the child in the womb is dealt with as a human being, although physiologically it is a part of the mother, but the law has been fairly well settled, during its centuries of growth, against the beneficence of an artificial rule of liability for personal injuries sustained by it.

Does the present case permit the establishment by judicial decision of the rule that the innocent infant need not bear unrequited the consequences of another's fault? In the mother's womb he had no separate existence of his own. When born he became a person. He carried the injuries out into the world with him. His full rights as a human being sprang into existence with his birth. No longer may it be urged that the mother alone is injured. The presence of the injured child refutes that theory. Did he succeed to his mother's rights?

The modern tendency of decided cases is to ignore fictions and deal with things as they are. At common law, a cause of action for personal injuries did not survive if death resulted from another's negligence or wrongful act. Lord Campbell's Act, passed in England in 1846, and followed generally in

this state (Code Civ. Proc. § 1905), was necessary to correct this omission. May this court attach an unnatural meaning to simple words, and hold, independently of statute, that a cause of action for prenatal injuries is reserved to the child until the moment of its birth, and then accrues? The formulation of such a principle of legal liability against precedent and practice may be a tempting task, to which sympathy and natural justice point the way; but I cannot bring myself to the conclusion that plaintiff has a cause of action at common law. The injuries were, when inflicted, injuries to the mother. No liability can arise therefrom except out of a duty disregarded, and defendant owed no duty of care to the unborn child in the present case, apart from the duty to avoid injuring the mother.

Strong reasons of public policy may be urged both for and against allowing the new right of action. The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it, as to call for judicial legislation on the question.

The order appealed from should be reversed, and the motion for judgment on the pleadings granted, with costs in all courts, and the question certified should be answered in the negative.

Hiscock, Ch. J., and Hogan, McLaughlin, Crane, and Andrews, JJ., concur.

Cardozo, J., dissents.

ANNOTATION.

Prenatal injury as ground of action.

The cases are agreed that in the absence of statute a prenatal injury affords no basis for an action in damages, in favor either of the child or its personal representative. *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427; *Dietrich v. Northampton* (1884) 20 A.L.R.—95.

138 Mass. 14, 52 Am. Rep. 242; *Buel v. United R. Co.* (1913) 248 Mo. 126, 45 L.R.A. (N.S.) 625, 154 S. W. 71, Ann. Cas. 1914C, 613, 4 N. C. C. A. 129; *DROBNER v. PETERS* (reported herewith) ante, 1503; *Nugent v. Brooklyn Heights R. Co.* (1913) 154 App. Div. 667, 139 N. Y. Supp. 367, appeal dismissed in (1913) 209 N. Y. 515, 102

N. E. 1107; *Gorman v. Budlong* (1901) 23 R. I. 169, 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704, 10 Am. Neg. Rep. 188; *Lipps v. Milwaukee Electric R. & Light Co.* (1916) 164 Wis. 272, L.R.A.1917B, 334, 159 N. W. 916, 13 N. C. C. A. 1113; *Walker v. Great Northern R. Co.* (1891) Ir. L. R. 28 C. L. 69. See *Quinlen v. Welch* (1893) 69 Hun, 584, 23 N. Y. Supp. 963, set out in the reported case.

Kirk v. Middlebrook (1906) 201 Mo. 286, 100 S. W. 450, while referring to the *Allaire*, *Dietrich* and *Walker* Cases, *supra*, as supporting the rule that the common law gives no right of action to an infant for injuries received by it while *en ventre sa mere*, does not pass upon the question, but leaves it to be determined when a case arises wherein the matter is directly in issue.

The court in *Lipps v. Milwaukee Electric R. & Light Co.* (1916) 164 Wis. 272, L.R.A.1917B, 334, 159 N. W. 916, 13 N. C. C. A. 1113, an action against a railway company by the guardian of the infant, in which the petition charged that the infant suffered epileptic fits as a direct result of injuries received on defendant's car while a fetus *en ventre sa mere* of the age of about five months, the court said: "We go no further than the facts of the case require, and hold that no cause of action accrues to an infant *en ventre sa mere* for injuries received before it could be born viable."

In *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427, affirming (1898) 76 Ill. App. 445, it is held that an infant has not, before birth, such an independent existence that a negligent injury to him will sustain an action in his behalf after he is born. The court said: "That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere

legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie." *Boggs, J.*, dissented in an able opinion which is worthy of consideration. The injury complained of here was inflicted by the negligence of a hospital, which had undertaken for hire the safe delivery of the child.

And in *Gorman v. Budlong* (1901) 23 R. I. 169, 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704, 10 Am. Neg. Rep. 188, it is held that a child has no right of action for injuries to its mother which cause its premature birth, so that in case death results a cause of action will survive, under a statute giving a right of action for wrongful death caused by negligence, where it is such as would, had death not resulted, have entitled the person injured to maintain an action. The injuries here complained of were inflicted by the falling of a defective ceiling, of which the defendant had notice, and which he had promised to repair.

And in *Dietrich v. Northampton* (1884) 138 Mass. 14, 52 Am. Rep. 242, where a woman four or five months advanced in pregnancy, by reason of a fall upon a defective highway, was delivered of the child, who, although not directly injured, unless by communication of the shock to the mother, was too little advanced in fetal life to survive its premature birth more than ten or fifteen minutes, it was held that the child was not a "person" for the loss of whose life an action could be maintained against a municipality, by his administrator, as allowed by statute. The court said: "The court below ruled that the action could not be maintained; and we are of the opinion that the ruling was correct. . . . Some ancient books seem to have allowed the mother an appeal

for the loss of her child by trespass upon her person. . . . But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied upon by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." And, after considering certain cases and arguments, the court concluded: "Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning; and have not found it necessary to consider the question of remoteness, or the effect of those cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common-law liability for negligence."

The relation of passenger and carrier does not exist between a railroad company and an unborn child whose mother is a passenger, so as to render the company liable in tort or contract for injuries to the child. *Walker v. Great Northern R. Co.* (1891) 1r. L. R. 28 C. L. 69; *Nugent v. Brooklyn Heights R. Co.* (1913) 154 App. Div. 667, 139 N. Y. Supp. 367, appeal dismissed in (1913) 209 N. Y. 515, 102 N. E. 1107. In the latter case the court said: "This is an action for negligence, for violation of defendant's duty as a carrier, and defendant cannot be judged as a trespasser. Negligence is culpable failure to observe a duty owed by one to another in a particular relation, and remedy is allowed for injury therefor. What duty did the defendant . . . owe the unborn child? The child in its distinct entity was not a passenger, and the company owed it as a separate person no duty in the manner of safe carriage. Had it, born, been carried in its mother's arms, it would

have been a gratuitous passenger, but the carrier's duty towards it would not have been thereby lessened. The learned counsel for the plaintiff suggests that the duty would attach had the child been concealed in a garment. Such condition does not usually escape the observation of the carrier's servants exercising ordinary attention, and the case of mothers concealing their infants from the expectable knowledge of carriers might, under some circumstances, excuse some act of the carrier whereby it was injured. But it is not the duty of a carrier to scrutinize its passengers for the detection of unborn children, to the end that they, although latent, may be regarded as passengers. It undertakes to carry as passengers the born, and not the unborn. It carries by compulsion those visibly offering themselves. So, the mother presents herself and her living children, and the carrier is bound by the law of the realm to receive and to carry them. Its duty begins with receiving and ends with discharging them, and due care is required. The plaintiff stood in no such relation to the carrier as to earn such obligation on its part, and liability to respond for injury for the negligent carriage and discharge of the mother was coincident with the limits of its duty to her. The obligation arises from implied convention with the state that the carrier shall transport persons with due care, and the remedy is given to the one injured by the breach. The obligation is the same whether the action is in form based on breach of contract or of duty to carry." But neither of these cases necessarily goes so far as to deny the right of a child to recover for a prenatal injury under any circumstances, although the broad language of some of the judges in the *Walker Case* is much more unfavorable to such a recovery than that of the court in the *Nugent Case*.

In *Buel v. United R. Co.* (1913) 248 Mo. 126, 45 L.R.A.(N.S.) 625, 154 S. W. 71, Ann. Cas. 1914C, 613, 4 N. C. C. A. 129, the parents of a child which died, soon after its birth, from injuries negligently inflicted upon it be-

fore birth, were held not entitled to maintain an action against the negligent person for damages, under a statute providing that, whenever a person shall die from an injury occasioned by negligence, the negligent person shall pay a penalty to father and mother, if deceased is a minor unmarried.

While not in point in this annotation, the holding in *Prescott v. Rob-*

inson (1908) 74 N. H. 460, 17 L.R.A. (N.S.) 594, 124 Am. St. Rep. 987, 69 Atl. 522, that a pregnant woman, injured by another's negligence so as to cause the child to be born deformed, cannot hold the negligent person liable to her for the pain and suffering and inability to labor of the child, is interesting in connection with the foregoing holdings, denying the child himself a right of action. W. A. E.

UNITED SHOE MACHINERY CORPORATION

v.

CHARLES W. FITZGERALD et al., Appts.

Massachusetts Supreme Judicial Court—March 3, 1921.

(237 Mass. 537, 130 N. E. 86.)

Strike — legality — to compel collective bargaining.

1. A strike to compel an employer to adopt a system of collective bargaining is unlawful.

[See note on this question beginning on page 1513.]

Master and servant—contract for year's service.

2. An employer may contract for a year's service with employees entering his service, which requires training to render an employee skillful, although the influence of the union would be weakened and the power of the strike impaired.

—right to leave service.

3. Members of a labor union who have not signed contracts to render a specific term of service to their em-

ployer may retire from his service at will.

[See 16 R. C. L. 434; 3 R. C. L. Supp. 569.]

Injunction — against illegal picketing.

4. The maintenance of pickets in aid of an illegal strike will be enjoined.

Strike — to compel breach of contract.

5. A strike to compel a breach of existing contracts between an employer and his employees is illegal.

APPEAL by defendants from a decree of the Supreme Judicial Court for Essex County in favor of plaintiff in a suit to enjoin defendants from continuing a strike and from conducting it in an unlawful manner. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. G. Thompson, Peter J. Donaghue, and Harold R. Donaghue, for appellants:

The purpose for which the strike was begun and carried on was a lawful purpose.

Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.

1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Bowen v. Mathe-son*, 14 Allen, 499; *Snow v. Wheeler*, 113 Mass. 179; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.)

(237 Mass. 537, 130 N. E. 86.)

1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Minasian v. Osborne, 210 Mass. 250, 37 L.R.A.(N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; Hoban v. Dempsey, 217 Mass. 166, L.R.A.1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810; Cornellier v. Haverhill Shoe Mfrs' Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; Bogni v. Perotti, 224 Mass. 152, L.R.A. 1916F, 831, 112 N. E. 853; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N. E. 429.

There is nothing in the master's findings warranting the granting of any relief to the plaintiff in respect of the manner in which the strike was carried on by the defendants.

Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304; Martineau v. Foley, 231 Mass. 220, 1 A.L.R. 1145, 120 N. E. 445; Folsom Engraving Co. v. McNeil, 235 Mass. 269, 126 N. E. 279; Morris Run Coal Min. Co. v. Guy, 14 Pa. Dist. R. 600; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500; Iron Molders' Union v. Allis-Chalmers Co. 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Barnes v. Chicago Typographical Union, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Atchison, T. & S. F. R. Co. v. Gee, 139 Fed. 582; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Bowen v. Matheson, 14 Allen, 499; Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 17 L.R.A.(N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236; Karges Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829; Cumberland Glass Co. v. Glass Bottle Blowers' Asso. 59 N. J. Eq. 49, 46 Atl. 208; W. & A. Fletcher Co. v. International Asso. — N. J. Eq. —, 55 Atl. 1077; Jones v. Maher, 62 Misc. 338, 116 N. Y. Supp. 180.

The fact, found by the master, that the cause of the strike was the persistent attempt of the plaintiff to induce members of the union to violate the contractual obligations into which they had entered with one another in mutually agreeing to be bound by the provisions of the constitutions of the grand lodge and the district lodge, is of itself sufficient to require the dismissal of this bill.

Walker v. Cronin, 107 Mass. 555; Beekman v. Marsters, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; Hickey v. Baine, 195 Mass. 446, 81 N. E. 201; Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919; Henry v. Jackson, 37 Vt. 431; Highland Park Asso. v. Boseker, 169 Mich. 4, 135 N. W. 106.

Messrs. Charles F. Choate, Jr., Joseph Wentworth, and James Garfield, for appellee:

The strike was inaugurated and maintained to compel the plaintiff to withdraw and eliminate the individual contract, and is illegal.

Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Baush Mach. Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188; Folsom Engraving Co. v. McNeil, 235 Mass. 269, 126 N. E. 279; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1183; Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 254, 62 L. ed. 277, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Walker v. Cronin, 107 Mass. 555; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, L.R.A.1917F, 755, 116 N. E.

801; *Smith v. Bowen*, 232 Mass. 106, 121 N. E. 814; *Shinsky v. Tracey*, 226 Mass. 21, L.R.A.1917C, 1053, 114 N. E. 957; *Martineau v. Foley*, 231 Mass. 220, 1 A.L.R. 1145, 120 N. E. 445.

The strike is an interference with existing contracts, and is therefore illegal.

Walker v. Cronin, 107 Mass. 555; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; *Aberthaw Constr. Co. v. Cameron*, 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478.

The Peaceful Persuasion Act, so called, does not legalize strike picketing.

Vonnegut Machinery Co. v. Toledo Mach. & Tool Co. 263 Fed. 192; *Vege-lahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

Braley, J., delivered the opinion of the court:

A strike having been inaugurated at the plaintiff's factory March 5, 1920, suit is brought against the defendants as the officers, agents, and members of the local lodge of the international association of machinists, a voluntary organization, asking for injunctive relief from a continuance of the strike, and from its maintenance by unlawful means. We shall hereafter refer to the defendants who hold the offices and exercise the powers described in the second paragraph of the bill as the union, and to the plaintiff as the company. It appears from the master's report, and the single justice could find, that in November or December, 1919, the company, for the purpose of preventing machinists from leaving its employment after they had been trained as skilled workmen at considerable expense, and to retain a force of reliable workmen so that it could enter into and perform contracts for the manufacture and delivery of its product with reasonable assurance of success and despatch, solicited individual machinists as they were hired to sign a contract, a copy of which is annexed to the report. By these contracts, which are referred to in the record as "individual con-

tracts," the employee to the best of his skill and ability, and in accordance with factory regulations, agreed to work for the company during its regular working hours for one year from the date of employment, at a fixed compensation for each hour worked, or the prevailing piece rate. If at the expiration of the year neither party gave to the other notice in writing of termination, the agreement was to remain in force for the further period of one year. The company could lawfully contract with machinists who desired to enter its service, and, as no law of the land was violated, it could impose as a condition precedent to employment, the terms of the "individual contracts." *Plant v. Woods*, 176 Mass.

492, 502, 598, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Folsom Engraving Co. v. McNeil*, 235 Mass. 269, 126 N. E. 479. And this right is not cut down or abridged, as the single justice could say, by the master's further finding "that another motive operating in the minds of officials of the company in desiring to obtain such contracts was that by means thereof the influence of the union would be weakened and the power of the strike impaired."

The means being legitimate, the company could protect itself from the interruption of its business and consequent damage from the action of discontented employees hired in the mass, and controlled at all times in their contractual relations by the union of which they were members. *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, L.R.A.1917F, 755, 116 N. E. 801; *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461.

The union also was under no obligation whatever to recognize the "individual contracts," and its members who had not thus obligat-

Master and
servant—con-
tract for year's
service.

ed themselves could retire at will from the company's service, leaving it to go into the labor market and obtain competent workmen if any could be found. *Smith v. Bowen*, 232 Mass. 106, 121 N. E. 814; *Folsom Engraving Co. v. McNeil*, supra. But the defendants, as the master states, were not satisfied to take this course, or any other action short of organizing and precipitating a strike which should so cripple the industrial powers of the company as to compel it to abandon its policy of selecting and hiring employees whenever and wherever it pleased. The situation very likely was becoming critical, as "the contracts were steadily adopted by considerable numbers of the machinists until on March 5, 1920, 2,222 employees of a total of about 6,000 had signed."

We now take up the action of the union, begun shortly after the company had requested signatures to the "individual contracts." It first protested. It next presented to the company an agreement which provided that none but union men should be employed when available, and shop committees appointed by the union should be recognized by the company as authorized to consider all disputes or grievances arising between members of the union and the company. It would seem almost unnecessary to say that the parties could have mutually agreed to this proposed form of contract. *Smith v. Bowen*, supra. But the company on February 7th declined, and insisted on its right to continue to make "individual contracts," and that this form of employment would be followed. The union replied that it could not agree that its members should sign the "individual contracts," and it would have to "insist on the practice being discontinued." During further negotiations the proposed agreement submitted by the union was withdrawn, but the proposition then submitted demanded "the elimination of the individual contracts as it concerns

employees of the machine department," and it would be "absolutely useless to consider this or any other proposition unless we can come to some agreement as to holding in abeyance the making of these (individual) contracts in the meantime"—"that is, for six or seven days while the new proposition was being considered by the company, or until a compromise with the board of directors could be arranged." The company on the same day received a letter from the representative of the union, which in substance formally withdrew the proposed agreement, and asked that shop committees to represent the workmen be formed by the machinists, which should be recognized as their representatives by the company, and that the "individual contracts" should be withdrawn. The union had voted on February 21st to strike, but this action had not been communicated to the company until March 5th, when the strike was put in force, which on March 3d had been sanctioned by the grand lodge with which as a subordinate it was affiliated. It is expressly found that there was no dispute concerning wages, hours of employment, or general conditions of labor. The master reports that the union claimed before him that the strike was called in defense of "collective bargaining," while the plaintiff, as alleged in the bill, contended that it was ordered to compel the abandonment of the "individual contracts." The question whether the strike was lawful does not depend upon the choice of descriptive words. If the company surrendered to the union it must of necessity give up in the future the "individual contracts" as applied to employees of the machine department, and the demands even in modified form were not limited to "collective bargaining," but included an irrevocable abandonment of the "individual contracts."

The defendants' answer to all the essential allegations of the bill is nothing more than a general denial, and on the master's findings, with

such material inferences of fact as properly could be drawn, the single justice as shown by the decree could determine that the strike was for the purpose of compelling the company to do away with "individual contracts," and to recognize the rights of the union as stated by their representative, and his conclusion, not being plainly wrong, should not be reversed. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 66 N. E. 427; *Kennedy v. Welch*, 196 Mass. 592, 594, 83 N. E. 11; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; *Folsom Engraving Co. v. McNeil*, supra. But if, notwithstanding the unequivocal and positive statements to the contrary appearing in the circulars it sent out broadcast, the contention of the union that the strike was solely to compel the company to adopt "collective bargaining," the decree should stand. "Whatever

**Strike—legality
—to compel
collective
bargaining.**

may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through them to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461. It has been uniformly held in principle by this court, "that the employer is as free to make nonmembership in a union a condition of employment as the workingman is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation un-

less through some proper exercise of the paramount public power." *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; *Cornellier v. Haverhill Shoe Mfrs. Asso.* 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; *Baush Mach. Tool Co. v. Hill*, 231 Mass. 30, 120 N. E. 188; *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, L.R.A.1917F, 755, 116 N. E. 801; *Smith v. Bowen*, 232 Mass. 106, 121 N. E. 814; *Folsom Engraving Co. v. McNeil*, 235 Mass. 269, 126 N. E. 479. The strike, being illegal (Stat. 1913, chap. 690), is not applicable, and the maintenance by the union of relays of pickets from twenty-five to seventy-five in number patrolling the streets in the vicinity, and at the main entrance of the company's

factory, calling out at various times the epithets recited in the report, while not sufficient, as the master finds, to frighten or coerce other employees, was unjustifiable. *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307. The action taken also was intended to be an interference with existing contracts. Before the vote to strike was taken the union appointed committees who were instructed to investigate and report the names of members who had signed existing contracts, in order that charges could be preferred against them, and some fifty-nine members who had signed contracts joined the strikers, of whom five were in the ranks of the picketers. The circulars which were distributed, as we have said, directly and indirectly assailed the individual contract system. It is plain on the entire report that what was done was the out-

**Injunction—
against illegal
picketing.**

**Strike—to compel
breach of
contract.**

(237 Mass. 537, 130 N. E. 86.)

growth of concerted action manifested in various forms, but all for the single purpose of forcing compliance with the terms of the union. *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Folsom v. Lewis*, 208 Mass. 336, 35

L.R.A.(N.S.) 787, 94 N. E. 316; *Folsom Engraving Co. v. McNeil*, supra. We are therefore of opinion that the injunctive relief granted is supported by the record, and the decree should be affirmed, with costs. Ordered accordingly.

ANNOTATION.

Lawfulness of strike to compel collective bargaining.

The reported case (*UNITED SHOE MACHINERY CORP. v. FITZGERALD*, ante, 1508), holding that the purpose of forcing an employer to adopt a system of "collective bargaining" is not a justifiable cause for a strike, seems to go beyond the other reported cases.

The language quoted in the reported case from *Hitchman Coal & Co. v. Mitchell* (1917) 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461, to the effect that, "whatever may be the advantage of 'collective bargaining,' it is not bargaining at all in any just sense, unless it is voluntary on both sides," followed a statement in the latter case to the effect that an employer was acting within its lawful rights in employing its men only upon terms of non-membership in a union, and was used in discussing the question of the employer's right to protection of the status resulting from the employment of its men on those terms.

It will be noted that in the reported case there was no dispute concerning wages, hours of employment, or general conditions of labor,—it being expressly found that there was no dispute in that regard,—and that the strike was in reality in the interest of the union as an organization. In *Tunstall v. Stearns Coal Co.* (1911) 41 L.R.A.(N.S.) 453, 113 C. C. A. 132, 192 Fed. 808, the court said: "It may well be that the limits of lawful persuasion, when exercised by employees in the course of a strike by them to force from their employer better terms or better conditions for themselves, and as a means collateral to their side of the conflict, are wider than are such limits in a case where there is no complaint by employees, but where

the strike is directed by officials of a labor organization for the primary purpose of compelling its recognition." In that case, where, as the court said, there was no complaint by any of the company's employees regarding wages or conditions of service, the contest being wholly over "recognition," it was held that the labor union should be enjoined from paying employees or candidates for employment to leave the service, or to refrain from entering the employment, in order to promote a strike.

That the decision in the reported case carries no condemnation of "collective bargaining" voluntarily entered into on both sides, or of an agreement otherwise unobjectionable reached as the result of voluntary collective bargaining, is apparent from the opinion; and the distinction between the question of the lawfulness of a strike to compel "collective bargaining," and the lawfulness of an agreement reached as a result of such bargaining, voluntarily engaged in, is illustrated by comparison of the reported case with *Shinsky v. O'Neil* (1919) 232 Mass. 99, 121 N. E. 790, which denied equitable relief to a former employee who was unable to secure further employment in consequence of agreements between the employers and a labor union, to the effect that no one but members of the union should be employed. The court in that case said: "It is established that workmen can combine to get the advantage of bargaining for their common benefit in respect to the terms and conditions upon and under which they should work. It is further established that if they are successful in getting the bargain they wish, they

can insert in the agreement setting forth that bargain a clause providing that all the work of the employer shall be given to them, or that a preference should be given to them in the employment of workmen." The question as to the validity of such an agreement, or as to the lawfulness of a strike to compel the employer to enter into such an agreement, is, however, beyond the scope of this annotation.

In *Michaels v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195, although a permanent injunction was granted in a case growing out of a strike to compel the recognition of a labor union, the right to call a strike for that purpose is recognized, "if no threats, intimidation, force, violence, or other coercive measures" are employed; and the injunction in that case was granted because of the disorderly and violent character of the picketing and other means employed to promote the strike.

In *Grand Shoe Co. v. Children's Shoe Workers' Union* (1920) 187 N. Y. Supp. 886, the court observed that labor has the right of collective bargaining, but that no organization or combination of workmen has the right to debar any individual or group of workers from employment; an employer not only has the right to employ whom he sees fit, but may even make membership in a labor union a bar to employment; and he may exercise this right even if he thereby makes collective bargaining impossible. The injunction in this case also seems to have been granted upon the ground that the picketing complained of had been conducted in an unlawful manner, and not upon the ground that the strike itself was unlawful.

It has been held that picketing, even peaceable picketing, is not permissible where the only purpose is to compel the recognition by the employer of the labor union, there being no dispute as to wages, hours, or other conditions of employment. *Heitkemper v. Central Labor Council* (1920) 99 Or. 1, 192 Pac. 765. There were two dissenting

opinions in this case. What was involved in the "recognition" of the union is apparently indicated in the allegations in the answer of the union, to the effect that the plaintiffs had refused "to consider or treat with the defendants' organizations, or any of them, or to consider or agree to recognize the existence of defendants' organizations, or any of them, for the purpose of collectively bargaining or collective treatment, consideration, or settlement of any trade dispute or controversy of the defendants between the plaintiffs as employers and the defendants' organization of employees, or to recognize the existence of defendants' organization for any purpose whatever." The majority not only held that picketing for such purpose was unlawful in the absence of a statute authorizing it, but also that the controversy was not one between "employer and employee," or between "persons employed and those seeking employment," and did not arise from or grow out of a "dispute as to terms or conditions of employment," within the provisions of a statute providing that no restraining order or injunction shall be granted in such a case. And it was further held that the case was not within another section providing that no restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor; or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any such person to abstain from working; or from ceasing to patronize any party to such dispute; or from recommending, advising, or persuading others by peaceful or lawful means so to do.

Generally, as to boycott as a weapon in industrial disputes, see annotation in 16 A.L.R. 230. G. H. P.

STATE OF CONNECTICUT
v.

TIHON SINCHUK et al.

Connecticut Supreme Court of Errors—August 14, 1921.

(96 Conn. 605, 115 Atl. 33.)

Constitutional law — right to assemble and petition.

1. A statute forbidding publication of disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag, or uniform, or which tends to foster opposition to organized government, does not violate a constitutional provision that citizens have a right to assemble and appeal to those invested with power, for redress of grievances or other proper purposes.

[See note on this question beginning on page 1535.]

Sedition — sufficiency of statute penalizing.

2. A statute penalizing disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag, or uniform, is not invalid because it fixes no ascertainable standard of guilt.

[See 8 R. C. L. 58; 2 R. C. L. Supp. 530.]

— forbidding utterances without regard to consequences.

3. A statute which penalizes disloyal, scurrilous, and abusive matter concerning the form of government of the United States is not invalid because the showing of harmful consequences is not required.

Constitutional law — applicability to aliens.

4. Aliens are not within the protection of a constitutional provision that the people have at all times the right to alter their form of government in such manner as they may think expedient.

— freedom of speech — objection to government — right of alien.

5. The constitutional right of free-

dom of speech does not include the right of aliens to publish disloyal, scurrilous, or abusive matter concerning the form of government, or which fosters opposition to organized government.

— right to protection in news dealing.

6. Aliens have a right to the equal protection of the laws in conducting the business of news dealing in which they engage.

[See 1 R. C. L. 799; 6 R. C. L. 394, 395; 2 R. C. L. Supp. 108.]

— who may attack validity of statute.

7. No one has a right to attack a statute as unconstitutional unless he can show that its enforcement against him has violated or will violate his constitutional rights.

[See 6 R. C. L. 89; 2 R. C. L. Supp. 21.]

— equal protection of laws — denial of freedom of speech to aliens.

8. Denial by a state, to aliens, of the right to attack the form of government of the United States, does not deny them the equal protection of the laws as guaranteed by the Constitution of the United States.

(Wheeler, Ch. J., dissents.)

RESERVATION by the Superior Court for Fairfield County (Maltbie, J.) for determination by the Supreme Court of Errors of questions arising upon demurrer by defendants to an information charging them with violation of the statute concerning sedition. *Overruling of demurrer advised.*

Statement by Beach, J.:

Information charging the accused with violation of chapter 312 of the

Public Acts of 1919, entitled "An Act Concerning Sedition," brought to the superior court of Fairfield

county and reserved for the advice of this court, on the issues of law raised by a demurrer to the information. The superior court is advised to overrule the demurrer and to enter judgment pursuant to the stipulation.

The information charges "that on the 14th day of March, 1921, at Bridgeport, in said county, Tihon Sinchuk and Alexander Yavsk, not being citizens of the United States or of the state of Connecticut, and residing in said Bridgeport, with force and arms, did publicly exhibit or advertise certain disloyal, scurrilous, or abusive matter concerning the form of government of the United States and of its flag, and certain matter which was intended to bring them into contempt, or which creates or fosters opposition to organized government, against the peace and contrary to the statute in such case made and provided."

The offenses are charged in the exact language of the statute, but no excerpts from the matter complained of are included in the information, and no statement of the facts in the case is contained in the record.

To this information the accused demurred: (1) Because the information is insufficient in law; (2) because it does not state facts constituting an offense; and (3) because the statute is unconstitutional and void in that it violates §§ 2, 5, 6, 9, and 16 of article 1 of the Constitution of Connecticut, § 9 of article 1 of the Federal Constitution, and also the 6th and 14th Amendments thereof. The stipulation reserving the issues of law raised by the demurrer of the accused to the information recites that the cause is ready for plea and final judgment, and it is further stipulated that no question shall be raised by the defendants based upon any informality in the information, or upon any defects therein because of the failure to incorporate in the information specific quotations from the matter complained of. The only questions discussed in argument or

on the briefs were those relating to the constitutionality of the statute.

Messrs. Homer S. Cummings, Galen A. Carter, and Warren F. Cressy, for the State:

The act does not violate the constitutional provisions relating to freedom of speech or of the press.

Cooley, Const. Lim. 7th ed. 612; State v. Pape, 90 Conn. 98, 96 Atl. 313; Rex v. St. Asaph, 3 T. R. 428, note, 100 Eng. Reprint, 657, note; State v. Pioneer Press Co. 100 Minn. 173, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 110 N. W. 867, 10 Ann. Cas. 351; Story, Const. 2d ed. § 1880; 4 Bl. Com. 151; Com. v. Blanding, 3 Pick. 304, 15 Am. Dec. 214; State v. McKee, 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; People v. Most, 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175; State v. Gibson, 189 Iowa, 1212, 174 N. W. 34; Allyn's Appeal, 81 Conn. 534, 23 L.R.A.(N.S.) 630, 129 Am. St. Rep. 225, 71 Atl. 794; Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; State v. Kahn, 56 Mont. 108, 182 Pac. 107; State v. Holm, 139 Minn. 267, L.R.A.1918C, 304, 166 N. W. 181; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525, affirming 74 Neb. 759, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, 105 N. W. 298.

Defendants are not denied due process of law, or the right to be informed of the nature of the accusation against them, nor are they denied the equal protection of the laws.

Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190; State v. McKee, 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; O'Brien's Petition, 79 Conn. 46, 63 Atl. 777; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; People v. Case, 153 Mich. 98, 18 L.R.A.(N.S.) 657, 116 N. W. 558; Adams v. Cronin, 29 Colo. 488, 63 L.R.A. 61, 69 Pac. 590, affirmed in 192 U. S. 108, 48 L. ed. 365, 24 Sup. Ct. Rep. 219.

The right to alter the form of government is limited to the methods and purposes defined by law.

Collier v. Frierson, 24 Ala. 100; United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407, 65 L. ed. 704, 41 Sup. Ct. Rep. 352.

Defendants are aliens, and they are not included within the provisions of art. 1, § 5, or of art. 1, § 16, since both of these, by their terms, apply to citizens only.

Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

Messrs. A. S. Geduldig, Walter Nelles, and Isaac Shorr, for defendants:

The Sedition Law fixes no ascertainable standard of guilt, and would operate to delegate to courts and juries legislative discretion.

United States v. L. Cohen Grocery Co. 255 U. S. 81, 65 L. ed. 516, 14 A.L.R. 1045, 41 Sup. Ct. Rep. 298; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; Collins v. Kentucky, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924; American Seeding Mach. Co. v. Kentucky, 236 U. S. 660, 59 L. ed. 773, 35 Sup. Ct. Rep. 456; Fox v. Washington, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. Rep. 383; State v. Pape, 90 Conn. 98, 96 Atl. 313; Campbell v. Spottiswoode, 3 Best & S. 769, 122 Eng. Reprint, 288, 32 L. J. Q. B. N. S. 185, 9 Jur. N. S. 1069, 8 L. T. N. S. 201, 11 Week. Rep. 569; Pollock, Torts, 9th ed. 262; Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479.

In penalizing expression for its character, regardless of relation to harmful consequence, the Sedition Law oversteps the police power and deprives of liberty without due process of law.

Ingham v. Brooks, 95 Conn. 317, 111 Atl. 209; State v. Feingold, 77 Conn. 326, 59 Atl. 211; Opinion of Justices, 207 Mass. 601, 34 L.R.A. (N.S.) 604, 94 N. E. 558; State v. McKee, 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Ex parte Hudgins, 86 W. Va. 526, 9 A.L.R. 1361, 103 S. E. 327; People ex rel. O'Connell v. Turner, 55 Ill. 280, 8 Am. Rep. 645; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; Ex parte Smith, 135 Mo. 223, 33 L.R.A.

606, 58 Am. St. Rep. 576, 36 S. W. 628; Watertown v. Christnacht, 39 S. D. 290, L.R.A. 1917F, 903, 164 N. W. 62; Lancaster v. Reed, — Mo. App. —, 207 S. W. 868; St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; Hechinger v. Maysville, 22 Ky. L. Rep. 486, 49 L.R.A. 114, 57 S. W. 619; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252.

The Sedition Law infringes specific limitations upon the police power.

State v. McKee, 73 Conn. 28, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Masses Pub. Co. v. Patten, 244 Fed. 535; Freund, Pol. Power, § 475; State v. Tachin, 92 N. J. L. 269, 106 Atl. 145; State v. Gabriel, 95 N. J. L. 337, 112 Atl. 611.

The statute makes no distinction between citizens and aliens.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; People v. Crane, 214 N. Y. 154, L.R.A. 1916D, 550, 108 N. E. 427, Ann. Cas. 1915B, 1254; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Opinion of Justices, 207 Mass. 601, 34 L.R.A. (N.S.) 604, 94 N. E. 558; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Beach, J., delivered the opinion of the court:

The statute in question is entitled "An Act Concerning Sedition," and on its face it appears to penalize three classes of publications: (1) Disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag, or uniform; (2) any matter intended to bring them into contempt; (3) or which creates or fosters opposition to organized government. The demurrer and the stipulation accompanying the reservation waive all defenses except the unconstitutionality of the statute.

The brief for the accused presents this defense in three aspects,

which are described as to some extent overlapping: First, because it fixes no ascertainable standard of guilt and amounts to delegation to courts and juries of the legislative function of defining statutory offenses; second, because it oversteps the police power and deprives of liberty without due process of law in penalizing expressions for their character regardless of relation to harmful consequence; third, because it contravenes specific limitations on the police power, namely, the free speech sections, the right of the people to adapt their form of government in accordance with their opinion, and the right of remonstrance.

In support of the first of these propositions the defendants rely mainly on *United States v. L. Cohen Grocery Co.* 255 U. S. 81, 65 L. ed. 516, 14 A.L.R. 1045, 41 Sup. Ct. Rep. 298, holding that § 4 of the Lever Act (41 Stat. at L. 298, chap. 80, Comp. Stat. § 3115½ff, Fed. Stat. Anno. Supp. 1918, p. 183), penalizing the making of "any unjust or unreasonable rate or charge, in handling or dealing in or with any necessities," was unconstitutional because it did not fix any ascertainable standard of guilt, and did not inform persons accused of violation thereof of the nature and cause of the accusation against them. To the same effect are *International Harvester Co. v. Kentucky*, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; *Collins v. Kentucky*, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924; *American Seeding Mach. Co. v. Kentucky*, 236 U. S. 660, 59 L. ed. 773, 35 Sup. Ct. Rep. 456. These last cases arose under statutes forbidding combinations to fix a price greater or less than the "real value" of the article dealt in; and the attempt was to determine criminality by asking the court or jury to say what the real value of the article would have been had the combination not existed. On the other hand, a criminal statute is not unconstitutional merely because it throws upon men the risk of rightly

estimating the effect of their conduct upon a condition of fact, e. g., what is "undue restraint" of trade (*Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780); whether their conduct is "reasonably calculated" to restrain trade (*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220); whether their language tends to encourage or advocate an actual breach of the law (*Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. Rep. 383); or whether a newspaper is "principally made up of criminal news" (*State v. McKee*, 73 Conn. 18, 46 Atl. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124). And coming closer to the point, we have upheld a statute which penalized the publication of "any offensive, indecent, or abusive matter concerning any person." *State v. Pape*, 90 Conn. 98, 96 Atl. 313. Of this statute we said that it must be construed consistently with the principles of the common law governing the publication of all defamatory matter, and with the constitutional provision that in all actions of libel the truth shall be a defense.

Applying the principles underlying these authorities to the present case, we think the statute is not fairly open to the objection that it fixes no ascertainable standard of guilt. The phrase "disloyal, scurrilous, or abusive matter" is confined specifically to the form of government of the United States, its military forces, flag, or uniform; and the principles of the common law governing the publications of defamatory matter, in so far as they are applicable, furnish all the analogies necessary to define the nature and cause of this branch of the accusation. Whether the publication in question was with intent to bring the form of government of the United States and its flag into contempt is an issue of fact such as is presented in most criminal prosecutions. Whether the publication creates or fosters

*Sedition—sum-
macy of statute
penalizing.*

opposition to organized government is also an issue of fact no more uncertain than the question whether a publication is obscene.

The second objection is that the act penalizes expression for its character regardless of relation or *harmful consequence*. This objection, both in its form and in the mode in which it was presented in argument and on the brief, stands by itself and does not involve the third objection above stated. It deals not with the alleged violation of any specific limitation on the exercise of the police power, but with the reasonableness of the prohibition as a measure for the public peace and safety. It may be admitted that the publication of matter concerning the form of the Federal government which is merely scurrilous or abusive is not necessarily a direct incitement of disobedience to any other law; but it is not necessary to look outside of the statute itself to find a legal basis for criminality, because the act itself is the declaration of the general assembly that the publication of the prohibited forms of expression does endanger the public peace and safety.

—forbidding
utterances
without regard
to consequences.

This declaration it has power to make unless the court can see that it is plainly

unfounded. *State v. McKee*, 73 Conn. 18, 24, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409. We have no doubt that a sufficient probability of danger to the public peace and safety arises from publications concerning the government of the United States and of its flag which would come within the common-law definition of defamatory matter to justify the statute so far as its first two clauses are concerned. Defamatory publications seem as dangerous to the public welfare when addressed to the national government as when addressed to an individual. *State v. Pape*, supra. As to the final clause of the statute, it is idle to say that anarchistic propaganda is harmless in law.

We come now to the question,

which also underlies the objections already discussed, whether the statute contravenes any specific provisions of the Bill of Rights or of the Federal Constitution. Section 2 of the Bill of Rights in the Constitution of this state provides: "That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that they have at all times an undeniable and indefeasible right to alter their form of government in such a manner as they may think expedient."

This section is plainly inapplicable to the defendants. The information alleges, and the demurrer admits, that the defendants are not "citizens of the United States or of the state of Connecticut." The right affirmed by this section is the right of the people to alter "their form of government." It is because it is their own and instituted by themselves for their own benefit that they have the right to alter it. The proposition that aliens have an undeniable and indefeasible right to alter our form of government will hardly bear statement.

Constitutional
law—applicability to aliens.

Section 16 provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

This section is also inapplicable. No right of peaceable assembly is invaded by the statute, and there is nothing to show that the publications in question were addressed for any purpose whatever to those invested with the powers of government. The allegations of the information and the admissions of the demurrer do not indicate that such was the fact, and the inference to be drawn from the admission that the publications were of the character described in

—right to
assemble and
petition.

the statute would lead to another conclusion.

Sections 5 and 6 of the Bill of Rights are as follows:

"Sec. 5. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

"Sec. 6. No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

If we are right so far, the next question is whether matter of the kind described in the statute and information is of such a constitutionally privileged character that its publication by the defendants may not be punished, although dangerous to the public welfare. The defendants attempt to maintain that their publications are so privileged, and are a legitimate exercise of the right of free speech, by what is, in practical effect, an appeal to § 2 of the Bill of Rights. They quote from *State v. McKee*, 73 Conn. 18, 28, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 413: "The right to discuss public matters stands in part on the necessity of that right to the operation of a government by the people." And they say: "There is a public necessity, however, that public matters should be freely discussed. . . . Is it not the law that such discussion, even though potentially harmful, may not be punished—is not an 'abuse' of free speech—so long as it does not amount to direct and positive incitation of harm?"

The distinction thus attempted is in principle a familiar one between harmful utterances intended to incite resistance or disobedience to law and the same harmful utterances intended only to secure a change in the law; the latter, though dangerous, being justified by the inalienable and indefeasible right of the people to alter their political institutions. 21 Columbia Law Rev. 526. The question then recurs whether the defendants, being aliens, possess that right. We discuss that question, and then the question whether the

denial of that right to aliens violates the requirement of the 14th Amendment that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The defendants' brief does not argue the question whether § 2 of the Bill of Rights applies to aliens. It simply assumes that aliens are included in the term "the people," and then uses the assumption that the defendants are exercising the constitutional right of altering their form of government as a plea of privilege for the publication of matter which the legislature has declared to be dangerous to the public peace and safety. *Prima facie*, publications which have been forbidden by the legislature because dangerous to the public welfare are abuses of the privilege of free speech. Unless the defendants can successfully claim the right to unlimited political discussion, they cannot say that the statute deprives them of any constitutional privilege.

The question whether aliens are entitled to the benefit of the reservations of personal liberty guaranteed to citizens and to the people in our Bill of Rights is not altogether a new question in this state. In *Jackson v. Bulloch*, 12 Conn. 38, the question arose in a writ of habeas corpus, whether a slave could be held in servitude in Connecticut by her owner, who had brought her here with a view to a temporary residence. The petitioner relied both upon the Constitution and upon the slavery statutes then in force. On the latter ground she prevailed, but in discussing the constitutional question we said: "The Bill of Rights, in its 1st section, declares that all men, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive public emoluments or privileges from the community. The language is certainly broad; but not as broad as that of the Bill of Rights in Massachusetts, to which it has been compared. It seems evidently to be limited to

those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or to be represented in it."

And of § 8 of the Bill of Rights, we said: "The 8th section of the Bill of Rights has also been pressed upon us,—that 'the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches or seizures.' This is almost a transcript of the 4th article of the Amendments of the Constitution of the United States. And the fact that this Amendment was adopted at all, and that amidst all the conflict of opinions upon the subject of slavery this clause has never been claimed to affect that subject, shows very strongly that it was not intended to apply to that description of persons. When the preamble to the Constitution of the United States speaks of 'We, the people, . . . to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution,' it cannot be seriously contended that it included that class of people called slaves; and the term 'people,' in the Bill of Rights, must have been used in a similar sense."

The principle underlying this portion of the decision applies to the present case with added force, for the 2d section of the Bill of Rights, declaring that all political power is inherent in the people, cannot refer to aliens, who have no political power; nor can the declaration that the people have at all times an undeniable and infeasible right to alter their form of government refer to aliens, who have no part or lot in the government.

Turning back to the free speech sections, § 5 declares that "every citizen" may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. This privilege is, on its face, confined to citizens. And § 6, that no law shall ever be passed to curtail or restrain

the liberty of speech or of the press, plainly refers to the liberty of speech and of the press conferred by § 5 on citizens.

We do not mean to say that aliens have no right of free speech. If the general assembly should undertake to declare a comprehensive censorship of the press, and an alien newsdealer should be prosecuted for selling a book or a newspaper which had not been passed by the censor, the statute could not be enforced against him, and for the reason that the business of newsdealing is a matter of private concern, and is a business in which aliens, who are duly admitted to the United States under our immigration laws, have an inherent right to

engage, and having that right they are entitled to the equal

protection of the laws in the conduct of that business. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Truax v. Raich*, 239 U. S. 34, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. We do, however, lay it down as a self-evident proposition, supported in principle by *Jackson v. Bulloch*, *supra*, that aliens have no constitutional right to share in the privilege and responsibility of attempting to change our laws or forms of government, and hence that they have no right, under cover of being engaged in good faith to accomplish those ends, to engage in scurrilous or anarchistic propaganda which has been declared by the general assembly to be dangerous to the public welfare. It follows that, so far as aliens are concerned, the general assembly has a right to pass a statute forbidding or penalizing the publication of such propaganda. And as it is a principle of constitutional law that no one has a right

to attack a statute as unconstitutional unless he can show that its enforcement against him has violated or will violate his constitutional rights, the defense of unconstitu-

—right to protection in news dealing.

—freedom of speech—objection to government—right of alien.

—who may attack validity of statute.

tionality is not open to the defendants in this action. *Tyler v. Judges of Ct. of Registration*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, 6 R. C. L. 89, and numerous cases cited in the note to § 87.

The remaining question is whether this conclusion deprives the defendants of the equal protection of

—equal protection of laws—
denial of freedom of speech to aliens.

the laws. Evidently not, for the question whether the statute is enforceable against citi-

zens is not before us. We simply hold that the defendants, being aliens, do not possess the right of attempting to alter our form of government, and for that reason are not qualified to plead the privilege of unlimited political discussion on which their defense that the statute violates the 2d, 5th, and 6th sections of the Bill of Rights is founded.

We may add that, if this defense had been pleaded by a citizen, it would have been by no means clear that the statute might not be construed so as to avert most, if not all, of the criticism directed against it. *State v. McKee*, supra; *State v. Pape*, 90 Conn. 98, 96 Atl. 313.

We have already indicated that the 1st and 2d clauses of the statute are to be construed in the light of the principles of the common law governing the publication of defamatory matter. And while the construction of the statute as a whole is not required or permitted by this record, it is a fair question, Professor Freund to the contrary notwithstanding, whether the 2d section of the Bill of Rights justifies the publication of anarchistic propaganda.

The Superior Court is advised to overrule the demurrer and to enter judgment pursuant to the stipulation.

Gager, Curtis, and Burpee, JJ., concur.

Wheeler, Ch. J., dissenting:

This appeal involves questions of highest importance, which justify a statement of the grounds of this

dissent and of my view upon these questions. I assume that the information charges three offenses: Publicly exhibiting or advertising (1) certain disloyal, scurrilous, or abusive matter concerning the government of the United States and its flag; (2) certain matter which was intended to bring them into contempt; (3) certain matter which creates or fosters opposition to organized government.

The matter thus generally characterized is not set forth in the information either in terms or in substance. The court has no means of ascertaining whether, on its face, the matter is any of the things the state charges. Under our law the accused must be informed of the nature of the crime with which he is charged. Criminal procedure of universal acceptance requires that the information for criminal libel should set forth the charge, either in the terms made, or so fully that by reference its terms can be wholly known.

Wharton's Criminal Law, 11th ed. says:

Section 1982. "The alleged libelous matter also must be set out accurately; any variance being fatal."

Section 1983. "It is enough now to say that if the indictment does not on its face profess to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer, or in arrest of judgment."

Wharton's Criminal Procedure, 10th ed. vol. 2, § 921, says: "An indictment or information alleging libelous matter should set it out in *hæc verba*; a mere statement as to the meaning and effect of the words being insufficient."

Various authorities are cited in support of this principle of criminal procedure. Other textbooks make a like statement. 17 R. C. L. § 228, p. 465; Newell, Slander & Libel, 3d ed. pp. 1160, 1161. In reported cases of criminal libel we find the libel set forth in the information. *State v. McKee*, 73 Conn. 18, 29, 49

L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409, is not in conflict. There the information sustained charged the accused with having in his possession, with intent to sell, a paper devoted to criminal news, and described the issue of the paper so that it could be identified. The practical objection to incorporating the entire newspaper as a part of the information led to the ruling made.

The parties herein by counsel stipulated "that no question shall be raised upon appeal by the defendants, based upon any informality in the information, or upon any defect therein, because of the failure to incorporate in the information specific quotations from the matter complained of."

My brethren assume that this stipulation of counsel removes this question from the case. I do not think it should be regarded as doing this. What is there in the stipulation which would compel the accused to plead guilty to this charge after the judgment herein? An agreement not to press a point upon an appeal is far from an agreement to plead guilty after the appeal is determined. It is true that counsel for the defendants say in their brief "that the defendants have agreed to submit themselves for punishment if this statute is held valid," but such agreement is no part of the stipulation of record. Again, what is there in the stipulation which prevents these defendants from urging this point upon a motion in arrest? What is really determined by the majority opinion? Only this, that it is possible to conceive of matter which these defendants may have published which would offend this statute. But what that matter is which is within the statute the opinion cannot name. One judge hereafter may have one view; another, another view. The decision does not make for certainty in the law, but the reverse. And it may well be that the justices who concur had different matter in mind as constituting the charge. Other

reasons suggest themselves, but these seem to be sufficient reasons why the court should refuse to regard this stipulation and should determine the first and second grounds of demurrer, that the information is insufficient and does not state facts constituting an offense, to be well taken. When we consider the situation of these defendants—aliens—whose counsel have stipulated away their fundamental right to have the charge against them set out with reasonable certainty, and that this stipulation may be construed as their agreement that they have been guilty of inciting violence, murder, and revolution against the United States, with the intention of subverting its government, we may well stop to ask whether intelligent aliens, understanding their rights and the penalty of their agreement, would ever have made the stipulation counsel have made for them.

A court should be most careful to see that the rights of these aliens under our law are fully protected, and if there is a reasonable possibility that they may not have fully understood the effect of their stipulation, and that it does deprive them of a right which is vital to a fair trial and a fair consideration of their case, the court ought not to permit the action of counsel, or their action upon the advice of counsel, to prevent a consideration of their cause without this elementary safeguard.

As we examine the nature of these charges, it will become more apparent that the court ought not to determine the grave questions raised on this appeal without having before it the matter charged to have been published. I agree that what is disloyal, scurrilous, or abusive matter concerning the government of the United States and its flag, and whether matter was intended to bring these into contempt, can be ascertained by our courts by the application of the definitions and principles known to our common law, so that it cannot be said

that this statute fixes no ascertainable standard of guilt. Nor do I think this statute oversteps the police power in depriving these defendants of liberty without due process of law, by penalizing expression without regard to harmful consequences.

Publications which degrade or throw into contempt the government of our country necessarily tend to incite and encourage breach of the peace. The constitutional guaranty of free speech gives to every person who comes within the United States the right to discuss publicly any subject so long as its object and effect be not to disturb the peace of individuals or of families, the quiet of society, or the existence of government, Federal or state.

"The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property." *State v. McKee*, 73 Conn. 29, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409.

Any published matter which tends to degrade or vilify or bring into contempt the government of the United States or its flag is libelous, and libels of this nature are seditious and criminal. The law presumes harmful consequences may result from their use, for this is a natural consequence. *Newell, Slander & Libel*, 3d ed. § 1090; 2 *Wharton, Crim. Proc.* § 911.

Had the matter which the defendants are charged with publicly exhibiting been set up in the information, the demurrer would then have raised the question whether this matter fell within the characterization. No hard and fast rule can automatically determine this. The circumstances surrounding the matter and its nature must in each case be considered in the light of the accepted legal definitions of these

terms, where such exist, and, if they do not exist, then they must be considered by the exercise of a judgment formed after a consideration of applicable legal principles.

Aside from the objection that the matter which creates or fosters opposition to organized government is not stated in the information, this particular count is bad for other reasons. It does not state whether the opposition created or fostered was by means of force or by means calculated to—that is, likely to—incite or encourage the use of force or a breach of the public peace, or whether it was a purely speculative discussion without relation to the accomplishment of evil purpose. The constitutional right of free speech does not give anyone the right to create or foster opposition to the government of the United States or of this state by the advocacy of force or the incitement of means calculated to destroy or subvert or injure the government or the peace of the community. The majority opinion assumes that the charge is against the United States or this state. But specification 3 of this information is not personal to the United States or this state. The opposition charged is to all organized government. Such opposition may intend present danger to government by inciting the use of force or of opinions, beliefs, or arguments likely to subvert or injure government.

If it be opposition of this kind which is created or fostered, our constitutional guaranty of free speech does not protect one in such form of opposition. But if it be a purely philosophical or speculative discussion of the condition of society without the restraints and burdens of any government, it cannot be said that this will be likely to subvert or injure government. Such discussion has no relation to any particular government. The Constitution of the United States and our Bill of Rights forbid the abridgment of freedom of speech and of the press, and their guaranties for-

ever do away with some of the restraints and limitations to which this fundamental right had been subjected not so many years before these constitutional enactments. But the exercise of this vital adjunct of freedom does not countenance licentiousness of speech, or seditious utterances. And such utterances are those which incite or encourage the use of force, or means which injure government or are likely to injure government. In passing upon an indictment under the Espionage Act (Comp. Stat. §§ 10,212a-10,212h, Fed. Stat. Anno. Supp. 1918, pp. 120-125), for preventing recruiting by named illegal acts, the Supreme Court, by Justice Holmes, said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247.

Publications inciting or encouraging revolution in another country, the subversion of its government, the murder of its rulers, or any evil to its government by the use of force, would clearly fall without the liberty of speech guaranteed by the Constitution. And so would publications which are likely to produce these effects. For these would be seditious libels, and would properly subject their authors to criminal penalty. Whether language is or is not likely to produce such an effect is the dividing line between what is and what is not seditious libel. While this determination is difficult, it is one to which courts are accustomed. A breach of the peace may occur by any act likely to produce violence. *Bishop*, *Crim. Law*, 8th ed. § 536. And a libel has been indictable, time out of mind, because it tends to produce violence. *People v. Most*, 171 N. Y. 423, 424, 58 L.R.A. 509, 64 N. E. 175.

In determining whether a libel is

likely to injure organized government, a court will be careful to be sure of its ground that danger clear and imminent is likely to result from the publication, since it must never forget that freedom of speech is an indispensable prop of our free government, and that "repression of full and free discussion is dangerous in any government resting upon the will of the people." *Coolsey*, *Const. Lim.* 7th ed. p. 614. Whether the statement is seditious libel, we test by the question, "Is the language calculated to promote public disorder or physical force or violence in a matter of state?" *Odgers*, *Libel & Slander*, p. 513.

No case and no authority, so far as we discover, go so far as to penalize mere opinion concerning government or its institutions without regard to evil consequences occurring or likely to occur. This we suppose to be the meaning of the Supreme Court of the United States when it says: "We understand the state court, by implication at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." *Fox v. Washington*, 236 U. S. 273, 277, 59 L. ed. 573, 575, 35 Sup. Ct. Rep. 383; *Schenck v. United States*, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; *State v. Tachin*, 92 N. J. L. 269, 274, 106 Atl. 145.

Newell on Slander and Libel, § 1090, thus states the rule: "Mere theoretical discussions of abstract questions of political science, comparisons of various forms and systems of government, and controversies as to details of our own constitutional law, are clearly permissible."

The language of the statute before us is not limited to matter

which incites or encourages, or which is likely to so incite or encourage, opposition to all organized government. It may include a philosophical or theoretical discussion without regard to means or effect which may remotely be held to incite or encourage such opposition. A statute cannot do this without violating the constitutional guaranties of free speech.

The majority opinion does not construe this statute as one which is confined to the incitement or encouragement of force, or which is likely to produce this result. What it really decides is that aliens such as the accused have no right "to engage in scurrilous or anarchistic propaganda which has been declared by the general assembly to be dangerous to the public welfare." It fails to discuss that phase of the right of free speech which is involved, and holds the statute good against aliens. I think the state has the right to prohibit the publication of matter which is disloyal, scurrilous, or abusive concerning the government of the United States and its flag, or which is intended to bring them into contempt, whether it be published by a citizen or by an alien. Our treatment of this subject so far is equally applicable to citizen or alien. Our Bill of Rights, with few exceptions, and all of our fundamental constitutional guaranties, are for the protection of the alien as well as the citizen.

I agree with my associates that §§ 5, 16, and 17 of our Bill of Rights are by their terms applicable to citizens alone. I also agree that the right to alter our form of government as guaranteed by § 2 is the exclusive privilege of the citizen. Aside from these sections, our Bill of Rights protects aliens and citizens alike.

I do not agree that § 6 of our Bill of Rights is confined to citizens. That section provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

While denying to aliens the pro-

tection of this section, my associates say: "We do not mean to say that aliens have no right of free speech." But the right of free speech which they accord the alien is a very limited one, unprotected by Constitution and restricted by judicial construction. I cannot believe that this position is sound. I cannot find the parallel between the slave and the alien and so treat *Jackson v. Bulloch*, 12 Conn. 38, as controlling the judgment, as my associates do.

So far as the right of free speech is concerned, the distinction between the rights of citizen and alien does not exist except as to the specific guaranties given to citizens alone. The 14th Amendment was enacted "to secure equal rights to all persons." *Ex parte Virginia*, 100 U. S. 339, 347, 25 L. ed. 676, 679. And when it says: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"—it included the alien within the term "any person."

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1070; *Truax v. Raich*, 239 U. S. 33, 39, 60 L. ed. 131, 134, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283.

We quote from a few of the many authorities:

"The equal protection of the laws is due to aliens as to citizens." *Cardozo, J., People v. Crane*, 214 N. Y. 154, L.R.A.1916D, 550, 108 N. E. 427, Ann. Cas. 1915B, 1254.

"An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance." *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714.

"These rights and privileges [of aliens] include both personal rights—such as the right to dwell safely in the country, the general right to engage in any lawful labor, trade, or business within the state, and the right of protection to person, reputation, and other relative rights—and property rights. In return for the protection given aliens they owe a temporary and local allegiance to the country in which they reside, which continues during the period of their residence." 2 C. J. 1046, 1074, 1078; 2 Cyc. 89, 107.

That the 14th Amendment guarantees freedom of speech is unquestioned. But, apart from this, Connecticut is ever bound to maintain a republican form of government. *Beach v. Bradstreet*, 85 Conn. 344, 348, 82 Atl. 1030, Ann. Cas. 1913B, 946. And a republican form of government without the right of free speech would be an anomaly. The statute in question on its face applies to "any person," be he citizen or alien. And the constitutional guaranty of free speech does not prevent any state penalizing seditious libel, whether committed by

alien or citizen. Citizen or alien who publicly exhibits matter which creates or fosters opposition to organized government by force, or is likely to produce force or disorder, will be guilty of a criminal or seditious libel. And if this statute were confined to this, it would not violate the right of free speech. But since it goes further and penalizes all speculative and philosophical matter without regard to its actual or likely effect, it does in this respect violate the right of free speech which the Constitution of Connecticut and of the United States guarantees to alien and citizen alike.

NOTE.

As to validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, see annotation following *STATE v. DIAMOND*, post, 1535. As to the specific question presented in the reported case (*STATE v. SINCHUK*, ante, 1515), see III. a, of that annotation, post, 1539.

STATE OF NEW MEXICO

v.

JACK DIAMOND, Appt.

New Mexico Supreme Court—November 30, 1921.

(— N. M. —, 202 Pac. 988.)

Constitutional law — right of free speech.

1. Chapter 140, Laws 1919, prohibiting acts which have for their object the destruction of organized government, is held to be unconstitutional as violative of the right of free speech guaranteed by § 17 of article 2 of the state Constitution.

[See note on this question beginning on page 1535.]

Statute — construction — sedition.

2. Chapter 140, Laws 1919, interpreted, and held, that the offenses therein enumerated are not confined to acts of violence or force or other unlawful things, but include all acts,

peaceful or otherwise, which have for their object the destruction of organized government, or acts antagonistic to or in opposition to such organized government, or acts inciting or attempting to incite revolution against

or opposition to such organized government, or the teaching of such doctrines.

Definition — "revolution."

3. The word "revolution," as used in the act, held to include all forms of revolution, accomplished by peaceful means or otherwise, and not to be limited to revolution by force of arms.

Statute — uncertainty — invalidity.

4. The act uses words of no determinative meaning, and the language is so general and indefinite as to em-

brace not only acts properly and legally punishable, but also others which cannot be punished, and it is for this reason void for uncertainty.

[See 25 R. C. L. 810.]

Appeal — constitutionality of statute — first attack.

5. Where an act creating a crime is found to be unconstitutional, the question may be raised for the first time on appeal.

[See 6 R. C. L. 96; 2 R. C. L. Supp. 24.]

APPEAL by defendant from a judgment of the District Court for Colfax County (Leib, J.) convicting him of unlawfully and feloniously attempting to incite revolution and opposition to the organized government of the United States and of the state of New Mexico. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Edward D. Tittmann, for appellant:

Jurisdictional matters can always be raised for the first time on appeal.

17 Cyc. ¶ 3334; *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489; *Arbuckle v. State*, 80 Miss. 15, 31 So. 437.

The statute is void for want of due process of law because it fails to describe with reasonable certainty the elements of the offense.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; 16 C. J. 68, note 10.

The indictment is void for the reason that it fails to charge any offense and fails to set forth the names of the persons solicited to become members of the Industrial Workers of the World, and the places where such solicitation was made, and because it does not show in what manner the soliciting of membership in this organization should be described as an attempt to incite revolution.

12 C. J. 1202; *State v. Lucero*, 20 N. M. 55, 146 Pac. 407; *United States v. Medina*, 15 N. M. 204, 103 Pac. 976; *Territory v. Cortez*, 15 N. M. 92, 103 Pac. 264; *Territory v. Lotspeich*, 14 N. M. 412, 94 Pac. 1025; *Fontana v. United States*, 262 Fed. 283; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Reeder v. United States*, 262 Fed. 36; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Batchelor v. United States*, 156 U. S. 426, 39 L. ed. 478, 15 Sup. Ct. Rep. 446; *Dunbar v. United States*, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325; *United States v. Mayer*, 252 Fed. 868; 2 McClain, Crim. Law, p. 534; 3 Whart.

Crim. Law, p. 2313, ¶ 2162; *People v. Lynch*, 11 Johns. 549.

The manner in which the trial was conducted deprived the defendant of his liberty without due process of law, and deprived him of the equal protection of the law.

State v. Brooks, 57 Mont. 480, 188 Pac. 942; *Wheeler v. Wallace*, 53 Mich. 355, 19 N. E. 33.

The demurrer of the defendant to the evidence of the state at the conclusion of the state's case should have been sustained for the reason that, aside from the defects in the law and in the indictment, there was no evidence to sustain the charge in the indictment, and especially no evidence that the defendant attempted to incite to treason against the state of New Mexico.

Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182; 3 Whart. Crim. Law, 11th ed. 2301.

Messrs. Harry S. Bowman, Attorney General, and **A. M. Edwards**, Assistant Attorney General, for the State:

Failure to raise, in the court below, the question of the unconstitutionality of the act involved waives the right to raise such question in the appellate court.

R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. 236 Ill. 452, 23 L.R.A. (N.S.) 620, 127 Am. St. Rep. 297, 86 N. E. 248; *McDonald v. Spring Valley*, 2 A.L.R. 1359, note, p. 1363, 285 Ill. 52, 120 N. E. 476; 6 R. C. L. 96;

Minden v. McCrary, 108 La. 518, 32 So. 468; State v. Raymond, 156 Mo. 117, 56 S. W. 894; State ex rel. Vandiver v. Burke, 175 Ala. 561, 57 So. 870; State v. Hertzog, 92 S. C. 14, 75 S. E. 374; State v. Meyer, 180 Iowa, 210, 163 N. W. 244; State v. Swift & Co. 270 Mo. 694, 195 S. W. 996; Ellis v. State, 74 Fla. 215, 76 So. 698; Jersey City v. Thorpe, 90 N. J. L. 520, 101 Atl. 414; State v. Mack, 92 Vt. 103, 102 Atl. 58; State v. Gibson, — Iowa, —, 174 N. W. 34; State v. Hefton, — Mo. —, 213 S. W. 442; Scoggins v. State, 24 Ga. App. 677, 102 S. E. 39; State v. Chavez, 19 N. M. 325, 142 Pac. 922, Ann. Cas. 1917B, 127.

If the title of the act on which the indictment is based does not strictly conform to the requirements of § 16 of art. 4 of the state Constitution, it will hardly be contended that the fundamental rights of the defendants are violated thereby.

State v. Helton, 255 Mo. 170, 164 S. W. 457; State v. Gibson, — Iowa, —, 174 N. W. 34; State v. Herzog, 92 S. C. 14, 75 S. E. 374.

The legislature, in creating an offense, may define it by particular description of the act or acts constituting it, or may define it as any act which produces, or is reasonably calculated to produce, a certain defined or prescribed result.

16 C. J. 67, 68; State v. Helton, 255 Mo. 170, 164 S. W. 457; Fessler v. State, 12 Okla. Crim. Rep. 579, 160 Pac. 1129; State v. Gibson, — Iowa, —, 174 N. W. 34.

Defendant cannot complain that he has been deprived of his right of freedom of speech, if, by the act under which he was tried, he was forbidden to utter statements inciting to revolution or the overthrow of the organized government.

People v. Most, 71 App. Div. 160, 75 N. Y. Supp. 591; State v. Gibson, supra; Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252.

The indictment is sufficiently specific.

22 Cyc. 341, 342; 14 R. C. L. 185, 187.

Parker, J., delivered the opinion of the court:

The appellant, Jack Diamond, was convicted in the district court of Colfax and sentenced to the penitentiary, from which judgment this appeal is prosecuted.

The indictment charged that the defendant "did then and there unlawfully and feloniously attempt to incite revolution and opposition to the organized government of the United States of America and of the state of New Mexico by then and there soliciting members for the Industrial Workers of the World, an organization which has for its purpose and aim the destruction of organized government, Federal, state, and municipal."

The statute under which the prosecution was had is chapter 140, Laws 1919, which provides as follows:

"Section 1. That it shall be unlawful for any person or persons, firm or corporation, to commit or perform or to cause to permit or to be performed any act of any kind whatsoever which has for its purpose or aim the destruction of organized government, Federal, state, or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such organized government, or incite or attempt to incite revolution or opposition to such organized government.

"Any person violating any of the provisions of this act shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than \$200 nor more than \$1,000, or by imprisonment in the state penitentiary for not less than one year nor more than ten years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 2. It shall be unlawful for any person or persons, firm or corporation to advocate or teach, or cause to be advocated or taught, in any manner whatsoever, the doing or performance of any of the acts prohibited by § 1 hereof."

Counsel for appellant argues that the act is unconstitutional for several reasons, among which is that it violates § 17 of article 2 of the state Constitution, which provides: "Every person may freely speak, write or publish his sentiments on

all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

1. It is apparent from the terms of the statute, considered as a whole, that the offenses enumerated are not confined to

**Statute—
construction—
sedition.**

, acts of violence or force or other unlawful things, but include all acts, peaceful or otherwise, which have for their object the destruction of organized government, or acts antagonistic to or in opposition to such organized government, or acts inciting or attempting to incite revolution against or opposition to such organized government, or the teaching of such doctrines. In this particular this statute is unique. Under its terms no distinction is made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force and violence. Both are alike guilty. It prohibits alike the creation of public opinion by argument and persuasion, and the compulsion of action by the people by force of arms, intimidation, sabotage, or other criminal or illegal means. And we are not at liberty to supply by intentment the element of force and violence which would render the statute free from the objection raised to it. To do so would be to insert words in the statute which are not there and which would entirely change its meaning. This is not allowable, especially in statutes creating crimes, where the rule of strict construction must be applied. *State v. Armijo*, 19 N. M. 345-349, 142 Pac. 1126.

2. In *State v. Tachin*, 92 N. J. L. 270, 106 Atl. 145, the New Jersey court had before it a somewhat similar question to the one at bar. The statute of New Jersey (P. L. 1918,

p. 130) provided in § 1 of the act punishment for inciting, or, by writing, speech, or other means, attempting to incite, "insurrection or sedition." Section 2 of the act provided that "any person who shall advocate, in public or private, by speech, writing, printing, or by any other means, the subversion or destruction by force of the government of the United States, or of the state of New Jersey, or attempt by speech, writing, printing, or in any other way whatsoever to incite or abet, promote or encourage hostility or opposition to the government of the United States, or of the state of New Jersey, shall be guilty," etc.

Section 3 of the act prohibited membership in any society formed for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the United States, or of the state of New Jersey.

In the case before the court the defendant was charged with a violation of § 2 of the act by reason of a speech in which it was urged he attempted to incite hostility and opposition to the government of the United States. The section was challenged as unconstitutional upon the ground that it invaded the constitutional guaranty of the right of free speech. The majority of the court construed the section to the effect that the words "hostility or opposition to the government of the United States, or of the state of New Jersey," meant such hostility and opposition as involved the "subversion or destruction by force" of those governments, and held that the statute, as thus construed, was constitutional. The court states, however, that if the statute punished hostility or opposition to the government without force, the statute would be unconstitutional. Two vigorous dissents were filed in this case, which are reported in 93 N. J. L. 485, 108 Atl. 318. In one of these opinions §§ 2 and 3 of the act are condemned on the ground that they violate the right of free speech, the freedom of the press,

and the freedom of assembly guaranteed by the Federal Constitution and the Constitution of New Jersey. Sections 2 and 3 of this same act came before the New Jersey court again in *State v. Gabriel*, 95 N. J. L. 337, 112 Atl. 611. The court adhered to the former construction of § 2 of the act, but held § 3 to be unconstitutional, and said: "At the close of the trial counsel for defendant moved that the court direct that the defendant be acquitted on this indictment, because the statute upon which it rested is unconstitutional, and this, we think, is sound. Under the Constitution and Bill of Rights the legislature cannot make it criminal to belong to a party organized or formed for the purpose of encouraging hostility or opposition to the government of the United States or of this state, unless the hostility or opposition includes a purpose to overthrow or subvert such government. The constitutionality of the 2d section of the act was sustained in *State v. Tachin*, 92 N. J. L. 269, 106 Atl. 145, because that section provides that the hostility or opposition prohibited involved subversion and destruction by force. While by the section under consideration it is made a crime to be a member of a society organized or formed for the purpose of encouraging hostility or opposition to the Federal or state government, not to subvert or destroy them by force, and would apply to any citizen who sought a change in the form of the government by a most peaceful means. . . . In our judgment, so long as an organization formed for the purpose reserved in the paragraph of the Constitution referred to confines its purpose to peaceful hostility or opposition, and does not advocate or indicate a purpose to overthrow or subvert the existing government by force, but only by constitutional methods, the right of the members of such society to assemble together and consult for the common good is protected by the Bill of Rights."

In Iowa they have an act very

similar to the New Jersey act, and which is chapter 372, Laws 1917. Section 1 prohibits the inciting of "insurrection or sedition." Section 2 of the act prohibits the advocacy by speech, writing, printing, or other means of the subversion and destruction by force of the government of the state of Iowa or of the United States, or the attempt by speech, writing, printing, or other means to incite or abet, promote or encourage, hostility or opposition to the government of the state of Iowa or of the United States. Section 3 of the act prohibits membership in any organization or society organized for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the state of Iowa or of the United States. This statute came before the supreme court of Iowa in *State v. Gibson*, — Iowa, —, 174 N. W. 34. The defendant was charged that he "did attempt by speech, action, and manner of speaking to incite, abet, promote, and encourage hostility and opposition to the government of the state of Iowa and of the United States, contrary to the statutes in such case made and provided," etc.

The indictment evidently was brought under § 2 of the act, and was sustained by the court upon the ground that it charged an attempt to promote sedition. If the construction of the statute by the court was intended to mean that the hostility and opposition to the government was hostility and opposition by force, the opinion of the court is, no doubt, correct. The court said: "It is presented that the statute violates the guaranty of article 1, § 7, of the Constitution of the state, that all may speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and that no law shall be passed to restrain or abridge the liberty of speech or of the press. The constitutional guaranty itself qualifies the immunity by a plain indication that, while the right is given, the abuse of that right is not

to be tolerated. The framers of our Constitution were laboring for the good of the commonwealth. They did not intend to protect what might destroy the state. It was not intended that the right of free speech included the right to promote sedition."

If our interpretation of our statute is correct, as no doubt it is, the whole statute is unconstitutional upon the same reasoning as that adopted by the New Jersey court in regard to § 3 of their act. It is true that § 3 of that act violated the right of assembly, but the principles governing the right of assembly and the right of free speech are the same.

3. What has been heretofore said refers to the statute generally. It remains to consider specifically the provisions prohibiting the inciting or attempting to incite revolution. Is the word "revolution" as used in the statute confined to an armed revolution, or does it include revolution by peaceful methods? "Revolution" has been variously defined as a radical change or modification of the government (*McMullen v. Hodge*, 5 Tex. 34-75); the overthrow of an established political system (*Ballentine's Law Dictionary*); a fundamental change in government or in the political Constitution of a country effected suddenly and violently, and mainly brought about by internal conditions (*New Standard Enc.*); a radical change in social or governmental conditions; the overthrow of an established political system, generally accompanied by far-reaching social changes (*Century Dictionary*).

In the American mind the word "revolution," at first view, is associated with the war for independence by the colonies, which was, of course, a rebellion and a revolution accomplished by force of arms. But this cannot be said to be the ordinary meaning of the word in all cases. The promulgation and adoption of the Constitution of the United States was a revolution of

far-reaching importance. At the time there was in existence a complete government of the thirteen states under the Articles of Confederation. Under article 13 of that document the Articles of Confederation could be amended only with the consent of all the states, and they provided for a "perpetual union." Notwithstanding this contract between the thirteen states, the Constitution provided that upon the ratification of the same by nine states it should become established as a Constitution between the states so ratifying the same. As a matter of fact, eleven of the states ratified before any action was taken under the Constitution, leaving North Carolina and Rhode Island without any participation in the new government. The contract between the states was thus violated by the adoption of the Constitution, and the Constitution went into effect without the consent of those two states. Upon this subject Judge Cooley says: "This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be articles of 'perpetual union,' and the action of the eleven states in making radical revision of the Constitution, and excluding their associates for refusal to assent, was really revolutionary in character, and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government." See Cooley, *Const. Lim.* 7th ed. pp. 9 and 10.

The result was accomplished by argument and persuasion, and, of course, no one would say that any law could now be passed which would make criminal the same kind of conduct. Nor is the meaning of the word changed by its connection with the word "incite." To "incite" is to arouse to action, nothing more, and cannot be held to narrow the word "revolution" to revolution by violence. The doctrine of *noscitur*

Constitutional
law—right of
free speech.

a sociis is applicable here. The word "revolution" is directly associated with the words "opposition to such organized governments," and must be held to include the same thing. A fair, general view of the whole statute leads to the conclusion that it was designed to close

the mouths and tie
the hands of people
who were dissatisfied

with the government as at present constituted, and who advocated by any means, peaceful or otherwise, change in the form of government, or the abandonment of organized government entirely. This act was passed after the Armistice and and before the conclusion of peace with Germany, which has been accomplished only within the last few days. But the act is not a war measure, and none of the considerations which apply to conduct which constitutes a proximate and imminent danger to the government in the time of war, or danger to the success of its arms against the public enemy, apply here. See *Schenck v. United States*, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247, and *Gilbert v. Minnesota*, 254 U. S. 325, 65 L. ed. 287, 41 Sup. Ct. Rep. 125, where the distinction is pointed out that time and circumstances may be determinative as to whether a statute limiting the right of free speech will be valid.

4. A further technical legal objection to the statute is its want of certainty. Where the statute uses

words of no determinative meaning,
or the language is
so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty. 16 C. J. § 28. Thus in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, the defendant, with another, had been indicted for an offense under an act of Congress, and was charged with refusing to receive and count at an election the

vote of a citizen of African descent. Congress had passed an act (16 Stat. at L. 140, chap. 114, Comp. Stat. § 3966, 3 Fed. Stat. Anno. 2d ed. p. 118) to put the 15th Amendment into operation, § 4 of which provided for the punishment of any person who should by force, bribery, threat, intimidation, or other unlawful means, hinder, delay, or combine with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election. It will thus be seen that this section went beyond the purview of the 15th Amendment and was not limited in its terms to cases involving the deprivation of the right to vote by colored people, but included all classes of voters. The court pointed out that the statute did not confine its operation to unlawful discrimination on account of race, etc., and that the act was broad enough to punish discrimination against any class of voters, which was, of course, beyond the power of Congress. The court said:

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully

prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . .

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In *Augustine v. State*, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77, the question was as to the uncertainty of a statute which provided for a different venue in cases of murder by "mob violence." The court said: "We have given this question much thought and study, and we confess to being unable to solve the difficulty, and to determine what the legislature really meant by the term 'mob violence,' or what character of cases they intended the act should embrace. It is so uncertain in its terms as to escape intelligible construction, and we therefore declare it inoperative and void."

In *United States v. Capital Traction Co.* 34 App. D. C. 592, 19 Ann. Cas. 68, the question was whether an act of Congress which made it a criminal offense for the street railway company in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon without crowding the same was so indefinite and uncertain as to be void. The court said: "What shall be the

guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements essential in determining the validity of criminal statutes, is wholly lacking. There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

In *Czarra v. Medical Supers.* 25 App. D. C. 443, the question was whether an act of Congress providing for the cancellation of a physician's license to practise medicine was void for uncertainty. The act (29 Stat. at L. 200, chap. 313) provided that the license might be revoked for any of the following causes, to wit: "The employment of fraud or deception in passing the examinations provided for in this act, chronic inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or of unprofessional or dishonorable conduct."

The court said: "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible. But when the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite as that it may embrace within its comprehension, not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possess-

ing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute void for its uncertainty."

The court then quotes from *United States v. Reese*, supra, as follows: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

See also, in this connection, *Stoutenburgh v. Frazier*, 16 App. D. C. 229, 48 L.R.A. 220; *State v. Gaster*, 45 La. Ann. 636, 12 So. 739; *Ex parte Jackson*, 45 Ark. 158.

In view of the foregoing considerations and the cases cited, it would seem clear that the statute under consideration here is void for uncertainty.

5. The unconstitutionality of the act was not raised in the trial court, and the attorney general insists that the weight of authority supports his contention that a constitutional question is not jurisdictional in character, and therefore cannot be raised for the first time on appeal.

It is true that we have held in *State v. Chavez*, 19 N. M. 325, 142 Pac. 922, Ann. Cas. 1917B, 127, and

State v. Garcia, 19 N. M. 420, 421, 143 Pac. 1012, that where the alleged unconstitutional character of a statute concerns a matter of evidence, rather than the offense itself, the constitutional question cannot be raised for the first time on appeal. But in this case a different proposition is involved. Here the question of the constitutionality of the act involved determines whether a crime has been committed. If the law is void, no crime has been committed and none can be committed under it, and the court has no jurisdiction over the person of the defendant or the subject-matter of the cause. It is a proceeding to punish a man where there is no law authorizing the same. In such a case it would seem that the question is jurisdictional and may be raised for the first time on appeal, and we so hold. See, in this connection, *Schwartz v. People*, 46 Colo. 239, 47 Colo. 483, 104 Pac. 92; *State v. Gibson*, — Iowa, —, 174 N. W. 34, and *State v. Winehill & Rosenthal*, 147 La. 781, 86 So. 181.

For the reasons stated, the judgment of the court below will be reversed, and the cause remanded, with directions to the District Court to dismiss the cause and discharge the defendant, and it is so ordered.

Raynolds, Ch. J., concurs.

Davis, J., did not participate.

ANNOTATION.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency.

- I. Introduction, 1535.
- II. Espionage Act:
 - a. In general, 1536.
 - b. As affected by provisions in Federal Constitution regarding treason, 1538.
- III. State statutes:
 - a. Sedition acts generally, 1539.
 - b. Syndicalism and sabotage statutes, 1543.

I. Introduction.

The present annotation is supplemental to that on the same question

III.—continued.

- c. Statutes directed against interference with military forces or war, 1547.
- d. Possession or display of red flags, 1548.
- IV. Intent as an essential element, 1549.
- V. Miscellaneous, 1549.

appended to *State v. Moilen*, 1 A.L.R. 336.

The annotation is concerned only

with the question of the validity, and not with the construction, of legislation of the nature indicated in the above title. In several cases, however, attention is called to the nature of the particular language, words, or acts relied on, in order to show that, as thus drafted and applied, the statute has been held valid.

II. Espionage Act.

a. In general.

The Espionage Act enacted by Congress in 1917 (40 Stat. at L. 219, chap. 30), and the amendment thereto in 1918 (40 Stat. at L. 553, chap. 75, Comp. Stat. § 10,212c, Fed. Stat. Anno. Supp. 1918, p. 120), have been held constitutional in numerous cases. *Frohwerk v. United States* (1919) 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; *Debs v. United States* (1919) 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252 (amendment); *Schenck v. United States* (1919) 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; *Abrams v. United States* (1919) 250 U. S. 616, 63 L. ed. 1173, 40 Sup. Ct. Rep. 17 (amendment); *Schaefer v. United States* (1920) 251 U. S. 466, 64 L. ed. 360, 40 Sup. Ct. Rep. 259; *Pierce v. United States* (1920) 252 U. S. 239, 64 L. ed. 542, 40 Sup. Ct. Rep. 205, affirming (1917) 245 Fed. 878; *O'Connell v. United States* (1920) 253 U. S. 142, 64 L. ed. 827, 40 Sup. Ct. Rep. 444; *United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson* (1921) 255 U. S. 407, 65 L. ed. 704, 41 Sup. Ct. Rep. 352; *Heynacher v. United States* (1919) 168 C. C. A. 273, 257 Fed. 61, petition for writ of certiorari denied in (1919) 250 U. S. 674, 63 L. ed. 1021, 40 Sup. Ct. Rep. 54; *Dodge v. United States* (1919) 7 A.L.R. 1510, 169 C. C. A. 316, 258 Fed. 300, petition for writ of certiorari denied in (1919) 250 U. S. 660, 63 L. ed. 1194, 40 Sup. Ct. Rep. 10 (amendment); *Hickson v. United States* (1919) 169 C. C. A. 587, 258 Fed. 867; *Equi v. United States* (1919) 171 C. C. A. 649, 261 Fed. 53, petition for writ of certiorari denied in (1920) 251 U. S. 560, 64 L. ed. 414, 40 Sup. Ct. Rep. 219 (amendment); *Schoborg v. United States* (1920) 264 Fed. 1, petition for certiorari denied in (1920)

253 U. S. 494, 64 L. ed. 1029, 40 Sup. Ct. Rep. 586 (amendment); *Wimmer v. United States* (1920) 264 Fed. 11, petition for writ of certiorari denied in (1920) 253 U. S. 494, 64 L. ed. 1030, 40 Sup. Ct. Rep. 586 (amendment); *Lockhart v. United States* (1920) 264 Fed. 14, petition for writ of certiorari denied in (1920) 254 U. S. 645, 65 L. ed. 455, 41 Sup. Ct. Rep. 14 (amendment); *Dierkes v. United States* (1921) 274 Fed. 75 (amendment). See also *Seebach v. United States* (1919) 262 Fed. 885.

Section 3 of the 1917 Act above referred to provided a punishment for "whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States." The 1918 amendment provides, *inter alia*, for punishment for anyone who, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or wilfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, or "wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States," or its Constitution, military or naval forces, flag, or uniform, or any language intended to bring the form of government of the United States, or the Constitution, military or naval

forces, flag, or uniform, into contempt or disrepute, or "wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies," or whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things enumerated in the statute, or "whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein."

It was said in *Frohwerk v. United States* (1919) 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249, supra, that the 1st Amendment to the Federal Constitution, while prohibiting legislation against free speech as such, could not have been, and obviously was not, intended to give immunity for every possible use of language. And it was held in this case that constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act, under which a person might be convicted for conspiring to obstruct the military recruiting or enlistment service by words of persuasion in newspaper publications.

In *Schenck v. United States* (1919) 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247, supra, the Federal Supreme Court held that the 1st Amendment to the Federal Constitution, forbidding the abridgment of freedom of speech, did not prevent conviction for a conspiracy to violate the Espionage Act through the distribution of a circular denouncing conscription in impassioned terms, and vigorously urging that opposition to the selective draft be asserted, although in form the circular was confined to peaceful measures, such as a petition for the repeal of the act. It was said: "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in

20 A.L.R.—97.

falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

And the court in *Schenck v. United States* (U. S.) supra, declared that the question in every case is whether the words are used under such circumstances, and are of such a nature, as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent; that it is a question of proximity and degree.

It was held in *Debs v. United States* (1919) 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252, supra, that a public speech so expressed that its natural and intended effect was to obstruct the military recruiting or enlistment service was not protected by the constitutional guaranty of freedom of speech, from condemnation under the Espionage Act, by reason of the immunity of the general theme, viz., socialism, its growth, and prophecy of its ultimate success, or because it was a part of a general program to obstruct war, and expressed a general and conscientious belief.

In *Schoborg v. United States* (1920) 264 Fed. 1, petition for certiorari denied in (1920) 253 U. S. 494, 64 L. ed. 1029, 40 Sup. Ct. Rep. 586, supra, the court applied the rule that language in a statute which is capable of a very broad or of a very narrow construction should receive the latter where the former would or might make it unconstitutional, and where the latter was sufficient to reach the particular case; and held that it was unimpor-

tant that the terms "favor," "support," and "oppose" in the amendment of the Espionage Act of 1918 might be susceptible of a definition broad enough to cover and include some things which were within the protection of the Amendment forbidding abridgment of freedom of speech; and that the important question before it was whether that particular kind and degree of favor, support, or opposition alleged against the defendant was within the constitutional immunity.

The constitutional guaranty of freedom of speech does not extend to the protection of utterances in time of war, which involve the integrity of the nation or injure or tend to injure it. *Dodge v. United States* (1919) 7 A.L.R. 1510, 169 C. C. A. 316, 258 Fed. 300, petition for writ of certiorari denied in (1919) 250 U. S. 660, 63 L. ed. 1194, 40 Sup. Ct. Rep. 10, *supra*.

Where the defendant stated, among other things, that he "would rather serve a term in the penitentiary than wear a uniform in Wilson's Wall street war," it was held in *Dierkes v. United States* (1921) 274 Fed. 75, *supra*, that the language used was not protected by the Amendment to the Federal Constitution forbidding abridgment of freedom of speech; that the court could not say as matter of law that the language used was, under appropriate environment, incapable of being reasonably construed as disloyal to the military forces of the United States, or such as might bring those forces into disrepute; and that a conviction under the Espionage Act should be affirmed.

In *Seebach v. United States* (1919) 262 Fed. 885, *supra*, the court, in sustaining a conviction under the Espionage Act of 1917, said: "Time, place, and circumstance have everywhere much to do with the quality of human conduct, and this is true of the exercise of rights under the Constitution. The Constitution contains no invitation to destroy the fundamental structure of the government, to frustrate its duly ordered operations, or to lend aid to the public enemies. When the nation is at war, its very exist-

ence is in the scales, and the freedom of action and speech of the individual is qualified accordingly. If this were not so, each one might determine for himself the validity or force of public statutes for the general safety; there could even be no such crime as treason."

The constitutionality of the Espionage Act was conceded in *Schaefer v. United States* (1920) 251 U. S. 466, 64 L. ed. 360, 40 Sup. Ct. Rep. 259, *supra*, in which, however, it was unsuccessfully contended that freedom of speech and of the press, protected by the Federal Constitution, was violated by convictions for the particular publications in question, which were in the German language, and were derisively contemptuous of the war activities of the United States, and intended to convey the idea that the war was not demanded by the people, but was the result of the machinations of the Executive power, and in effect justified the German aggressions.

b. As affected by provisions in Federal Constitution regarding treason.

In several cases the contention has been overruled that the offense, if any, was treason, and punishable only according to the provisions of article 3, § 3, of the Federal Constitution. (See, in this connection, *State v. Hennessy* (Wash.) *infra*, III. b.)

Thus, the Federal circuit court of appeals in *Equi v. United States* (1919) 171 C. C. A. 649, 261 Fed. 53, *supra*, in affirming a conviction under the Espionage Act, of one who at a public meeting of the Industrial Workers of the World had used language which it was charged was disloyal and abusive with respect to the flag and the military forces of the government, and was calculated and intended to provoke and encourage resistance to the United States and to promote the cause of its enemies, overruled the contention that the crime defined by the Espionage Act was treasonable, and was punishable as treason or not at all.

To a similar effect is *Frohwerk v. United States* (1919) 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249, *supra*,

in which the Federal Supreme Court said: "Some reference was made in the proceedings and in argument to the provision in the Constitution concerning treason, and it was suggested, on the one hand, that some of the matters dealt with in the Act of 1917 were treasonable and punishable as treason or not at all, and, on the other, that the acts complained of, not being treason, could not be punished. These suggestions seem to us to need no more than to be stated."

And in *Wimmer v. United States* (1920) 264 Fed. 11, *supra*, the Federal circuit court of appeals overruled the contention that the Espionage Act was unconstitutional in that it punished treasonable conduct without proof of the overt act and without the two witnesses thereto required by the Federal Constitution. The case was one where the offense did not consist in overt acts but in words only, which, it was alleged, violated that provision of the Espionage Act providing for punishment of anyone who, by word or act, supported or favored the cause of any country with which the United States was at war, or by word or act opposed the cause of the United States therein. The court said: "If we had to do with a case where the conduct which was prosecuted consisted of acts, we would have to consider the line of reasoning upon which *Wimmer* depends. That Congress has power to take hold of an act which is, in fact, treason, and to say that it shall be severely punished, without the proof which is required to establish treason, and to justify this result because the conduct is given another name, is a proposition which we have no occasion to affirm or deny. Here the only conduct alleged or proved, as making out the offense, consisted of oral statements,—words only. It is well settled that one cannot, by mere words, be guilty of treason, . . . and thus the fallacy of *Wimmer's* contention becomes apparent."

To the same effect, overruling the contention that the Espionage Act was invalid because it unwarrantably extended the constitutional definition of

the crime of treason, is *Schoborg v. United States* (1920) 264 Fed. 1, petition for certiorari denied in (1920) 253 U. S. 494, 64 L. ed. 1029; 40 Sup. Ct. Rep. 586.

III. State statutes.

a. Sedition acts generally.

See also *People v. Most* (1902) 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175, set out in the earlier annotation on the same subject in 1 A.L.R. on p. 338.

It was held in *STATE v. SINCHUK* (reported herewith) ante, 1515, that the Connecticut sedition statute penalizing the publication of disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag, or uniform, or any matter which was intended to bring them into contempt, or which created or fostered opposition to organized government, was not unconstitutional in that it fixed no ascertainable standard of guilt, and amounted to a delegation to court and jury of the legislative function of defining statutory offenses. It was held, also, that the statute was not invalid on the ground that it overstepped the police power, and deprived of liberty without due process of law, in penalizing expressions because of their character, regardless of relation to harmful consequences.

And the court in the *SINCHUK CASE* further held that the defendants, who were aliens, with no constitutional right to share in the privilege and responsibility of attempting to change our laws or forms of government, and hence with no right, under cover of being engaged in good faith to accomplish those ends, to engage in scurrilous or anarchistic propaganda declared by the legislature to be dangerous to the public welfare, could not invoke the defense of the unconstitutionality of the statute as in violation of provisions of the Bill of Rights that "all political power is inherent in the people," who have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may deem expedient; that "every citizen" may freely speak,

write, and publish his sentiments upon all subjects, being responsible for the abuse of that liberty; and that no law should be passed to curtail or restrain the liberty of speech or of the press.

The constitutionality of the Iowa statute prescribing a punishment for anyone who should excite an insurrection by sedition, or should attempt by writing, speaking, or other means to do this, or who should by any means, including speech and writing, advocate the subversion and destruction by force of the government of the state or United States, or should incite, abet, promote, or encourage hostilities or opposition to either government, was sustained in *State v. Gibson* (1919) — Iowa, —, 174 N. W. 34, and a conviction affirmed for attempting by speech and action to incite and encourage hostility and opposition to the government of the state and of the United States. The court said, in reply to the contention that the statute violated the provision of the state Constitution, that all persons might speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and that no law should be passed to restrain or abridge liberty of speech or of the press; that the constitutional guaranty itself qualified the immunity by a plain indication that, while the right was given, the abuse of that right was not to be tolerated; that the framers of the Constitution did not intend to protect that which might destroy the state; and that it was not intended that the right to free speech included the right to promote sedition.

The principal constitutional question discussed in *State v. Gibson* (Iowa) *supra*, was whether the title of the statute was sufficient, being, "An Act Relating to Offenses against the State of Iowa, and providing for Punishment for Violation Thereof." It was unsuccessfully contended that the act created an offense against each government,—state and Federal,—and provided a punishment for offending against either, and that the title was therefore insufficient.

The court held that the act did not make separate offenses as against the state and the nation respectively, but charged only a single offense,—against the state; although it is intimated that the title might be sufficient, even if the statute created two distinct offenses.

The validity of the Montana Sedition Act of 1918 has been sustained in several cases. *Ex parte Starr* (1920) 263 Fed. 145; *State v. Kahn* (1919) 56 Mont. 108, 182 Pac. 107; *State v. Wyman* (1919) 56 Mont. 600, 186 Pac. 1; *State v. Smith* (1920) 57 Mont. 563, 190 Pac. 107; *State v. Fowler* (1921) 59 Mont. 346, 196 Pac. 992, rehearing denied in (1921) 59 Mont. 356, 197 Pac. 847; *State v. Schaffer* (1921) 59 Mont. 463, 197 Pac. 986.

The provision of the Montana statute declaring that whenever the United States is engaged in war, any person who shall utter, print, write, or publish any language calculated to incite or inflame resistance to any duly constituted Federal or state authorities in connection with the prosecution of the war, shall be guilty of the crime of sedition, was held valid, in *State v. Kahn* (1919) 56 Mont. 108, 182 Pac. 107, *supra*, as against the objection that the subject-matter was national in character, with respect to which Congress alone had the power to legislate; that the act infringed on the provision of the state Constitution, forbidding the impairment of freedom of speech, and providing that every person should be free to speak or write on any subject, being responsible for all abuse of that liberty. Regarding the latter point, the court said that neither the Federal nor the state Constitution was intended to extend immunity for every use or abuse of language; that one's words, like his acts, assumed their character from the surrounding circumstances; that in time of peace the language employed by the defendant in this case might not constitute a crime, and that it might be true that it was beyond the power of the legislature to make its use a crime in time of peace.

Substantially the same contentions against the validity of the Montana statute were overruled in *State v. Wyman* (1919) 56 Mont. 600, 186 Pac. 1, *supra*, on the authority of the *Kahn Case*.

And the contention that the statute was unconstitutional in that the subject-matter was one upon which Congress alone might legislate was overruled in *State v. Fowler* (1921) 59 Mont. 346, 196 Pac. 992, *supra*.

In *Ex parte Starr* (Fed.) *supra*, the Federal district court sustained the validity of the Montana statute, as applied to the offense of uttering and publishing contemptuous and slurring language about the flag, committed before the amendment in 1918 of the Federal Espionage Act. The contention was that the state law was repugnant to the Federal Constitution in that it assumed powers which were vested in the United States alone, and which had been exercised by it. It was found unnecessary to decide whether the state law, which the court said, in so far as it related to the flag, was similar to the Espionage Law of 1918, was superseded by that act, because the offense in question was committed prior to the enactment of that law, and the latter neither pardoned the offense nor drew it within Federal jurisdiction.

The decisions of the New Jersey court, in passing on the construction and validity of the state Sedition Statute of 1918, in *State v. Tachin* (1919) 92 N. J. L. 269, 106 Atl. 145, affirmed in (1919) 93 N. J. L. 485, 108 Atl. 318, and *State v. Gabriel* (1921) 95 N. J. L. 337, 112 Atl. 611, are set out at length in *STATE v. DIAMOND* (reported herewith) ante, 1527. The effect of these decisions is that while the state may constitutionally make it unlawful for any person to advocate the subversion or destruction by force of the government of the United States, or attempt by speech, writing, or in any other way to promote or encourage hostility or opposition to such government, involving subversion or destruction by force, it cannot consti-

tutionally make it unlawful for any person to become a member of an organization or society formed for the purpose of upholding or encouraging hostility or opposition to the government of the United States, or aid, abet, or encourage any such organization, provided the means by which this is to be accomplished are peaceful and lawful. Section 2 of the New Jersey Statute, which is set out in the *DIAMOND CASE*, was, as is there indicated, construed as referring to hostility or opposition to the government of the United States or of the state, which involved the use of force; and a conviction under this section was sustained in the *Tachin Case*. But § 3 of the statute was construed as referring to organizations which opposed the government of the United States or of the state even by peaceful means, and therefore was held to offend against the constitutional provision reserving to the people the right freely to assemble, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. The latter section, which was held unconstitutional, provided that "any person who shall become a member of any organization, society, or order organized or formed, or attend any meeting, or counsel or solicit others so to do, for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the United States, or of the state of New Jersey, or who in any manner shall aid, abet, or encourage any such organization, society, or order or meeting in the propagation or advocacy of such a purpose, shall be guilty of a high misdemeanor."

In *State v. Tachin* (N. J.) *supra*, the court said that primarily sedition against the United States was a crime against the Federal government, which is the direct object of attack; but that under our system the Federal and state governments are so closely interwoven that an attack on the former may imperil the existence of the latter. And, after calling at-

tention to the fact that it has been held that the Federal government, which is a government of delegated powers only, may properly protect by criminal law the honesty and purity of elections, the court said that much more could the state government protect its own existence against sedition, which, although aimed directly at the Federal government, must indirectly affect the security of the state government.

And it was held, also, in *State v. Tachin* (N. J.) *supra*, that the fact that Congress had enacted a statute punishing sedition did not necessarily operate to destroy the power of the state; that the act of Congress, if inconsistent, superseded the state statute; but that if the statute was not inconsistent, the two acts might both be in force,—the one punishing the crime against the Federal government and the other punishing the crime against the state government, although both crimes were based on the same facts.

To a somewhat similar effect as the New Jersey cases cited *supra* is *STATE v. DIAMOND* (reported herewith) ante, 1527, in which the court, in holding the statute in question unconstitutional, took the view that the acts prohibited were not merely acts of violence or force, but included all acts, peaceful or otherwise, which had for their object the destruction of organized government, or acts antagonistic to or in opposition to such organized government, or acts inciting or attempting to incite revolution against or opposition to organized government, or the teaching of such doctrines; and that the word "revolution" as used in the statute included all forms of revolution, accomplished by peaceful means or otherwise, and was not limited to revolution by force of arms.

The New York statute making it a felony for any person, by word of mouth or writing, to advocate, advise, or teach the duty or necessity of overthrowing organized government by force or violence, or by assassination of officials, or "by any unlawful means," was held constitutional in

People v. Gitlow (1921) 195 App. Div. 773, 187 N. Y. Supp. 783, as applied to the advocacy of the overthrow and destruction of the government by "mass strike" and other class action to obtain objects which obviously could not be peaceably obtained, even though the doctrines advocated contemplated the formation of a government by a proletariat dictatorship and ultimately by the proletariat. The statute, it was held, was not limited in its application to the recognized doctrine of anarchists, which merely seeks the destruction and end of all governments. And it was unsuccessfully contended that the statute, unless confined to the advocacy of anarchy in its strict sense, would be unconstitutional as constituting, an abridgment of personal liberty guaranteed by the 14th Amendment to the Federal Constitution, and of the freedom of speech and of writing and publishing one's sentiments, and freedom of the press, preserved by the state Constitution, as well as in violation of due process of law provisions of the state and Federal Constitutions.

The view also was taken in *People v. Gitlow* (N. Y.) *supra*, that the legislature might make it a criminal offense to advocate within the state the overthrow of the government of the United States, or of any state thereof, by any means or method other than constitutional means or methods, even though the means used did not of themselves constitute a crime. The court took the view that the words "unlawful means" as used in the statute could not necessarily be construed as limiting its provisions to the advocacy of the overthrow of government by the commission of a crime, but might be held to have been used in the sense of means which were unauthorized by law; although it was said that if the statutory provision required a construction that the doctrines advocated must in and of themselves be illegal, in the sense that they advocated the commission of a crime, the scheme and program advocated by the defendant in this instance, if they did not as matter of law require the

construction that they advocated the overthrow of government by illegal means involving the commission of a crime, warranted a finding to that effect by the jury.

It was held, also, in *People v. Gitlow* (N. Y.) *supra*, that even the initial steps and other acts looking toward the ultimate overthrow of the government, although such effect might not be presently and immediately threatened, could be constitutionally punished under the statute. The court said that it could not subscribe to the proposition that the legislature was incompetent to forbid the advocacy of such doctrines designed and intended to overthrow governments, until it was shown that there was a present or immediate danger that they would be successful.

It was said in *Re Lithuanian Workers' Literature Soc.* (1921) 196 App. Div. 262, 187 N. Y. Supp. 612, that the right of free speech does not embrace the right to advise or encourage attempts to overthrow by force the existing government; in other words, by revolutionary methods.

But the prohibition of the use of disloyal language per se, as a war measure, was held in *Ex parte Meckel* (1919) 87 Tex. Crim. Rep. 120, 220 S. W. 81, to be the subject exclusively of Federal legislation, and not within the scope of state regulation. And it was held that the state disloyalty act was invalid, as not within the police power of the state, and in conflict with the provision of the Bill of Rights guaranteeing liberty of speech and of the press. The court took the view that if the disloyal language which the statute prohibited must be uttered under such circumstances as to make the same reasonably provocative of a breach of the peace, the statute would be valid as within the police power of the state, but held that this was not a proper construction of the statute, which provided that "if any person shall, at any time or place within this state, during the time the United States of America is at war with any other nation, use any language in the presence and hearing of another per-

son, of and concerning the United States . . . or of and concerning any flag . . . of the United States, . . . which language is disloyal to the United States of America, or abusive in character, and calculated to bring into disrepute the United States of America, . . . or is of such nature as to be reasonably calculated to provoke a breach of the peace, if said in the presence and hearing of a citizen of the United States of America, [he] shall be deemed guilty of a felony." The court said that the gravamen of the offense thus created was the use of language of such nature as that, in case it was uttered in the presence of a citizen, it would likely cause a breach of the peace; and that the terms of the statute were so framed as to penalize one who uttered language of such a nature, whether it was used under circumstances or in such presence as to make it reasonably provocative of a breach of the peace.

The result of the last decision would apparently limit the power of the state to punish language which was disloyal to the United States and was uttered in the presence of another person, to cases where it was uttered under circumstances reasonably tending to lead to a breach of the peace, in which case it would be within the police power of the state; but, in the absence of such circumstances, the punishment of disloyal language must, according to this decision, be left to Congress.

To the same effect, following the last case in holding the Texas Disloyalty Act unconstitutional, is *Schellenger v. State* (1920) 87 Tex. Crim. Rep. 411, 222 S. W. 246.

b. Syndicalism and sabotage statutes.

As to the validity of the New Jersey statute, see *State v. Quinlan* (1914) 86 N. J. L. 75, 91 Atl. 586, affirmed on opinion below, with dissenting opinion, in (1915) 87 N. J. L. 333, 93 Atl. 1086; and *State v. Boyd* (1914) 86 N. J. L. 75, 91 Atl. 586, affirmed, without opinion, in (1915) 87 N. J. L. 328, 93 Atl. 599, which are set out in the

earlier annotation on this question in the annotation 1 A.L.R. pp. 336, 337.

The California Statute of 1919 defining criminal syndicalism and sabotage, and prescribing penalties for those who are guilty of the same, was sustained in *Re McDermott* (1919) 180 Cal. 783, 183 Pac. 437, and *People v. Malley* (1920) — Cal. App. —, 194 Pac. 48. The statute defines criminal syndicalism to be "any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership or control, or effecting any political change." And any person was declared guilty of a felony who should print, publish, edit, issue, or circulate, or publicly display, any book, paper, pamphlet, or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid in abetment of, or advising, criminal syndicalism.

The validity of the California Criminal Syndicalism Act, which was before the court in the last case, was sustained also in *People v. Steelik* (1921) — Cal. —, 203 Pac. 78, the particular provision of the statute violated in this instance being that which made one guilty of a felony who organized, or assisted in organizing, or was or knowingly became a member of any organization or society which was organized or assembled to advocate, teach, or aid and abet any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, wilful and malicious physical damage, or injury to physical property, or unlawful acts of force and violence, or unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership or control, or effecting any political change. The court overruled the contention that the statute was void for uncertainty in that it denounced acts and conduct "as a means" of accom-

plishing political or industrial changes, leaving it to a court or jury to determine whether or not the particular act or conduct of the defendant was adapted to the result denounced by the statute. The court said, also, that it was clear that the statute did not violate the right of free speech; that this right did not include the right to advocate the destruction or overthrow of the government, or the criminal destruction of property; although it was said, also, that the defendant was not in a position to raise this point, as he was not charged with or convicted of a violation of the act with respect to anything which he said or published.

The fact that the statute punished aiders and abettors even where the crime advocated was not committed was held in *People v. Steelik* (Cal.) *supra*, not to render it invalid on the ground of uncertainty.

And that the legislature may constitutionally denounce membership in organizations formed for the purpose of committing crimes against persons and property in furtherance of political or industrial changes is supported by *People v. Taylor* (1921) — Cal. —, 203 Pac. 85, where the court sustained a conviction under the California Syndicalism Act on a charge of the offense of knowingly belonging to an organization advocating sabotage, etc.

The validity of the California Syndicalism Act seems sustained also by *Whitney v. Alameda County* (1920) 182 Cal. 114, 187 Pac. 12, which does not show the nature of the offense in question, but which is referred to in *People v. Steelik* (Cal.) *supra*, as involving the question of the constitutionality of the act, which was attacked on the ground that it violated a provision of the Constitution prohibiting a legislative act which embraced more than one subject.

The Minnesota Criminal Syndicalism Act of 1917, forbidding anyone to teach the duty, necessity, or propriety of crime, sabotage, and other unlawful methods of terrorism as a means of accomplishing industrial or political ends, was held valid in *State v.*

Worker's Socialist Pub. Co. (1921) — Minn. —, 185 N. W. 931, as against the contention that the statute was so uncertain and indefinite that it violated the provision of the state Constitution that in any criminal prosecution the accused was entitled to know the nature and cause of the accusation against him. As upholding the validity of the statute against attacks made on other grounds, see *State v. Moilen*, 1 A.L.R. 331, to which the earlier note on the present question is appended.

The Nevada Statute of 1919, against criminal syndicalism, was held constitutional in *Re Moriarity* (1920) 44 Nev. 164, 191 Pac. 360, as against the contention that the statute constituted class legislation and denied the equal protection of the laws. The statute provided that any person should be guilty of a felony who, "by word of mouth or writing, advocates or teaches the duty, necessity, or propriety of crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform," or who did certain other acts of an analogous nature, as circulating books and documents advocating such doctrine, or organizing or becoming a member of a society formed to teach or advocate criminal syndicalism.

The Oregon statute against criminal syndicalism and sabotage was held constitutional in the recent case of *State v. Laundry* (1922) — Or. —, 204 Pac. 958, rehearing denied in (1922) — Or. —, 206 Pac. 290. In this case the defendant was indicted for helping to organize, becoming a member of, and voluntarily assembling with, the society known as the Industrial Workers of the World, which, it was alleged, taught and advocated the doctrine of criminal syndicalism, sabotage, violence, and crime, the indictment following the provision of the statute making any person guilty of a felony who "helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates or affirmatively suggests the

doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution, or for profits." It was urged against the constitutionality of the statute that it unlawfully infringed on personal liberties, constituted class legislation, violated constitutional provisions concerning treason, infringed upon the right of free speech, and encroached upon the right of assemblage. It was said: "The statute is not an unlawful interference with personal liberties. Liberty does not import an absolute right to be freed from all restraint. Liberty does not imply unrestricted license. The possession and enjoyment of all rights are subject to such reasonable conditions as the governing authority may deem essential to the safety, peace, and welfare of the general public. . . . Stated broadly, the Syndicalism Statute penalizes the advocacy or teaching of crime as a means of effecting industrial or political ends, or for profit. The acts which shall not be advocated are acts which, when done, are of themselves unlawful by force of statutes other than the Syndicalism Statute. If any one of those unlawful acts should be actually committed, the person so committing such unlawful act would be guilty of a crime; and surely no competent person would think of attempting to argue that his personal liberties are unconstitutionally curbed by legislation penalizing him for intentionally injuring the person or property of another. Statutes penalizing those who solicit or incite others to commit crimes are not innovations upon the criminal law. . . . If it is within the power of the legislature to declare that a given act, when done, constitutes a crime, then it is likewise within the power of the legislature to declare that to advocate the doing of such act is a crime; for, if public policy requires the punishment of him who does an act, it likewise may require the punishment of him who

incites the doing of such act, whether the act is actually done or not. . . . At the hearing it was argued, on the authority of *Ex parte Smith* (1896) 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 629, that any person may, if he chooses, rightfully associate with persons having the reputation of being thieves. There is a vast difference, however, between the act of merely associating with persons having the reputation of being thieves, and the act of joining with such person either in the commission of theft or in the advocacy of the commission of theft. . . . The Syndicalism Statute is not class legislation. It affects all alike. It does not discriminate against some or favor others. . . . The defendant argues that the Syndicalism Act, when resolved to its final analysis, declares that the doing of the prohibited act constitutes constructive treason. This argument arises out of the fact that the statute penalizes the advocacy of the commission of unlawful acts 'as a means of accomplishing or effecting any industrial or political ends, change, or revolution, or for profit.' A single sentence taken from the opinion delivered by Marshall, Ch. J., in *Ex parte Bollman* (1807) 4 Cranch (U. S.) 75, 126, 2 L. ed. 554, 571, completely answers the defendant's contention: 'Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society are not to escape punishment because they have not ripened into treason.' . . . The same organic law which protects the right of each person to speak freely also makes him responsible for the abuse of that right. The Syndicalism Statute does not attempt to punish the advocacy of peaceable methods for effecting changes. . . . The same organic law which assures the right of assembling limits that right to assembling 'in a peaceable manner.' Freedom of speech does not mean unbridled license. No man can enter a crowded theater, falsely shout 'Fire,' and thus cause a panic

resulting in the crushing, maiming, and killing of enfeebled men, helpless women, and innocent children, and then justify his conduct by brazenly proclaiming that he did no more than to exercise his constitutional right of free speech. . . . The Syndicalism Act does not violate the constitutional right to speak freely or the constitutional right to assemble peaceably."

The contention was also overruled in *State v. Laundry* (Or.) supra, that the statute was void because it was too vague, indefinite, and uncertain, and that the indictment was likewise bad because of indefiniteness.

And it was also held in *State v. Laundry* (Or.) supra, that the title of the statute was sufficient, the contention in this respect being that the title was not broad enough to cover those provisions of the act which prohibited organizing, helping to organize, and becoming a member of a society of the character denounced. The title was: "An Act Entitled an Act Defining Criminal Syndicalism, and the Word 'Sabotage;' Prohibiting the Advocacy, Teaching or Affirmative Suggestion Thereof; and Prohibiting the Advocacy, Teaching or Affirmative Suggestion of Crime, Physical Violence, or the Commission of Any Unlawful Act or Thing as a Means to Accomplish Industrial or Political Ends, Change or Revolution, or for Profit; and Prohibiting Assemblages for the Purpose of Such Advocacy, Teachings or Suggestions; Declaring It Unlawful to Permit the Use of Any Place, Building, Rooms or Premises for Such Assemblages in Certain Cases."

The validity of the Washington Criminal Syndicalism Statute of 1919 was sustained in *State v. Hennessy* (1921) 114 Wash. 351, 195 Pac. 211, as against objections that the statute amounted to an attempt to punish constructive treason (see in this connection, II. b, supra), that it unconstitutionally interfered with the powers of Congress in this respect; that it was class legislation; that it violated the constitutional provision against cruel and

unusual punishment; that it was void for indefiniteness; that the title was too general and insufficient; that the act infringed upon the personal liberties of citizens; and that it unconstitutionally abridged freedom of speech. The statute provided that any person should be guilty of a felony who should "advocate, advise, teach, or justify crime, sedition, violence, intimidation, or injury as a means or way of effecting or resisting any industrial, economic, social, or political change;" or who should print, sell, circulate, distribute, or display any book, pamphlet, etc., advocating, advising, etc., as above indicated; or who should organize or help to organize, give aid to, or be a member of or voluntarily assemble with, any group of persons formed to advocate, advise, or teach crime, etc., as above quoted. The court said that the fact that treason was defined in the Federal Constitution did not deprive the state legislature of the power to enact the statute; that while the Federal government undoubtedly had ample power to protect its sovereignty, it did not necessarily follow that the legislature of a state might not pass laws for the purpose of aiding or assisting the national government; that the state was one of the component parts of the Federal government, and what affected the latter affected the former.

To similar effect, following the above case, are *State v. Hestings* (1921) 115 Wash. 19, 196 Pac. 13, and *State v. Hemhelter* (1921) 115 Wash. 208, 196 Pac. 581.

The constitutionality of the Kansas statute concerning criminal syndicalism is apparently assumed in such cases as *Re Danton* (1921) 108 Kan. 451, 195 Pac. 981. The statute in effect declared anyone guilty of a felony who, by word of mouth or by writing, suggested or taught the duty, necessity, or expediency of crime, criminal syndicalism, or sabotage, or the destruction of property or injury to persons, as a means of accomplishing any industrial or political end, change, or revolution, or for profit; or who published or knowingly circulated, distributed, or displayed writ-

ten or printed matter of the character and for the purposes named; or who organized or helped to organize or became a member of any society or assemblage which taught or advocated the doctrine and practices mentioned.

c. Statutes directed against interference with military forces or war.

In several cases the courts have sustained the validity of the Minnesota Statute of 1917, making it unlawful for any person to advocate or teach that men should not enlist in the military or naval forces of the United States or of the state, or that citizens of the state should not aid the United States in prosecuting war with its public enemies. *Gilbert v. Minnesota* (1920) 254 U. S. 325, 65 L. ed. 287, 41 Sup. Ct. Rep. 125, affirming (1918) 141 Minn. 263, 169 N. W. 790; *State v. Holm* (1918) 139 Minn. 267, L.R.A.1918C, 304, 166 N. W. 181 (cited in note in 1 A.L.R. 336); *State v. Townley* (1918) 140 Minn. 413, 168 N. W. 591 (question as to title); *State v. Kaercher* (1918) 141 Minn. 186, 169 N. W. 699 (same); *State v. Gilbert* (1919) 142 Minn. 495, 171 N. W. 798 (same).

It was held by the Federal Supreme Court in *Gilbert v. Minnesota*, supra, that the statute did not usurp or encroach upon congressional power, and did not unlawfully deny freedom of speech or press; and that it might even be sustained as a simple exercise of the police power to preserve the peace of the state, in view of the necessity of suppressing a seditious speech in order to prevent disorder and violence.

In *State v. Townley* (1918) 140 Minn. 413, 168 N. W. 591, supra, it was held that the title to the Minnesota statute, designating as the subject thereof interference with or discouragement of enlistments in the military or naval forces of the United States or of the state, was sufficient to cover that provision of the act making it unlawful for citizens of the state to advocate or teach that citizens "should not aid or assist the United States in prosecuting or carrying on war."

d. Possession or display of red flags.

In *Com. v. Karvonen* (1914) 219 Mass. 30, L.R.A.1915B, 706, 106 N. E. 556, Ann. Cas. 1916D, 846, the court sustained the validity of the Massachusetts statute, providing that "no red or black flag, and no banner, ensign, or sign having upon it any inscription opposed to organized government, or which is sacrilegious, or which may be derogatory to public morals, shall be carried in parade within this commonwealth," as applied to the carrying in a socialistic parade of a branch organization's regular banner, which was red throughout, except that it contained an inscription on one side in gilt letters, it being left to the jury to determine whether it was a red flag within the meaning of the statute. The court said: "The statute as thus construed does not violate any rights protected by either the state or Federal Constitutions. Under both these instruments the liberty of the citizen is guaranteed. But the liberty thus secured does not mean the unrestrained license of an unbridled will. Constitutional freedom means liberty regulated by law. Personal rights may be curbed in a rational way for the common good. Liberty is immunity from arbitrary commands and capricious prohibitions, but not the absence of reasonable rules for the protection of the community. . . . The statute here in question cannot be said to interfere unreasonably with the liberty of the citizens, nor can it be adjudged to have no rational connection with the preservation of public safety. The maintenance of order is plainly a lawful exercise of the police power. Statutes designed to promote that end cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result. It is said in Webster's Dictionary that, 'historically, a red flag has been a revolutionary and terroristic emblem.' In the Century Dictionary is found this: 'A red flag is a flag of a red color with or without devices associated with blood or danger.' Other lexicographers give similar defini-

tions. In the light of this well-recognized significance of the red flag, it may be assumed that the legislature regarded it as the symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare. Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised."

Attention is called, also, to *People v. Burman* (1908) 154 Mich. 150, 25 L.R.A.(N.S.) 251, 117 N. W. 589, in which the court took the view that there is no right to display a red flag in a procession where those composing the procession know that the natural and inevitable consequence will be to disturb the public peace and tranquillity, in violation of a municipal ordinance against riot.

But attention is called in this connection to *Re Hartman* (1920) 182 Cal. 447, 188 Pac. 548, where a municipal ordinance was declared invalid which made it unlawful for any person to display, or to have in his possession, a flag of any society or association which in its purposes or regulations espoused for the government of the people of the United States principles or theories of government antagonistic to the Constitution and laws of the United States, or to the form of government thereof as now constituted. The court said that, under this ordinance, a person would be guilty of the crime defined therein who should have in his possession a flag or emblem of an organization which advocated or espoused any change of principle or theory of government, merely because such principle or theory was antagonistic to our present Constitution and form of government; that the language was so broad as to render criminal the display or possession of the flag or emblem of a peaceful organization which espoused

amendments to the Federal Constitution, or form of government, national or state, in respect admittedly proper from a legal point of view; that nothing seems more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws, or form of government, although such cases may be based upon theories or principles of government antagonistic to those which now serve as its basis; and that it seemed equally certain that an organization peaceably advocating such basis might adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem could not be made an unlawful act.

IV. Intent as an essential element.

The question whether intent is an essential ingredient of the offense declared by the various statutes above referred to is one involving principles beyond the scope of the present annotation, and is only referred to incidentally because it has arisen in connection with the question of their validity. It should be observed that the rule that intent is unnecessary under statutes enacted as police regulations is involved in many kinds of cases, and that those within the scope of the present annotation are only illustrative of this broader doctrine. It has generally been held that intent is not an essential element in the offense created by the various statutes, or that intent might, at least, be inferred from the particular acts or language. And notwithstanding this construction of the statutes, their validity has been sustained.

Thus, it was contended in *State v. Kahn* (1919) 56 Mont. 108, 182 Pac. 107, *supra*, III. a, that the Montana sedition statute was invalid because it characterized certain acts as criminal without reference to the intent. The court said that the act was a general police regulation; that it was elementary that for the preservation of the peace, the safety of the people, and the good order of society, the legislature might prohibit certain

acts, and attach a penalty for disobedience, without including evil intent as an ingredient of the offense other than the general intent implied from a violation of the statute. But the court took the further view that the word "calculated" in the statute implied the power to reason and to plan; that in its broadest significance it meant to intend, to purpose, to design.

Among possibly other cases to the effect that intent is not an essential element of the offense under the statutes above set out are *State v. Gilbert* (1918) 141 Minn. 263, 169 N. W. 790, affirmed in (1920) 254 U. S. 325, 65 L. ed. 287, 41 Sup. Ct. Rep. 125; *State v. Worker's Socialist Pub. Co.* (1921) — Minn. —, 185 N. W. 931; *State v. Smith* (1920) 57 Mont. 563, 190 Pac. 107; *State v. Tachin* (1919) 92 N. J. L. 269, 106 Atl. 145, affirmed in (1919) 93 N. J. L. 485, 108 Atl. 318; *State v. Hennessy* (1921) 114 Wash. 351, 195 Pac. 211.

The question, it seems, in most of the above cases, was as to the construction of the statute in this regard, a question, of course, beyond the scope of the annotation; and the courts do not generally discuss the bearing of their conclusion regarding the necessity of intent on the question of the statutes' validity.

In *People v. Gitlow* (1921) 195 App. Div. 773, 187 N. Y. Supp. 783, *supra*, III. a, the court said: "It will be observed that the statutes make the advocacy of the doctrine a crime, without regard to criminal intent. The doing of a lawfully prohibited act, in and of itself, without regard to intent, may constitute the crime; . . . but the language of these statutes is quite general, and, therefore, I think it is essential that the forbidden doctrine be knowingly advocated with a view to the accomplishment of the forbidden purpose."

V. Miscellaneous.

In *Fraina v. United States* (1918) 166 C. C. A. 356, 255 Fed. 28, the court, in affirming convictions for conspiracy to commit an offense against the United States by aiding and abetting,

persons unlawfully to evade the Selective Service Act, through speeches and pamphlets urging objections to the war and alleged discrimination against so-called "nonreligious conscientious objectors," said: "Men can be punished for words, if the legislature so decrees, within constitutional limits. Men commit crimes when they counsel or procure others to sin against the statute law, and they also commit crimes when they confederate to effect that object, and yet it is difficult to imagine any more suitable or usual method of procuring or counseling than by speech. In this inaccurate sense men have very often been punished for words by statutory enactment. The free speech secured federally by the 1st Amendment means complete immunity for the publication, by speech or print, of whatever is not harmful in character, when tested by such standards as the law affords. . . . Legal talk liberty never has meant, however, 'the unrestricted right to say what one pleases at all times and under all circumstances.' *Warren v. United States*, 33 L.R.A.(N.S.) 800, 106 C. C. A. 156, 183 Fed. 721."

Among other cases which are of value on the present question, but are not strictly within the scope of the annotation, is *State v. McKee* (1900) 73 Conn. 18, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409, in which it was held that a statute making it a penal offense to sell, or offer to sell, lend, or give a paper principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime, did not violate a constitutional provision that every citizen

may freely speak, write, and publish his sentiments on all subjects, and that no law should be passed to restrain the liberty of speech or of the press.

Attention is called also to *United States ex rel. Turner v. Williams* (1904) 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719, holding that the guaranty of the Federal Constitution as to freedom of speech and of the press was not infringed by the provisions of the Immigration Act of 1903 for the exclusion and deportation of alien anarchists, whether the statute was construed as applying to persons whose opposition to all organized government was professed as a political ideal, or simply as including those who advocated the forcible overthrow of government or assassination of officials.

But a municipal ordinance adopted in 1918, declaring certain persons to be vagrants and providing a punishment for them, was held invalid in *Taft v. Shaw* (1920) 284 Mo. 531, 225 S. W. 457, as covering matters of Federal rather than state cognizance, and as conflicting with definitions of a vagrant contained in a state statute. Among those who were declared by the ordinance to be vagrants was anyone who should become a member of an organization or association opposed to the prosecution of the war by the United States, or should circulate, or aid and abet in circulating, literature directly intended to hinder the United States in the exercise of its war powers, or who should utter seditious sentiments against the United States government.

R. E. H.

COMBINED INDEX

TO

NOTES AND CASES.

ABANDONMENT.

Of contract, see **CONTRACTS**.

ABSENCE.

Direct contempt by presenting libelous charge against judge in open court, though parties responsible are absent when contents of paper become known. 20-900.

ABUSE OF PROCESS.

Servant's or agent's personal liability for. 20-116.

ACCESS.

Tenant's rights and remedies in case of destruction of access by lessor. 20-1400.

ACCIDENT.

Liability of person causing injury for aggravation thereof by accident, see **DAMAGES**.
In general, see **NEGLIGENCE, PERSONAL INJURIES**.

ACCIDENT INSURANCE.

See **INSURANCE**.

ACTINOMYCOSIS.

Workmen's compensation, necessity and sufficiency of evidence that actinomycosis contracted by applicant for compensation is attributable to his employment. 20-6.

ACTION OR SUIT.

Forbearance to sue as consideration for contract, see **CONTRACTS**.

Parties, see **PARTIES**.

By or against partners, see **PARTNERSHIP**.

Defenses.

In action for trespass, see **TRESPASS**.

In workmen's compensation cases, see **WORKMEN'S COMPENSATION**.

Consolidation.

Court's right, of its own motion, to consolidate appeal from order appointing guardian for child and a motion to modify an order for its custody, entered in divorce proceedings between its parents. 20-827.

ADMINISTRATION.

Of estates of decedents, see **EXECUTORS AND ADMINISTRATORS**.

ADMIRALTY.

Jurisdiction.

Injury to longshoreman at work upon a wharf by breaking of sling by which cargo was being unloaded from vessel. 20-1079.

State's power to confer jurisdiction on admiralty courts in nonmaritime matters. 20-1079.

ADMISSIONS.

Admissibility in evidence, see EVIDENCE.
By pleading, see PLEADING.

ADVERTISEMENTS.

Constitutionality of statutes as to cigarette advertising. 20-930.

AFFIDAVIT.

In contempt proceedings, see CONTEMPT.
In support of motion for new trial, see NEW TRIAL.

AFTERBORN CHILDREN.

Prenatal injury as ground of action. 20-1505 (case p. 1503).

AGENCY.

See PRINCIPAL AND AGENT.

AIR.

Tenant's rights and remedies in case of destruction of air or light by landlord. 20-1400.

ALIENATION OF AFFECTIONS.

Action for, see HUSBAND AND WIFE.

ALIENS.

Constitutional rights of, see CONSTITUTIONAL LAW.

AMBIGUITY.

In statute, see STATUTES.

AMUSEMENTS.

On Sunday, see SUNDAY.

ANCIENT LIGHTS.

Servant's or agent's personal liability for obstruction of. 20-116.

ANEURISM.

Workmen's compensation, necessity and sufficiency of evidence that aneurism contracted by applicant for compensation is attributable to his employment. 20-6.

ANKYLOSIS.

Workmen's compensation, necessity and sufficiency of evidence that ankylosis contracted by applicant for compensation is attributable to his employment. 20-7.

ANNULMENT.

Of judgment, see JUDGMENT.

ANTHRAX.

Workmen's compensation, necessity and sufficiency of evidence that anthrax contracted by applicant for compensation is attributable to his employment. 20-7 (case p. 1).

APOPLEXY.

Workmen's compensation, necessity and sufficiency of evidence that apoplexy suffered by applicant for compensation is attributable to his employment. 20-9.

Italic type indicates points with annotation; roman type, points without.

APPEAL AND ERROR.**In general.**

In public improvement proceedings, see
PUBLIC IMPROVEMENTS.

*Bail bond given on appeal, termination
of liability of sureties. 20-636.*

Security.

Raising for first time on appeal objection
that bond for appeal to intermediate
court was not filed in time. 20-827.

Objections and exceptions.

Evidence, necessity of specifying particu-
lar section of constitution alleged to
be violated by admission of. 20-639.

Dismissal of appeal.

Appeal from judgment, not taken in man-
ner prescribed by statute properly
dismissed. 20-1441.

Rules of decision.

Evidence viewed in aspect tending to sup-
port verdict upon review of denial of
motion to direct verdict for defend-
ant. 20-1118.

Presumptions.

Presumption that jury, instructed to find
against defendant if they found that
he was negligent, considered only
such grounds of negligence as were
supported by the evidence, although
others were alleged in the complaint.
20-525.

Refusal of affirmative charge presumed to
be supported by sufficient evidence,
where evidence is not in record.
20-1303.

Discretionary matters.

Withdrawal of plea of guilty, discretion
as to, not reviewable except in case
of clear abuse. 20-1441.

Questions not raised below.

Bond for appeal to intermediate court,
objection that, because of failure to
file in time, intermediate court had
no jurisdiction. 20-827.

Crime, right to raise for first time on
appeal question of constitutionality
of act creating. 20-1527.

Evidence, failure to object to admission
of, as bar to right to complain there-
of on appeal. 20-936.

Homicide, refusal to give accused benefit
of instruction as to presumption of
law from use of deadly weapon by
deceased, where attention of trial
court was not called to the omission.
20-1249.

Review of verdict.

Verdict on conflicting evidence as conclu-
sive on appeal. 20-1261.

Verdict supported by sufficient evidence.
20-86.

Verdict supported by evidence and ap-
proved by trial court. 20-83.

Separate maintenance and custody of
child in divorce proceedings, conclu-
siveness of verdict of jury as to.
20-827.

— as to damages.

Refusal to set aside verdict for excess if
not so much as to indicate passion
and prejudice. 20-1138.

Review of findings of court.

Decision of trial court on motion for new
trial, upon question whether new evi-
dence was introduced in jury room,
as conclusive. 20-1180.

Witness's recollection of contract between
husband and wife, made twenty years
before, as sufficient to sustain finding
that it provided for passing of wife's
separate property to husband upon
her death. 20-1272.

— on appeal from appellate court.

Findings of fact by appellate court in
divorce proceeding not binding on su-
preme court. 20-827.

What errors warrant reversal.

Taking verdict binding upon the judge as
to the facts in an action which should
have been tried as a suit in equity.
20-1079.

— as to pleadings.

Striking from defendant's pleadings in
personal injury case where violation
of speed ordinance is pleaded as ele-
ment of negligence, facts tending to
show unreasonableness of ordinance.
20-1214.

— failure or refusal to instruct.

*Duty to charge as to reasonable doubt as
between different degrees of crime
or included offenses. 20-1253
(case p. 1249).*

Homicide by killing police officer raiding
gambling house, failure to give spe-
cial charge on law of excessive force
of officers. 20-1180.

Monitory instruction concerning individu-
al responsibility of each juror in
criminal case. 20-502.

— conduct of jury.

*Receipt of document or statement in jury
room, constituting new evidence, as
ground for reversal in criminal case.
20-1187 (case p. 1180).*

The dash in each citation stands for A.L.R.

20 A.L.R.—98.

APPOINTMENT.

Of guardian, see **GUARDIAN AND WARD**.
Power as to, see **POWERS**.

APPROPRIATIONS.

Particularity of specification of purpose required in appropriation bill. 20-981 (case p. 972).

ARCHITECTS.

Construction of contract for compensation of. 20-1356 (case p. 1352).

Estimating percentage of cost price to which architect is entitled. 20-1352.

ARRAIGNMENT.

Of one charged with direct contempt, right to. 20-900.

ARREST.

Transportation of concealed liquor as an offense within presence of officer authorizing an arrest without a warrant. 20-652 (case p. 639).

Information sufficient to justify officer in arresting suspected person without warrant. 20-639.

ARSENICAL POISONING.

Workmen's compensation, necessity and sufficiency of evidence that arsenical poisoning suffered by applicant for compensation is attributable to his employment. 20-11.

ARSON.

What is an "outhouse," or "outbuilding." 20-234.

ARTERIOSCLEROSIS.

Workmen's compensation, necessity and sufficiency of evidence that arteriosclerosis suffered by applicant for compensation is attributable to his employment. 20-11.

ARTHRITIS.

Workmen's compensation, necessity and sufficiency of evidence that arthritis suffered by applicant for compensation is attributable to his employment. 20-12.

ASSAULT AND BATTERY.

Former jeopardy, see **CRIMINAL LAW**.

Servant's or agent's liability for assault committed at command of principal or master, or in discharge of duties of employment. 20-111.

ASSEMBLY.

Constitutional right of, see **CONSTITUTIONAL LAW**.

ASSESSMENTS.

For public improvement, see **PUBLIC IMPROVEMENTS**.

ASSIGNMENT.

Check for whole amount which drawer has on deposit as equitable assignment; necessity of acceptance. 20-174.

ASSUMPSIT.

Agent's or servant's personal liability to action by third person for money had and received. 20-131.

Italic type indicates points with annotation; roman type, points without.

Client's right to recover money placed in hands of attorney to be used in compounding crime. 20-1471.

ATTACHMENT.

Exemptions, see EXEMPTIONS.

ATTORNEY GENERAL.

Right to defend judge sued for libel in a matter pertaining to the duties of his office. 20-398.

ATTORNEYS.

Validity of contract by attorney to compound crime, see CONTRACTS.

Confidential communications to, see EVIDENCE.

Agreement or understanding between attorney and client to use money for unlawful purposes as affecting their rights inter se. 20-1476 (case p. 1471).

Evidence in civil suit of threats by plaintiff's attorney. 20-1352.

AUCTIONS.

Conversion, auctioneer's personal liability for sale of property which does not belong to the one employing him. 20-135.

Right of auctioneer employed by owner as against prospective purchaser or bidder who refuses to complete purchase. 20-214 (case p. 211).

AUTOMOBILES.

Garage, see GARAGE.

Negligence in use of; injuries by.

Coasting in street, injury by collision with automobile. 20-1435 (case p. 1429).

"Family purpose" doctrine, liability of owner under, for injuries by automobile while being used by member of his family. 20-1469 (case p. 1460).

Guest, liability of owner or operator for injury to. 20-1014 (case p. 1008).

Who is responsible for injury by car during demonstration or instruction by dealer. 20-194 (case p. 189).

Adult son's negligent driving while using car for purpose of his own. 20-1460.

Instructions in action for injury. 20-525.

Wife's negligence in driving car, husband's liability. 20-525.

BAIL AND RECOGNIZANCE.

Stage of proceeding at which sureties are discharged in criminal case. 20-594 (case p. 589).

Variance between name in bail bond and in judgment of forfeiture. 20-411 (case p. 410).

Extrinsic evidence to impeach forfeiture of bail bond. 20-589.

BAILMENT.

Liability of a bailee of money who commingles it with his own funds. 20-378 (case p. 374).

BANKRUPTCY.

Insurer's refusal to consent to change of beneficiary in life policy as affecting right of trustee in bankruptcy of insured. 20-256 (case p. 253).

BANKS.

Negligence as to condition of bank premises, see NEGLIGENCE.

The dash in each citation stands for A.L.R.

Officers and agents.

President's power to make contract for purchase of cotton. 20-984.

President's power to agree that liability of party to commercial paper shall not be enforced. 20-412.

Payment of checks.

Gift of check uncollected at death of drawer not validated by statute permitting payment of checks by bank during specified time after drawer's death. 20-174.

Insolvency.

Right of depositor to rescind, or to claim a trust in respect of a deposit because of insolvency of bank when it was made. 20-1206 (case p. 1208).

Fraud in taking deposits after insolvency 20-1203.

When bank is insolvent. 20-1203.

BARBERS.

Constitutionality of statute regulating barbers. 20-1111 (case p. 1105).

BARN.

As an "outhouse" or "outbuilding." 20-236.

BATTERY.

See ASSAULT AND BATTERY.

BEAT HAND.

Workmen's compensation, necessity and sufficiency of evidence that "beat hand" suffered by applicant for compensation is attributable to his employment. 20-13.

BIAS.

Evidence to show bias of witness, see WITNESSES.

BIBLE.

Reading of, in schools, see SCHOOLS.

BILLIARD ROOMS.

Licensing and regulation of. 20-1482 (case p. 1478).

BILLS AND NOTES.**In general; validity.**

Bank president's authority as to, see BANKS.

Parol evidence as to, see EVIDENCE.

Place of maker's signature on bill or note. 20-394 (case p. 392).

Statute of frauds, note as memorandum satisfying. 20-363.

Validity of sealed note to repay money given to the maker. 20-392.

Delivery.

Parol evidence to show conditional delivery of note. 20-424 (cases pp. 412, 417).

Consideration.

Parol evidence as to, see EVIDENCE.

Extension of time for payment of invalid special assessment as consideration for note. 20-1317.

Repayment of money given to maker of note as a gift as consideration. 20-392.

BLOOD POISONING.

Workmen's compensation, necessity and sufficiency of evidence that blood poisoning suffered by applicant for compensation is attributable to his employment. 20-13.

BONDS.

Appeal bond, see APPEAL AND ERROR.

Bail bonds, see BAIL AND RECOGNIZANCE.

Italic type indicates points with annotation; roman type, points without

BOWLING ALLEYS.

Licensing and regulation of. 20-1482
(case p. 1478).

BREACH.

Of contract, see **CONTRACTS**.

BRICKKILN.

As an "outhouse" or "outbuilding."
20-236.

BROKERS.

In general.

Personal liability of broker who sells property for one who is not the true owner. 20-132.

Real estate brokers.

Does ordinary broker's contract exclude right of sale by owner. 20-1268 (cases pp. 1261, 1265).

Right of broker employed by owner as against prospective purchaser who refuses to complete purchase. 20-214.

Right of real estate broker to commissions under a contract providing for payment of commissions out of purchase price. 20-289 (case p. 280)

Necessity that customer produced by broker be able and willing to purchase on terms stated in the original contract. 20-280.

Price named, necessity of securing, to entitle broker to commissions. 20-280.

Revocability of authority to sell. 20-1265.

BURGLARY.

Indictment for, see **INDICTMENT, ETC.**

What is an "outhouse" or "outbuilding" within meaning of statute as to breaking and entering. 20-236.

BUSINESS.

Validity of agreement to refrain from, see **CONTRACTS**.

Negligence as to condition of place of business, see **NEGLIGENCE**.

Right of individual to adopt name under which to carry on business. 20-984.

CANCER.

Workmen's compensation, necessity and sufficiency of evidence that cancer suffered by applicant for compensation is attributable to his employment. 20-23.

CARRIERS.

Injury to passenger.

Servant's or agent's personal liability for injuries to passenger. 20-144.

"Step box" or other device to facilitate entering and leaving car, duty and liability of carrier as to. 20-914 (case p. 908).

Wrong doorway, injury to passenger in consequence of passing through. 20-1155.

— contributory negligence.

Step box, contributory negligence in using. 20-908.

Freight carriers.

Mob or strikers causing loss of, or damage to, freight, liability of carrier. 20-262 (case p. 257).

CARS.

Freight car used as warehouse as an "outhouse." 20-237.

CATTLE RINGWORM.

Workmen's compensation, necessity and sufficiency of evidence that cattle ringworm suffered by applicant for compensation is attributable to his employment. 20-23.

CAUSA MORTIS.

See GIFT.

CAUSE.

Presumption and burden of proof as to, see EVIDENCE.

Question for jury as to, see TRIAL.

CHANGE OF BENEFICIARIES.

See INSURANCE.

CHARACTER.

Impeachment of witness by evidence as to character, see WITNESSES.

New trial or reversal in criminal case because of statement in jury room reflecting on character of accused. 20-1195.**CHATTEL MORTGAGE.***Auctioneer's personal liability for sale of mortgaged property at instance of mortgagor.* 20-137.*Servant's or agent's personal liability for conversion of mortgaged property.* 20-128.**CHECK.**

Check as equitable assignment, see ASSIGNMENT.

Gift of, see GIFT.

Statute of frauds, check as memorandum satisfying. 20-363 (cases pp. 357, 361).**CHICKEN HOUSE.**

As an "outhouse." 20-236.

C. I. F.*What constitutes delivery of goods sold under "c. i. f." contract.* 20-1236 (case p. 1232).

Documents necessary to execute a sale c. i. f. 20-1232.

Insurance in name of seller, provision for, as repugnant to c. i. f. contract. 20-1232.

Tender of the goods instead of the documents in case of c. i. f. contract. 20-1232.

Uniform Sales Act as affecting c. i. f. contracts. 20-1232.

CIGARETTES.*Constitutionality of anti-cigarette legislation.* 20-926 (case p. 921).

Election between counts in prosecution for illegal sale. 20-921.

Making possession of cigarettes and cigarette papers prima facie evidence of selling and keeping for sale. 20-921.

CITIZEN.

Conclusiveness of judgment as to, see JUDGMENT.

CLASS LEGISLATION.

See STATUTES.

COASTING.

Right to coast in highway, generally, see HIGHWAYS.

Injury to one while coasting in the street. 20-1433 (case p. 1429).**COLLECTIVE BARGAINING.**

Lawfulness of strike to compel, see STRIKES.

Italic type indicates points with annotation; roman type, points without.

COMMERCE.

State's power to create and enforce lien for a nonmaritime tort on ship engaged in interstate commerce. 20-1095 (case p. 1079).

Ordinance requiring draymen to file notice of destination of household goods moved by them as interference with commerce. 20-206.

COMMERCIAL TRAVELERS.

Workmen's compensation, death or injury while traveling as arising out of, and in the course of, employment. 20-309. (cases pp. 309, 316).

COMMISSION MERCHANTS.

See FACTORS.

COMMISSIONS.

See COMPENSATION.

COMMITTEES.

Political committees, see ELECTIONS.

COMMON CARRIERS.

See CARRIERS.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE.

COMPENSATION.

Of architect, see ARCHITECT.
Of broker, see BROKERS.

Auctioneer's right to recover damages for loss of commissions from one refusing to comply with his bid. 20-211.

COMPLAINT.

In criminal case, see INDICTMENT, ETC.

COMPOUNDING CRIME.

Illegality of contract for, see CONTRACTS.

CONDEMNATION.

Of property, see EMINENT DOMAIN.

CONDITIONAL SALE.

See SALE.

CONDITIONS.

See COVENANTS AND CONDITIONS.

CONFIDENTIAL COMMUNICATIONS.

Evidence of, see EVIDENCE.

CONSENT.

Of insurer to change of beneficiary, see INSURANCE.
Judgment by, see JUDGMENT.

CONSEQUENTIAL INJURIES.

Compensation for, see EMINENT DOMAIN.

The dash in each citation stands for A.L.R.

CONSIDERATION.

For note, see **BILLS AND NOTES**.

For contracts generally, see **CONTRACTS**.

Parol evidence as to, see **EVIDENCE**.

CONSOLIDATION.

Of actions or proceedings, see **ACTION OR SUIT**.

CONSPIRACY.

Picketing, see **PICKETING**.

Strikes, see **STRIKES**.

CONSTITUTIONAL LAW.

Sunday law, see **SUNDAY**.

Construction of constitution.

Homestead, liberal construction of constitutional provisions as to. 20-270.

Legislative construction of constitutional provision of no weight when there is no doubt as to its proper construction. 20-972.

Delegation of power.

Barbers, delegation of power to regulate. 20-1112.

Pool rooms and billiard rooms, validity of statute authorizing local option elections as to prohibition of. 20-1491.

Rights of persons and property; equal protection and privileges; due process of law; police power.

Provisions against taking or damaging property without compensation, see **EMINENT DOMAIN**.

What trades or occupations shall be regulated, nature and extent of regulations, as questions for legislature, in exercise of police power. 20-1105.

—aliens.

Constitutional guaranty of right of people to alter their form of government, aliens as within protection of. 20-1515.

Equal protection of the laws to aliens in conducting business. 20-1515.

Equal protection of the laws not denied to aliens by statute forbidding them to attack form of government of the United States. 20-1515.

Freedom of speech, constitutional right of, as including right of aliens to publish disloyal or abusive matter concerning form of government. 20-1515.

—barbers.

Constitutionality of statute regulating barbers. 20-1111 (case p. 1105.)

—billiard and pool rooms; bowling alleys.

Constitutionality of regulations as to. 20-1482 (case p. 1478).

—cigarettes.

Constitutionality of anti-cigarette legislation. 20-926 (case p. 921).

—dower.

Constitutionality of statutes in relation to dower. 20-1330 (case p. 1326).

—freedom of speech, press, and worship.

Political, social, or industrial propaganda deemed to be of a dangerous tendency, validity of legislation directed against. 20-1535 (cases pp. 1515, 1527).

Sectarianism in schools. 20-1351 (case p. 1334).

Alien's right to publish disloyal or abusive matter concerning form of government as within constitutional guaranty of freedom of speech. 20-1515.

Statute forbidding publication of disloyal, scurrilous, or abusive matter concerning form of government of United States, its military forces, flag, or uniform, validity of. 20-1515.

Statute forbidding all acts, peaceable or otherwise, having for their object the destruction of organized government, or acts inciting revolution against such organized government. 20-1527.

—master and servant.

Workmen's compensation, see **WORKMEN'S COMPENSATION**.

—nonresidents.

Dower statute which discriminates against nonresidents. 20-1332 (case p. 1326).

Italic type indicates points with annotation; roman type, points without.

—propaganda.

Political, social, or industrial propaganda deemed to be of a dangerous tendency, validity of legislation directed against. 20-1535 (cases pp. 1515, 1527).

—remedies; notice and hearing; evidence.

Seizure of vessel to answer in damages for injury as sufficient notice to owner of vessel of pendency of the proceeding. 20-1079.

Making possession of cigarette and cigarette papers prima facie evidence of selling and keeping for sale. 20-921.

—vested rights.

Constitutionality of statutes in relation to dower as affecting rights previously vested by contract or death of husband. 20-1333.

CONSTRUCTION.

Of Constitution, see CONSTITUTIONAL LAW.

Of contract, see CONTRACTS.

Of pleading, see PLEADING.

Of statutes generally, see STATUTES.

Of Workmen's Compensation Act, see WORKMEN'S COMPENSATION.

CONSUMPTION.

See TUBERCULOSIS.

CONTAGIOUS AND INFECTIOUS DISEASES.

See also ANTHRAX; DIPHTHERIA; INFLUENZA; SCARLET FEVER; TUBERCULOSIS; TYPHOID FEVER.

Tenant's rights and remedies because of existence of infectious disease on premises, where he remains in possession. 20-1408.

CONTEMPT.

In general; what constitutes.

Reflection on judge by grand or petit juror as contempt. 20-908 (case p. 900).

Definition of criminal contempt. 20-900.

Direct contempt by presenting libelous charge against judge in open court, though parties responsible are absent when contents of paper become known. 20-900.

Intent as affecting question of one's guilt of contempt. 20-900.

Privilege of grand jurors in filing report criticizing judge. 20-900.

Purpose of punishment of persons guilty of criminal contempt. 20-900.

Procedure.

Arraignment, right to, of one charged with direct contempt. 20-900.

Statement, filing after issuance of warrant for arrest of persons in contempt. 20-900.

Venue, right of accused to change of. 20-900.

Purging from contempt.

Truth of charge as purging grand jurors of contempt in charging judge with bias and favoritism. 20-900.

Power as to.

Judge not required to proceed for libel rather than to punish for contempt one filing libelous charge against him. 20-900.

Power of courts of record of general jurisdiction. 20-900.

CONTRACTORS.

Definition of contractor. 20-658.

CONTRACTS.

Bank president's power to make, see BANKS.

Bills and notes, see BILLS AND NOTES.

Parol and extrinsic evidence as to written contracts, see EVIDENCE.

Parties plaintiff in action on, see PARTIES.

Specific performance of, see SPECIFIC PERFORMANCE.

Implied agreements.

Landlord's right to recover on quantum meruit for use and occupation in case of partial eviction of tenant. 20-1378.

Consideration.

Consideration for note, see **BILLS AND NOTES**.

Parol evidence as to, see **EVIDENCE**.

Validity of promise based on invalid paving assessment. 20-1326 (case p. 1317).

Baseless demand, extension of time to pay, or forbearance to sue thereon, as consideration for promise. 20-1317.

Mutuality.

Restrictive covenant in contract of employment, effect of lack of mutuality of obligation on validity of. 20-869 (case p. 846).

Offers and their acceptance or withdrawal.

Acceptance by mail, see **POSTOFFICE**.

Mistake in using word "October" for "September" in exercising option to secure services from September to September. 20-846.

Statute of Frauds.

Entirety of parol contract to sell land and personal property. 20-361.

-sufficiency of writing or memorandum.

Check or note as memorandum satisfying Statute of Frauds. 20-363 (cases pp. 357, 361).

Deed left with grantor's attorney for delivery. 20-357.

Tender of deed by vendor, not accepted by vendee. 20-361.

Construction.

Question for jury as to, see **TRIAL**.

Construction of contract for compensation of architect. 20-1356 (case p. 1352).

Giving meaning to all the words of a contract. 20-1352.

Reconciling different parts of contract unless so radically repugnant that no rational interpretation will render them effective. 20-1332.

Written portions of document as prevailing over printed parts. 20-1232.

Agreement to render theatrical performances for twenty weeks as a contract to perform on Sunday. 20-846.

-entirety.

Architect's contract to prepare plans and specifications. 20-1362.

Parol contract to sell land and personal property. 20-361.

Validity; public policy.

Contracts between husband and wife, see **HUSBAND AND WIFE**.

Attorney and client, agreement or understanding between, to use money for unlawful purpose as affecting their rights inter se. 20-1476 (case p. 1471).

Attorney's agreement to use money placed in his hands by client to compound a felony. 20-1471.

Husband's and wife's agreement that survivor shall have entire property of both. 20-1272.

Sunday performance of theatrical nature, validity of contract for. 20-846.

Year's service, employer's right to contract for, with employees entering service. 20-1508.

-gambling and wager contracts.

Nature and validity of "hedging" transactions on the commodity market. 20-1422 (case p. 1417).

-contracts in restraint of trade.

Validity and enforceability of restrictive covenant in contracts of employment. 20-861 (cases pp. 846, 857).

Performance; breach.

Specific performance, see **SPECIFIC PERFORMANCE**.

-recovery for extra work.

Architect's right to additional compensation for extra work. 20-1360.

-breach.

Injunction against breach, see **INJUNCTION**.

Strike to compel breach of contract, validity of. 20-1508.

Abandonment; repudiation.

Disagreement between parties to land contract as to which shall pay taxes for a certain year as an abandonment or termination of the contract. 20-357.

Husband's and wife's agreement that survivor shall take all their property, wife's right to repudiate. 20-1272.

Italic type indicates points with annotation; roman type, points without.

Question for jury as to abandonment.
20-357.

CONVERSION.

See TROVER AND CONVERSION.

CORPORATIONS.

Service of process on, see WRIT AND PROCESS.

Officers.

Bank officers, see BANKS.

Service of process on corporate officers,
see WRIT AND PROCESS.

*When resignation of officer of private
corporation becomes effective. 20-
267 (case p. 264).*

COST, INSURANCE, AND FREIGHT.

See C. I. F.

COTTON.

Bank president's power to bind bank by
contract for purchase of. 20-984.

COUNTERCLAIM.

See SET-OFF AND COUNTERCLAIM.

COUPONS.

*Constitutionality of legislation prohib-
iting use of coupons or other extra-
neous articles in cigarette package.
20-932.*

COURTS.

Contempt of, see CONTEMPT.

Judges, see JUDGES.

**Relation to other departments of
government.**

Review of orders of public service com-
mission, see PUBLIC SERVICE COM-
MISSION.

Review of decisions of workmen's com-
pensation commissions, see WORK-
MEN'S COMPENSATION.

— **political questions.**

*Determination of controversy within
political party. 20-1035 (case p.
1030).*

Recognition and vindication by courts of
rights accorded by decisions of polit-
ical parties. 20-1030.

— **legislative department; statutes.**

Refusal to declare statute unconstitution-
al except where conflict between act
and Constitution is clear. 20-1105.

Workmen's compensation, question wheth-
er liability exists to compensate
workmen under, as judicial. 20-994.

— **municipal matters.**

Reasonableness of ordinance passed in
exercise of express power. 20-206.

Loss of jurisdiction.

Divorce proceedings, jurisdiction of or-
ders in, not lost where motion to open
the judgment is made at term at
which orders were entered, and con-
tinued from time to time. 20-827.

State and territorial courts.

Jurisdiction of Nebraska district courts
to protect minors and enforce pater-
nal obligations. 20-809.

COVENANTS AND CONDITIONS.

Conditional delivery of note, see BILLS
AND NOTES.

Parol evidence that note was conditional,
see EVIDENCE.

Condition to grant of license, see LICENSE.

*What is "outhouse" or "outbuilding."
20-234 (case p. 230).*

CREDIBILITY.

Of witnesses, see WITNESSES.

The dash in each citation stands for A.L.R.

CRIMINAL CONVERSATION.

Action for, see HUSBAND AND WIFE.

CRIMINAL LAW.

Bail, see BAIL AND RECOGNIZANCE.

Compounding crime, see COMPOUNDING CRIME.

Violation of liquor law, see INTOXICATING LIQUORS.

New trial, see NEW TRIAL.

See also ARSON; BURGLARY; EXTORTION; GAMING; ROBBERY; SEDITION.

Intent.

Political, social, or industrial propaganda of dangerous tendency; intent as element of offense for violating statute directed against. 20-1549.

Former jeopardy.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offense against another person at the same time. 20-341 (case p. 328).

Procedure.

Failure or refusal to instruct as prejudicial error, see APPEAL AND ERROR.

Evidence in criminal case, see EVIDENCE.

Election between counts, see TRIAL.

Instructions in criminal case generally, see TRIAL.

Waiver of rights by accused.

Statutory provision as to time for pronouncing sentence after a plea of guilty, waiver of. 20-1441.

Arraignment.

Contempt, right of one charged with direct contempt to arraignment. 20-900.

Pleading; demurrer.

Bail bond, plea to the indictment as terminating liability of sureties. 20-615.

Right to withdraw plea of guilty. 20-1445 (case p. 1441).

Statute requiring plea of guilty to be made by accused himself; sufficiency of compliance with. 20-1441.

Review of discretion as to withdrawal of plea of guilty. 20-1441.

State's right to answer over upon overruling of its demurrer to pleading in criminal case. 20-328.

Judgment; sentence.

Bail bond, discharge of sureties on pronouncement of judgment or sentence. 20-629.

Waiver of statutory provision as to time for pronouncing sentence after plea of guilty. 20-1441.

CROSSINGS.

Accidents at railroad crossings, see RAILROADS.

CUSTODY.

Of infant, see INFANTS.

DAMAGES.

Review of, on appeal, see APPEAL AND ERROR.

Amendment of pleading as to, see PLEADING.

Award of, in connection with specific performance, see SPECIFIC PERFORMANCE.

Liability of person causing injury for aggravation thereof by accident. 20-524 (case p. 520).

Recent variations in rate of foreign exchange as affecting damages for tort. 20-899 (case p. 884).

Restrictive covenant in contract of employment, effect of provision for liquidated damages or penalty on enforceability of. 20-870.

DEAFNESS.

Workmen's compensation, necessity and sufficiency of evidence that deafness suffered by applicant for compensation is attributable to his employment. 20-25.

Italic type indicates points with annotation; roman type, points without.

DEATH.

Question for jury as to cause of, see TRIAL.

Right of action for.

Contributory negligence of beneficiary as bar to action for death. 20-1214.

Contributory negligence of one beneficiary as affecting other beneficiaries. 20-1214.

Question for jury as to contributory negligence of beneficiary. 20-1214.

Effect of.

Payment of checks by bank after drawer's death, see BANKS.

Gift of personal check as revoked by death of drawer. 20-174.

DEBTOR AND CREDITOR.

Claims against decedent's estate, see EXECUTORS AND ADMINISTRATORS.

Exemptions, see EXEMPTIONS.

Conveyance in fraud of creditor, see FRAUDULENT CONVEYANCES.

DECEDENTS' ESTATES.

Administration of, see EXECUTORS AND ADMINISTRATORS.

Agent's personal liability for meddling with. 20-119.

DECEIT.

See FRAUD AND DECEIT.

DECLARATIONS.

Admissibility of, in evidence, see EVIDENCE.

DEEDS.

Undelivered deed as memorandum satisfying Statute of Frauds, see CONTRACTS.

Covenants in, see COVENANTS AND CONDITIONS.

Execution of power by, see POWERS.

DEFENSES.

In civil actions, see ACTION OR SUIT.

In homicide case, see HOMICIDE.

DELAY.

In enforcing specific performance of contract to sell real estate as depriving purchaser of right to rents and profits. 20-357.

DELEGATION OF POWER.

See CONSTITUTIONAL LAW.

DELIRIUM TREMENS.

Workmen's compensation, necessity and sufficiency of evidence that delirium tremens suffered by applicant for compensation is attributable to his employment. 20-26.

DELIVERY.

Of note, see BILLS AND NOTES.

Of personalty sold, see SALE.

DEMONSTRATION.

Who is responsible for injury by automobile during demonstration or instruction by dealer. 20-194 (case p. 189).

DEMURRER.

See PLEADING.

The dash in each citation stands for A.L.R.

DEPOSITIONS.

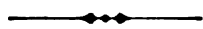
Admissibility of, in evidence, see EVIDENCE.

**DERMATITIS.**

Workmen's compensation, necessity and sufficiency of evidence that dermatitis contracted by applicant for compensation is attributable to his employment. 20-27.

**DESTRUCTION.**

Bail bond, liability of sureties as terminated on destruction of indictment. 20-607.

**DETAINER.**

See FORCIBLE ENTRY AND DETAINER.

**DETINUE.**

See REPLEVIN.

**DIABETES.**

Workmen's compensation, necessity and sufficiency of evidence that diabetes suffered by applicant for compensation is attributable to his employment. 20-27.

**DIPHThERIA.**

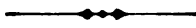
Workmen's compensation, necessity and sufficiency of evidence that diphtheria contracted by applicant for compensation is attributable to his employment. 20-27.

DIRECTION OF VERDICT.

See TRIAL.

**DISCHARGE.**

Of jury, see TRIAL.

**DISCRETION.**

Review of, on appeal, see APPEAL AND ERROR.

**DISLOYALTY.**

Political, social, or industrial propaganda deemed to be of a dangerous tendency, validity of legislation directed against. 20-1535 (cases, 1515, 1527).

**DISMISSAL OR DISCONTINUANCE.**

Libel, motion to dismiss complaint to hold judge liable for placing libel on files of court as proper. 20-398.

**DIVORCE AND SEPARATION.**

In general.

Conclusiveness of divorce decree, see JUDGMENT.

Decree rendered in other state, see JUDGMENT.

Findings of fact by appellate court in divorce proceeding not binding on supreme court. 20-827.

Loss of jurisdiction of orders entered in divorce proceeding. 20-827.

Custody and support of children.

Foreign decree as to custody, see JUDGMENT.

Consolidation of appeal from order appointing a guardian for infant child and a motion to modify an order for its custody, entered in divorce proceedings. 20-827.

Court acquiring jurisdiction of divorce as entitled to dispose of custody of children. 20-827.

Father not relieved of duty to support minor child by divorce. 20-809.

Jury's verdict as to maintenance and custody of child as advisory merely. 20-827.

Third person's right as against father to custody of children after death of mother, to whom custody was awarded. 20-827.

DOCUMENTARY EVIDENCE.

See EVIDENCE.

DOMICIL.

Guardian's right to change domicil of child. 20-827.

DONATION.

See GIFT.

DOWER.

Constitutionality of statutes in relation to dower. 20-1330 (case p. 1326).

Validity of statute providing for forfeiture of dower by nonresidents. 20-1326.

DRAYMEN.

See TEAMING AND TRUCKING.

DRUMMERS.

See COMMERCIAL TRAVELERS.

DRUNKENNESS.

See DELIRIUM TREMENS.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

DUGOUT.

As an "outhouse" or "outbuilding." 20-243.

DUST STORM.

As affecting liability for injury to one struck by train or street car. 20-1067, 1072.

ELECTION.

Between counts in indictment, see TRIAL.

ELECTION OF REMEDIES.

Liens, statutory provision for foreclosure of, as exclusive. 20-1079.

Lessor's action of replevin to recover leased machine from third person as an election to recover possession discharged from the lease. 20-83.

ELECTIONS.

Determination of controversies within political party. 20-1035 (case p. 1030).

Court's refusal to determine controversies between rival political committees or factions of such committees. 20-1030.

Recognition and vindication by courts of rights accorded by decision of political parties. 20-1030.

ELEVATORS.

Tenant's rights and remedies against landlord for failure to furnish elevator service where tenant remains in possession. 20-1414.

EMINENT DOMAIN.**Consequential injuries.**

Levee, right to compensation for damages to land left outside of. 20-302 (case p. 296).

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken. 20-516 (case p. 512).

Cutting off switch connections with railroad from land not taken in construction of levee. 20-296.

Public improvements, action against counties to recover compensation for injuries to property by construction of. 20-512.

EMPLOYEES.

In general, see MASTER AND SERVANT.

ENCEPHALITIS.

See SLEEPING SICKNESS.

ENTIRETY.

Of contract, see CONTRACTS.

ENTRY.

Forcible entry, see FORCIBLE ENTRY AND DETAINER.

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITY.

Review on appeal of findings in equity, see APPEAL AND ERROR.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Tender of money received as necessary in equitable suit to rescind compromised judgment. 20-1239.

ERYSIPELAS.

Workmen's compensation, necessity and sufficiency of evidence that erysipelas contracted by applicant for compensation is attributable to his employment. 20-27.

ESPIONAGE ACT.

Validity of. 20-1536.

ESTOPPEL.

By judgment.

Divorce or separation decree as basis of estoppel in action for alienation of affections or criminal conversation. 20-943 (case p. 936).

Equitable estoppel.

Change of position to his injury of party asserting estoppel, necessity of. 20-936.

Reliance of party asserting estoppel, necessity. 20-936.

— by laches or silence.

Husband's failure to set up, in proceeding against him by his wife, for divorce, her misconduct with another man, as estopping him from maintaining action against such man for criminal conversation. 20-936.

— by inconsistency.

Probate of wife's will by husband, and electing not to take under it, as estopping him from setting up contract by which he was to receive her entire estate. 20-1272.

— who may set up.

Criminal conversation, right of defendant in action for husband's conduct in settling property rights with his wife in suit for divorce as an estoppel. 20-936.

EVICTIION.

Of tenant, see LANDLORD AND TENANT.

EVIDENCE.

Objections and exceptions to, see APPEAL AND ERROR.

Presumption as to, on appeal, see APPEAL AND ERROR.

Constitutionality of rules of, see CONSTITUTIONAL LAW.

Receipt of new evidence in jury room as ground for new trial, see NEW TRIAL.

Judicial notice.

Rules and regulations of political parties and tribunals for their administration. 20-1030.

Workmen's compensation commission, judicial notice by, that hides on which employee was working were of a kind that frequently contained anthrax germs, and that person working about them with an open wound would receive the germs. 20-1.

Presumptions and burden of proof.

Constitutionality of statute as to, see CONSTITUTIONAL LAW.

— laws; ordinances.

Ordinance passed in pursuance of statutory authority presumptively valid. 20-206.

Ordinance regulating speed of trains through municipality presumptively valid. 20-1214.

— establishing allegations or claims.

New trial, burden of establishing grounds on which asked. 20-1180.

— cause.

Workmen's compensation, presumption that claim comes within provisions of statute. 20-1.

Documentary evidence.

Decree of divorce or separation as evidence in action for alienation of affections or criminal conversation. 20-951.

— depositions; former testimony.

Deposition taken for and used at first trial, admissibility upon second trial. 20-86.

Admissibility of evidence at trial of action against carrier and refrigerator company for injury to shipment of fruit, which was dismissed without prejudice to the merits, as between plaintiff and the refrigerator company, after holding carrier not liable, in subsequent action against the refrigerator company for the same cause. 20-86.

Parol and extrinsic evidence concerning writings.

General rule as to. 20-984.

Right to prove oral parts of contract partly oral and partly written which are consistent with the written parts. 20-984.

Writer of letter capable of but one construction not entitled to testify as to what he meant by it. 20-392.

— condition.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose. 20-421 (cases pp. 412, 417).

Conditional character of contract, parol evidence to show. 20-412.

Condition attached to note, right to show in suit by one not a holder in due course. 20-417.

— consideration.

Evidence of want of consideration admissible in action by one not a holder in due course. 20-417.

— identity.

Admissibility of extrinsic evidence, to identify the person or persons intended to be designated by the name in which a contract is made. 20-992 (case p. 984).

— character of party.

Signature of firm name "by" the name of an individual, parol evidence as to capacity in which individual signed. 20-984.

Opinions and conclusions.

Note may be established by proof of signature of maker. 20-392.

The dash in each citation stands for A.L.R.

20 A.L.R.—99.

Admissions.

Note may be established by admissions of maker. 20-392.

Evidence wrongfully obtained.

Evidence discovered by search of person arrested without warrant. 20-639.

Declarations; confidential communications; threats.

Evidence of declarations to impeach witness, see WITNESSES.

Homicide, declarations of one accused of, made prior to killing. 20-1249.

Threats by plaintiff's counsel to defendant in civil suit. 20-1352.

Wife's communications to attorney acting for both husband and wife in settling property rights as privileged in action by husband to establish rights under agreements made. 20-1272.

Relevancy and materiality.

Evidence to impeach witness, see WITNESSES.

Conversion of machine, evidence as to purpose of putting store in name of witness, which resulted from foreclosure of a mortgage which did not include the machine. 20-83.

Weight, effect, and sufficiency.

Sufficiency of evidence to sustain findings of court, see APPEAL.

Necessity and sufficiency of evidence that disease contracted by applicant for workmen's compensation is attributable to employment. 20-4 (case p. 1).

EXCEPTIONS.

To raise question for appeal, see APPEAL AND ERROR.

EXCHANGE.

Damages for tort as affected by recent variations in rate of foreign exchange. 20-899 (case p. 884).

EXECUTION.

Sale under, see JUDICIAL SALE.

Levy under, see LEVY AND SEIZURE.

Of power, see POWERS.

EXECUTORS AND ADMINISTRATORS.

Personal liability of agent of executor or administrator for injuries caused to third person. 20-119.

Loose declarations of recipient of gift of money that it is to be repaid at her death as obligating her estate to repay it. 20-392.

EXEMPTIONS.

Homestead exemptions, see HOMESTEAD.

Set-off or counterclaim of judgment under which exempt property has been seized against claim based on the wrongful seizure. 20-276 (case p. 270).

Damages because of unlawful invasion of plaintiff's homestead rights. 20-270.

EXTENSION OF TIME.

As consideration for promise, see CONTRACTS.

EXTORTION.

Servant's or agent's personal liability for injury inflicted on third person by extortion committed on behalf of employer. 20-112.

EXTRA WORK.

Recovery for, see CONTRACTS.

EYES.

Workmen's compensation, necessity and sufficiency of evidence that eye inflammation or infection contracted by applicant for compensation is attributable to his employment. 20-28.

Italic type indicates points with annotation; roman type, points without.

FACTIONS.

Controversies between factions of political parties, see ELECTIONS.

FACTORS.

Personal liability to true owner as for a conversion of factor selling property for one who is not the owner. 20-182.

FACTS.

Review of, on appeal, see APPEAL AND ERROR.

FALLING OBJECTS.

Master's liability for injury to employee by stone rolling down hill. 20-371.

FAMILY PURPOSE DOCTRINE.

See AUTOMOBILES.

FELLOW SERVANTS.

Servant's liability for injury to, see MASTER AND SERVANT.

FELON.

Workmen's compensation, necessity and sufficiency of evidence that felon suffered by applicant for compensation is attributable to his employment. 20-34.

FELONY.

Compounding, see COMPOUNDING CRIME.
In general, see CRIMINAL LAW.

FINDINGS.

Review of, on appeal, see APPEAL AND ERROR.

Privilege within law of libel of findings or the like of judge or person acting in judicial capacity. 20-407 (case p. 398).

FIRE INSURANCE.

See INSURANCE.

FIRES.

Personal liability of servants or agents for injury to third person by fire. 20-145.

Carrier's liability for destruction by, of property during transportation, see CARRIERS.

FISHERIES.

Injury to licensee fishing from log rollway in lake. 20-197.

Public's right to fish in waters of navigable lake stocked with fish by the public. 20-197.

Trespass upon fast land of riparian owner, or use of his deck or railway of logs while fishing in waters of navigable lake. 20-197.

FOE.

As affecting liability for injury to one struck by train or street car. 20-1067, 1073, 1077, 1079.

FORBEARANCE.

As consideration for promise, see CONTRACTS.

The dash in each citation stands for A.L.R.

FORCIBLE ENTRY AND DETAINER.

Agent's or servant's personal liability for. 20-138.

FRAUDULENT CONVEYANCES.

Judicial process, right to revocatory action where fraudulent sale was made by. 20-665.

FOREIGN JUDGMENT.

See JUDGMENT.

FREEDOM OF SPEECH AND PRESS.

See CONSTITUTIONAL LAW.

FORFEITURE.

Of bail bond, see BAIL AND RECOGNIZANCE.

FREIGHT CARRIERS.

See CARRIERS.

FORMER ADJUDICATION.

See JUDGMENT.

FUTURES.

Validity of contracts dealing in futures, see CONTRACTS.

FORMER TESTIMONY.

Admissibility of, in. evidence, see EVIDENCE.

GAMING.

Validity of gambling transactions, see CONTRACTS.

What is an "outhouse" where people resort, within meaning of statute as to gaming. 20-243.

FRAUD AND DECEIT.

Statute of frauds, see CONTRACTS.

Fraudulent conveyance, see FRAUDULENT CONVEYANCES.

In making proofs of loss by insured, see INSURANCE.

As ground for impeachment of foreign judgment, see JUDGMENT.

Servant's or agent's personal liability for injury to third person by fraud committed on behalf of employer. 26-112.

Bank's act in accepting deposit with knowledge of insolvency as fraud. 20-1203.

GARAGE.

As an "outhouse" or "outbuilding." 20-237.

GAS.

Advance in price conditions due to World War as affecting valuation of property for rate-making purposes. 20-555 (case p. 542).

Service charge for gas meter, validity of. 20-225 (cases pp. 217, 222).

Amortizing loss inflicted by rate fixed by commission, and spreading it over a term of years. 20-542.

FRAUDS, STATUTE OF.

See CONTRACTS.

Italic type indicates points with annotation; roman type, points without.

Compensation to which company is entitled as founded upon the fair value of the property, and not upon stock issued or debts owed. 20-542.

Constitutional requirement that property shall not be taken for public use without just compensation as affecting gas rates. 20-542.

Costs of operation as essential element in fixing rates. 20-542.

Right to rate which will make securities of gas company attractive to investors. 20-542.

Tax imposed upon profits of gas company as element to be considered in fixing rates. 20-542.

GAS INHALATION.

Workmen's compensation, necessity and sufficiency of evidence that inhalation of poisonous gas by applicant for compensation is attributable to his employment. 20-35.

GASTRALGIA.

Workmen's compensation, necessity and sufficiency of evidence that gastralgia suffered by applicant for compensation is attributable to his employment. 20-35.

GIFT.

Donor's own check as subject of gift. 20-177 (case p. 174).

Check on commercial bank, accompanied by drawer's pass book, as valid gift. 20-174.

Check not collected before death of drawer not validated by statute permitting bank to pay checks during a specified time after drawer's death. 20-174.

Recipient of money intended as a gift as a trustee for the donee. 20-392.

GRAND JURY.

Contempt by reflection on judge by grand jurors. 20-903 (case p. 900).

Right to indict judge for commission of crime. 20-900.

GREENHOUSE.

As an "outhouse" or "outbuilding." 20-239 (case p. 230).

GUARDIAN AND WARD.

Guardian's right to custody of child, see INFANTS.

Consolidation of appeal from order appointing a guardian for infant child and a motion to modify an order for its custody, entered in divorce proceedings. 20-827.

Decree awarding custody of child to father as divesting mother's right to make testamentary disposition of it. 20-827.

Domicil of ward, guardian's right to change. 20-827.

Interests of child as controlling upon question of its guardianship. 20-827.

GUEST.

Automobile, liability of owner or operator for injury to guest. 20-1014 (case p. 1008).

GUILT.

Plea of, see CRIMINAL LAW.

HAIL STORM.

As affecting liability for injury to one struck by train or street car. 20-1059.

HANDWRITING.

Proof of, see EVIDENCE.

HEALTH.

Anti-cigarette legislation, see CIGARETTES.

Barbers, regulations as to, in interest of health. 20-1113 (case p. 1105).

HEARING.

Necessity of, to constitute due process of law, see CONSTITUTIONAL LAW.

HEART DISEASE.

See also ANEURISM.

The dash in each citation stands for A.L.R.

Workmen's compensation, necessity and sufficiency of evidence that heart disease suffered by applicant for compensation is attributable to his employment. 20-36.

HEAT.

Landlord's duty as to, see LANDLORD AND TENANT.

Loss by, without external ignition, as within fire insurance policy. 20-967.

HEAT STROKE.

Workmen's compensation, necessity and sufficiency of evidence that heat stroke suffered by applicant for compensation, is attributable to his employment. 20-42.

HEDGING.

Nature and validity of "hedging" transactions on the commodity market. 20-1422 (case p. 1417).

HEMORRHAGE.

Workmen's compensation, necessity and sufficiency of evidence that hemorrhage suffered by applicant for compensation is attributable to his employment. 20-44.

HERNIA.

Workmen's compensation, necessity and sufficiency of evidence that hernia suffered by applicant for compensation is attributable to his employment. 20-48.

HIGHWAYS.

Injury to one while coasting in the street. 20-1433 (case p. 1429).

Coasting as contributory negligence. 20-1429.

Coasting as a nuisance. 20-1429.

Hand sled as a vehicle within law requiring vehicles to carry lights. 20-1429.

Question for jury as to negligence of one coasting in highway. 20-1429.

HODGKIN'S DISEASE.

Workmen's compensation, necessity and sufficiency of evidence that Hodgkin's disease suffered by applicant for compensation is attributable to his employment. 20-57.

HOMESTEAD.

Damages sustained because of unlawful invasion of plaintiff's homestead rights as exempt. 20-270.

Judgment under which homestead property was seized as a set-off or counterclaim against claim based on the wrongful seizure. 20-270.

Liberal construction of constitutional and statutory provisions. 20-270.

Policy of the law as to homestead. 20-270.

What included in homestead right. 20-270.

HOMICIDE.

In general.

Former jeopardy, see CRIMINAL LAW.

Evidence generally, see EVIDENCE.

Impeachment of witnesses, see WITNESSES.

Homicide as affected by time elapsing between wound and death. 20-1006 (case p. 1004).

Evidence of declarations of accused. 20-1249.

Failure or refusal to instruct in homicide case. 20-1180.

Necessity that death occur within a year and a day after infliction of the wound to constitute murder. 20-1004.

Statute providing for punishment of murder as referring to that crime as it existed at common law. 20-1004.

While engaged in unlawful act.

Homicide by one of several persons attempting to commit robbery, by discharge of gun with which victim is covered when he grabs for it, as murder in the first degree. 20-1441.

Defense of property.

Actual, and not merely constructive, possession necessary to justify homicide in defense of property. 20-1249.

Necessity of making every effort to repel aggression before killing aggressor. 20-1249.

When homicide may be considered as in defense of property. 20-1249.

Italic type indicates points with annotation; roman type, points without.

Self-defense.

Gaming house, patrons' right to protect themselves against police officers raiding the place. 20-1180.

Instructions as to. 20-1180.

Limit on right of patrons of gambling house to protect themselves against excessive force of police officers raiding the place. 20-1180.

HORSEPLAY.

Recovery under workmen's compensation act for injury sustained through, see **WORKMEN'S COMPENSATION.**

HOTEL.

See **INNKEEPERS.**

HOURS.

Regulating hours within which pool and billiard rooms and bowling alleys may be kept open. 20-1487.

HUSBAND AND WIFE.

Husband's liability for wife's torts.

Automobiles, liability under family-purpose doctrine where spouse of owner is using car. 20-1471.

Liability of husband for independent tort of wife. 20-528 (case p. 525).

Property rights; transactions between.
Dower right, see **DOWER.**

Wife's interest in husband's life insurance, see **INSURANCE.**

— **community property.**

Partner's interest in partnership real estate as community property. 20-374 (case p. 369).

— **contracts with, or conveyances to, each other.**

Partnership agreement between husband and wife, validity. 20-1304 (cases pp. 1272, 1303).

Contract that survivor should have entire property of parties. 20-1272.

Estoppel of husband to set up contract by which he was to receive wife's entire estate at her death. 20-1272.

Necessity that agreement by wife to leave her property to her husband be executed as a testamentary instrument. 20-1272.

Privileged character of communications by wife to attorney acting for both husband and wife in settling property rights in action by husband to establish rights under agreements made. 20-1272.

Witness's recollection of contract between husband and wife, made twenty years before, as sufficient to sustain finding that it provided for passing of wife's separate property to husband upon her death. 20-1272.

Alienation of affections or criminal conversation.

Decree of divorce or separation as res judicata or basis of estoppel or evidence in action for alienation of affections or criminal conversation. 20-943 (case p. 936).

Estoppel to maintain action for criminal conversation. 20-936.

HYDROPHOBIA.

Workmen's compensation, necessity and sufficiency of evidence that hydrophobia contracted by applicant for compensation is attributable to his employment. 20-57.

ICE HOUSE.

As an "outhouse" or "outbuilding." 20-239.

IDENTITY.

Extrinsic evidence to identify the person or persons intended to be designated by the name in which a contract is made. 20-992 (case p. 984).

IMPEACHMENT.

Of witnesses, see **WITNESSES.**

IMPLIED TRUST.

See **TRUSTS.**

INCONSISTENCY.

Estoppel by, see **ESTOPPEL.**

INDEPENDENT CONTRACTORS.

Employer's liability for injuries to employees of, see MASTER AND SERVANT.

The dash in each citation stands for **A.L.R.**

Liability of, see MASTER AND SERVANT.

Who are, see MASTER AND SERVANT.

Recovery under Workmen's Compensation Act for injury to, see WORKMEN'S COMPENSATION.

INDICTMENT, INFORMATION, AND COMPLAINT.

In general.

Ball bond, failure to indict or destruction of indictment as terminating liability of sureties. 20-507, 600.

Burglary, necessity of naming owner of building in indictment or information for. 20-510 (case p. 502).

Necessity of stating whether owner of building burglarized was a corporation or a partnership. 20-502.

Quashing.

Ball bond, quashing of indictment as terminating liability of sureties. 20-604.

What questions raised by motion to quash information for burglary on ground that facts stated do not constitute a public offense. 20-502.

INDUSTRIAL INSURANCE.

Workmen's compensation, see WORKMEN'S COMPENSATION.

INDUSTRIAL PROPAGANDA.

Validity of legislation directed against industrial propaganda deemed to be of a dangerous tendency. 20-1535 (cases pp. 1515, 1527).

INFANTS.

In general.

Jurisdiction in matters pertaining to, see COURTS.

Guardian for, see GUARDIAN AND WARD.

Injury to, while coasting, see HIGHWAYS.

Contributory negligence of, see NEGLIGENCE.

Minor children as wards of the state. 20-809.

Custody.

In case of divorce, see DIVORCE AND SEPARATION.

Nonresidence as affecting one's right to award of custody of child. 20-838 (case p. 827).

Decree awarding custody of child to father as divesting mother's right to make testamentary disposition of it. 20-827.

Father's primary right to custody. 20-827.

Father's lack of property because he had transferred it to his wife as affecting his right to custody. 20-827.

Guardian's right to custody as against father merely because former is more prosperous. 20-827.

Intoxicating liquors, occasional indulgence in, by father as affecting his right to custody of child. 20-827.

Nonresidence as affecting father's right to custody of child in preference to aunt. 20-827.

Preference of child as affecting right to custody as between guardian and father. 20-827.

Judgment against.

Right of infant to set aside consent judgment in action for personal injuries. 20-1249 (case p. 1239).

Consent judgment not binding on infant unless based on facts judicially ascertained upon a real hearing. 20-1239.

Avoiding judgment on ground of infancy merely. 20-1239.

INFLUENZA.

Workmen's compensation, necessity and sufficiency of evidence that influenza contracted by applicant for compensation is attributable to his employment. 20-57.

INFORMATION.

In criminal case, see INDICTMENT, ETC.

INFRINGEMENT.

Of patent, see PATENTS.

INJUNCTION.

Interference by landlord with tenant's possession or enjoyment as ground for injunction. 20-1390.

Italic type indicates points with annotation; roman type, points without.

Irreparable injury justifying injunction. 20-846.

Picketing in aid of illegal strike, injunction against. 20-1508.

Theatrical performer, injunction against breach of restrictive covenant in contract employing. 20-846.

INNKEEPERS.

Injury to guest in consequence of passing through wrong doorway. 20-1154.

INSANITY.

Workmen's compensation, necessity and sufficiency of evidence that insanity suffered by applicant for compensation is attributable to his employment. 20-59.

INSOLVENCY.

Of bank, see **BANKS**.

Bankruptcy, see **BANKRUPTCY**.

When trader is insolvent. 20-1203.

INSTRUCTIONS.

See **TRIAL**.

INSURANCE.

Vested interest of beneficiary. In policy which provides for change of beneficiary. 20-253.

Change of beneficiary.

Vested interest of beneficiary, see *supra*.

Refusal of insurer to consent to change of beneficiary in life policy as affecting right of trustee in bankruptcy of insured. 20-256 (case p. 253).

Proofs of loss.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy. 20-1164 (case p. 1159).

Risks and causes of loss, injury, or death.

Death or injury intentionally inflicted on another as due to accident or accidental means. 20-1123 (case p. 1118).

Loss by heat, smoke, or shot without external ignition as within fire insurance policy. 20-967 (case p. 964).

Question for jury as to whether death of insured was accidental. 20-1118.

Interest in proceeds.

Second wife's right to take under policy designating "wife" or "widow" as beneficiary, issued during life of first wife. 20-959 (case p. 956).

Lien of beneficiary who pays dues from his own money to keep certificate in force. 20-956.

Actions.

Direction of verdict in action on insurance policy, see **TRIAL**.

INTENT.

As element of criminal offense, generally, see **CRIMINAL LAW**.

Contempt as affected by. 20-900.

INTENTIONAL INJURIES.

To insured, see **INSURANCE**.

INTERSTATE COMMERCE.

See **COMMERCE**.

INTOXICATING LIQUORS.

Transportation of concealed liquor as an offense within presence of officer authorizing arrest without a warrant. 20-652 (case p. 639).

Breach of peace by having intoxicating liquor in possession. 20-639.

Breach of peace by transportation of intoxicating liquor. 20-639.

Custody of child, parent's right to as affected by occasional indulgence in intoxicating liquor. 20-827.

INVITEES.

Liability for injury to, see **NEGLIGENCE**.

IRRIGATION.

Landlord's breach of covenant to pay assessments on water stock, so that tenant is deprived of water, as a partial eviction. 20-1363.

JEOPARDY.

See CRIMINAL LAW.

JUDGES.

Contempt by conduct affecting, see CONTEMPT.

Privilege of statement or publication by, see LIBEL AND SLANDER.

Attorney general as entitled to defend judge sued for libel in matter pertaining to the duties of his office. 20-398.

Grand jury's right to indict judge for commission of crime. 20-900.

JUDGMENT.

In criminal case generally, see CRIMINAL LAW.

Estoppel by, see ESTOPPEL.

Admissibility in evidence, see EVIDENCE.

Against infant, see INFANTS.

Set-off of, see SET-OFF AND COUNTERCLAIM.

*Effect and conclusiveness.*Foreign judgment, see *infra*.

Consent judgment against infant, see INFANTS.

*Decree of divorce or separation as res judicata or basis of estoppel or evidence in action for alienation of affections or criminal conversation. 20-943 (case p. 936).**Judgment in favor of defendant or respondent in an action or proceeding involving a matter of public right or interest as a bar to a subsequent action or proceeding by a different plaintiff or relator. 20-1183 (case p. 1127).*

Final judgment for defendant sustaining demurrers to complaint as one upon the merits. 20-1127.

Divorce decree as conclusive upon strangers as to status of parties, but not as to facts litigated. 20-936.

Infants, decree awarding custody to father as divesting mother's right to make testamentary disposition of child. 20-827.

Attack upon and relief against.

Setting aside judgment against infant, see INFANTS.

Meritorious defense, necessity that motion for vacation of judgment for lack of service of process show existence of. 20-264.

Tender of money received as necessary in equitable suit to rescind compromised judgment. 20-1239.

Foreign judgment.*Alienation of affections or criminal conversation, foreign divorce decree as bar to action for. 20-953.**Extraterritorial effect of provision in decree of divorce as to custody of child. 20-815 (case p. 809).*

Mere procedure resulting in judgment or in the modification thereof not protected by full faith and credit clause. 20-809.

State is required to give to foreign judgment only the effect to which it is entitled where rendered. 20-809.

JUDICIAL NOTICE.

See EVIDENCE.

JUDICIAL PROCEEDINGS.

Privilege as to, see LIBEL AND SLANDER.

JUDICIAL SALE.

Chilling bids or preventing competition as ground for setting aside. 20-665.

JURISDICTION.

Of admiralty, see ADMIRALTY.

Raising question of, for first time on appeal, see APPEAL AND ERROR.

In divorce proceedings generally, see DIVORCE.

Lack of, as ground for impeachment of foreign judgment, see JUDGMENT.

In general, see COURTS.

JURY.

Presumptions on appeal as to conduct of, see APPEAL AND ERROR.

Conduct of, or interference with, as ground for reversal, see APPEAL AND ERROR.

Grand jury, see GRAND JURY.

Affidavits of, in support of new trial, see NEW TRIAL.

JUSTIFIABLE HOMICIDE.

See HOMICIDE.

Italic type indicates points with annotation; roman type, points without.

KIDNEY DISEASE.

Workmen's compensation, necessity and sufficiency of evidence that kidney disease suffered by applicant for compensation is attributable to his employment. 20-60.

LABOR.

Priority of lien for, see **LIENS.**

LABOR ORGANIZATIONS.

Right of members of, to quit work at will, see **MASTER AND SERVANT.**
Strikes, see **STRIKES.**

LAKES.

Riparian rights in beds and shores of, see **WATERS.**

LANDLORD AND TENANT.

Injunction as between landlord and tenant, see **INJUNCTION.**

Set-off and counterclaim in actions between landlord and tenant, see **SET-OFF AND COUNTERCLAIM.**

Lease.

Unavoidable or inevitable casualty or accident, what is, within provision of lease. 20-1101 (case p. 1098).

Interference with possession of tenant; eviction.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment. 20-1369 (cases pp. 1363, 1366).

Discordant music produced by tenant of other portions of premises, landlord's liability. 20-1366.

General rule as to what constitutes eviction. 20-1363.

Irrigation, landlord's failure to furnish water for, as partial eviction. 20-1363.

Odors from other parts of building interfering with enjoyment of premises, waiver of right to object. 20-1366.

Taxes.

Change in time for assessment or payment of taxes as affecting provision for payment of taxes during term of lease. 20-1502 (case p. 1497).

Rent.

Unavoidable or inevitable casualty or accident, what is, within provision of lease as to effect of, on rent. 20-1101 (case p. 1098).

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment. 20-1363 (cases pp. 1363, 1366).

Freezing of pipe causing hot water heater to burst, as an "unavoidable casualty" which will relieve tenant from liability for rent. 20-1098.

LAW OF THE ROAD.

See **AUTOMOBILES; HIGHWAYS.**

LAWYERS.

See **ATTORNEYS.**

LEAD POISONING.

Workmen's compensation, necessity and sufficiency of evidence that lead poisoning contracted by applicant for compensation is attributable to his employment. 20-61.

LEASE.

In general, see **LANDLORD AND TENANT.**

Lessor's action of replevin to recover leased machine from third person as an election to recover possession discharged from the lease. 20-83.

Lessor's right to maintain trespass for leased chattel wrongfully appropriated by third person. 20-83.

LEVEE.

Compensation for damages to land left outside of. 20-302 (case p. 296).

LEVY AND SEIZURE.

Exemptions, see **EXEMPTIONS.**

Sale under, see **JUDICIAL SALE.**

LIBEL AND SLANDER.**Who liable.**

Servant's or agent's personal liability for libel published while acting in capacity of servant or agent. 20-116.

Privileged communications.

Findings or the like of judge or person acting in judicial capacity as privileged within law of libel. 20-407 (case p. 399).

Demurrer to complaint containing averment that defendant acted maliciously as preventing defendant from raising question of privilege. 20-398.

LICENSE.

Liability to licensees generally, see NEGLIGENCE.

Negligence as to licensees, generally, see NEGLIGENCE.

From public; of right to do business.

Barbers, constitutionality of regulations requiring license of. 20-1111 (case p. 1105).

'Pool and billiard rooms and bowling alleys, licensing and regulation of. 20-1482 (case p. 1478).

LIENS.**In general.**

As interference with interstate commerce, see COMMERCE.

For nonmaritime tort, see SHIPPING.

Independent contractor, who is a contractor not entitled to lien. 20-665.

Priorities.

Priority as between lien for repairs and right of seller under conditional contract. 20-249 (cases pp. 244, 246).

General rule as to priority of labor lien. 20-244.

Enforcement.

Exclusiveness of statutory remedy for foreclosure. 20-1079.

LIFE INSURANCE.

See INSURANCE.

LIGHTS.

See also ANCIENT LIGHTS.

Tenant's rights and remedies in case of destruction of air or light by landlord. 20-1400.

Hand sled as a vehicle within law requiring vehicles to carry lights. 20-1429.

LIQUIDATED DAMAGES.

See DAMAGES.

LOCAL IMPROVEMENTS.

See PUBLIC IMPROVEMENTS.

LOCAL LEGISLATION.

See STATUTES.

LOCATION.

Pool and billiard rooms and bowling alleys, regulation of location of. 20-1456.

LOCKJAW.

See TETANUS.

LOCOMOTOR ATAXIA.

Workmen's compensation, necessity and sufficiency of evidence that locomotor ataxia suffered by applicant for compensation is attributable to his employment. 20-61.

LOGS.

Riparian owner's right to use submerged lands of lake to store logs. 20-197.

LOST INSTRUMENTS.

Specific performance of lost contract, see SPECIFIC PERFORMANCE.

MAILS.

See POSTOFFICE.

Italic type indicates points with annotation; roman type, points without.

MANDAMUS.

- Bible reading in school, mandamus to require board of education to comply with ordinance as to. 20-1334.
 Necessity of clear legal right of relator to have performance of the act he seeks to coerce performance of. 20-1030.

MASTER AND SERVANT.**In general.**

- Validity of contracts of employment, generally, see **CONTRACTS**.
 Labor organizations, see **LABOR ORGANIZATIONS**.
 Picketing, see **PICKETING**.
 Strikes, see **STRIKES**.

Restrictive covenant in contract of employment, validity and enforcement of. 20-861 (cases pp. 846, 857).

Termination of relation.

- Right of employee who has not signed contract for definite term to leave service at will. 20-1508.

Injuries to servants.

- Recovery under Workmen's Compensation Act, see **WORKMEN'S COMPENSATION**.
 General rule as to master's duty as to places and appliances. 20-678.
 Foreman's negligence in uprooting stump on a hillside, for use as fuel, so that it causes a stone to roll down on person working at foot of hill. 20-671.
 Question for jury as to negligence of foreman, rendering working place unsafe. 20-671.

—employee of independent contractor.

- Statute as to duty of owners, contractors, etc., to protect employees, as rendering property owner liable for injury to employee of independent contractor by breaking of scaffold rope. 20-654.

Liability of master for wrongful acts of servant or independent contractor.

- Injury by servant driving automobile, see **AUTOMOBILES**.

—for acts of independent contractors.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor. 20-684 (cases pp. 654, 658, 662, 665, 671, 674, 678).

Definition of "contractor." 20-558.

Definition of independent contractor. 20-678.

Employer's intention to retain control over person performing work, presumption as to. 20-678.

General rule as to what may be considered in determining relation between proprietor and one doing work for him. 20-678.

Question for jury as to who is an independent contractor. 20-678.

Liability of servant.

Personal liability of servant to third person for injuries caused by the performance or nonperformance of his duties to his employer. 20-97 (cases pp. 83, 86).

Liability of independent contractor.

Injury to private property by casting material thereon where contractor follows plans prepared by municipal authority, where the right to hold the city liable has been lost. 20-674.

MASTOIDITIS.

Workmen's compensation, necessity and sufficiency of evidence that mastoiditis suffered by applicant for compensation is attributable to his employment. 20-61.

MEAT HOUSE.

As an "outhouse." 20-289.

MEMORANDUM.

Sufficiency of, to satisfy statute of frauds, see **CONTRACTS**.

MINORS.

See **INFANTS**.

MISFEASANCE.

Agent's liability for, see **PRINCIPAL AND AGENT**.

MOBS AND RIOTS.

Carrier's liability for loss of property by acts of, see **CARRIERS**.

MONEY.

Trover for, see **TROVER AND CONVERSION**.

The dash in each citation stands for A.L.R.

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

MOTOR VEHICLES.

See AUTOMOBILES.

MOVING.

Validity of statute or ordinance in relation to moving vans and moving operations. 20-210 (case p. 206).

MOVING PICTURES.

Tenant's right and remedies where odors escape into theater from other portions of premises. 20-1366.

Tenant's rights and remedies where loss results from discordant music produced by tenant of other portion of building. 20-1366.

MUNICIPAL CORPORATIONS.

Power as to license, see LICENSE.

Public improvements by, see PUBLIC IMPROVEMENTS.

Ordinances.

Court's power to review ordinance, see COURTS.

- validity.

Presumptions and burden of proof as to validity, see EVIDENCE.

Licensing and regulation of pool and billiard rooms and bowling alleys. 20-1482 (case p. 1478).

Moving vans and moving operations, validity of ordinance in relation to. 20-210 (case p. 206).

Reasonableness of regulation of speed of railroad train. 20-1222 (case p. 1214).

Court's right to inquire into reasonableness of ordinance. 20-206.

MURDER.

See HOMICIDE.

MUTUAL BENEFIT INSURANCE.

See INSURANCE.

MUTUALITY.

Of contract, see CONTRACTS.

MUTUAL WILLS.

Repudiation by one party of contract to execute. 20-1272.

NAME.

Indictment or information for burglary, necessity of naming owner of building in. 20-510 (case p. 502).

Variance between name in bail bond and in judgment of forfeiture. 20-411 (case p. 410).

Right of individual to adopt business name. 20-984.

NEGLIGENCE.

In use of automobile, see AUTOMOBILES.

Of bailee, see BAILMENT.

Of carrier, see CARRIERS.

Measure of damages for, see DAMAGES.

In highway, see HIGHWAYS.

Of innkeeper, see INNKEEPERS.

Of master or servant, see MASTER AND SERVANT.

Agent's liability for, see PRINCIPAL AND AGENT.

In operation of railroad, see RAILROADS.

In operation of street railway, see STREET RAILWAYS.

Correctness of instructions as to, see TRIAL.

Dangerous premises.

Duty of owner to licensee as to changing condition of premises. 20-202 (case p. 197).

Liability for injury to person on business premises in consequence of passing through wrong doorway. 20-1147 (case p. 1138).

Bank's duty to provide safe and suitable entrances to banking rooms. 20-1138.

Fisherman using private rollway as a fishing ground as an invitee, where riparian owner points out where he thinks fish may be caught. 20-197.

Notice to licensees using log rollway in a lake for fishing purposes, of danger from changed condition. 20-197.

Person entering bank to transact business with it and with an employee, who is also a municipal officer, as an invitee. 20-1138.

Question for jury as to negligence. 20-1138.

Contributory negligence.

Passenger's contributory negligence, see CARRIERS.

Of beneficiary as bar to action for death, see DEATH.

Of person injured in highway, see HIGHWAYS.

Of person injured on railroad track, see RAILROADS.

As question of law or fact generally, see TRIAL.

Passing through wrong doorway as contributory negligence. 20-1147 (case p. 1138).

Question for jury as to negligence of one entering business place in failing to look to the floor of the vestibule before crossing the threshold of an open door, apparently leading into the business room. 20-1138.

— of children.

General rule as to. 20-1214.

Question for jury as to. 20-1239.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES; CHECKS.

NEPHRITIS.

Workmen's compensation, necessity and sufficiency of evidence that nephritis suffered by applicant for compensation is attributable to his employment. 20-62.

NEURASTHENIA.

Workmen's compensation, necessity and sufficiency of evidence that neurasthenia suffered by applicant for compensation is attributable to his employment. 20-62.

NEW TRIAL.

Grounds for.

Receipt of document or statement in jury room constituting new evidence as ground for new trial in criminal case. 20-1187 (case p. 1130).

Burden of establishing grounds on which new trial is asked. 20-1180.

Conclusiveness of decision of trial court as to whether new evidence was introduced in jury room. 20-1180.

Evidence against reputation of accused, introduced in jury room. 20-1180.

Affidavit for.

Defective verification of affidavit; right to correct. 20-1180.

Verification of affidavits by jury in support of new trial taken before attorney for appellant. 20-1180.

NOLLE PROS.

Bail bond, entry of nolle pros. as terminating liability of sureties. 20-602.

NONFEASANCE.

Agent's liability for, see PRINCIPAL AND AGENT.

NONRESIDENTS.

Custody of child, nonresidence as affecting one's right to award of. 20-838 (case p. 827).

Discrimination against, in statute as to dower. 20-1330 (case p. 1326).

NOTICE.

Necessity of, to constitute due process of law, see CONSTITUTIONAL LAW.

NUISANCES.

In highway, see HIGHWAYS.

Billiard room as nuisance. 20-1496.

Bowling alley as nuisance, subject to regulation or abatement. 20-1496.

OBJECTIONS.

To raise question for appeal, see APPEAL AND ERROR.

OBSTRUCTION.

Of ancient lights, see ANCIENT LIGHTS.

The dash in each citation stands for A.L.R.

OCCUPATION TAX.

See LICENSE.

ODORS.

Tenant's rights and remedies where his enjoyment is interfered with by odors from other portions of premises. 20-1366.

OFFICERS.

Of bank, see BANKS.

Of private corporation, generally, see CORPORATIONS.

Self-defense as justification for killing, see HOMICIDE.

Judges, see JUDGES.

Absolute duty imposed where power is granted to officer in permissive language. 20-589.

OPTIONS.

Offers and their acceptance or withdrawal generally, see CONTRACTS.

Definition of. 20-846.

ORAL CONTRACTS.

In general, see CONTRACTS.

ORAL EVIDENCE.

See EVIDENCE.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

OSTEOMYELITIS.

Workmen's compensation, necessity and sufficiency of evidence that osteomyelitis suffered by applicant for compensation is attributable to his employment. 20-62.

OUTHOUSE.

What is an "outhouse" or "outbuilding." 20-234 (case p. 230).

OVEREXERTION.

See ANEURISM.

PARALYSIS.

Workmen's compensation, necessity and sufficiency of evidence that paralysis suffered by applicant for compensation is attributable to his employment. 20-63.

PARENT AND CHILD.

Custody of child, see INFANTS.

PARESIS.

Workmen's compensation, necessity and sufficiency of evidence that paresis suffered by applicant for compensation is attributable to his employment. 20-65.

PAROL CONTRACTS.

In general, see CONTRACTS.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

Husband and wife who agree between themselves to render service under a contract with a third person as proper and necessary parties to an action to enforce the latter contract. 20-1303.

PARTNERSHIP.

Between husband and wife, see HUSBAND AND WIFE.

Community character of interest of a partner in partnership real property. 20-374 (case p. 369).

Action against partnership without showing membership. 20-984.

Action by partnership in firm name. 20-984.

Common-law partnership as a contractual status only, and not a legal entity. 20-984.

Italic type indicates points with annotation; roman type, points without.

Joint interest of partners in property upon dissolution of firm. 20-1272.

PASSENGER CARRIERS.

See CARRIERS.

PATENTS.

Agent's or servant's personal liability for infringement of patent. 20-118.

PEOPLE.

Délégation of power to, see CONSTITUTIONAL LAW.

PEREMPTORY INSTRUCTIONS.

See TRIAL.

PERITONITIS.

Workmen's compensation, necessity and sufficiency of evidence that peritonitis suffered by applicant for compensation is attributable to his employment. 20-65.

PERSONAL INJURIES.

Admiralty jurisdiction of action for, see ADMIRALTY.

To unborn child, see AFTER-BORN CHILDREN.

Presumption and burden of proof as to cause of, see EVIDENCE.

To servant, see MASTER AND SERVANT.

In general, see NEGLIGENCE.

Agent's liability for, see PRINCIPAL AND AGENT.

Lien for, on ship, see SHIPPING.

Instructions in action for, see TRIAL.

Infant's right to set aside consent judgment in action for. 20-1249 (case p. 1239).

PERSONAL SERVICES.

Injunction against breach of contract for, see INJUNCTION.

PERSONALTY.

Mortgage of, see CHATTEL MORTGAGE.

Sale of, see SALE.

PETITION.

Constitutional right of, see CONSTITUTIONAL LAW.

PHLEBITIS.

Workmen's compensation, necessity and sufficiency of evidence that phlebitis suffered by applicant for compensation is attributable to his employment. 20-66.

PICKETING.

Injunction against, see INJUNCTION.

PIGSTY.

As an "outhouse" or "outbuilding." 20-239.

PLACE.

Of signature on bill or note, see BILLS AND NOTES.

PLAINTIFF.

Parties plaintiff, see PARTIES.

PLEADING.

In criminal case, see CRIMINAL LAW.

Construction.

Language as controlling figures in case of discrepancy in claim of damages between words and figures. 20-1079.

Admissions.

Admissions by demurrer, see infra.

Amendments.

Amendment of complaint as to amount of damages made just before the jury retires. 20-1079.

Withdrawal.

In criminal case, see CRIMINAL LAW.

The dash in each citation stands for A.L.R.

20 A.L.R.—100.

Striking out.

Prejudicial error as to, see **APPEAL AND ERROR**.

Demurrer.

Demurrer in criminal case, see **CRIMINAL LAW**.

— admissions by.

Allegations of fact contained in plea admitted by demurrer. 20-328.

Inference drawn by pleader from facts stated not admitted. 20-328.

— effect; practice.

Conclusiveness of rulings on demurrer, see **JUDGMENT**.

Libel, demurrer to complaint containing averment that defendant acted maliciously as barring defendant from raising question of privilege. 20-398.

State's right to answer over upon overruling of its demurrer to pleading in criminal case. 20-328.

PNEUMONIA.

Workmen's compensation, necessity and sufficiency of evidence that pneumonia contracted by applicant for compensation is attributable to his employment. 20-66.

POISONING.

See **ARSENICAL POISONING; BLOOD POISONING; LEAD POISONING**.

POLICE.

Homicide of police officer; self-defense as justification. 20-1180.

POLICE POWER.

See **CONSTITUTIONAL LAW**.

POLITICAL PARTIES.

In general, see **ELECTIONS**.

Judicial notice as to, see **EVIDENCE**.

POLITICAL PROPAGANDA.

Validity of legislation directed against political propaganda deemed to be of a dangerous tendency. 20-1535 (cases pp. 1515, 1527).

POOL ROOMS.

Licensing and regulation of. 20-1482 (case p. 1473).

POSSESSION.

Of plaintiff in replevin, see **REPLEVIN**.

Necessity and sufficiency of, in action for trespass, see **TRESPASS**.

POSTOFFICE.

Mailing of letter exercising option as closing the contract. 20-846.

Right to accept offer by mail. 20-846.

POWER.

Tenant's rights and remedies for landlord's failure to furnish power where tenant remains in possession. 20-1412.

POWERS.

Will as exclusive means of exercising power conferred by will to dispose of property. 20-388 (case p. 383).

PRACTICAL CONSTRUCTION.

Of constitutional provision, see **CONSTITUTIONAL LAW**.

PRACTICAL JOKE.

Recovery under Workmen's Compensation Act for injury sustained through, see **WORKMEN'S COMPENSATION**.

PRAYER.

In schools, see **SCHOOLS**.

PREJUDICE.

Evidence to show prejudice of witness, see **WITNESSES**.

PRELIMINARY EXAMINATION.

Bail, termination of liability of sureties by appearance of principal at preliminary examination. 20-597.

Italic type indicates points with annotation; roman type, points without.

FETATAL INJURY.

See **AFTER-BORN CHILDREN.**

PRESIDENT.

Powers of bank president, see **BANKS.**

PRESS.

Freedom of, see **CONSTITUTIONAL LAW.**

PRESUMPTIONS.

On appeal, see **APPEAL AND ERROR.**
In general, see **EVIDENCE.**

PRINCIPAL AND AGENT.

Parol evidence on question of agency, see **EVIDENCE.**

Agent's authority; liability of principal.

Appropriation of money deposited by third persons with agent, principal's liability. 20-374.

Receipt of money on deposit as within agent's implied authority. 20-374.

— ratification.

Knowledge of facts, necessity of, to render one liable for tortious acts of another, on theory of ratification. 20-1460.

Disaffirmance of ratification of acts of agent, made without knowledge of material facts. 20-1460.

Liabilities of agent.

Personal liability of agent to third person for injuries caused by the performance or nonperformance of his duties to his employer. 20-97 (cases pp. 83, 86).

PRINCIPAL AND SURETY.

Surety on bail bond, see **BAIL AND RECOGNIZANCE.**

PRIORITY.

As between liens, generally, see **LIENS.**

PRIVILEGE.

In libel case, see **LIBEL AND SLANDER.**

PROBATE.

Of will, see **WILLS.**

PROCEDURE.

In contempt case, see **CONTEMPT.**

PROCESS.

Abuse of, see **ABUSE OF PROCESS.**

Service of, see **WRIT AND PROCESS.**

PROOFS OF LOSS.

By insured, see **INSURANCE.**

PROPAGANDA.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency. 20-1535 (cases pp. 1515, 1527).

PROPERTY.

Homicide in defense of, see **HOMICIDE.**

PUBLIC.

Conclusiveness of judgment as to, see **JUDGMENT.**

PUBLIC IMPROVEMENTS.

Right to compensation for injuries arising from construction of, see **EMINENT DOMAIN.**

Validity of promise based on invalid paving assessment. 20-1326 (case p. 1317).

Defects in assessments, attempt to cure, by appeal to board of supervisors. 20-1317.

Defects in assessments, provisions in ordinance for curing, which contravene terms of city charter. 20-1317.

Defects in street improvement proceedings, provisions for curing not applicable to preliminary steps necessary to confer jurisdiction. 20-1317.

The dash in each citation stands for A.L.R.

PUBLIC MONEY.

Appropriation of, see APPROPRIATIONS.

Public aid of sectarian schools. 20-1334.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC SERVICE COMMISSIONS.

Review of orders, failure to state facts on which findings of commission are based. 20-542.

PUBLIC SERVICE CORPORATIONS.

See also CARRIERS; GAS; RAILROADS; TELEPHONES; WATERS.

Rates.

Gas rates, see GAS.

Public utility rate valuations as affected by advance in price conditions due to World War. 20-555 (case p. 542).

Reproduction cost, less depreciation, as basis for fixing value of property. 20-542.

QUASHING.

Of indictment, see INDICTMENT, ETC.

QUO WARRANTO.

Judgment for defendant in quo warranto proceeding by individual relator acting for the general public as bar to subsequent proceeding by another relator to effect the same result. 20-1127.

RAILROADS.

For all questions involving the duty and liability of a railroad company as a carrier to its patrons, or the public, or governmental control of railroad companies, see CARRIERS.

Speed regulations.

Reasonableness of regulation of speed of railroad train. 20-1222 (case p. 1214).

Injuries to persons on or near tracks.

Weather conditions as affecting liability for injury to one struck by train. 20-1064 (case p. 1061).

General rule as to duty of railroad company to trespasser on track. 20-1061.

Weather conditions as affecting liability for injury to trespasser. 20-1061.

Accidents at crossings.

Coaster colliding with train at crossing. 20-1440.

Engineer's or fireman's personal liability for injury to one at highway crossing. 20-142.

RAIN STORM.

As affecting liability for injury to one struck by train or street car. 20-1069, 1074, 1076.

RATES.

Gas rates, see GAS.

Of public utilities, generally, see PUBLIC SERVICE CORPORATIONS.

RATIFICATION.

Of acts of agent, see PRINCIPAL AND AGENT.

RATE.

Tenant's rights and remedies where his possession or enjoyment is interfered with by rats. 20-1394.

REAL ESTATE AGENTS.

See BROKERS.

REAL PROPERTY.

Deeds, see DEEDS.

Homestead, see HOMESTEAD.

Community property, see HUSBAND AND WIFE.

Power as to, see POWERS.

Rights and liabilities on sale of, see VENDOR AND PURCHASER.

REASONABLE DOUBT.

Instructions as to, see TRIAL.

Italic type indicates points with annotation; roman type, points without.

RECIPROCAL WILLS.

See **MUTUAL WILLS.**

RECOGNITION OF UNION.

Validity of strike to compel, see **STRIKES.**

RECOGNIZANCE.

See **BAIL AND RECOGNIZANCE.**

RECORDS.

Drayman, ordinance requiring filing of records of destination of household goods moved by. 20-206.

RED FLAG.

Validity of legislation prohibiting possession or display of. 20-1548.

REFRIGERATOR COMPANY.

Liability of refrigerator company which contracts with carrier to supervise loading of fruit and to ice the cars, to shipper for negligent performance of undertaking. 20-86.

RELEASE.

Of sureties on bail bond, see **BAIL AND RECOGNIZANCE.**

RELIGIOUS FREEDOM.

See **SCHOOLS.**

REMEDIES.

Election of, see **ELECTION OF REMEDIES.**

RENT.

For gas meter, see **GAS.**

In general, see **LANDLORD AND TENANT.**

Delay of purchaser in enforcing specific performance of contract to sell real estate as depriving him of right to rents and profits. 20-357.

REPAIRS.

Priority of lien for, see **LIENS.**

REFPLEVIN.

Lessor's right to maintain trespass de bonis against third person who has wrongfully appropriated leased machine. 20-83.

REPUDIATION.

Of contract, see **CONTRACTS.**

RESIGNATION.

Of officer of private corporation, see **CORPORATIONS.**

RESTRAINT OF TRADE.

Validity of contracts in restraint of trade, generally, see **CONTRACTS.**

RESULTING TRUST.

See **TRUSTS.**

REVIVOR.

Revival of liability of bail, terminated by execution of appeal bond, on dismissal of the appeal. 20-636.

REVOCATION.

Of broker's authority to sell, see **BROKERS.**

Of gift of personal check by death of drawer. 20-174.

RHEUMATISM.

Workmen's compensation, necessity and sufficiency of evidence that rheumatism contracted by applicant for compensation is attributable to his employment. 20-72.

RINGWORM.

See **CATTLE RINGWORM.**

The dash in each citation stands for **A.L.R.**

RIOTS.

See **MOBS AND RIOTS.**

ROBBERY.

Homicide in attempt to perpetrate robbery, see **HOMICIDE.**

RUPTURE.

See **HERNIA.**

SABOTAGE.

Validity of legislation directed against. 20-1543.

SALE.

Priority as against conditional vendor, of lien for labor and repairs, see **LIENS.**

What constitutes delivery of goods sold under "c. i. f." contract. 20-1236 (case p. 1232).

C. i. f. contracts not affected by Uniform Sales Act. 20-1232.

Documents necessary to execute a sale c. i. f. 20-1232.

Insurance in name of seller, provision for as repugnant to c. i. f. contract. 20-1232.

Tender of the goods instead of the documents in case of c. i. f. contract. 20-1232.

SALES AGENT.

Personal liability of agent who sells property for one who is not the true owner as for conversion. 20-132.

SAMPLE ROOM.

As an "outhouse" or "outbuilding." 20-240.

SCARLET FEVER.

Workmen's compensation, necessity and sufficiency of evidence that scarlet fever contracted by applicant for compensation is attributable to his employment. 20-73.

SCHOOLHOUSE.

As an "outhouse" or "outbuilding." 20-240.

SCHOOLS.

Mandamus to school officers, see **MANDAMUS.**

Ectarianism in schools. 20-1351 (case p. 1334).

SCIATICA.

Workmen's compensation, necessity and sufficiency of evidence that sciatica contracted by applicant for compensation is attributable to his employment. 20-73.

SEAL.

Effect of, on validity of note, see **BILLS AND NOTES.**

SEARCH AND SEIZURE.

Admissibility of evidence secured by illegal search, see **EVIDENCE.**

SECTARIANISM.

In schools, see **SCHOOLS.**

SEDITION.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency. 20-1535 (cases pp. 1515, 1527).

SELF-DEFENSE.

In case of homicide, see HOMICIDE.

**SENTENCE.**

For crime, generally, see CRIMINAL LAW.

**SEPARATION.**

See DIVORCE AND SEPARATION.

**SERVICE.**

Of process, see WRIT AND PROCESS.

**SERVICE CHARGE.**

For gas meter, see GAS.

**SET-OFF AND COUNTERCLAIM.**

Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on the wrongful seizure. 20-276 (case p. 270).

Interference with possession or enjoyment of tenant who remains in possession of all or part of the premises, set-off of damages for, in action for rent. 20-1384.

**SHED.**

As an "outhouse" or "outbuilding." 20-241.

**SHIPPING.**

Power of the state to create and enforce liens on ships for a nonmaritime tort. 20-1095 (case p. 1079).

Tort committed by the ship itself within meaning of statute giving lien on vessel, what constitutes. 20-1079.

**SIGNATURE.**

Place of signature to note, see BILLS AND NOTES.

**SLANDER.**

See LIBEL AND SLANDER.

**SLEEPING SICKNESS.**

Workmen's compensation, necessity and sufficiency of evidence that sleeping sickness suffered by applicant for compensation is attributable to his employment. 20-74.

**SMELLS.**

See ODORS.

**SMOKE.**

Loss by, without external ignition, as within fire insurance policy. 20-967 (case p. 964).

**SMOKEHOUSE.**

As an "outhouse" or "outbuilding." 20-241.

**SMOKING.**

Constitutionality of legislation prohibiting cigarette smoking. 20-931.

The dash in each citation stands for A.L.R.

SNOW STORM.

As affecting liability for injury to one struck by train or street car. 20-1070, 1075.

SPEECH.

Freedom of, see CONSTITUTIONAL LAW.

SOCIAL PROPAGANDA.

Validity of legislation directed against social propaganda deemed to be of a dangerous tendency. 20-1535 (cases pp. 1515, 1527).

Regulation of speed of railroad train, see RAILROADS.

SOOT.

Loss by, without external ignition, as within fire insurance policy. 20-967 (case p. 964).

SPONDYLITIS DEFORMANS.

Workmen's compensation, necessity and sufficiency of evidence that spondylitis deformans suffered by applicant for compensation is attributable to his employment. 20-74.

SPECIAL ASSESSMENTS.

See PUBLIC IMPROVEMENTS.

SPRINGHOUSE.

As an "outhouse" or "outbuilding." 20-242.

SPECIAL LEGISLATION.

See STATUTES.

SPUR TRACKS AND SIDINGS.

Cutting off switch connections with railroad from land not taken in construction of levee, right to damages for. 20-296.

SPECIFIC PERFORMANCE.

In general.

Agreement to make particular disposition of property by will enforceable against promisor's heirs, devisees, or personal representatives. 20-1272.

Lost contract, provable only by parol evidence specifically enforceable. 20-1272.

Right to enforce contract breach of which might be the foundation of civil action for damages. 20-1272.

Award of damages.

Delay of purchaser in enforcing performance of contract to sell real estate as depriving him of right to rents and profits. 20-357.

STABLE.

As an "outhouse" or "outbuilding." 20-242.

STATEMENT.

In contempt proceedings, see CONTEMPT.

STATUTE OF FRAUDS.

See CONTRACTS.

Italic type indicates points with annotation; roman type, points without.

STATUTES.

Appropriation bills, see APPROPRIATIONS.
Review of, by courts, see COURTS.

Validity in general.

Questioning for first time on appeal constitutionality of statute, see APPEAL AND ERROR.

Resolving doubt as to validity in favor of statute. 20-1105.

- ambiguity.

Statute prohibiting acts having for their object the destruction of organized government. 20-1527.

- who may question validity.

Residents of state not entitled to attack statute on ground that it discriminates against nonresidents. 20-1105.

Necessity that one attacking constitutionality of statute show that it will violate his constitutional rights. 20-1515.

Title.

Anti-cigarette statutes. 20-935.

Local and special legislation.

Statute regulating barbers applicable only in cities in excess of 5,000 inhabitants. 20-1105.

Construction.

Liberal construction of homestead laws, see HOMESTEAD.

"Contractor," meaning of, as used in Workmen's Compensation Act. 20-658.

"Revolution," meaning of word as used in act forbidding acts inciting or attempting to incite revolution against or opposition to organized government. 20-1527.

STEP BOX.

Duty and liability of carrier as to "step box" or other device to facilitate entering and leaving car. 20-914 (case p. 908).

STILLHOUSE.

As an "outhouse" or "outbuilding." 20-242.

STOLEN PROPERTY.

Auctioneer's personal liability to true owner for sale of stolen property. 20-137.

Broker's personal liability to true owner for selling stolen property for principal. 20-134.

STORE.

Negligence as to condition of, see NEGLIGENCE.

STOREHOUSE.

As an "outhouse" or "outbuilding." 20-242.

STRAIN.

See OVEREXERTION.

STREET RAILWAYS.

As common carriers, see CARRIERS.

Coaster colliding with street car. 20-1439.

Weather conditions as affecting liability for injury to one struck by street car. 20-1070.

STRIKES.

Carrier's liability for loss of or damage to freight by acts of strikers, see CARRIERS.

Lawfulness of strike to compel collective bargaining. 20-1513 (case p. 1508).

Breach of existing contracts between employer and employees, validity of strike to compel. 20-1508.

STRIKING OUT.

Of pleading, see PLEADING.

The dash in each citation stands for A.L.R.

SUNDAY.

Barber shops, validity of Sunday closing statute. 20-1114.

Agreement to render theatrical performances for twenty weeks as a contract to perform on Sunday. 20-846.

Contract for Sunday performance of theatrical nature, validity of. 20-846.

TEAMING AND TRUCKING.

Validity of statute or ordinance in relation to moving vans and moving operations. 20-210 (case p. 206).

Notice of destination of household goods moved by draymen, ordinance requiring filing of, as interference with commerce. 20-206.

SUN STROKE.

Workmen's compensation, necessity and sufficiency of evidence that sun stroke suffered by applicant for compensation is attributable to his employment. 20-42.

TELEPHONES.

Advance in price conditions due to World War as affecting valuation for rate-making purposes. 20-555.

Tenant's rights and remedies against landlord for failure to furnish telephone service where tenant remains in possession. 20-1414.

SWITCH YARD.

Reasonableness of regulation of speed of railroad train in. 20-1230.

TERMINATION.

Of broker's authority, see **BROKERS**.

Of contract of employment, see **MASTER AND SERVANT**.

SYNDICALISM.

Validity of legislation directed against. 20-1543.

TESTAMENTARY CHARACTER.

Of instrument, see **WILLS**.

TAXES.

Landlord or tenant's duty to pay, see **LANDLORD AND TENANT**.

Definition of tax. 20-994.

Disagreement between parties to land contract as to which shall pay taxes for a certain year as an abandonment or termination of the contract. 20-357.

Gas rates, tax imposed upon profits of company as element to be considered in fixing. 20-542.

TETANUS.

Workmen's compensation, necessity and sufficiency of evidence that tetanus contracted by applicant for compensation is attributable to his employment. 20-75.

THEATERS.

Sunday performance, see **SUNDAY**.

TAXPAYER.

Conclusiveness of judgment as to, see **JUDGMENT**.

THEATRICAL PERFORMER.

Restrictive covenant in contract employing. 20-846.

Italic type indicates points with annotation; roman type, points without.

THREATS.

Admissibility in evidence, see EVIDENCE.

TIME.

For giving appeal bond, see APPEAL AND ERROR.

Extension of, as consideration for promise, see CONTRACTS.

Architect's compensation, when payable. 20-1861.

Withdrawal of plea of guilty, time for. 20-1447.

Statutory provision as to time for pronouncing sentence after plea of guilty, waiver of. 20-1441.

TITLE.

Of statute, see STATUTES.

TOBACCO.

See CIGARETTES.

TORTS.

Damages for, see DAMAGES.

Husband's liability for torts of wife, see HUSBAND AND WIFE.

Negligence generally, see NEGLIGENCE.

Agent's liability for, see PRINCIPAL AND AGENT.

Lien on vessel for nonmaritime tort, see SHIPPING.

Liability for tortious acts of another, on theory of ratification. 20-1460.

TRADE.

Contracts in restraint of, see CONTRACTS.

TRAVELING.

Workmen's compensation, death or injury while traveling as, arising out of, and in the course of, employment. 20-319 (cases pp. 309, 316).

TRAVELING SALESMAN.

See COMMERCIAL TRAVELERS.

TREASON.

Political, social, or industrial propaganda deemed to be of a dangerous tendency, validity of legislation against as affected by provisions of Federal Constitution regarding treason. 20-1538.

TRESPASS.

Servant's or agent's personal liability to third person for trespass in the course of his employment. 20-109 (case p. 83).

Tenant's right to maintain action of trespass against landlord for interference with his possession or enjoyment. 20-1882.

Lessor's right to maintain trespass against third person wrongfully taking leased machine. 20-83.

Third person's order to do illegal act complained of as defense. 20-83.

TRIAL.

Evidence, see EVIDENCE.

New trial, see NEW TRIAL.

Witnesses, see WITNESSES.

Election between counts.

Election between several sales in prosecution for wrongful sale of cigarettes. 20-921.

What may be considered by jury.

Jury's right to consider fact that an implement which broke, to injury of one engaged in unloading a vessel, was furnished by the owner of the vessel, as bearing upon the question of his knowledge of the defect. 20-1079.

Questions of law and fact—cause.

Shooting of insured by another as an accident. 20-1118.

—relation of parties.

Who is independent contractor. 20-678.

—fraud.

Insured's fraudulent intent in overvaluing property in proofs of loss. 20-1172.

The dash in each citation stands for A.L.R.

— contracts.

Abandonment of contract as question for jury. 20-357.

Independent contractor, question whether contract creates relation of. 20-678.

— negligence.

Bank's negligence in maintaining two doors in vestibule to bank, one of which leads to a flight of steps to the basement. 20-1138.

Negligence of foreman of bridge gang in loosening stump on hillside, causing stone to roll down upon workman. 20-671.

Contributory negligence of one entering business place in failing to look to the floor of the vestibule before crossing the threshold of an open door, apparently leading into the business room. 20-1138.

Court's duty to declare contributory negligence as matter of law where, on facts disclosed, all fairminded men would agree. 20-1138.

Infant's negligence when acting in emergency as question for jury. 20-1239.

Direction of verdict.

Viewing evidence in aspect tending to support verdict upon review of denial of motion to direct verdict for defendant. 20-1118.

Refusal to direct verdict for defendant in action on accident insurance policy where court could not have said, as matter of law, that death was not accidental. 20-1118.

Verdict not directed for defendant if, on any reasonable view of evidence, plaintiff could recover. 20-83.

Discharge of jury.

Bail bond, discharge of jury as terminating liability of sureties. 20-623.

Instructions.

Necessity of exception or objection to failure or refusal to instruct, see **APPEAL AND ERROR**.

Prejudicial error as to, see **APPEAL AND ERROR**.

Homicide by killing officer raiding gambling house, instruction as to effect on defendant's right of self-defense of fact that he was a participant in the game. 20-1180.

— on evidence and facts; reasonable doubt.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses. 20-1258 (case p. 1249).

Homicide, effect of instruction in prosecution for killing officer raiding gambling house, that if jury believed defendant was not interested in running any of the tables, but was only a patron of the place, his right of self-defense was not abridged by the fact that he was participating in the game, to place upon him the burden of proving that he was not the proprietor of the house. 20-1180.

— as to negligence.

General terms in instructions given at request of plaintiff, that they should find for him if defendant was found to be negligent. 20-525.

Instruction to find for plaintiff if defendant is found negligent as charged in complaint as incorporating exaggerated forms of lack of ordinary care charged in the complaint. 20-525.

Instruction exempting driver of automobile from liability for injuring pedestrian if she temporarily took her eyes off the street to give attention to her children. 20-525.

Verdict.

Direction of verdict, see *supra*.

Review of verdict on appeal, see **APPEAL AND ERROR**.

TROVER AND CONVERSION.

Agent's liability, see **PRINCIPAL AND AGENT**.

Servant's liability, see **MASTER AND SERVANT**.

Bailee's liability in action of trover for money commingled with his own funds. 20-378 (case p. 374).

Set-off or counterclaim of judgment under which exempt property has been seized in action for conversion based on the wrongful seizure. 20-276.

Relevancy and materiality of evidence in action for conversion. 20-83.

TRUCKING.

See **TEAMING AND TRUCKING**.

TRUSTEES.

Bankruptcy trustees, see **BANKRUPTCY**.
In general, see **TRUSTS**.

Italic type indicates points with annotation; roman type, points without.

TRUSTS.

In deposit received after insolvency of bank, see **BANKS**.

Agreement to devise property to certain person as impressing a trust upon the property in the hands of devisees to whom the property is given in violation of the agreement. 20-1272.

Gift, recipient of money intended as, as a trustee for the donee. 20-392.

TRUTH.

Purging from contempt by showing truth of charge, see **CONTEMPT**.

TUBERCULOSIS.

Workmen's compensation, necessity and sufficiency of evidence that tuberculosis contracted by applicant for compensation is attributable to his employment. 20-75.

TUMOR.

Workmen's compensation, necessity and sufficiency of evidence that tumor resulting from accident to applicant for compensation is attributable to his employment. 20-80.

TYPHOID FEVER.

Workmen's compensation, necessity and sufficiency of evidence that typhoid fever contracted by applicant for compensation is attributable to his employment. 20-80.

UNBORN CHILDREN.

See **AFTER-BORN CHILDREN**.

UNCERTAINTY.

In statute, see **STATUTES**.

UNFINISHED DWELLINGHOUSE.

As an "outhouse" or "outbuilding." 20-243.

UNOCCUPIED HOUSE.

As an "outhouse" or "outbuilding." 20-243.

UREMIA.

Workmen's compensation, necessity and sufficiency of evidence that uremia suffered by applicant for compensation is attributable to his employment. 20-80.

VACATION.

Of judgment, see **JUDGMENT**.

VALUATION.

For rate-making purposes, see **GAS; PUBLIC SERVICE CORPORATIONS**.

Overvaluation by insured in proofs of loss, see **INSURANCE**.

VARIANCE.

Between name in bail bond and in judgment of forfeiture. 20-411 (case p. 410).

VENDOR AND PURCHASER.

Abandonment or termination of contract, see **CONTRACTS**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

The dash in each citation stands for **A.L.R.**

VENUE.

Contempt, right of one charged with, to change of venue. 20-900.

VERDICT.

Review of, on appeal, see **APPEAL AND ERROR**.

Direction of, see **TRIAL**.

Bail bond, return of verdict as discharging sureties from liability. 20-624.

VERIFICATION.

Of affidavits in support of motion for new trial. 20-1180.

VERMIN.

Tenant's rights and remedies where his possession or enjoyment is interfered with by vermin. 20-1804.

VESTED RIGHTS.

See **CONSTITUTIONAL LAW**.

VIOLATION OF LAW.

Homicide while engaged in unlawful act, see **HOMICIDE**.

Coasting, effect of ordinance against, on right to recover for injury while coasting in street. 20-1434.

WAGERING CONTRACTS.

See **CONTRACTS**.

WAIVER.

Of rights by accused, see **CRIMINAL LAW**.
Tenant's waiver of rights, see **LANDLORD AND TENANT**.

WAR.

Political, social, or industrial propaganda interfering with military forces or war, validity of legislation directed against. 20-1547.

Public utility rate valuations as affected by advance in price conditions due to World War. 20-555 (case p. 542).

WARD.

See **GUARDIAN AND WARD**.

WAREHOUSE.

Freight car used as warehouse as an "outhouse." 20-237.

WARRANT.

Arrest without warrant, see **ARREST**.

WATER.

Tenant's rights and remedies for landlord's failure to furnish water where tenant remains in possession. 20-1412.

WATERS.

In general.
Right to fish, see **FISHERIES**.

Logs, right of owner of land on lake to use submerged land for storing. 20-197.

Public water supply.

Valuations for rate-making purposes as affected by advance in price conditions due to World War. 20-555.

WEATHER.

State of weather as affecting liability for injury to one struck by train or street car. 20-1064 (case p. 1061).

Italic type indicates points with annotation; roman type, points without.

WIDOW.

Dower of, see DOWER.

Second wife's right to take under insurance policy designating wife or widow as beneficiary issued during life of first wife. 20-959.

WIFE.

See HUSBAND AND WIFE.

WILLS.

In general.

Power conferred by, see POWERS.

Specific performance of contract to will property, see SPECIFIC PERFORMANCE.

Right of one party to contract to execute mutual wills to repudiate contract. 20-1272.

What passes by.

Property not owned by testator at time of death not affected by will. 20-1272.

Testamentary character.

Necessity that agreement to will property be executed as a testamentary instrument. 20-1272.

Probate.

Estoppel of husband by probating wife's will and electing not to take under it, to set up contract by which he was to have her entire estate. 20-1272.

Description of beneficiaries; class gifts.

Right of devisee of precedent estate to take under limitation over to heirs or next of kin of the testator. 20-356 (case p. 351).

Devise to next of kin as referring to those entitled to take under Statute of Distribution. 20-351.

WIND STORM.

As affecting liability for injury to one struck by train or street car. 20-1072.

WITHDRAWAL.

Of plea, see PLEADING.

WITNESSES.

Impeaching.

Evidence of statement by witness in homicide case which he denied having made. 20-1249.

Lapse of years since conviction of witness for crime as preventing evidence thereof to affect his credibility. 20-1249.

Credibility.

Evidence to impeach credibility, see ante.

Reversal or new trial in criminal case because of statement in jury room affecting credibility of witness. 20-1193.

WORDS AND PHRASES.

Anthrax. 20-1.

Cause. 20-606, note.

Cerebral embolism. 20-81, note.

Check. 20-174.

Contractor. 20-658.

Criminal contempt. 20-900.

Criminal syndicalism. 20-1544, note.

Delivered. 20-425, note.

Emergency. 20-972.

Greenhouse. 20-230.

Hedge. 20-1417.

Hedging. 20-1422, note.

Incite. 20-1527.

Independent contractor. 20-678.

Inevitable casualty. 20-1101, note.

Malfeasance. 20-86, 20-104, note.

Misfeasance. 20-86, 20-104, note.

Next of kin. 20-351.

Nonfeasance. 20-86, 20-104, note.

Option. 20-846.

Out building. 20-230, 234, note.

Outhouses. 20-230, 234, note.

Owned. 20-253.

Pulmonary embolism. 20-81, note.

Red flag. 20-1548, note.

Revolution. 20-1527.

Sabotage. 20-1544, note.

Tax. 20-994.

Unavoidable casualty. 20-1098, 1101, note.

Value. 20-542.

Wages. 20-665.

WORKMEN'S COMPENSATION.**Constitutionality of statute.**

Constitutionality of provision of Workmen's Compensation Act for contribution to general fund in absence of dependents of deceased workman. 20-1001 (case p. 994).

Judicial power, legislative power to confer upon industrial commission. 20-994.

Rehabilitation of disabled employees generally, legislative power to provide for. 20-994.

Construction of statute generally.

Presumption that word "contractor" is used in the sense commonly employed. 20-658.

Power to determine whether liability exists to compensate a workman as judicial. 20-994.

Persons and employments within statute.

Ohio corporation, with branch at Minneapolis, as within Minnesota compensation act as to employees of branch. 20-316.

Who is an independent contractor, not entitled to benefit of compensation act. 20-658.

Traveling salesman injured outside of state. 20-316.

What injuries or diseases are within act.

Death or injury while traveling as arising out of and in the course of employment. 20-319 (cases pp. 309, 316).

Necessity and sufficiency of evidence that disease contracted by applicant for compensation is attributable to his employment. 20-4 (case p. 1).

Right to compensation in case of injuries sustained through horseplay or fooling. 20-882 (cases pp. 870, 872).

Necessity that injury occur in the service of the master and by reason thereof. 20-309.

Injury to boy while he was playing a joke upon a fellow servant. 20-872.

Defenses.

Rule of master, disregard of, by employee which results in injury, as affecting right to compensation. 20-872.

Practices.

Necessity and sufficiency of evidence that disease contracted by applicant for compensation is attributable to his employment. 20-4 (case p. 1).

Judicial notice by compensation commission. 20-1.

— review of decisions of commissions.

Evidence, examination of, by court on review of decision of commission. 20-872.

WORSHIP.

Freedom of, see **SCHOOLS.**

WRIT AND PROCESS.

Absence of, or defect in, as ground for setting aside judgment, see **JUDGMENT.**

Resignation of officer of corporation before service of process on him. 20-264.

Italic type indicates points with annotation; roman type, points without.

L.R.
ries
vol-
2).

ce
of.

ke

ree
ng

that
for
his

mis-

lena.
re-
son.

se-
NT
it?

L

1873

